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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: Rep. Mario Diaz-Balart (R-FL) has introduced the "Federal Communications Commission Reform Act of 2012" (H.R. 3309) designed to force the FCC to be more accountable for its FOIA implementation. Diaz-Balart noted that "my amendment was in response to overwhelming data demonstrating the FCC's apparent lack of transparency and openness with the American people. In FY 2011, the FCC denied more than 46% of the FOIA requests it processed, compared to about 7% across the entire federal government." He referred particularly to how the FCC had handled the application of LightSquared to run a wireless network that could potentially interfere with GPS signals. Pointing out that President Obama and FCC chairman Julius Genachowski had both promised increased government transparency, Diaz-Balart added that "my amendment will provide accountability and shed light on controversies like the one dealing with LightSquared, which appears to have political ties."

DOJ Required to Search For Disciplinary Records

Judge Amy Berman Jackson has dealt with a number of interesting procedural issues–from who is responsible for processing requests for records old enough that they should have been transferred to the National Archives, to the need to search for third-party records before claiming they are presumptively exempt—in a case involving records pertaining to former Assistant U.S. Attorney Lesa Gail Bridges Jackson and whether she had been authorized to practice law when she worked in Arkansas.

The Justice Department divided Lonnie Parker's request for six categories of records into two parts—requests for records pertaining to personnel matters and law license records, and a request for records pertaining to any disciplinary matters that may have involved Jackson. DOJ found no personnel records and told Parker to contact the National Personnel Records Center, part of the National Archives. NARA provided Parker with three documents, but told him that it did not possess the records because they were never actually accessioned to NARA. Regarding Jackson's disciplinary records, DOJ informed Parker it would neither confirm

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nor deny the existence of such records. The agency ignored the sixth category of records Parker had requested, which asked for any documentation of remedial measures or additional policies by the U.S. Attorney's Office to prevent future occurrences where an AUSA could be employed notwithstanding the fact that he or she was not authorized to practice law. The agency contended this was too vague to constitute a FOIA request.

Jackson started by addressing the adequacy of the agency's search. She noted that "at best, DOJ has told plaintiff that the [personnel] records are 'most likely' in St. Louis at the NPRC and in NARA's custody and control. But NARA states that it never received the rest of the records and points to DOJ's Records Management Office in Maryland. In either event, DOJ retains legal custody over the records." She pointed out that "while it is true that NARA is responsible for *processing* FOIA requests made at the NPRC under section (b) of [its] regulation, the Court cannot conclude that responding to the FOIA request in this case fell within NARA's purview instead of DOJ's because no one has been able to inform plaintiff or the Court where the records are actually located. And, there does not appear to have been any serious effort made to track them down. Therefore, based on this record, the Court cannot find as a matter of law that the search was adequate." She added that "although NARA is not a party to this lawsuit, it would behoove DOJ to communicate with NARA to ascertain: (1) where the records are located; (2) which agency bears responsibility to search the records in that location; and (3) the status of the accession of the records concerning Ms. Jackson to NARA's permanent collection. If the records have not been transferred to NARA, then DOJ must provide the Court with sufficient grounds to conclude that its search has been adequate."

The agency had refused to search for the AUSA's disciplinary records, instead invoking a *Glomar* response neither confirming nor denying their existence. But Jackson explained that "to show that a Glomar response is appropriate, the agency must explain why it can neither confirm nor deny the existence of responsive records. This inquiry is not based on the actual content of the documents but on whether the potential harm created by revealing the existence of the documents is protected by a FOIA exemption. Thus, the question presented to the Court is would revealing the existence of documents related to a disciplinary intestigation of AUSA Jackson constitute an 'invasion of privacy' under either Exemption 6 or 7(C)."

To show that the disciplinary records were compiled for law enforcement purposes, the agency had to show that they dealt with specific alleged illegal acts. Jackson indicated that "here, DOJ has not met its burden of demonstrating that the disciplinary records in question were compiled for law enforcement purposes. The only evidence the agency offers to support their contention otherwise is a single sworn statement that '[a]ll information at issue in this case was compiled for law enforcement purposes.' . . .In order to makes this determination, DOJ must actually provide evidence that the disciplinary investigation focused on illegal activity that could result in civil or criminal sanctions." Jackson added that "it is simply not possible that DOJ knows whether any particular records were or were not compiled for law enforcement purposes without first conducting a search and identifying any responsive records." She concluded that "because DOJ failed to demonstrate that the responsive disciplinary records were compiled for law enforcement purposes, it cannot rely on Exemption 7(C) to sustain its Glomar response."

