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Washington Focus: The most recent FOIA audit by the National Security Archive focuses on agencies' spotty record of updating their FOIA regulations to include recent amendments or policy changes. The audit found that nearly 70 percent of agencies had not updated their regulations since Attorney General Eric Holder's 2009 FOIA memo and that more than 50 percent have not updated their regulations since the 2007 OPEN Government Act. A Justice Department spokesman explained that "all these various policy initiatives that have been undertaken by agencies as a result of the new FOIA guidelines do not require revising their FOIA regulations." Sen. Patrick Leahy (D-VT) observed that "the audit released today by the National Security Archive makes clear that the overwhelming majority of federal agencies are neither fulfilling the president's promise of an open and transparent government for the American people, nor complying with the vital reforms to the FOIA process that Congress demanded by enacting the Leahy-Cornyn Open Government Act."

Court Enjoins Agency From Using Consent Requirements

A federal magistrate judge in California has enjoined the Department of Homeland Security from requiring requesters to provide consent to disclose personal information before it will process a request. The ruling comes in a case brought by Gonzales and Gonzales Bond and Insurance Agency, which posts immigration bonds with DHS for the release of aliens from detention pending determination of the alien's immigration status. Gonzales and Gonzales had requested 571 "A-files" since June 2009. After the agency refused to provide identifying information for 183 requests, the company administratively appealed but the agency failed to respond.

When the agency declined to process subsequent requests, the company filed suit, arguing that because of its earlier experience with the appeals process it had concluded further administrative appeals would be futile. The court had earlier dismissed the company's claims, finding that it failed to

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exhaust its administrative remedies by not complying with the agency's consent provision. Nevertheless, the court allowed Gonzales and Gonzales to continue its APA claim that the policy as applied was arbitrary and capricious.

DHS argued that FOIA required agencies to promulgate rules and procedures for making a request and the consent provision was appropriate under that authority. The company countered by arguing the policy discriminated against classes of requesters because those requesters that could obtain consent could get the records while requesters unable to obtain consent could not.

Using a deferential standard under the APA, Magistrate Judge Donna Ryu agreed with the company, noting that "DHS not only will withhold all records if a requester does not or cannot comply with the provision, but will not even determine what potential responsive materials exist. This procedure renders it impossible for a requesting party to ascertain whether DHS has properly withheld the records, and nullifies the agency's burden of demonstrating that it correctly invoked the exemptions." She pointed out that "if an individual does not comply with the provision, DHS terminates the FOIA process before it has begun, under the guise of applying a procedural regulation which implements FOIA's privacy exemptions. If the requester appeals that decision, DHS can do what it did in this case: file a motion to dismiss the case, alleging that the requester failed to exhaust its administrative remedies. In this manner, the agency obviates the requester's right to judicial review of the agency's application of the privacy exemptions, casting off its legal burden to demonstrate the propriety of its withholdings."

Ryu also found the provision ran counter to FOIA's requirement to process records based on their disclosability and not based on the identity of the requester. "The Consent Provision, however," she observed, "interferes with this design. It provides that DHS will produce documents about an individual if the requester (1) is that individual or (2) has received consent from (or proven the death of) that individual. It will refuse to produce the same documents to a requester who has not obtained the required consent or proof. DHS cannot lawfully administer its FOIA obligations in this manner."

Turning to the privacy exemptions, Ryu noted that ""DHS makes no attempt to search for responsive records pursuant to FOIA. It does not perform any analysis, let alone the balancing test, . . . to winnow those documents it should disclose from those it should not. This blanket refusal to disclose, or even examine, records is not consistent with the agency's disclosure obligations under Exemption 6 [invasion of privacy]. By halting the FOIA process prior to conducting a thorough search for responsive documents and invoking the administrative exhaustion doctrine in the name of enforcing the exemption, DHS makes no effort to meet its burden of showing that the exemption applies to its withholdings and also deprives requesters of the judicial review guaranteed to them in the statute."

