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Washington Focus: According to The Hill, House Republicans sent a letter June 6 to Acting EPA Administrator Bob Perciasepe complaining that the agency is discriminating against conservative groups by denying their fee waiver requests more frequently than those of liberal groups. Pointing to a May report from the Competitive Enterprise Institute, a conservative pro-business organization, showing the agency waived fees to conservative groups 27 percent of the time compared with 92 percent of the time for liberal groups, Rep. Steve Scalise (R-LA), chairman of the Republican Study Committee, and 34 other House Republicans, complained to Perciasepe that "this activity calls into question the objectivity of the FOIA employees at EPA and undermines public confidence in an agency that is charged with protecting our air and water." Senate Republicans have also complained to the agency, suggesting it is colluding with environmental groups for political purposes. As a result, Perciasepe has asked the EPA Inspector General to review agency FOIA policies and has denied that the agency means to treat groups differently.

D.C. Circuit Court Judge Blasts Criteria for Assessing Attorney's Fees

Circuit Court Judge Brett Kavanaugh has used a concurrence in a per curiam decision remanding the district court's denial of attorney's fees to researcher Jefferson Morley for failure to properly apply the appeals court's holding in *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008), to attack the four-factor criteria for assessing attorney's fees as being outdated and not supported by FOIA's statutory language. Sending the case back to the district court, the panel agreed that *Davy* held that there was a probable public interest in disclosure of records concerning the assassination of President John F. Kennedy even if the information revealed little on its own since its disclosure would enable further research. Much like Senior Circuit Court Judge A. Raymond Randolph's dissent in *Davy*, Kavanaugh's concurrence strongly recommended abandoning the four-factor standard in favor of a more workable standard.

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The four factors commonly considered by courts in making an attorney's fees determination look at (1) the public benefit derived from the case, (2) the commercial benefit to the requester, (3) the nature of the requester's interest in the information, and (4) the reasonableness of the agency's conduct. Those factors are not in the statutory text—indeed, the statute itself says little more than that the court must decide that the plaintiff has substantially prevailed, the definition of which was revised by Congress in the 2007 OPEN Government Act—but were taken from the Senate Report on the 1974 Amendments.

In no uncertain terms, Kavanaugh urged that "we should ditch the four-factor standard. As Judge Randolph has cogently explained, the four factors have no basis in the statutory text. And Congress's decision not to include the four factors in the statutory text appears to have been deliberate. The four factors were in the original Senate bill addressing FOIA attorney's fees, but the final bill did not include them." While Randolph's dissent in 2008 outlined his own interpretation of the attorney's fees provision, Kavanaugh's rejoinder had the support of the Supreme Court's recent holding in *Milner v. Dept of Navy*, 131 S. Ct. 1259 (2011) behind it. He pointed out that "to be sure, the factors were mentioned in a Senate committee report, but the Supreme Court recently reiterated—in an eight-Justice opinion by Justice Kagan in a FOIA case—that we should heed the statutory text of FOIA, not committee reports. In short, the text of FOIA does not require this four-factor standard."

He added that "FOIA grants courts discretion to determine when attorney's fees should be awarded. It is not inappropriate for courts to flesh out that discretion with specific rules or standards that are rational and consistent with the structure and purposes of FOIA. But the four-factor standard adopted by this Court is arbitrary and inconsistent with the structure and purposes of FOIA."

Kavanaugh argued that the factor assessing the public benefit from disclosure and the two factors related to the requester's commercial or personal interest in the records "incentivize and reward only certain kinds of FOIA requests and requesters, notwithstanding that FOIA deliberately renders the nature of the request and the identity of the requester irrelevant to whether a request should be granted. Those three factors are therefore in tension with the basic structure and purposes of FOIA." Kavanaugh then indicated he had problems with the public interest standard in general. He asked "how can a court know whether some disclosures of government documents benefit the public more than others? How does a judge evaluate 'public benefit' in a principled way? Doesn't this factor inevitably devolve into what *the judge* subjectively thinks is important, rather than an objective determination?"