Jackson then turned to Exemption 6. She noted that "here, the Court finds that AUSA Jackson has a valid privacy interest at stake in DOJ's disclosure of disciplinary documents about her. These records, if they exist, would reveal that DOJ took internal disciplinary action as a result of her misconduct, implicating her recognized interest 'in avoiding disclosure of personal matters.'" Parker argued the events underlying any disciplinary action were a matter of public record. He provided two reports from the Arkansas Supreme Court Committee on Professional Conduct detailing Jackson's surrender of her law license and two AP stories reporting the surrender of her law license. But Jackson noted that "although this argument has some force, a person does not lose all of her privacy interests simply because the information has been made public in the past. Thus, while the publicity surrounding the matter may factor into the ultimate balance of the public and

private interests, AUSA Jackson has at least some recognizable privacy interest in avoiding the disclosure of the existence of any disciplinary records in her name." Jackson found that "there is a valid public interest in knowing how DOJ handles the investigation of unlicensed attorneys." She observed that "because the Court finds that there is both a real private interest and a valid public interest here, DOJ must weigh the privacy interests in non-disclosure against the public interest in the release of the records. DOJ has not engaged in any balancing of the public and private interests at stake here. Accordingly, the Court will remand the case to the agency to engage in the statutory exercise established under FOIA."

Finally, Jackson rejected DOJ's claim that Parker's request for remedial measures taken to ensure such incidents did not happen in the future was too vague. Instead, she noted: "The Court finds this request clear enough to constitute a valid FOIA request. The plaintiff requested information related to DOJ's policies regarding unauthorized practice of law by Assistant U.S. Attorneys, specifically any remedial policies. Further, DOJ's own FOIA regulations prevent it from denying a request simply because it is unclear. Instead, DOJ must inform the requester why the request was unclear and allow the requester to modify their request. DOJ did not comply with this regulation here. DOJ must locate any responsive records to this sixth category of documents and either disclose them or claim an exemption." (*Lonnie Parker v. U.S. Department of Justice*, Civil Action No. 10-2068 (ABJ), U.S. District Court for the District of Columbia, Mar. 29)

Views from the States…

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

Alabama

A court of appeals has ruled that the Athens City Board of Education did not violate the Open Meetings Act when one board member sent an email to other board members outlining his position on the board's policy concerning renewal of contracts for coaches and other employees. Charles Lambert brought suit, claiming the email constituted a meeting of the board because the board member had outlined his position on a matter before the board. The court, however, disagreed. It noted instead that the statutory definition of a meeting included a quorum where members deliberated about specific matters before the public body. The court pointed out that, while the email went to a quorum and was about a specific issue, there was no deliberation. The court observed that "the 'deliberation' component of a 'meeting' is missing because [the member's] email message was a unilateral declaration of *his* ideas or opinions, not '[*a*]*n exchange of information or ideas among*' a quorum of board members concerning a specific matter that the members expected to be presented to the board for a decision." (*Charles Gregory Lambert v. David McPherson*, No. 2100766, Alabama Court of Civil Appeals, Mar. 30)

Connecticut

A trial court has ruled that the Department of Corrections properly assessed the likelihood of harm in disclosing victim impact statements to convicted murderer David Taylor by considering its experience with other inmates. The FOI Commission had found the Department had failed to provide evidence that Taylor, a British citizen who had been a model prisoner while incarcerated, was likely to try to harm the victims or their families if he was denied a transfer to England. The Department claimed the statements could be withheld under an exemption for records if the Department had reasonable grounds to believe disclosure could result in a safety risk. The Department's witness had testified that "Taylor really wants to get to England, and if, for

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some reason, he thinks that a particular witness hindered that transfer, I would imagine it would upset him. And to what degree, I don't know, but I have to think of the worst in the event that—it could happen." The Commission argued that the exemption required more specific proof of harm. Ruling for the Department, the court noted that the grounds for the exemption were met "if reasonable reasons given by the department are drawn from observations about inmates in general as opposed to a specific inmate making the request." The court added that "the department has reasonable grounds for concluding that the redaction of the name and contact information of the victims would not resolve the security risk. The court has reviewed the impact statements in camera and it is clear that on disclosure to Taylor, he would easily identify those that wrote the statements." (*Commissioner, Department of Corrections v. Freedom of Information Commission*, No. CV 106006278S, Connecticut Superior Court, Judicial District at New Britain, Apr. 5)

