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Washington Focus: Open government advocates have written a letter to Cass Sunstein, head of OMB's Office of Information and Regulatory Policy, complaining of what the advocates see as a latent hostility by Justice Department's Office of Information Policy towards the development of a FOIA portal by the EPA, with support from the Department of Commerce and the National Archives and Records Administration. The portal, which is expected to go public in October, hopes to offer the ability to track multiple agency FOIA requests through a central location. By contrast, OIP's FOIA.gov website is already operational and offers performance data on how FOIA requests are being handled government-wide. The letter to Sunstein indicated that "we understand some in the Department of Justice have discouraged agencies from participating in the FOIA portal pilot project, suggesting its website offers a better option with its newly-added links to all agency websites." But the letter pointed out that the two sites "should work seamlessly to give agencies and the public better tools to manage FOIA processing, track requests, identify bottlenecks, and push for improvements. The government should support both by developing both."

Court Finds Dams Remain Tempting Terrorist Target

In a decision that one can only hope is an outlier, Senior Judge Barbara Rothstein has brought back the worst excesses of FOIA overreach from the days after 9/11 and has applied them like we were still expecting a terrorist attack any moment. Aside from the D.C. Circuit's decision in *Center for National Security Studies v. Dept. of Justice*, 331 F.3d 918 (D.C. Cir. 2003), which extended deference under Exemption 1 (national security) to national security-related investigations under Exemption 7 (law enforcement records), no other early post-9/11 case was more reviled than *Living Rivers, Inc. v. Bureau of Reclamation* (D. Utah 2003), in which the government persuaded a district court judge that a combination of Exemption 2 (internal practices and procedures) and Exemption 7(F) (harm to individuals) somehow protected flood inundation maps for several dams. Now, in what easily could pass as "Son of *Living Rivers*," Rothstein has accepted the same argument, with Exemption 7(E) (investigatory methods

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and techniques) substituted for Exemption 2, which fell by the wayside after *Milner v. Dept. of Navy*, to protect—what else?—dam inundation maps prepared for the U.S. Section of the International Boundary and Water Commission.

Public Employees for Environmental Responsibility requested records about a number of dams that were under shared jurisdiction between the U.S. and Mexico, including a November 2009 report by a panel of technical advisors regarding the condition of Amistad Dam. The Commission's original response was that it could not locate the November 2009 report, two responsive records were being withheld under Exemption 5 (deliberative process privilege), and other responsive records were located and disclosed. In total, the Commission released 1,492 pages and withheld 383 pages. PEER appealed, alleging the Commission acted in bad faith when it said it could not locate the November 2009 report. This time, PEER provided an article from the *Brownsville Herald* referencing the existence of the report. The Commission then explained that it had not realized until PEER provided the newspaper article that they were talking about an October 2009 report. Nevertheless, the Commission withheld the report under the circumvention prong of Exemption 2. PEER filed suit and while the litigation was pending, the Supreme Court ruled in *Milner* that the circumvention prong of Exemption 2 did not exist because it was not supported by the plain language of the exemption. But instead of releasing the records protected by Exemption 2, the Commission now asserted they were protected by Exemption 7(E) and 7(F).

PEER first challenged the adequacy of the Commission's search. Rothstein found that, although the Commission did not find a folder containing 77 inundation plans until subsequent searches were conducted, its search was reasonable. She also rejected PEER's contention that the agency had acted in bad faith by claiming that it could not find the November 2009 report, which, PEER pointed out, was listed on the Commission's website with a November 2009 date. But Rothstein noted that "the USIBWC responds that its Safety Dams Section [which conducted the search] was unaware of the date of the report on the agency website, and that it was not until PEER's appeal and reference to the newspaper article that Mr. Hernandez, who conducted the actual search, understood which document PEER sought. The court finds this explanation credible. . .In the instant case, PEER has not presented the court with any evidence of bad faith, incredulity alone cannot undermine the presumption of good faith that is accorded to agency affidavits." While Hernandez's explanation sounds like the way many agency searches are conducted, the statute actually requires agencies to contact requesters when they do not understand what records are being sought. In this case, Hernandez could surely have contacted PEER for more information rather than assuming with no basis that the report did not exist.