Even under the more lenient standards of Exemption 7(C) (invasion of privacy concerning law enforcement records), the consent provision still failed. Ryu explained that "if an individual submitting a FOIA request fails to comply with the Consent Provision, DHS does not search for responsive records, but simply refuses to produce any records pursuant to FOIA. It does not perform any FOIA analysis to separate those records that it should disclose from those that it should not. This absolute refusal to disclose, or even examine, records contravenes the agency's disclosure obligations under FOIA, as DHS does not even attempt to satisfy its burden of proving that the exemption applies to the withheld documents. Moreover, by halting the FOIA process prior to conducting a thorough search for responsive documents and invoking administrative exhaustion in the name of enforcing the exemption, DHS unlawfully deprives requesters of judicial review guaranteed to them in the statute."

Ryu indicated that she would have reached the same conclusion analyzing the issues under FOIA's *de novo* standard. She pointed out that "the regulation allows DHS to improperly withhold records, as it enables DHS to avoid its statutory obligation to demonstrate that FOIA's exemptions apply to documents that it has withheld. . .The Consent Provision also violates FOIA by allowing DHS to render its determinations based on applicants' identities, rather than based on the nature of the documents requested, as the statute demands. In addition, the regulation causes DHS to impermissibly withhold records under the cover of enforcing the privacy exemptions set forth in Exemptions 6 and 7(C), and obstructs judicial review of these determinations. Because the Consent Provision does not 'carry into effect the will of Congress as expressed by the statute,' the court finds it unlawful."

As a result, Ryu prohibited the agency from using the Consent Provision in the future. "The court therefore enjoins the Department of Homeland Security from using the Consent Provision in these proscribed manners and remands Plaintiff's FOIA requests to the agency for further consideration consistent with this opinion." (*Gonzales and Gonzales Bond and Insurance Agency Inc. v. United States Department of Homeland Security*, Civil Action No. 11-02267 DMR, U.S. District Court for the Northern District of California, Dec. 21, 2012)

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 remanded a case back to the FOI Commission to clarify parts of its decision. The Commission had found the Planning and Zoning Commission of the Town of Monroe had held an improper executive session because there was no sufficient pending claim against the Commission to invoke the exception for pending litigation. The court noted that "the final decision does not analyze whether the phrase 'intention to institute an action in an appropriate forum' modifies 'a demand for legal relief' or only 'a legal right.' The court asks that the FOIC construe the statutory definition. Has the FOIC previously held that a 'demand for legal relief' must also be accompanied by a declaration to institute an action?" (*Planning and Zoning Commission of the Town of Monroe v. Freedom of Information Commission*, No. CV 126015308S, Connecticut Superior Court, Judicial District of New Britain, Dec. 31, 2012)

A trial court has ruled that prisoner William Connelly did not show that he had properly served the FOI Commission when he filed suit against it. The court noted that "service by mail [under the statute] takes place when the item is placed in the mail and postmarked. Since the plaintiff has no proof that the complaint was deposited in the mail by March 30, the appeal lacks subject matter jurisdiction." Although Connelly argued that he did not find out about the FOI Commission's decision until later, the court observed that "the answer to these claims is that this court cannot 'disregard established and mandatory requirements which circumscribe jurisdiction in the first instance.' Further, our appellate courts has not allowed the deadlines [for service] to be tolled, even when mistaken instructions were given to the plaintiff by court personnel. The legislature has provided in the Uniform Administrative Procedure Act only that the time for serving an appeal starts to run from the deposit of the final decision in the mail." (*William Connelly v. Osborn Correctional Institution, Freedom of Information Commission*, No. CV 125015589S, Connecticut Superior Court, Judicial District of New Britain, Dec. 28, 2012)

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Michigan

A court of appeals has ruled that the statutory provision barring attorneys from charging illegal or clearly excessive fees applies to the fee provision in the Open Meetings Act, which provides for recovery of "actual fees." After Kenneth Speicher successfully sued the Columbia Township Board of Election Commissioners for violating the Open Meetings Act, he filed for $32,484 in attorney's fees. The court found the request excessive and found he was entitled to $7,500 instead. Speicher appealed, arguing that he was entitled to actual attorney's fees as provided for in the Open Meetings Act. The appeals court noted the OMA "provides for the imposition of 'actual attorney fees,' [but] the statute declares that such fees must be 'for the action.'" The court added that "giving effect to the plain meaning to the requirement that actual attorney fees be 'for the action,' the fees charged by a successful litigant under the OMA must be for that action and cannot be unrelated to the OMA claims." Speicher admitted his attorney was required to research election laws, but argued that was necessary to determine if the Board had violated the OMA. The court pointed out that "research of election law was not necessary to determine if plaintiff had a viable OMA claim. Rather, to determine if plaintiff had a viable OMA claim, plaintiff's attorney needed only to determine whether defendant's failure to allow public comment and its failure to read the minutes from the previous meeting were violations of the OMA." The court concluded that "the time billed by plaintiff's attorney for election law research was not for the OMA action and, accordingly, cannot be included in the calculation of plaintiff's actual attorney fees under the OMA." (*Kenneth J. Speicher v. Columbia Township Board of Election Commissioners*, No. 306368, Michigan Court of Appeals, Dec. 20, 2012)