Kavanaugh was equally troubled with the two factors assessing the requester's interest. Expressing a rather peculiar concern about the potential problems the commercial interest factor presented for businesses, he pointed out that "no business is a bottomless well, and that is especially true of small businesses and individual proprietors. And if attorney's fees are not available, some businesses presumably will not litigate some FOIA disputes that they might otherwise have litigated." He then raised one of the most frequent criticisms of FOIA by government FOIA professionals that "the case law has drawn an odd distinction between an ordinary business's commercial interests (which count against an award of fees) and a news organization's commercial interests (which do not count against an award of fees)." He noted that "one of the broad purposes of FOIA was to enable all citizens to directly access government information without having to rely on filters. So why penalize non-media businesses that directly seek more information about how the government is carrying out its responsibilities? And to add a further complication, who qualifies and doesn't qualify as a news organization today?"

Noting that "unpredictability undermines whatever incentive the four-factor standard is supposed to create in the first place for plaintiffs with meritorious FOIA claims," he indicated that "we should stop relying on these atextual factors and stop discriminating against FOIA requesters' fee requests based on a necessarily ill-

informed perception of public benefit and an arbitrary assessment of the nature of the requester's interests." He then recommended jettisoning the four-factor standard and replacing it with the standard enunciated by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), where the Court held that "prevailing plaintiffs should receive attorney's fees—with a very narrow exception for 'special circumstances' such as bad faith by a prevailing plaintiff." He pointed out that "such a rule for FOIA fee awards would be clear and predictable, would treat FOIA requests and requesters equally, and would incentivize would-be FOIA plaintiffs with meritorious claims." Coming from a conservative judge, this is an interesting suggestion because it would make fee awards mandatory once a plaintiff was found to have substantially prevailed. It also seems philosophically at odds with the Supreme Court's more recent ruling in *Buckhannon*, where a conservative majority placed severe restrictions on the ability of a plaintiff to substantially prevail.

Apparently not restrained by consistency, Kavanaugh then suggested an alternative—get rid of the first three factors and just assess the reasonableness of the government's position to determine if a plaintiff should get a fee award. He pointed out that this was substantially the same standard used to assess attorney's fees in the Equal Access to Justice Act, a kind of catch-all statute for awarding fees when the statute itself does not have its own fee provisions. While this standard might appear attractive, the reality is that courts rarely find the government's position so egregious that it can be characterized as unreasonable. Courts can easily find that the government's withholdings were improper without finding that its actions were unreasonable. To fall back only on the reasonableness of the agency's conduct would likely result in far fewer fee awards.

Kavanaugh concluded by referring to two reasons why he thought courts should act to change the interpretation of the attorney's fees provision. He noted that in *Milner*, the Supreme Court had rejected "a similar atextual 30-year-old FOIA precedent from this Court. The Supreme Court emphatically concluded that it did not matter that this Court had applied a contrary interpretation for three decades. The obvious lesson to be drawn from *Milner* is that we should not reflexively cling to FOIA decisions that were decided on the basis of legislative history during an era when statutory text was less central to statutory interpretation. . .[J]ust as important, the four-factor standard causes continuing real-world problems—among other things, drawing arbitrary and unfair distinctions among FOIA requesters and requests, and generating satellite litigation that is wasteful and unnecessary." (*Jefferson Morley v. Central Intelligence Agency*, No. 12-5032, U.S. Court of Appeals for the District of Columbia Circuit, June 18)

Views from the States…

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

Iowa

The supreme court has ruled that volunteer members of the Upper Explorerland Regional Planning Commission are immune from liability for violations of the Open Meetings Act unless such actions amounted to intentional misconduct or were a willful violation of the OMA. After conducting a secret vote on whether to purchase a piece of property, the Commission members decided that the secret vote might be a violation of the OMA and asked the state ombudsman for guidance. Pursuant to the ombudsman's recommendation, the Commission voted again in open session. The City of Postville sued the commission for that violation as well as violations of the OMA's notice requirements. Finding that the Commission's actions to reaffirm the vote in public did not constitute willful misconduct, the supreme court noted that "such actions demonstrate a desire