New York

The Court of Appeals has ruled that the Kings County District Attorney properly withheld records concerning 1984 charges against Avrohom Mondrowitz for multiple counts of sexual abuse involving young boys because at the time author Michael Lesher made the request in 2007 it appeared likely that Mondrowitz would be extradited from Israel to face the charges in New York. Lesher originally requested records on Mondrowitz in 1998, at which time the district attorney provided some documents. But when Lesher made a second request in 2007, the district attorney denied his request, indicating that Israel had arrested Mondrowitz and it appeared he would be extradited to face the charges. Lesher argued that the extradition request material was not exempt because it was not related to the investigatory records. The district attorney replied that the extradition request contained extensive detail about the charges. The Court of Appeals noted the district attorney had explained in detail that the records contained investigatory materials that could harm his case if prematurely disclosed. It also pointed out that "there is no doubt that law enforcement proceedings were ongoing when Lesher commenced this [FOIL suit]. Indeed, at that time there was every reason to believe that Mondrowitz would be returned to Brooklyn for trial." The court observed that most criminal cases were completed reasonably quickly. But in other cases, such as "where a suspect flees the jurisdiction the potential to prosecute remains, although an eventual trial might be uncertain of occurrence or timing. But this case of a fugitive from justice may now effectively be over." Lesher argued that Israel still might decline to extradite Mondrowitz. The Court of Appeals, realizing that was still a possibility, observed that Lesher could make another request if the extradition fell through and essentially closed the case. (*In the Matter of Michael Lesher v. Charles J. Hynes*, No. 49, New York Court of Appeals, Apr. 3)

A court of appeals has ruled that while the Chestertown Volunteer Fire Company is an agency for purposes of the Freedom of Information Law, it is not a public body for purposes of the Open Meetings Law. After a group of residents made a number of repetitive requests that went unanswered and were not allowed to attend the fire company's meeting, they filed suit, alleging violations of both FOIL and the Open Meetings Law. The trial court found that the fire company was subject to FOIL, but indicated it would review its records to separate out those pertaining to the fire company's public duties and those pertaining to its private activities. The appellate court reversed that part of trial court's decision, noting that "having determined that CVFC is an 'agency' subject to FOIA, [the trial court] was required to order disclosure of the requested records—without regard to whether they related to governmental or nongovernmental functions—unless one of the exemptions set forth in[FOIL] was applicable. Because CVFC has not claimed the benefit of any FOIL exemption, it must make the requested records available." The court then pointed out that although the fire company was part of the Fire District, which was a public body, the fire company itself was not. The court pointed out that "the Fire District is charged with. . .the responsibility of providing fire protection for the district, and there is no evidence that the Fire District delegated, or could delegate, any of its statutory responsibilities to the CVFC." The court added that "the meetings of the CVFC relate to its internal affairs and the social, recreational and benevolent activities that it undertakes in furtherance of its charitable

purpose." (*In the Matter of Christine A. Hayes v. Chestertown Volunteer Fire Company, Inc.*, No. 512856, New York Supreme Court, Appellate Division, Third Department, Mar. 29)

Vermont

The supreme court has ruled that the exemption for records dealing with the detection and investigation of crime has no temporal limit and any record that fits into that category may be withheld even after an investigation is over. The case involved a request by the *Rutland Herald* for records concerning the investigation of employees of the Criminal Justice Training Council at the Vermont Police Academy for having child pornography on their work computers. The state police investigated the incident and focused on a single employee, who committed suicide the next day. The state police compiled several files during its investigation, including inquest-related materials. The Attorney General declined to prosecute, finding no criminal conduct by anyone other than the employee who committed suicide. The newspaper requested records related to the investigation. The state police refused to disclose the records, claiming they fell within the exception for records compiled for detection and investigation of crime. The *Herald* sued and the trial court, rejecting the *Herald*'s argument that the exemption ended when an investigation was closed, ruled in favor of the state police. The supreme court agreed. The court noted that "investigation records are 'maintained' or kept on individuals on an ongoing basis, after active 'detection and investigation' is complete. Using the past tense of 'compile' indicates intent to exempt records both during and after the compilation process. The words 'maintained' and 'compiled' suggest that the Legislature anticipated keeping investigatory records exempt after an active investigation had ended. Like the trial court, we are not persuaded by the Herald's argument that the use of the word 'compiled' suggests that the exception ends when the compilation process ends. The term 'compiled' describes the type of record involved." The court added that "that the Legislature included temporal limitations in numerous other [Public Records Act] exemptions makes it unlikely that it intended to include a temporal limitation in [the investigatory exemption] without specific language to this effect." The court also pointed out that "because [the exemption] provides a record-based, rather than content-based, limitation, we also reject the Herald's argument that the court could release investigatory records but require redaction of information." (*Rutland Herald v. Vermont State Police*, No. 2010-434, Vermont Supreme Court, Mar. 30)