New York

A court of appeals has ruled that the Elmont Public Library must disclose a copy of a report prepared by the library's attorney as to whether Frank Marino was a library employee or an independent contractor. The attorney prepared the report and submitted it to the library board, but allowed Marino to view the report and take notes. The court observed that "the Library failed to submit any evidentiary materials to support its claimed exemptions." The court added that "in any event, by voluntarily and deliberately disclosing the report to Marino, the Library affirmatively waived its right to claim the intra-agency exemption or the attorney-client privilege." (*In the Matter of Thomas Madera v. Elmont Public Library*, New York Supreme Court, Appellate Division, Second Department, Dec. 5, 2012)

Pennsylvania

A court of appeals has ruled that an employee termination letter is not a "final action" and thus does not fit within an exception to the exemption pertaining to personnel actions. Reporter Jonathan Silver requested the termination letter for an employee of the Borough of Wilkinsburg. The Borough redacted the letter so that it contained only the employment termination language and the fact that the employee had been given notice of the termination. Silver appealed to the Office of Open Records, which affirmed the Borough's decision, as did the trial court. At the appellate court, Silver argued that the termination letter was part of the final action that fell under the exception to the exemption. The court noted that "here, discipline is not included in the exception. Thus, discipline cannot be disclosed. It is undisputed that the employment termination letter contains prior disciplinary action." The court added that "that part of the letter setting forth the employment termination must be disclosed; however, the references to exempt prior discipline are to be redacted." One judge dissented, pointing out that "because no one disputes that this letter is a 'final action' and while the information may have been gleaned from a personnel file, once it was placed in the final action letter, it is no longer 'contained' in a personnel file making that information subject to disclosure." (*Jonathan*

Silver and the Pittsburgh Post-Gazette v. Borough of Wilkinsburg, No. 154 C.D. 2012, Pennsylvania Commonwealth Court, Dec. 14, 2012)

Texas

A court of appeals has dismissed claims that members of the Junction Texas Economic Development Corporation violated the Texas Open Meetings Act when various members repeatedly held one-on-one discussions about Corporation business with each other, allegedly reaching a consensus on issues before the Corporation. Addressing an email that was circulated to Corporation members suggesting the members were aware that such behavior violated the Act, the court noted that "the email simply does not discuss public business. . .Absent evidence that a quorum of the Board met and discussed public business, [the plaintiffs] cannot prevail on their claims for violation of the Act." (*Lynn Foreman v. Patricia Whitty, et al.*, No. 04-11-00841, Texas Court of Appeals, San Antonio, Dec. 12, 2012)