PEER argued that the report of the joint panel of technical advisors was not protected by Exemption 5 because it was not an inter- or intra-agency record since it was prepared by employees of the U.S. Army Corps of Engineers and the Bureau of Reclamation whose interests did not coincide with those of the Water Commission. Rothstein, however, disagreed, and pointed out that "the USIBWC has assured the court that the responsibility of the panel that worked on the Joint Expert Panel Review of the Amistad Dam was assisting the USIBWC. There is not the slightest indication that these experts represented any outside interests. It appears that their function was simply to provide accurate information for the USIBWC to use in making various determinations with respect to the Amistad Dam. PEER has provided no evidence in contradiction." PEER also claimed that, according to the Commission's website, it planned to implement the recommendations, suggesting that the report had been adopted by the agency. Rothstein noted that the website citations were "far from convincing proof that the agency has adopted the document as policy. In the court's view, the Joint Expert Panel Review is not only clearly predecisional, but deliberative as well."

Rothstein turned to Exemption 7. She first addressed the threshold issue of whether or not the records qualified as records compiled for law enforcement purposes. The Commission asserted that the National Dam

Safety Act gave the Commission a role in maintaining the security of dams. It also contended that it shared the inundation maps with agencies like the FBI and the U.S. Border Patrol to assist emergency officials in the event of a dam accident or terrorist attack. While PEER called these claims "disingenuous," Rothstein accepted them readily, explaining that "the USIBWC's concern that its dams might be attractive targets for terrorists does nothing to alter the reality that such concerns may be valid. The court is aware that it is widely accepted that dams are a matter of concern for homeland security, and as such, implicate law enforcement. Similarly, the court is unmoved by PEER's assertion that this country has many such potential terrorist targets. A suggestion that the likelihood of a terrorist attack on, in particular, the Amistad Dam or the Falcon Dam, compared with any other national infrastructure may be relatively low, does not negate the fact that the USIBWC's activities have a nexus with law enforcement, or that these documents were, in fact, compiled for a law enforcement purpose." She then cited both *Center for National Security Studies* and *Living Rivers* for the proposition that an agency with any tenable connection with homeland security could qualify under the law enforcement exemption.

After finding the records qualified as law enforcement records, Rothstein addressed Exemption 7(E) and 7(F). PEER argued that disclosure of Commission emergency guidelines would not endanger anyone's safety. But Rothstein pointed out that "but this argument is premised on PEER's unsubstantiated contention that the USIBWC dams are not a genuine target for terrorist activity." She then observed that "dams operated by the USIBWC such as the Falcon and Amistad Dams, are considered possible terrorist threats because of the potential for massive downstream casualties. Moreover, the [guidelines] contain sensitive information, the disclosure of which could endanger public safety. As the [guidelines] contained information, in part, that would reveal the USIBWC's guidelines and procedures for an emergency such as a terrorist attack, the agency properly redacted portions of the [guidelines] pursuant to Exemption 7(E)." As to Exemption 7(F), Rothstein rejected PEER's claim that other agencies had disclosed inundation maps. She pointed out that "PEER would need something more than evidence that different agencies have, at times, made different judgments about the security issues implicated by making inundation maps public. Further, there is a good reason to believe that the USIBWC's decision in this instance was based on legitimate security considerations." She supported that observation by again referring to *Living Rivers* and, gratuitously, to Justice Samuel Alito's self-serving concurrence in *Milner* embracing the 7(F) argument as an alternative to the now departed circumvention prong of Exemption 2. (*Public Employees for Environmental Responsibility v. United States Section International Boundary and Water Commission, U.S.-Mexico*, Civil Action No. 1:11-cv-261 (BJR), U.S. District Court for the District of Columbia, Mar. 20)

Views from the States…

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

Connecticut

A trial court has upheld a ruling by the FOI Commission that disclosure of records received by the Department of Public Health from the federal National Practitioner's Data Bank may be disclosed under the FOIA, but that records received from the Healthcare Integrity and Protection Data Bank are confidential under federal law. The case involved a request from the *Greenwich Time* for a Department of Public Health report concerning the investigation of a complaint against a local doctor. The FOI Commission found that the NPDB records were disclosable, but that the HIPDB records were not. Both parties appealed. As to the NPDB