In a companion case, the supreme court has ruled that the City of Rutland has not yet shown that records pertaining to an investigation of the use of city computers by several police officers to view pornography qualifies for the exemption for records related to the detection and investigation of crime. In a suit brought by the *Rutland Herald*, the trial court found that the exemption did not apply and that the public interest in knowing how the allegations were investigated and what disciplinary action was taken as a result outweighed the minimal privacy interest of the police officers. The supreme court first noted that "the language of [the investigation and detection of crime exemption] plainly requires that records 'deal with the detection and investigation of crime' to fall within this exemption. Only when this requirement is satisfied can such records 'include those maintained on any individual or compiled in the course of a criminal or disciplinary investigation by any police or professional licensing agency.' The City did not aver that these documents dealt with the detection and investigation of crime here." Because the City had not shown the investigation and detection of crime exemption applied, the court pointed out that in such cases "the Legislature intended purely disciplinary investigations—those that do not deal with the detection and investigation of crime—to be evaluated under the 'personal documents' exemption." The court declined to consider whether the records were investigatory because "as the State points out, the burden is on the City to justify its nondisclosure decision and the City provided no affidavit stating that the records 'deal with the detection and investigation of crime.' Should the [trial] court find the exemption applicable to some or all of these records on remand, we note that we have rejected the argument that [the investigation and detection of

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crime exemption] contains a temporal limit." Pointing out that if the trial court found the records qualified under the investigation and detection of crime exemption they would be completely exempt, the court observed that "other records, however, may promote the Legislature's desire for accountability to the public through knowledge of how and how well the police department manages its employees." (*Rutland Herald v. City of Rutland and AFSCME Council 93, Local 1201*, No. 2010-344, Vermont Supreme Court, Apr. 6)

Washington

The supreme court has ruled that the Washington State Patrol must disclose accident reports by location to Michael Gendler, who was paralyzed as the result of a bike accident on a Seattle bridge, after agreeing with both the trial and appeals courts that the accident reports were not privileged under 23 U.S.C. § 409, which prohibits accident reports collected by the Department of Transportation from being used in evidence against state or local governments. The extent of coverage of 23 U.S.C. § 409 was the subject of a U.S. Supreme Court decision in *Pierce County v. Guillen*, 537 U.S. 129 (2003), in which the Court ruled that § 409 prohibited litigants from using the accident reports as evidence, but did not prohibit their disclosure under public access laws. The Court also concluded that § 409 protected only information compiled or collected under 23 U.S.C. § 152, which encouraged states and local governments to provide information about dangerous intersections. Although the WSP had a memorandum of understanding with the state DOT that recognized the accident reports as DOT records for purposes of § 409, the supreme court noted that "the records, when held by the WSP, are not privileged as they would be if held by the DOT because each agency collects and uses the records for different purposes." Rejecting the WSP's claim that the memorandum of understanding protected the records, the court pointed out that "the fact that DOT is granted joint access to and use of the reports for its own purposes does not change the character of the reports or divest WSP of its authority or ability to produce them." The court added that "the fact that WSP has chosen to relocate its records into a database that is subsequently analyzed in greater detail by the DOT, does not relieve it of its obligation to produce the records upon request." The court observed further that "Section 409 does not extend to police accident reports generated and received by WSP pursuant to its own statutory duty. The WSP's shared database with DOT does not alter this duty or its obligations under the [Public Records Act]." (*Michael W. Gendler v. John R. Batiste*, No. 85408-4, Washington Supreme Court, Apr. 12)

The Federal Courts…

Judge Emmet Sullivan has ruled that the Department of Homeland Security did not **waive** its right to claim exemptions for records pertaining to how it assessed and processed H1-B petitions, which provide for the admission of temporary workers, when it made public various documents that shed light on the process. In response to several requests from the American Immigration Lawyers Association, U.S. Citizenship and Immigration Services disclosed large portions of a memo by Donald Neufeld, Acting Associate Director of Domestic Operations, regarding H-1B fraud initiatives and, further, had issued the memo as a final agency determination. The agency also disclosed a redacted H1-B petition fraud referral sheet. AILA argued that these disclosures, along with other related materials that were publicly available, constituted a waiver on the part of the agency. The agency claimed none of the disclosed records revealed the same information the agency was currently withholding. Sullivan agreed, noting that "because the fraud referral form filed in [a separate lawsuit] was a different version than the one at issue in this case, AILA has failed to meet its burden of pointing to specific information in the public domain that duplicates what is being withheld." He added that "AILA has not persuaded the Court that the attachment of the FOIA request (and the H-B Fraud Referral Sheet) was done for the purpose of any desire to officially disclose the document; to the contrary, it appears that the document was filed in support of USCIS's arguments in that case that it had responded appropriately