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to comply with the requirements of IOMA, not sidestep the statute." Postville had also contended that posting meeting notices on a bulletin board outside the Commission's office did not provide adequate notice and that publication of notices and minutes in the *Oelwein Daily Register* violated the statute because the paper did not have a general circulation in the Commission's five-county geographic area. The supreme court found that there was a genuine issue of material fact concerning the posting of notice on the Commission's bulletin board and sent that issue back to the trial court for further determination. The supreme court rejected Postville's challenge to the adequacy of publication in the *Register*. The court pointed out that "the Commission specifically selected the *Register* to publish its meeting minutes, and subsequently, the annual report of the members' names and salaries, because it is the only daily newspaper serving the five-county area." Postville argued the paper did not have subscribers in all five counties. But the court observed that "a newspaper of general circulation is not determined by the number of its subscribers, but by its diversity." The court added that "by having subscriptions in all but one county of the Commission's five-county region, the purpose of the publication requirement is fulfilled—individuals within the area served by the Commission have notice of the members' names and salaries." (*City of Postville v. Upper Explorerland Regional Planning Commission*, No. 12-1002, Iowa Supreme Court, June 7)

Louisiana

A court of appeals has ruled that the Board of Pharmacy must produce its digital copy of its list of pharmacies to Randal Johnson, president of the Louisiana Independent Pharmacies Association, in response to his public records request. The Board contended that because the list included confidential information such as social security numbers that production would take some time and would probably cost about $4200. Johnson's computer expert testified that redacting the information was relatively simple and that the whole process should not exceed more than four hours for a total of $400. The trial court agreed with Johnson's expert and ordered the Board to provide the digital copy and charge Johnson no more than $500. Upholding the trial court's decision, the appellate court noted that "the evidence presented wholly supports the trial court's conclusion that the Board has both the ability and the capability to extract whatever confidential information may be contained in the requested documents, as well as the capability to extract the requested information from its existing database and copy that for the plaintiff. The testimony of the two experts differed greatly in the estimated cost for accessing the database, excising the confidential information, and producing the requested copy of the database for the plaintiff." But the appeals court observed that at oral argument Johnson had indicated that he was primarily concerned with obtaining the data and was willing to pay $4200 if that was what it cost to get the information. Taking this into account, the appellate court indicated that "in light of this concession by the plaintiff, together with the statutory language, allowing the custodian to ensure the integrity of its systems, and the confidentiality of the information therein, we amend the trial court's judgment to order plaintiff to pay reimbursement costs in an amount between $500 and not to exceed $4200, as reasonably warranted by the actual efforts taken to reproduce the requested materials." (*Randal Johnson v. Malcolm Broussard, Carlos Finalet and the Louisiana Board of Pharmacy*, No. 2012 CA 1982, Louisiana Court of Appeal, First Circuit, June 7)

Pennsylvania

A court of appeals has ruled that the Office of Open Records erred in summarily dismissing Benjamin Barnett's multi-part request to the Department of Public Welfare because he had not sufficiently responded to the agency's reasons for denying much of his request. DPW provided a 13-page response to Barnett's request, providing detailed reasons for denying information and attaching an "Omnibus Response" filled with case citations to preserve any other arguments it might have initially missed. When Barnett appealed the denial to OOR, that office responded with a checklist dismissal indicating Barnett had failed to respond to DPW's reasons for denial. Barnett then appealed to the court. Finding that the OOR had improperly summarily