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records, the court agreed with the FOI Commission that the state supreme court had found in *Director of Health Affairs Policy Planning v. FOI Commission*, 977 A.2d 148 (2009), that NPDB records received from the data bank were not exempt under the FOIA. The trial court noted that "the department now seeks to re-argue in this court the validity of *Health Affairs*. It points out that the Supreme Court when considering *Health Affairs* did not have before it a statement of the federal legislative history of the NPDB, a complete compilation of regulations governing the NPDB, or a comprehensive discussion of the U.S. Department of Health and Human Services of the meaning of the [use and disclosure] regulation." But the trial court pointed out that "while the department is free to take the record in this case and attempt to have the Supreme Court reverse its precedential holding, this court does not have that authority. . .Were this court to disregard an appellate decision that addressed identical facts and issues, it would violate 'the purpose of a hierarchical judicial system.' Since the holding in *Health Affairs* is binding precedent, the court dismisses the appeal by the department." Turning to the disclosability of HIPDB records, the court observed that "the court agrees with the final decision of the FOIC that a federal statute, 45 U.S.C. § 1320a-72 and a federal regulation 45 C.F.R. § 61.14(a) clearly exclude private parties from access to HIPDB records. Each provision states that these records are confidential except for certain health providers." (*Connecticut Department of Public Health v. Freedom of Information Commission*, No. CV 11 6009147S, Connecticut Superior Court, Judicial District of New Britain, Mar. 28)

Maine

The supreme court has ruled that the Legislature did not violate any Constitutionally-based protections when it retroactively set fees counties could charge for bulk data transfers of land records. The data broker MacImage of Maine requested bulk access to records of six counties. Under the public access statute that had been in effect since 1821, counties could charge reasonable fees for copies of deeds. MacImage challenged the fee estimates of the six counties and the trial court found the fees proposed were not reasonable. During the litigation, the Legislature specifically addressed the fee issue, but the trial court concluded that the new statute did not apply retroactively to the ongoing litigation. The counties appealed to the supreme court, which found that the legislative fix did not violate constitutional protections and that since the fees were within the parameters established by the legislature—which was a maximum of a $1.50 a page until July 2012—the counties' fees were not unreasonable. MacImage argued that the fees in the Freedom of Access Act applied, but the court noted that "the dispute that brings the parties before us relates only to the fees that may be charged by the counties for bulk electronic transfer of the records. The specific legislation regarding the registries, found in title 33—not the more general language of FOAA—controls the resolution of the dispute regarding the reasonableness of the fees charged by the counties. The Legislature has recently clarified that FOAA is not intended to govern fees for copying records from the registries of deeds." Pointing out that the legislature could apply a statute retroactively if it specifically intended to do so, the court observed that "in the 2011 enactment, the Legislature unequivocally expressed an intent for the statute to apply retroactively and the period of retroactivity includes the pending litigation by MacImage." (*MacImage of Maine, LLC v. Androscoggin County, et al.*, No. Cum-11-127, Maine Supreme Judicial Court, Mar. 27)

New York

The Court of Appeals has ruled that the EPA cannot be considered an agency for purposes of the FOIL's deliberative process privilege. The case involved an EPA-approved plan that required General Electric to pay for dredging a portion of the Hudson River to remove PCB-contaminated sediment. General Electric was ordered to prepare a "Water Supply Options Analysis" to address potential contingency measures available to the Towns of Waterford and Halfmoon for the protection of their drinking water during the first phase of the dredging project. After the options analysis was released, the Town of Waterford made a FOIL request to the state Department of Environmental Conservation concerning alternative water supplies,

materials exchanged between DEC and the EPA, and responses to GE's water supply options analysis. While DEC released some documents, it withheld materials from the EPA, arguing they were covered by the deliberative process privilege. The trial court found the EPA did not qualify as an agency, but the appellate court ruled that a federal agency could qualify under the "inter- or intra-agency" threshold. The Court of Appeals, however, agreed with the trial court. The court pointed out that "by its plain terms, the statutory definition does not include federal agencies. Rather, the definition of 'agency' is limited to state and municipal entities. . .
Although the EPA would be an agency within the definition of that term as it is commonly understood, that fact is of no assistance to respondent when the term is clearly defined in the statute. Since the EPA is not an 'agency' the inter-agency exemption does not apply to materials exchanged between these entities. To the extent that there is resonance to the argument that the exemption should apply in order to protect the pre-decisional joint deliberative process, that issue must be addressed to the Legislature." The court rejected DEC's argument that EPA could be considered an outside consultant under the circumstances. "Here, EPA and DEC have a collaborative relationship and are presumably working together toward the same ameliorative goal. However, EPA was not retained by the DEC and does not function as its employee or agent. To the contrary, EPA is actually the lead agency for the dredging project. Moreover, unlike typical consultants, these agencies represent different constituencies and their interests may diverge." (*In the Matter of Town of Waterford v. New York State Department of Environmental Conservation*, No. 50, New York Court of Appeals, Mar. 22)