to the FOIA requests it had received." The agency claimed much of the redacted information was protected by **Exemption 7(E) (investigatory methods and techniques)**. AILA argued that some techniques were already well-known or did not even constitute an investigatory technique. Sullivan pointed out that "the Court disagrees that factors such as the gross income of a company or the length of time a company has been in existence are factors that could not logically be used to circumvent agency regulation. In addition, the mere fact that the public may know about site visits generally, or may know some information about the fraud indicators does not mean that defendants must disclose all details concerning fraud indicators." But Sullivan found that the agency's two *Vaughn* indices did not adequately explain why the agency had concluded that no further information could be **segregated** and disclosed. He observed that "because [previously public documents] share a common subject matter (fraud indicators) with the documents that USCIS has redacted and listed in [its] *Vaughn* Index, the Court finds that USCIS is required to specifically explain the difference between what it has deemed appropriate for public disclosure and what remains withheld. Specifically, defendants must specify how the redacted information differs from the [publicly disclosed documents]." (*American Immigration Lawyers Association v. United States Department of Homeland Security*, Civil Action No. 10-1224 (EGS), U.S. District Court for the District of Columbia, Mar. 30)

Judge Amy Berman Jackson has ruled that the Federal Reserve conducted an **adequate search** for records pertaining to the potential consequences of a collapse of Lehman Brothers and AIG and properly claimed **Exemption 4 (confidential business information)**, **Exemption 5 (privileges)**, and **Exemption 8 (bank examination records)** to withhold portions of the records. Vern McKinley submitted two requests—one pertaining to Lehman Brothers and the other to AIG. He argued the agency's search was inadequate because it focused solely on its Project Collect Repository, which contained hundreds of thousands of documents collected as part of the agency's response to the financial crisis, and excluded records of the Federal Reserve Bank of New York. Jackson pointed out that "even if the Court were to agree with McKinley on that point, any records that remain at the FRBNY and not in the Project Collect repository—to the extent that such records exist—are beyond the scope of McKinley's FOIA requests. McKinley's AIG request asked only for records 'concerning or relating to *the Board's decision* that detail that "the orderly failure of AIG was likely to have a systemic effect on financial markets. . ."' So the FRBNY cannot possess any of the materials that fall within this request because the records that FRBNY has in its possession are records that the FRBNY consulted in deciding what information to send to the Board. These records are not related to *the Board's decision*, and therefore do not fall within McKinley's request." As to McKinley's request pertaining to Lehman Brothers, Jackson noted that "since the Board was the only body that considered whether to take action under Section 13(3) of the Federal Reserve Act—not the FRBNY—the request refers only to information that the Board itself considered, which again is contained entirely in the Project Collect repository." Of the 83 records withheld, McKinley claimed that 16 of them were in the public domain because they had been published by the Financial Crisis Inquiry Commission. The agency told Jackson it had provided the documents to the congressional committee under a written confidentiality agreement. She indicated that "the mere fact that the committee subsequently, and without authorization, published the records does not constitute a waiver of the Board's FOIA Exemptions." McKinley argued the agency had not shown why information redacted under Exemption 4 could not be made public. But Jackson noted that two documents—information supplied by a confidential market source and financial information about Lehman Brothers' foreign operations supplied by foreign bank supervisory agencies—had been supplied voluntarily and were not the kind of information a company would customarily make public. Jackson agreed that the other two documents, which had been supplied involuntarily, would impair the agency's ability to get similar information in the future if disclosed. Turning to Exemption 5, Jackson rejected McKinley's claim that the exemption did not protect factual material. She noted that "because McKinley's sole argument for disclosure rests on the flawed assumption that factual material is not deliberative, the Court finds each of the sixty-two

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redacted or withheld records to be protected from disclosure under FOIA Exemption 5." On Exemption 8, McKinley argued the agency had not shown that the records came from a supervised financial entity. Jackson disagreed, observing that "McKinley points to no evidence that would controvert the Board's declarations, nor any evidence of agency bad faith. *In camera* review confirms that the disputed records contain properly exempted information from supervised financial entities." (*Vern McKinley v. Board of Governors of the Federal Reserve System*, Civil Action No. 10-00751 (ABJ), U.S. District Court for the District of Columbia, Mar. 29)