dismissed his appeal for failing to address DPW's reasons for denying the request, the court noted that "requester's OOR Appeal does address the reasons given by DPW in denying his [Right to Know Law] Request, and includes his arguments as to why those reasons are flawed. Although Requester does not discuss any specific subsections of the RTKL, this does not render the OOR Appeal deficient." Barnett argued that the court had the independent authority to consider the merits of his request *de novo*. But the court, indicating that the statute encouraged the OOR to conduct the first appeal, decided to send the case back to OOR. The court noted that "here, there is no final determination on the merits, but merely a summary dismissal of Requester's OOR Appeal. There was no opportunity for either Requester or DPW to present any evidence to support each party's respective position. Under these circumstances, we believe that the better approach in this matter is to permit the OOR the opportunity to follow the procedures set forth in the RTKL and issue a final determination on the merits before we exercise review." (*Benjamin Barnett v. Pennsylvania Department of Public Welfare*, No. 1697 C.D. 2012, Pennsylvania Commonwealth Court, June 12)

The Federal Courts…

In denying Shane Moffat access to an unredacted FBI witness interview, the First Circuit has made some interesting observations concerning **Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(D) (confidential sources),** agency bad faith, and the hourly rate for **attorney's fees**. Moffat was convicted of murder after Desmond Wolfe implicated him in an FBI interview. In the interview, Wolfe related a conversation he had with an individual named "Screw" who had related how Moffat beat a man to death. The Wolfe interview was contained in a partially redacted FBI 302 report that Moffat allegedly got from the Massachusetts district attorney's office during his criminal prosecution; the district attorney had apparently received it from the U.S. Attorney's Office for the District of Connecticut. From this copy of the FBI 302, Moffat conjectured that "Screw" was an individual named Everol Bartlet, who the report indicated was at the murder scene. Moffat contended Bartlet had actually committed the murder. After his conviction Moffat requested the FBI 302 report, a heavily redacted version of which was ultimately disclosed. Moffat argued that the FBI could no longer claim the record was exempt because he had a copy of it. The district court upheld the agency's claims based on Exemption 7(C) and Exemption 7(D), but also found that Moffat's court-appointed attorney in his criminal case was entitled to attorney's fees, albeit at a reduced rate. Moffat appealed to the First Circuit. Rejecting Moffat's claim that Exemption 7(C) no longer applied because the report was public, the appeals court noted that "we have previously stated that prior revelations of exempt information do not destroy an individual's privacy interest. . .The privacy interests the government seeks to uphold remain as strong now as they were before." Recognizing that a request from a criminal defendant like Moffat could conceivably implicate a public interest that could outweigh the privacy interests, the court nevertheless pointed out that "Moffat's only discernible interest in the requested information is to challenge his murder conviction, and he has failed to connect his deeply personal stake in this information to a larger governmental function." Noting that their decision in *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989), recognized that confidential source information could be withheld even though the confidential sources had testified at public trial, the court observed that "the most Moffat could obtain would be a copy of the FBI 302 report that contains the exact same redactions as the version he already possesses. . .But that is not the nature of Moffat's claim. His goal is to obtain information *other* than what he already has, and nowhere does he suggest that his claims would be satisfied if the FBI simply produced a copy of the FBI 302 report that contains the same withholdings as the one in his possession." Moffat contended that the FBI's exemption claims in light of the fact that he already had a copy of the 302 report constituted bad faith. But the appeals court noted that "we question whether an agency's incorrect invocation of FOIA exemptions can ever serve as evidence of bad faith. We are certain, however, that even if the agency claimed an exemption in error, that fact alone does not

establish that the government's response lacked good faith, or that the search was inadequate. The adequacy of the search focuses on the reasonableness of the agency's response, not whether that response was legally correct in every particular." The district court had found that Moffat substantially prevailed, but reduced his attorney's requested rate of $225 an hour to the $100 an hour rate for court-appointed criminal attorneys. Upholding the district court's discretion in reducing the hourly rate, the appeals court observed that "Moffat's counsel submitted an affidavit stating in cursory fashion that his typical hourly rate was $225" without providing any explanation. "These threadbare assertions are wholly insufficient to warrant his claimed hourly rate." The court added that "in light of Moffat's failure to proffer any evidence in support of his hourly rate, we cannot say that the court abused its discretion in basing that fee aware on the value. . .placed on attorneys representing indigent defendants." (*Shane O. Moffat v. United States Department of Justice*, No. 11-2472, U.S. Court of Appeals for the First Circuit, June 14)