Pennsylvania

A court of appeals has ruled that the Public Utility Commission properly withheld records related to safety inspections of gas utilities under the non-criminal investigation exception. After denying most of *Wall Street Journal* reporter Daniel Gilbert's request on underground natural gas pipeline safety, Gilbert appealed to the Office of Open Records, which denied PUC a hearing but concluded that it failed to support its exemption claims. The court found the safety inspections were done to determine if the gas utilities were in compliance with both state and federal laws. Noting that strong public policy arguments supported keeping these investigatory materials confidential, the court observed that "requiring the PUC to disclose the gas safety inspectors' notes, employee statements, and other materials related to the inspections/investigations could lead to owners and employees being less likely to cooperate and provide relevant information out of fear of retaliation or public embarrassment. If individuals are less likely to cooperate in the inspections/investigations process, then the inspections/investigations will no longer be an effective means of monitoring the utilities' compliance with statutory and regulatory requirements." But the court noted that, because the investigatory exemption protected the records at an early stage, none of the provisions for mandated disclosure of fines/penalties or settlement agreements applied. The court pointed out that "the requested records are generated by the PUC's gas safety inspectors during inspections and ensuing determinations on whether to prosecute. The gas safety inspectors are without authority to assess fines/penalties, modify a prior authorization, or execute a settlement agreement to resolve formal complaints or prosecutions for violations of federal and state natural gas safety regulations. Any formal action or determination by the PUC to impose civil fines/penalties or to enter into settlements of formal complaints/prosecutions of gas safety activities can only be undertaken by the PUC after a majority vote at an open public meeting and effective upon entry of a PUC order." (*Pennsylvania Public Utility Commission v. Daniel Gilbert and the Wall Street Journal*, No. 1381 C.D. 2011, Pennsylvania Commonwealth Court, Mar. 27)

A court of appeals has affirmed a decision by the Office of Open Records finding that the Department of Transportation failed to support its denial of records concerning ENRADD technology. In response to a request from Earle Drack, the agency informed him that it would need an extra 30 days and that its final

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response would be due on Feb. 9, 2011. On that date, the agency sent Drack what it characterized as an interim response and told him that it would not process his request until he paid $16.38 owing on two other requests. Drack then appealed to the OOR, which initially concluded that DOT could only demand prepayment when the total was in excess of $100. Although DOT had disclosed records to Drack after he paid the $16.38 during the pendency of the appeal, OOR rejected its claim that some information was protected by attorney-client privilege. DOT then asked OOR for reconsideration. This time around, OOR concluded that because the Right to Know Law required a final response within 30 days after an extension, the agency's "interim" response effectively denied access to the records. Because DOT had not claimed the attorney-client privilege at the time of its final response, it was barred from doing so later. The appeals court observed that "although DOT is correct in stating that Section 901 [of the RTKL] requires an agency to provide one reason why it is seeking an extension beyond the fire-day period provide in Section 901 of the RTKL, once an agency exercises its right under Section 902 of the RTKL, it must provide a *final* response within the thirty-day period, and that final response, under Section 903 of the RTKL, must identify all reasons why an agency is denying access to all or part of the requested records." The court pointed out that "Drack's past due payment to DOT did not provide DOT with the power to issue an 'interim' final response." Rejecting DOT's argument that its privilege claim should be considered, the court noted that "DOT initially indicated in its January 10, 2011 letter to Drack that it was taking advantage of the thirty-day extension in order to make a legal determination as to whether the records were subject to access under the RTKL. Thus, DOT could have investigated the privilege issue during that time period, but it did not raise the privilege in its February 9, 2011 response. . .[T]he RTKL does not permit an appeal officer to consider reasons raised for the first time in an appeal to OOR, when an agency has not identified the reason in its final response to a requester." (*Department of Transportation v. Earle Drack*, No. 1030 C.D. 2011, Pennsylvania Commonwealth Court, Mar. 27)