A federal court in Connecticut has ruled that most of the items in multi-part requests submitted by the Service Women's Action Network and the ACLU pertaining to sexual assault in the military ask for aggregate or statistical data which neither the Defense Department nor Veterans Affairs were obligated to respond to under FOIA because they asked for answers to questions rather than for specific records. However, Judge Mark Kravitz found that a single request asking for records related to the non-judicial or administrative resolution of sexual assault-related complaints that did not result in court martial was a valid FOIA request. He noted that "as written, Item 11's request is clear enough—but it may be unduly burdensome. . .However, as the Court must examine the facts and draw inferences in favor of the non-moving Plaintiffs, and as the Defendants have not submitted evidence on this point, the Court concludes that there is a genuine issue of material fact as to whether the Item 11 request in unduly burdensome. After opening that door, Kravitz proceeded to find that most of the **searches** done by components of DOD and VA were inadequate. Describing the search done by the Navy, Kravitz noted that "rather than describing [the] reasons for selecting only certain commands for [database] search and not others, [the Navy] simply states that [its] search coordinators 'determined it was unlikely that any other commands would have responsive records.' [The Navy] therefore implicitly avers that all files likely to contain responsive material were searched, but [it] fails to provide sufficient details about why [it] selected specific commands for search and not others." He added that "while it may have been reasonable to limit the search terms to Plaintiffs' request, [the Navy] does not explain why [it] chose to do so. Given the lack of a reasonable description, the Court finds that [the Navy's] declaration does not meet the required burden of proof with regard to [its] description of the Naval Inspector General's search." The Action Network complained that the Army did not describe how it maintained records of FOIA requests. But Kravitz noted that a DOD supplemental affidavit explained that because DOD components do not record information on requests from service members, it could not produce it. But Kravitz agreed with the Action Network that the Army's search terms focused too narrowly on sexual assault and did not include terms like "rape." Kravitz indicated that "'sexual assault' is easily read as encompassing rape and other nonconsensual sexual crimes defined in the Army's offense codes. The fact that the agency was unwilling to read the Plaintiffs' request liberally to include such terms seems to be almost willful blindness." Kravitz also rejected the Army's claim that electronic reports were not created because they were not part of a "business as usual" approach to FOIA requests. But Kravitz pointed out that "the question is not whether the creation of a record from an electronic database is business as usual, but rather whether the creation of the record would require 'a significant expenditure of resources. . .that would cause a significant interference' with the agency's information system. Because [the Army] does not elaborate on whether the creation of a record from a search of databases would result in a significant interference, the Court finds that [this] declaration is not sufficient to support the agency's burden of demonstrating that it conducted a reasonable search." (*Service Women's Action Network, et al. v. Department of Defense and Department of Veterans Affairs*, Civil Action No. 3:10-1953 (MRK), U.S. District Court for the District of Connecticut, Mar. 30)

Judge Royce Lamberth has ruled that the FBI conducted an **adequate search** for records pertaining to organized crime figures Sam Giancana and Aniello Dellacroce in response to a voluminous request from journalist George Lardner. However, Lamberth also found that because of the large number of subsequent

disclosures from the agency's representative sampling of 150 records the agency was required to reprocess them further. Lardner argued that, while there were references to Giancana throughout the records provided, there was no discrete file specifically pertaining to him. Further, Lardner indicated that the National Archives had told him it had 21 file boxes of material on Giancana in its Kennedy Assassination Records Collection. Rejecting Lardner's challenge, Lamberth observed that "Lardner suggests, without support, that additional responsive records must exist. Mere speculation as to the existence of records not located as a result of the agency's search does not undermine the adequacy of the search. Additionally, Lardner's affidavit that the National Archives has a voluminous collection of records on Giancana does not create a justifiable inference that the FBI possesses the same records and is withholding them. Lardner does not specify which offices these records originated from or their respective dates. However, Lardner's initial FOIA request specifically sought pre-1960 records and was addressed to the FBIHQ office. Therefore, without additional information regarding the records contained in the 21 boxes, Lardner fails to present sufficient evidence that these records would indeed contain responsive documents to his request." Lardner also challenged the FBI's conclusion that some records were missing. But Lamberth noted that "although missing files are understandably frustrating to Lardner, the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." Saying that the agency's current *Vaughn* index was "in a word, inadequate," Lamberth explained that "in re-processing the sample documents for preparation of the *Vaughn* index, the FBI determined that information previously withheld out of concern for privacy did not warrant continued exclusion. The FBI provides no additional justification in any of [its] declarations as to why these documents were suddenly deemed proper for release. . .While the fact that 'some documents in a sample become releasable with the passage of time does not, by itself, indicate any agency lapse,' here the sheer magnitude of the additional releases indicates that the sample is not an accurate illustration of the whole." Lamberth also noted that a number of documents had been redacted under the circumvention prong of Exemption 2, which had been rejected by the Supreme Court in *Dept of Navy v. Milner*. He pointed out that "in light of the *Milner* decision, a reprocessing of the responsive documents is justified to allow the FBI to release additional information previously withheld solely under Exemption 2." (*George Lardner v. Federal Bureau of Investigation*, 03-0874 (RCL), U.S. District Court for the District of Columbia, Apr. 4)