The Supreme Court has ruled that a South Carolina law firm violated the Drivers Privacy Protection Act when it obtained the DMV records of more than 30,000 car owners to contact them concerning a class action suit under the state's Manufacturers, Distributors, and Dealers Act. The DMV released the information based on the attorneys' assertion that disclosure was permitted by (b)(4) of the DPPA allowing disclosure in connection with litigation. When several car owners brought suit against the law firm for violating the DPPA, the district court in South Carolina agreed with the law firm and its decision was upheld by the Fourth Circuit. But writing for the Supreme Court, Justice Anthony Kennedy concluded the letters were solicitations not covered by the litigation exception. Finding that the (b)(4) exception was not meant to cover solicitations, Kennedy noted that the examples in the DPPA's legislative history "suggest that the litigation exception has a limited scope to permit the use of highly restricted personal information when it serves an integral purpose in a particular legal proceeding. In light of the types of conduct permitted by the subsection, the 'in connection with' language should not be read to include commercial solicitations by an attorney." Justice Ruth Bader Ginsberg dissented in an opinion joined by Justice Antonin Scalia as well as Justices Sonia Sotomayor and Elena Kagan. She indicated that "I would read the statutory language to permit the use of DMV information tied to a specific, concrete proceeding, imminent or ongoing, with identified parties on both sides of the controversy." She concluded that "the Court today exposes lawyers whose conduct meets state ethical requirements to huge civil liability and potential criminal liability. It does so by adding to the DPPA's litigation exception a solicitation bar Congress did not place in that exception." (*Edward F. Maracich, et al. v. Michael Eugene Spears, et al.*, No. 12-25, U.S. Supreme Court, June 17)

Judge Gladys Kessler has ruled that the Justice Department properly invoked **Exemption 5 (privileges)** to protect substantial portions of its records concerning the investigation of Rep. Don Young (R-AK) for his role in a Florida earmark known as Coconut Road. The earmark caused such controversy that Congress passed legislation requiring DOJ to investigate Young's behavior and Young publicly admitted he was under investigation. CREW then requested DOJ's records, including its reasons for not bringing criminal charges against Young. DOJ initially responded with a *Glomar* denial neither confirming nor denying the existence of records. In her prior decision, Kessler rejected the agency's use of a *Glomar* response, finding that because the investigation of Young was congressionally-mandated and a matter of public record the public interest in the investigation outweighed Young's privacy interest. She sent the case back to Justice with instructions to search for responsive records and to make exemption claims. The FBI, EOUSA, and the Criminal Division all released records, but withheld others under Exemption 5 and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. CREW argued DOJ had failed to justify its attorney work product claims because it had not identified the circumstances surrounding the initiation of the Young investigation, the dates on which the investigation commenced and concluded, and the specific roles various employees played in the investigation. Rejecting CREW's claim, Kessler noted that "the relevant inquiry in analyzing an