The Federal Courts…

A federal judge in New York has ruled that the State Department has failed to show it conducted an **adequate search** for records concerning aliens whose deportation orders were subsequently overturned on appeal, but that searches conducted by both the Justice Department and the Department of Homeland Security are adequate. The National Immigration Project argued that State should have conducted a search of overseas posts. The court agreed, noting that "because 'individual overseas posts'—such as embassies, consulates, and attaché offices—facilitate aliens' return at DHS;s request, DOS could have reasonably foreseen that a search of such posts would reveal at least two types of information that plaintiffs requested: cases in which the DOS 'was notified by the DHS. . .that an individual. . .has been removed. . .and remained outside of the United States at the time that a decision ordering removal was overturned;' and 'documents related to coordination between the [DOS] and DHS. . .to arrange for the [relevant aliens'] return to the U.S.' Accordingly, the Court concludes that, because the DOS's search did not include at least some embassies, consulates, and attaché offices, it was not 'reasonably calculated to uncover all relevant documents.'" State argued that it had no way to locate such records because as a matter of policy returning aliens were treated no differently than other aliens. But the court indicated that "despite the DOS's lack of a formal policy, its documents may reveal that it treats aliens differently in practice. Plaintiffs, in any event, are entitled to review any non-privileged documents and draw their own conclusions." The agency contended that a search of overseas posts would be unduly burdensome. However, the plaintiffs had limited the overseas search to five countries—Jamaica, the Dominican Republic, Mexico, Guatemala, and El Salvador. The court pointed out that State had not previously claimed that the search of the five countries would be unduly burdensome, but had argued instead that the plaintiffs had not explained why those posts would have relevant documents. The court observed that "the Government cannot have it both ways, contending that a search that would likely reveal relevant records would be unduly burdensome, but that a manageable subset of that search would not likely reveal relevant records." The National Immigration Project also complained the agency had concluded that a large number of documents located in its search were non-responsive. Finding that the agency's characterization of the records as non-responsive was not sufficient, the court pointed out that "mistaken relevancy determination can undermine access just as easily as incorrect invocations of statutory exemptions. Accordingly, the Court orders DOS either to provide reasonably detailed explanations for why the documents in question do not pertain to plaintiffs' request or to produce any non-exempt documents so that plaintiffs may make their own determination concerning relevance." The court largely found the searches by Justice and Homeland Security were adequate. However, the court found Justice was required to search emails for attorneys in its

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Office of Immigration Litigation. The court noted that "whether or not OIL plays a formal role in the process of returning removed aliens, however, plaintiffs have produced evidence that shows that OIL's email records will likely contain relevant documents for independent reasons. . .[R]egardless of OIL's internal policies, removed aliens' practice of contacting OIL attorneys when attempting to return to the United States indicates that a search of OIL's email records is 'likely to turn up' information relating to, among other things, communications 'between OIL and the opposing counsel in a removal proceeding.'" (*National Immigration Project of the National Lawyers Guild v. United States Department of Homeland Security*, Civil Action No. 11-3235 (JSR), U.S. District Court for the Southern District of New York, Dec. 27, 2012)

Ruling in the FOIA litigation that got side-tracked for several years while the government appealed the Third Circuit's decision that AT&T's corporate privacy was protected by Exemption 7(C) (invasion of privacy concerning law enforcement records), Judge Royce Lamberth has ruled that the FCC has so far failed to show that it conducted an **adequate search** or that it had justified its invocation of a variety of exemptions in withholding records from COMPTEL concerning alleged violations by SBC Communications in connection with the receipt of universal service funds for work done for Connecticut public schools under the E-Rate program. Noting that "the history of this case makes it difficult for the Court to address the adequacy of the FCC's search," Lamberth indicated that the agency had recently disclosed previously redacted email headers, which revealed that all the responsive records came from a single FCC attorney. Lamberth observed that "unless [the attorney] was a party to every email chain involving the SBC investigation, searching for emails only from his account would not result in an adequate search." Lamberth found the agency had not justified its use of **Exemption 4 (confidential business information)** to withhold names and contact information of SBC/AT&T staff. He noted that "while the Court assumes corporations can have a commercial interest in the names of certain staff, it is not a certainty that a corporation would have a commercial interest in the names of every one of its employees. Thus, the FCC must state why this information is commercial in nature." Turning to **Exemption 5 (privileges)**, Lamberth questioned the agency's use of attorney-client privilege. He noted that "the FCC has done nothing to show that material for which the attorney-client privilege was invoked contained confidential communications or that it related to a legal matter for which the client sought legal advice." He added that "the information submitted by FCC sometimes suggests an *absence* of confidentiality. For example, the FCC seeks to protect 'attorney-client discussions' in an email chain between FCC staff and SBC officials. However, information shared with outside entities would no longer be confidential." Lamberth concluded that the agency had not met its burden of proof in regard to withholding names and contact information under **Exemption 6 (invasion of privacy)**. He explained that "while courts often uphold redaction of personal identifying information under Exemption 6, the agency must at least provide the Court with some basis for such an interest. This is particularly the case with respect to [government] staff since these individuals were engaged in the performance of their official duties, not targets of any investigation, and may be at less risk for embarrassment, harassment, or unwanted contacts." Lamberth found much the same problem with the agency's **Exemption 7(C) (invasion of privacy concerning law enforcement records)** claims. He pointed out that "here, the FCC merely restates the legal standard for Exemption 7(C). This is insufficient to support summary judgment." (*COMPTEL v. Federal Communications Commission*, Civil Action No. 06-1728 (RCL), U.S. District Court for the District of Columbia, Dec. 19, 2012)