Judge Ricardo Urbina has issued the first ruling on subsection 552(a)(3)(E), the only amendment to FOIA tied directly to the aftermath of 9/11. The 2002 amendment prohibited foreign government entities from requesting information from agencies who were members of the intelligence community. The All Party Parliamentary Group on Extraordinary Rendition, consisting of members of the Parliament of the United Kingdom, filed FOIA requests through their pro bono American attorney, Joe Cyr, for records pertaining to the U.S. government's extraordinary rendition program and the participation of the UK government. All the agencies declined to respond, citing § 552(a)(3)(E). The plaintiffs argued that none of them were foreign government "entities" because in the British parliamentary system the "government" specifically meant the executive branch formed by the political party that won a majority of seats in the House of Commons. But Urbina noted that "the court declines the plaintiffs' invitation to interpret FOIA (an American statute) solely with reference to foreign law. The court freely admits that the word 'government' may portend a more nuanced meaning within the milieu of the English system of governance. It would be decidedly peculiar to assume that Congress intended FOIA's terms to shift with the idiosyncratic governmental configuration of every sovereign state." Urbina had no trouble determining that the UK Parliament was a governmental entity. He pointed out that "in the English system of governance, legislation is enacted by Parliament; following the doctrine of Parliamentary sovereignty, legislation is binding and can be set aside by no political body other than Parliament itself. Accordingly, Parliament is the primary organ tasked with the expression of sovereign political authority and its enactment into law." He then found that Andrew Tyrie, a Member of Parliament and the Committee, functioned as a representative of a foreign government. "The fact that no individual wields the

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[power of legislating] *exclusively* is merely a feature of the democratic system. Andrew Tyrie, as a feature of his office, wields the power to act with the government's imprimatur." He also found the Committee was a foreign government entity. He indicated that "Congress deliberately drafted the foreign government entity provision in broad strokes. Specifically, the provision exempts from disclosure those requests made by '*any* government entity' that falls outside the United States. APPG's members are elected officials who serve in the House of Commons or the House of Lords. Because the group's membership consists exclusively of public officials, the court concludes that the APPG is a 'subdivision' of a foreign 'government entity' within the language of § 552(a)(3)(E)." Likewise, Urbina decided that Cyr was acting as the agent for a foreign government entity. He noted that "the foreign government entity exception states, however, that an agency 'shall not' make any disclosures if the requester is a representative of a foreign government entity. In conjunction, these two provisions may fairly be read as follows: *any person* can file a FOIA request *unless* that person is also a foreign government entity or acts as its representative. . .Because Joe Cyr is Andrew Tyrie's legal representative, Cyr's request is similarly barred." But Urbina added that "it seems clear that the plaintiffs could easily have circumvented this legal snarl; information disclosed under FOIA is freely available to the public at large. It therefore appears that Joe Cyr could have filed an identical FOIA request and then forwarded the information along to the remaining plaintiffs." (*All Party Parliamentary Group on Extraordinary Rendition v. United States Department of Defense*, Civil Action No. 09-2375 (RMU), U.S. District Court for the District of Columbia, Apr. 2)

Judge Rosemary Collyer has ruled that the CIA has failed to show that it conducted an **adequate search** for records pertaining to its mandatory declassification review procedures. In response to two related requests from National Security Counselors, the agency searched the Director's Area and located a single responsive document—the agency's CFR regulation on MDR. NSC's second request asked for special procedures developed pursuant to Executive Orders 12,958 and 13,292 on classification. The Director's Area was searched in response to this request as well and the agency found no responsive documents. Finding the search inadequate, Collyer noted that "the affidavit *concludes* that a 'thorough and diligent search' was conducted, but does not detail what search terms were used, who conducted the search, how the search was conducted, or what the 'other' [Information Management Systems] records systems were that were searched." The second request asked for special procedures in current use, a term the agency interpreted as meaning procedures developed under E.O. 13,292, which was the current E.O. on classification. NSC argued the term "current" would include any procedures developed under E.O. 12,958 if they were still in use under E.O. 13,292. Collyer agreed with the plaintiff. She noted that "the CIA cannot reasonably claim that it did not believe NSC sought materials in connection with Executive Order 12,958 (to the extent those materials were still current) when the single responsive document produced by CIA was based on Executive Order 12,958. . .[I]f checklists, worksheets, and similar reference and training documents were still being used by the CIA, although first utilized under Executive Order 12,958 and not Executive Order 13,292, the CIA must 'conduct a search reasonably calculated to uncover' those documents. The CIA must clarify whether such other documents exist and, if so, conduct a reasonable search for them." (*National Security Counselors v. Central Intelligence Agency, Department of Defense*, Civil Action No. 11-00442 (RMC), U.S. District Court for the District of Columbia, Mar. 28)

Judge John Bates has ruled that the Justice Department conducted an **adequate search** for records pertaining to a fraud case referred to DOJ by the World Bank and properly withheld most of the records it found under **Exemption 5 (privileges)**. Bates also found that the Government Accountability Project failed to **exhaust its administrative remedies** because it did not file a proper appeal. GAP originally requested records of correspondence between the World Bank or Diligence LLC and the Criminal Division regarding Satyam Computer Services, the Development Gateway Foundation, or Mohamed Vazir Mushin. The Criminal