attorney work product claim is far narrower and focuses on whether the documents in question were prepared in anticipation of litigation." She indicated that "the Government has filed detailed, specific declarations describing the various documents and explaining that they were prepared in contemplation of litigation. CREW does not identify any reason to doubt those explanations, and thus, they are entitled to a presumption of good faith." She added that "moreover, the original FOIA request specifically sought all documents related to DOJ's investigations of Rep. Young concerning allegations of bribery and other illegal conduct. Therefore, the scope of the document request itself supports the Court's conclusion that the Government's documents are attorney work product and its affidavits should be credited." The Criminal Division had withheld an email chain concerning how to respond to a press inquiry and, while Kessler doubted it was prepared in anticipation of litigation, she agreed that it was protected under the deliberative process privilege. She noted that based on prior case law, "it is clear that email exchanges between employees regarding how to respond to pending press inquiries are the types of discussions that agency employees are entitled to have without fear of disclosure." CREW argued DOJ was required to disclose any documents that articulated the basis for its final decision not to prosecute Young. But Kessler pointed out that "the deliberative process privilege does not turn on identifying such a decision." She added that "to the extent that the public is entitled to disclosure of 'the reasons which did supply the basis for an agency policy actually adopted,' there is no indication that these emails contain the final decision not to prosecute Rep. Young or the reasons behind that decision." While DOJ had withheld a range of personal information contained in the records, CREW only challenged the deletion of Young's name. Kessler criticized DOJ for failing to "distinguish between Rep. Young and other third parties. They do not at any point discuss this Court's findings that Rep. Young's privacy interest is clearly diminished by the fact that DOJ's investigations into his activity are 'already a matter of public record.'" She observed that for purposes of categorically withholding third-party information "the Government cannot treat Rep. Young as merely a 'suspect' whose name happens to be mentioned in these records because this does not fulfill its obligation to balance the *specific* interests involved." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 11-754 (GK), U.S. District Court for the District of Columbia, June 12)

A federal court in New York has ruled that the Department of Homeland Security has not shown that the privacy interests of aliens who were released from detention after having been held for six months with no showing of likely removal in the foreseeable future outweigh the public interest in monitoring the agency's performance in identifying and releasing such aliens, a policy mandated by the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001). *Boston Globe* reporter Maria Sacchetti contended that the information about crimes committed by the aliens and their deportation status was already publicly available. But, recognizing that the aliens had a privacy interest under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in the disclosure of a comprehensive list, Judge Shira Scheindlin noted that "here, too, there is a difference between the 'practical obscurity' of the existence of public records regarding individuals' prior convictions, and records regarding immigration status, which may be obtained with some effort, and the release of a spreadsheet compiled by [Immigration and Customs Enforcement] containing a variety of information about an individual including criminal convictions, status as an illegal immigrant, some information about that individual's current location, and the fact that he or she has not been deported." She then turned to the public interest in disclosure. She pointed out that "plaintiffs do not assert a direct public interest in knowing the names of individuals being released pursuant to *Zadvydas*. Rather, they argue that disclosure of the names of the Released Individuals would permit them to obtain information that 'would shed further light on critical aspects of the government's handling of its removal duties.'" Scheindlin indicated that the Second Circuit had considered and rejected a derivative use argument in *Associated Press v. Dept of Defense*, 554 F.3d 274 (2nd Cir. 2009)—information obtained as a result of information contained in government records—but did not foreclose the theory altogether. However, in this case, Scheindlin found the

way Sacchetti intended to use the information enhanced the public interest in disclosure. She noted that "plaintiffs do not propose to contact the individuals in furtherance of their investigation. . .Rather, plaintiffs argue that disclosure of individual names would permit 'monitoring of whether repeat offenders are on the list' and 'identif[ication] through public court documents [of] those countries with a track record of avoiding or resisting repatriations.'" Ruling that the list should be disclosed, Scheindlin observed that "plaintiffs have established that they would use the individual names in combination with other public information to draw conclusions about the performance of the DHS—information which the government agency, for whatever reason, is disinclined to disclose on its own." (*New York Times Company v. United States Department of Homeland Security*, Civil Action No. 12-8100 (SAS), U.S. District Court for the Southern District of New York, June 13)