The Seventh Circuit has ruled that a consultant's report prepared for the EPA assigning percentages of liability to potentially related parties (PRP) in a Superfund clean-up of the Fox River and Green Bay, Wisconsin did not lose its privileged status when portions of the report were used in two consent decrees with other PRPs. Appleton Papers, one of the PRPs involved in the clean-up, unsuccessfully tried to obtain the consultant's report during litigation over the consent decree. Appleton Papers subsequently made a FOIA request for the report. The EPA disclosed portions of the report that had previously been released, but refused to disclose the full report, citing **Exemption 5 (privileges)**. Appleton Papers sued, claiming the agency had

waived its attorney work-product claim by disclosing portions of the report as part of the consent decrees. The trial court upheld the agency's claim and Appleton Papers appealed to the Seventh Circuit. Appleton Papers argued that the agency was required to disclose factual material. But the Seventh Circuit disagreed, noting instead that "although there are differing levels of protection for fact and opinion work product, the Federal Rules protect both types. They require a showing beyond relevance before they are discoverable, and as such, they are covered by FOIA exemption 5." Appleton Papers contended that when a party relies on research from a non-testifying expert, it falls outside the privilege and becomes discoverable. The court answered this by pointing out that "parties need only disclose work product in the particular case they use it." Appleton Papers argued the agency waived the privilege when it disclosed portions of the report in the consent decrees. The Seventh Circuit, however, indicated that "there is no doubt that the government waived work product immunity for the portions of the documents it did use in the two consent decrees." But that partial disclosure did not constitute a waiver of non-disclosed privileged material. The Seventh Circuit observed that the agency had a very legitimate reason for continuing the privilege. "Although the government no longer has an interest in withholding the information made public in the consent decrees, it still has an interest in benefiting from its preparation of the other information it can use in future litigation. This interest is at the core of the work product rule. Therefore, we do not find waiver of the documents the government has neither used nor released to [Appleton Papers]." (*Appleton Papers, Inc. v. Environmental Protection Agency*, No. 12-2273, U.S. Court of Appeals for the Seventh Circuit, Dec. 26, 2012)

Judge Rosemary Collyer has ruled that the Defense Department improperly issued a *Glomar* response neither confirming nor denying journalist William McMichael's requests concerning the existence of an Inspector General investigation of Captain William Power, who served as J4 Director at the U.S. Strategic Command, based on a complaint that he allegedly maintained an abusive command climate. After McMichael's first request identifying Power as the subject of the IG investigation was rejected on the basis that the confirmation of such a request would violate **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, he made two subsequent requests concerning the investigation that did not identify Power but were rejected for the same reason. Collyer first explained that "Captain Power has a legitimate interest in keeping private the record of any investigation of an abusive command climate. But Captain Power's status as a federal employee with leadership responsibilities diminishes his privacy interest. Additionally, Mr. McMichael presented evidence that some number of USSTRATCOM employees were aware of the investigation and its subject." As to the public interest in disclosure, Collyer noted that "the public has a strong interest in knowing whether the IG investigated allegations of an abusive command climate by the J4 Director. Disclosure of whether the investigation took place will provide insight into what the government is up to, specifically if the IG's office is carrying out its official duties. Further, the public interest in information regarding an investigation is strengthened when the subject of the investigation is a federal employee in a leadership position." She concluded that "balancing Captain Power's diminished expectation of privacy against the public's interest in knowing whether the IG investigated allegations of misconduct, it must be concluded that the public interest prevails. Particularly where the fact that the IG investigation was known to a number of people and the identity of the person under investigation was equally apparent, a *Glomar* response cannot satisfy. The Court concludes, on these facts and this Complaint, that a *Glomar* response was inappropriate even if the records in question, if they exist, may otherwise be exempt from disclosure under FOIA Exemptions 7(C) and 6." (*William McMichael v. United States Department of Defense*, Civil Action No. 11-2119 (RMC), U.S. District Court for the District of Columbia, Dec. 18, 2012)

Judge Beryl Howell has ruled that Sharif Mobley is not entitled to **attorney's fees** because he did not substantially prevail in his FOIA suit. Mobley filed suit in November 2011and asked for a preliminary