The Federal Courts…

Judge Royce Lamberth has ruled that the Energy Department has failed to explain how information concerning loan applications for funding of new projects that reduce air pollutants or employ new technologies qualifies for protection under **Exemption 4 (confidential business information).** The case involved a request from the Southern Alliance for Clean Energy, a non-profit advocacy group, for records pertaining to loan applications received from Georgia Power, Oglethorpe Power, and Municipal Electric Authority of Georgia, who were seeking loans for two nuclear facilities under construction. While indicating that he was generally satisfied with the agency's explanations as to why disclosure would cause competitive harm, he pointed out the agency had provided essentially no information indicating how the withheld information had been "obtained from a person" as required by Exemption 4. Noting that the case law on this issue was sparse, Lamberth observed that in the cases that did exist "the key distinction—which will obviously be blurry in many instances—is between information that is either repeated verbatim or slightly modified by the agency, and information that is substantially reformulated by the agency, such that it is no longer a 'person's' information but the agency's information. The latter type is not shielded by Exemption 4." He pointed out that "nowhere does DOE adequately explain how these specific redactions concern information that DOE 'obtained from' the Applicants. Without further information, these appear to be simply commercial terms constituting parts of the deal arrived at by DOE and the Applicants, not commercial or financial information *of* the Applicants that ended up in the final term sheets and that might qualify for protection from disclosure under Exemption 4." Lamberth ordered the agency to supplement its *Vaughn* index to address this issue and noted that "the mere fact that a term or provision in these documents was 'negotiated' will be insufficient for [the agency] to carry its burden.' DOE must also provide specific information upon which the Court could conclude that the Applicants either provided the very information that was redacted or that the redacted

information is only a minimally modified version of information that originally came from the Applicants." (*Southern Alliance for Clean Energy v. United States Department of Energy*, Civil Action No. 10-1335 (RCL), U.S. District Court for the District of Columbia, Mar. 28)

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Lamberth has been particularly outspoken recently about the dilatory practices of government agencies. In sending this case back to DOE for a more detailed *Vaughn* index, he chided agencies for such behavior. "But the unfortunate effect of these evidentiary inadequacies is to drag out this litigation and needlessly tax the Court's—and everyone else's—resources in a type of litigation that is already notoriously time-consuming. In the context of FOIA litigation, information has a short shelf-life within which it can be useful to the requesting party, and accordingly there may be numerous (and illegitimate) reasons why a defending agency may want to run out the clock. Governmental information doesn't have to be secret forever—just as long as necessary—to do harm. Courts, in routinely giving agencies a 'second chance' in FOIA cases following the submission of patently inadequate supporting materials, may be unwittingly complicit in this subversion of FOIA's fundamental purpose: public access, not secrecy. Consequently, there may be a very legitimate reason for courts to revisit this routine, and to consider the strong medicine of immediate disclosure instead of ordering second chances for sophisticated repeat-players in FOIA litigation."

Judge James Boasberg has ruled that the Department of Health and Human Services properly applied various exemptions, particularly **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, to withhold information concerning investigations of the Office of Inspector General pertaining to mistreatment of FDA employees who were involved in whistleblowing activities related to allegations of improper approval of medical devices. The National Whistleblower Center, along with seven FDA employees, filed FOIA requests for the OIG's investigatory files. The agency first claimed the records were protected by **Exemption 7(A) (interference with ongoing investigation or proceeding)**, but once the investigations were complete the records were processed for other exemption claims. The plaintiffs particularly challenged the agency's use of the privacy exemption to withhold information that was not in itself private but in context could allow the whistleblowers to identify individuals involved in the case. Boasberg accepted the agency's argument that "an entire document such as a report or notes from a witness interview may be withheld in its entirety where disclosure would allow other agency employees to identify the witness and thus constitute an unwarranted invasion of privacy." But he added that "the Court's partial *in camera* review, which revealed general diligence and fairness on the part of OIG in selecting which information to disclose and which information to withhold, provides no cause to question the government's application of the exemption to these documents." In balancing the privacy interest against the public interest in disclosure, Boasberg noted that "in the process, however, the Court recognizes that substantive information beyond names, titles, and phone numbers will likely also be withheld in the name of privacy. This concern is not enough, however, to persuade the Court that these documents must be released." Boasberg found that the identities of employees about whom derogatory statements had been made could be withheld to protect their privacy. But he pointed out that "the *substance* of the accusations and derogatory statements contained in the records at issue, however, is another matter. To the extent the public has an interest in information that sheds light on whether or not OIG properly conducted the investigations at issue in this case, the *nature* of the accusations made against government officials may be probative of the propriety of the steps OIG took to investigate. The Court thus finds that *if* the accusations and derogatory statements contained in the documents Plaintiffs seek can be redacted such that the identity of the individuals against whom they are made remain private, OIG may not withhold them under Exemption 7(C)." While Boasberg upheld most of the agency's **Exemption 5 (privileges)** claims, he found handwritten notes were not necessarily protected. He observed