Division found no responsive records and GAP followed up with a similar request from specific offices within the Criminal Division—the Fraud Section, the Computer Crime and Intellectual Property Section, and the Office of International Affairs. Again, no responsive records were located. Based on information from the World Bank concerning a meeting between the Fraud Section and the World Bank and a follow-up letter from DOJ regarding "its review of the case for possible prosecution," GAP contacted the Public Liaison at the Criminal Division, describing the DOJ letter. As a result of that contact, the Fraud Section found responsive documents, but not the DOJ letter, and withheld most of them. The agency argued that GAP failed to appeal its second request for records from specific agencies. GAP asserted that its contact with the Criminal Division's Public Liaison constituted "a request to perform a better search" or "an administrative appeal." DOJ contended the contact was not an administrative appeal, which requires a written letter sent to the Office of Information Policy. Bates sided with DOJ, noting that "even though GAP claims that its informal communication should be considered a 'request to perform a better search' or alternatively, 'an administrative appeal,' GAP does not seriously contest that it failed to comply with DOJ's published regulations governing administrative appeals for FOIA requests. . .These procedures for appealing FOIA responses are not merely technical requirements. 'Rather, they are designed to create a uniform and streamlined process to ensure that appeals are received and processed, and the DOJ is entitled to insist that requestors adhere to their strictures.' Because GAP failed to comply with these procedures, its FOIA claims relating to the July 27, 2009 response [to its second request] must be dismissed." Rejecting GAP's contention that the search was inadequate, Bates noted that "DOJ performed four separate searches for records in the sections requested by GAP. . .DOJ also modified and expanded its search, after GAP provided additional information about the kinds of documents and information it sought. These efforts more than satisfied DOJ's obligation to conduct a good faith search using 'methods that can reasonably be expected to produce the information requested.'" GAP largely attacked the agency's privilege claims by arguing that the attorney who signed the agency affidavit did not have the authority to invoke either the deliberative process privilege or the attorney work-product privilege. Bates found the attorney was the deputy chief of the FOIA unit and did have the authority to invoke the privilege. He also dismissed GAP's assertion that only the attorneys involved in litigation could claim the work-product privilege. He noted that "GAP cites to no caselaw standing for the proposition that only the attorneys directly involved in the actual potential litigation can determine—on behalf of the agency as a whole—whether certain documents should be withheld under FOIA." (*Government Accountability Project v. U.S. Department of Justice*, Civil Action No. 11-342 (JDB), U.S District Court for the District of Columbia, Mar. 29)

The Supreme Court has settled an issue that has split the circuits by ruling 5-3 that the **Privacy Act** does not allow damages for emotional distress except to the extent a plaintiff is able to show that he or she suffered a pecuniary loss as the result of an agency's adverse action. In its second substantive decision involving the Privacy Act since 2004 after 30 years without a single Privacy Act case, the majority continued to show that it understands next to nothing about what the Privacy Act's remedies were intended to accomplish. After ruling in *Doe v. Chao*, 540 U.S. 614 (2004), that the $1,000 statutory minimum for damages did not kick in unless a plaintiff showed actual damages, the Court has now ruled that plaintiffs may only be compensated for actual damages. Writing for the majority, Associate Justice Samuel Alito explained that the crux of the case depended on the extent to which Congress had waived the government's sovereign immunity from suit. In concluding that actual damages were limited to pecuniary losses, he noted that the parallel "between the Privacy Act and the common-law torts of libel *per quod* and slander suggests the possibility that Congress intended the term 'actual damages' in the Act to mean special damages. The basic idea is that Privacy Act victims, like victims of libel *per quod* or slander, are barred from any recovery unless they can first show actual—that is, pecuniary or material—harm. Upon showing some pecuniary harm, no matter how slight, they can recover the statutory minimum of $1,000, presumably for any unproven harm." He

pointed out that "we do not claim that the contrary reading of the statute accepted by the Court of Appeals and advanced now by respondent is inconceivable. But because the Privacy Act waives the Federal Government's sovereign immunity, the question we must answer is whether it is plausible to read the statute, as the Government does, to authorize only damages for economic loss. When waiving the Government's sovereign immunity, Congress must speak unequivocally. Here, we conclude that it did not." Associate Justice Sonia Sotomayor dissented, pointing out the absurdity of the majority's conclusion. "Nowhere in the Privacy Act does Congress so much as hint that it views a $5 hit to the pocketbook as more worthy of remedy than debilitating mental distress, and the majority's contrary assumption discounts the gravity of emotional harm caused by an invasion of the personal integrity that privacy protects." (*Federal Aviation Administration v. Cooper*, No. 10-1024, U.S. Supreme Court, Mar. 28)