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injunction requiring the Department of Homeland Security to respond to his request. Mobley withdrew the request for a preliminary injunction three weeks later, indicating he was satisfied that the agency was properly processing his request. In January 2012, Mobley once again filed a motion for a preliminary injunction, this time to enjoin the agency from refusing to process his request. Two weeks later, Mobley withdrew that motion, indicating that the legal issues were such that he would file a motion for summary judgment instead. A month later, the agency filed a motion for summary judgment, but Mobley voluntarily dismissed his complaint, which Howell allowed him to refile without prejudice in the future. Six months later, Mobley filed a motion for $1,385 in attorney's fees, claiming he had substantially prevailed by forcing the agency to process his request. But Howell noted that "the Court, however, cannot agree with plaintiffs' novel interpretation of the term 'substantially prevailed.'" Pointing out that the D.C. Circuit in *Brayton v. Office of U.S. Trade Representative*, 641 F.3d 521 (D.C. Cir. 2011) had interpreted "substantially prevailed" as requiring the release of records, Howell explained that "the language of the statute itself, however, suggests that a broader conception of substantially prevailing is possible when a plaintiff relies on the catalyst theory. The FOIA provides that 'a complainant has substantially prevailed if the complainant has obtained relief' through 'a voluntary or unilateral change in position by the agency.' Although a garden-variety FOIA plaintiff may only seek the production of records, a substantial number of FOIA plaintiffs seek relief that, even when freely given by a unilateral action of the agency, does not necessarily lead to the production of any records. . . If an agency were to provide this sort of interim relief to a plaintiff by way of a voluntary or unilateral change in the agency's position, then it could be reasonable to conclude that, under the catalyst theory, that plaintiff has 'substantially prevailed.'" But Howell found Mobley had not substantially prevailed in this instance. She explained that "if a plaintiff obtains only one small piece of the relief it seeks in its complaint, as the plaintiffs did here, calling such prevalence 'substantial' is clearly incorrect. To give meaning to the language used in the statute, a FOIA plaintiff must obtain the essential elements of the relief that it seeks in its complaint in order to substantially prevail, which the plaintiffs did not do here." Howell also pointed out that the amended attorney's fees provision, contained in the 2007 OPEN Government Act, had been intended to discourage agencies from pursuing dilatory litigation. She observed that "the Court is cognizant that voluntary compliance very early in FOIA litigation, like the government's compliance here, should be encouraged rather than punished." (*Sharif Mobley v. Department of Homeland Security*, Civil Action No. 11-2074 (BAH), U.S. District Court for the District of Columbia, Dec. 10, 2012)

Judge James Boasberg has ruled that the FBI properly withheld records about the investigation of a 1993 murder of three boys in West Memphis, Arkansas. The agency received four requests from Stephen Braga, the attorney who represented Damien Echols, one of three men convicted in the murders, in post-conviction appeals that led to the release of the three men. In response to Braga's first request, the FBI released 190 pages previously disclosed to another FOIA requester, released 26 pages in response to a second request, and told Braga that the previously-disclosed 190 pages were responsive to his third request. In his fourth request, he asked the agency to process the records based on the 2009 Attorney General's memo. As a result, the agency disclosed 458 pages, but withheld 239 pages under **Exemption 6 (invasion of privacy)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)**. Boasberg indicated that "if the records and information the FBI seeks to withhold in this case were 'compiled for law enforcement purposes,' the Court need only address whether the agency has properly withheld these documents under Exemption 7(C). If so, there is no need to consider the higher bar of Exemption 6. Here, Braga never argues that the FBI records were not compiled for law enforcement purposes. Nor would he have much luck doing so given that the records all concededly relate to the FBI's work on a murder investigation." Boasberg noted that "the FBI here identifies the privacy interests of six categories of people 'whose names or other identifying information appear in the responsive records'. . .The Court finds each of these interests substantial, a decision consistent with D.C. Circuit law." Braga argued the existence of a significant public interest in the potential exoneration of those sentenced to death. But Boasberg observed

that "Echols is no longer a death-row inmate or a prisoner at all; he is now a free man. The public's interest, at this point, is diminished and cannot overcome the substantial privacy interests [identified in the case law]." Boasberg found that the FBI's Exemption 7(D) claims occurred only in conjunction with 7(C). He noted that "since the Court has already held that 7(C) applies here, its inquiry is at an end." (*Stephen L. Braga v. Federal Bureau of Investigation*, Civil Action No. 12-139 (JEB), U.S. District Court for the District of Columbia, Dec. 21, 2012)