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that "Exemption 5 provides no general exclusion for handwritten notes prepared by an agency employee, even though such notes inherently reveal what the notetaker thought was noteworthy about the subject of the notes." (*National Whistleblower Center v. Department of Health and Human Services*, Civil Action No. 10-2120 (JEB), U.S. District Court for the District of Columbia, Mar. 28)

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In a related decision, Boasberg has ruled the Whistleblower Center does not have standing to challenge Health and Human Services' expedited processing regulations. Although the agency admitted the FOIA requires agencies to have expedited processing regulations, it acknowledged that it had not finalized a regulation but abided by the statutory criteria. Finding the Center had not been injured, Boasberg pointed out that "if the standard HHS currently employs in evaluating requests for expedited processing is the same as that outlined in the statute and the same as that which a final regulation would likely entrench—given the language of the proposed rule and the agency's representations here—what injury accrued to Plaintiff's from HHS's failure to finalize its expedited-processing rule?" (*National Whistleblower Center v. Department of Health and Human Services*, Civil Action No. 10-2120 (JEB), U.S. District Court for the District of Columbia, Mar. 12)

The Ninth Circuit has ruled that since Steven and Linda Su Cheung have fled to China to avoid prosecution for tax fraud, records concerning their IRS investigation are protected by **Exemption 3 (other statutes)** and **Exemption 7(A) (interference with ongoing investigation or proceeding)**. Rather than face possible criminal prosecution, the Cheungs fled to China. The IRS then instituted a civil proceeding against the Cheungs to try to recover the money owed. The Cheungs' U.S.-based attorney then made a FOIA request for the records concerning the civil charges. Although the government argued that the Cheungs were ineligible to sue because of the fugitive disentitlement doctrine—individuals who have evaded the jurisdiction of the courts for one purpose cannot use the courts for another—both the district court and the Ninth Circuit chose not to address that issue and, instead, addressed the agency's exemption claims. The court noted that "the fact that the Cheungs wish to use the documents they seek in their civil tax proceeding does not make Exemption 3 and 7(A) inapplicable. Indeed, it is precisely because of the uses to which the Cheungs might put the documents that the exemptions are applicable. The district court properly denied [their attorney's] discovery requests for information concerning the nature and origin of documents he requested." The court added that "the Cheungs' problem is partly of their own making. They were indicted for tax-related crimes. . . Instead of defending against the criminal charges, the Cheungs fled the United States. . .If the Cheungs had stayed in the United States and defended the charges, the IRS would likely have gone forward with the criminal case before instituting any civil tax proceedings, in accordance with its usual procedure. Once the Cheungs' criminal proceedings were complete, the Cheungs would have had access to some of the documents they now seek, either because they would have received the documents during the criminal proceedings or because the harm of disclosing the documents would have been vitiated by the conclusion of those proceedings. But here the criminal proceedings have not taken place because the Cheungs have fled, and they must live with the consequences." (*William P. Shannahan v. Internal Revenue Service*, No. 10-35204, U.S. Court of Appeals for the Ninth Circuit, Mar. 13)

A federal court in New York has ruled that the FBI conducted an **adequate search** for records pertaining to "gang stalking." The agency originally provided records from another request it believed were responsive to Keith Labella's request, but later admitted the records were not responsive and conducted further searches using extensive terms supplied by Labella. The agency found no responsive records and Labella sued. After finding the agency's search had been adequate, the court examined documents submitted by