Judge Ellen Segal Huvelle has ruled that the DEA cannot issue a *Glomar* response under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** for Carlos Javier Aguilar-Alvarez because the agency had already officially confirmed Aguilar-Alvarez as a confidential source. Rene Cobar, who had been tried on drug charges, requested information about Aguilar-Alvarez's status as a confidential source and attached a DEA affidavit that confirmed Aguilar-Alvarez's confidential source status. DEA replied with a *Glomar* response based on **Exemption 7(D) (confidential sources)**. When Cobar appealed, OIP affirmed the agency's response, but cited Exemption 7(C) instead. Cobar sued, arguing the agency could not refuse to search for records on Aguilar-Alvarez because his status as a confidential informant had been officially confirmed. The DEA argued its *Glomar* response was necessary to protect Aguilar-Alvarez's privacy interests. Huvelle, however, disagreed. She noted that "in a typical confidential informant case, defendant's justification for a *Glomar* response relying on Exemption 7(C) may make perfect sense. But where the identity of a confidential informant has been officially confirmed, the reasons justifying a *Glomar* response no longer apply. Here, there can be no question that the identity of the confidential informant has been officially confirmed in light of [the DEA agent's] sworn affidavit, the content of Aguilar-Alvarez's public testimony at Cobar's criminal trial, and the district judge's opinion in July 2011 denying Cobar's motion for a new trial. Accordingly, a *Glomar* response is not available and defendant is not entitled to summary judgment." Noting that "the unavailability of a *Glomar* response as to the existence of responsive records does not mean that DEA is required to disclose the content of any particular record," Huvelle indicated the agency would have to file a *Vaughn* index describing the records and then litigate the applicability of any exemptions the agency claimed. (*Rene Oswald Cobar v. U.S. Department of Justice*, Civil Action No. 12-1222 (ESH), U.S. District Court for the District of Columbia, June 6)

Editorial Note: Although the three exclusions included in subsection (c) of FOIA, most prominently the one allowing law enforcement agencies to claim to have no records when a request identifies an alleged confidential informant unless his or her status has been officially confirmed, was considered a crucial provision by Justice when the 1986 FOIA Amendments were passed, for years there was almost no litigation on the exclusions. That has changed recently and a number of plaintiffs have raised the issue of whether the exclusions are properly invoked with some success. In a case brought by an Islamic group in California, the district court judge severely criticized the FBI, which was relying on the exclusions, for lying to the court about the existence of records. Nevertheless, the court ultimately found the records were properly exempt.

Judge Amy Berman Jackson has ruled that the FBI properly invoked **Exemption 7 (law enforcement records)** to withhold records from Josef Boehm, who was convicted on sex trafficking and drug charges. Boehm's request traveled a peculiarly circuitous processing route. He requested all records related to his investigation and conviction from the FBI, EOUSA, and the Criminal Division. The FBI responded that it was withholding any responsive records under **Exemption 7(A) (interference with ongoing investigation)**.