Judge Royce Lamberth has rejected a request by Landmark Legal Foundation for a preliminary injunction requiring the EPA to respond to its request for records concerning any agency rule or regulation for which public notice had not yet been made by December 24. Landmark asked for **expedited processing** when it submitted its request in August, which the EPA denied. Landmark filed suit in October, asking for an order requiring the EPA to preserve the records, to conduct an expedited search, and to recognize Landmark as falling within the media category for fee purposes. Reviewing Landmark's request for expedited treatment, Lamberth rejected the organization's claim that it was primarily involved in disseminating information. Instead, he noted that "Landmark has only stated that '*as part of* its mission as a tax-exempt, public interest law firm, Landmark *investigates, litigates*, and publicizes instances of improper and/or illegal government activity' and that *among* its primary activities is to disseminate to the public about the conduct of governmental agencies.' This is not sufficient to show that Landmark is primarily, and not just incidentally, engaged in information dissemination and thus the Court cannot now find that Landmark meets this prong of the compelling need test. A contrary reading of the statutory requirement would allow nearly any organization with a website, newsletter, or other information distribution channel to qualify as primarily engaged in disseminating information." In assessing the urgency of Landmark's need to inform the public, Lamberth indicated that "it is true that the content of Landmark's comments in response to the EPA proposed ruled *may* be affected by a delay in receipt of FOIA materials. However, Landmark states that it seeks information regarding politically motivated delays in publishing the rule. Thus, the failure to obtain this information should not impact Landmark's ability to comment on the substance of the rules and the merits of any proposed changes." He added that "if the EPA did, for political reasons, delay a controversial proposed rule until after the presidential election, the Court fails to see how receiving this information in January [as opposed to December] will irreparably harm Landmark." Lamberth also rejected Landmark's request to order the agency to preserve the records. He observed that "in contrast to any indication of destruction of records, the EPA has already indicated that it has begun the process of collecting records and that it has already collected approximately 1,600 pages of responsive records." (*Landmark Legal Foundation v. Environmental Protection Agency*, Civil Action No. 12-1726 (RCL), U.S. District Court for the District of Columbia, Dec. 21, 2012)

After holding a three-day trial, Judge Ellen Segal Huvelle has ruled that the Department of the Navy did not violate the **Privacy Act** when it disclosed information about its investigation of Timothy Reed to the Charleston Police Department. Reed worked as a police officer in Charleston while also serving in the Navy Reserve. He was called up for a guard duty deployment to Iraq, but was accused of several charges of misconduct during his training at Fort Lewis, Washington. As a result, he contacted the police department and indicated he was having "some training issues." Reed was subjected to a Disciplinary Review Board hearing. During the hearing he told the Board he was a police officer in Charleston. Skeptical of his claim, Command Master Chief David Carter contacted the Charleston Police Department, confirmed Reed's employment status, and told the police that Reed was being investigated for pointing a weapon and making derogatory statements. The Disciplinary Review Board found Reed guilty of three charges, including assault. He was demoted as a result. Reed contacted the Charleston Police Department and informed them that he planned to return to work. After learning more about the Navy's investigation, the police decided to investigate Reed's fitness for

employment. During the department's investigation, which included more contacts with the Navy, Reed was put on administrative leave. He later resigned rather than be terminated. He then filed suit against the Navy, arguing that the agency's disclosures had caused him to lose his job with the Charleston Police Department. Reed argued Carter had divulged too much information in his calls with the Charleston Police. But Huvelle indicated that "the investigation was not limited to the verification of a single fact, or to the assessment of plaintiff's credibility on a single issue. Rather, the Navy was investigating multiple allegations of military code violations and possible criminal acts." She added that "insofar as Carter was seeking information relevant to the Navy's investigation, his limited disclosure of two of the Fort Lewis allegations against plaintiff as a means of indicating the kinds of past behavior that he was interested in knowing about did not violate the Act." (*Timothy M. Reed v. Department of the Navy*, Civil Action No. 10-1160 (ESH), U.S. District Court for the District of Columbia, Dec. 18, 2012)

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