Labella to show the agency must have responsive records. The court noted that "these documents are neither FBI records nor contain any mention of the FBI, so presumably Labella submits them to suggest that since gang stalking is so pervasive and so well-known to several government agencies, the FBI *must* have documents responsive to his FOIA request." The court pointed out that "Labella's suggestion that, because it is the nation's leading law enforcement agency, the 'FBI should be charged with *constructive* knowledge of gang stalking and *presumed* to have records thereof,' shows only that Labella has no evidence at all that the FBI actually possesses records responsive to his request, let alone that the FBI failed to conduct a good-faith and reasonable search of its records. Labella's proposed 'presumption' turns the law on its head; it is the *FBI* that is entitled to a presumption of good faith with respect to its affidavit and Labella cannot rebut that presumption by speculating that the FBI simply must have the records he requests because of its stature and resources." Labella also argued that several articles criticizing the FBI's FOIA practices raised suspicions. But the court observed that "even if these articles are fully credited, two isolated incidents of the FBI's non-compliance with FOIA does not demonstrate that the FBI failed to conduct a reasonable search or acted in bad faith in this specific instance." (*Keith Salvatore Labella v. Federal Bureau of Investigation*, Civil Action No. 11-CV-0023 (NGG)(LB), U.S. District Court for the Eastern District of New York, Mar. 19)

A federal court in Ohio has ruled that the Department of Housing and Urban Development properly withheld technical and price proposals under **Exemption 3 (other statutes)**, citing 41 U.S.C. § 253b(m), which exempts contract proposals that were not incorporated into a final contract. Eddie Sinkfield requested the proposals submitted by Workers Compensation Services, which had been awarded the contract. Although Sinkfield produced evidence that he had sent his request and an appeal by FAX, the agency claimed it had no record of receiving the request. Nevertheless, once it was made aware of the request after Sinkfield filed suit, HUD's Philadelphia Regional Office processed the request and concluded the proposal was exempt. The court agreed, noting that "Section 253(b)(m) expressly states that such proposals 'may not be made available to any person' unless the proposal is set forth or incorporated in a contract entered into between the agency and the contractor that submitted the proposal. Section 253(b)(m) therefore leaves no discretion on the part of the agency. . ." Sinkfield argued that the 253(b)(m) applied only to unsuccessful bidders. But the court pointed out that "there is no language in the statute that limits its applicability only to unsuccessful bidders. The statute must therefore be given its plain meaning and applied to all proposals." (*Eddie Sinkfield v. Department of Housing and Urban Development*, Civil Action No. 1:10-885, U.S. District Court for the Southern District of Ohio, Mar. 15)

Judge Beryl Howell has ruled that Lawanda York has failed to show that the U.S. Army Reserve violated the **Privacy Act** when it inadvertently made a memo about York's mental health condition accessible on a shared drive. The memo was written by York's supervisor, Col. Dorothy Perkins and was filed on Perkins' personal computer. When Perkins was assigned to Iraq, the agency required her to make her computer files available on a shared drive in case they were needed while she was away. Although it was possible to locate the memo concerning York, Perkins' records on the hard drive were labeled only under her name. York found out that the memo could be accessed and after a work colleague successfully accessed the record using a keyword search, York filed a Privacy Act suit. Howell agreed with the agency that York had failed to show that the record was in a system of records whose records were retrieved by personal identifiers. She pointed out that "the plaintiff, however, supplies no evidence, let alone asserts, that the agency does, in practice, retrieve information on the [shared] drive using individuals' names or personal identifiers. To the contrary, the plaintiff states that 'anyone *can* use a personal identifier and find files by such a search, *if so desired*.' The mere capability of retrieving information by personal identifier is simply not sufficient to establish that a system of records exists." She added that "the fact that some documents were labeled with her

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name does not convert the [shared] drive into a system of records, particularly where there is no evidence that the agency used the shared drive to retrieve information by personal identifiers and the drive was not created for employees to do so." Howell also found York had failed to show that the memo had been disclosed. "Given that the plaintiff bears the burden at trial of proving by a preponderance of the evidence that actual disclosure occurred, and her concession that there is no evidence of such actual disclosure, the plaintiff's Privacy Act claim must fail." (*Lawanda York v. John McHugh*, Civil Action No. 09-075 (BAH), U.S. District Court for the District of Columbia, Mar. 27)