Boehm did not appeal the FBI's denial. While EOUSA and the Criminal Division both found responsive records, they concluded that none of the records originated with their offices and referred the records to the FBI. However, the agency processed the records referred to it from other agencies, disclosing about 1400 records and withholding 2800 records. Boehm filed suit and Jackson granted the agencies' request to submit a representative sampling of the documents. Finding that Boehm had **failed to exhaust administrative remedies** because he did not appeal the FBI's original denial, she dismissed that part of Boehm's complaint. Boehm argued the agency had waived that defense because it continued to process and provide records to him. But Jackson noted that "this argument is misleading. While the FBI did continue to provide documents to plaintiff even after it asserted the exhaustion defense in this Court, they were documents that had been referred to the FBI from other agencies because they originated from the FBI but were housed in a different agency at the time of the request. Plaintiff offers no evidence that the FBI ever revisited its initial decision regarding the documents that originated from the FBI and were located at the FBI at the time the agency received the request." Boehm challenged the **adequacy of the search** conducted by the agencies, arguing that the government identified only 4173 documents while there were 15,000 documents involved in his criminal prosecution. Dismissing his claim, Jackson observed that "but plaintiff provides no support for his belief that the government possesses 15,000 responsive documents or that a prosecution of an individual for the charges involved here would have generated that volume of paper." The agencies withheld some information under **Exemption 3 (other statutes)**, citing Rule 6(e) protecting matters occurring before a grand jury. Boehm argued that the names of many grand jury witnesses had been publicized at the time of his trial. But Jackson replied that "plaintiff cites no case law to support the theory that the public disclosure of any of this type of information makes 6(e) inapplicable, and he has submitted no evidence that any of this information has actually been made public." However, she found EOUSA had not shown that records "related to the grand jury" were protected by 6(e). She noted that "Rule 6(e) is not so broad; it shields matters 'occurring before the grand jury.' So the EOUSA has not provided a sufficient factual basis—or legal support—for its position that these materials are categorically exempt from not only disclosure but any FOIA processing." Upholding the government's **Exemption 7(C) (invasion of privacy concerning law enforcement records)** claims, Jackson rejected Boehm's contention that withholding information about which authorities investigated him violated his Sixth Amendment right to a fair trial. She pointed out that "this argument fails because disclosure in a FOIA case is governed by different standards than disclosure in a criminal case. The only factors relevant to the Exemption 7(C) analysis are the privacy interest and the public interest in disclosure." Boehm again challenged the government's invocation of **Exemption 7(D) (confidential sources)** by contending that any confidential informants had been made public by testifying at his trial. But Jackson explained that "plaintiff provides no evidence that any informants in his case later publicly identified themselves, let alone evidence that they identified themselves in a way that would waive the protection of Exemption 7(D)." While Jackson approved of using **Exemption 7(F) (safety of an individual)** to withhold the names of some government investigators, she balked at the FBI's assertion that it applied in at least one instance to Boehm himself. She noted that "here, the only individual that the FBI is seeking to protect is plaintiff. Given that plaintiff has waived any concern for his own safety, the Court finds that Exemption 7(F) is inapplicable." (*Josef F. Boehm v. Federal Bureau of Investigation, et al.*, Civil Action No. 09-2173 (ABJ), U.S. District Court for the District of Columbia, June 10)

Judge Reggie Walton has ruled that the FBI properly withheld its background investigation of Barack Obama under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Although there has already been a great deal of litigation over Obama's passport and other records that might shed light on his citizenship, reporter George Archibald requested the FBI's 2008 investigation of Obama when he was running for President, hoping it would support his theory that Obama was actually born in Kenya. The FBI responded to Archibald's request by denying access without a waiver from Obama. Archibald argued Obama waived his privacy by running for President. Walton first found the records were compiled for law enforcement purposes.

"A background check on a presidential candidate is an obvious national security function, and there is no indication the FBI was acting outside the scope of its law enforcement duties when it performed the background check on now-President Obama." Walton then found Obama had a privacy interest in the records. He noted that "although he [Obama] is the subject of this lawsuit, he is not a party to it. Moreover, the information requested by the plaintiff concerns the President's prior status as a private citizen. Except insofar as it relates to his citizenship, the President's early childhood background is unrelated to the performance of his public duties, and whatever sacrifices to his privacy he has made by taking public office do not, under these circumstances, extend to information that the FBI might have compiled about his early childhood." Archibald argued there was a public debate about whether Obama was a natural-born citizen. But Walton pointed out that "while this might be of public interest in some sense, it is not the *type* of public interest required to overcome a privacy interest under the FOIA, because the plaintiff has not presented 'a claim of public interest. . .based on the known facts.' Although the plaintiff maintains that there have been 'widely publicized claims. . .that [President Obama] was actually born in Kenya,' the plaintiff concedes that the FBI and the Department of Justice have released copies of President Obama's birth certificate, which indicates that he was born in the United States. Because the plaintiff's FOIA request claims a public interest that is not 'based on the known facts,' this is precisely the sort of circumstance in which 'the privacy interest is at its apex while the FOIA-based public interest. . .is at its nadir.'" (*George H. Archibald v. United States Department of Justice*, Civil Action No. 11-2028 (RBW), U.S. District Court for the District of Columbia, June 17)

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