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Washington Focus: Rep. Eleanor Holmes Norton (D-DC) introduced two bills on July 8 concerning accountability of the Smithsonian Institution. "The Smithsonian Modernization Act" (H.R. 2620) would revise the institution's board of governors to provide more active oversight. A companion bill, "The Open and Transparent Smithsonian Act" (H.R. 2622), would make the Smithsonian a federal agency for purposes of complying with the FOIA and the Privacy Act.

Court Rules Lapsed Statute No Longer Qualifies Under Exemption 3

To invoke Exemption 3 (other statutes), an agency must rely on a statutory provision. An agency regulation without a statutory basis does not qualify under Exemption 3. But what happens when an accepted Exemption 3 statute expires? A federal court in California has just provided an answer, finding that Section 12(c) of the Export Administration Act, long recognized as a bona fide Exemption 3 statute, no longer qualifies under FOIA because it has been expired since 2001. While the government has continued to use it to withhold information contained in dual-use export license applications for goods and technologies with both civilian and military applications, its continued use since 2001 has depended on an annual executive order issued under the International Emergency Economic Powers Act, which allows the President to declare a national emergency and then regulate exports.

EFF requested from the Commerce Department information for export license applications pertaining to devices and technologies primarily used to intercept or block communications. The Bureau of Industry and Security responded that it had located 45 responsive applications but was withholding them in their entirety under Section 12(c) of the EAA. Although Section 12(c) had been upheld ten years earlier by the Eleventh Circuit and the D.C. Circuit, EFF argued that since the EAA's most recent expiration in 2001, the statute's disclosure prohibition had continued to be enforced through a series of annual executive orders based on the IEEPA, which did not qualify under Exemption 3. Judge

Thelton Henderson sided with the public interest group, noting that "mindful that FOIA exemptions are to be construed narrowly in favor of disclosure, the Court agrees with EFF. Commerce has not shown that there is a statute within the scope of Exemption 3. [President Obama's] Executive Order 13222 is not a statute; it is an order by the President that the export control system be continued in effect 'to the extent permitted by law.' . . .Executive Order 13222 may not be interpreted as extending the EAA's August 20, 2001, expiration date." Further, he pointed out that "the IEEPA—the only statute currently in effect to which Commerce points—is not within Exemption 3's scope. The IEEPA permits the President upon declaring a national emergency, to regulate exports. . . [But] because the IEEPA makes no reference to withholding documents from the public, it cannot be a statute within the scope of Exemption 3."

The last time the lapsed EEA was subject to litigation was ten years ago. In *Times Publishing Co. v. Department of Commerce*, 236 F.3d 1286 (11th Cir. 2001) and *Wisconsin Project v Department of Commerce*, 317 F.3d 275 (D.C. Cir. 2003), both the Eleventh Circuit and the D.C. Circuit ruled that the combination of an executive order and the IPEEA, even though not technically a statute, still satisfied Exemption 3 by expressing congressional intent to keep the EEA's disclosure prohibition in force. But Henderson pointed out that the two opinions dealt with FOIA requests made in 1999 and relied heavily on the fact that Congress had specifically reauthorized the EAA by passing the 2000 Export Administration Modification and Clarification Act, which expired in 2001. Henderson explained that "the legislative history of the EAMCA demonstrates that Congress understood and intended that the bill would extend the validity of the EEA through August 30, 2001, and that after that date, Commerce would not be able to rely on Exemption 3 to withhold information protected from disclosure by Section 12(c)." He observed that Sen. Lindsay Graham (R-SC) had remarked that after that time he anticipated the EEA would be subject to a comprehensive review. Henderson observed that the Eleventh Circuit had found that the passage of the EAMCA was crucial to the continued viability of the EEA as an Exemption 3 statute. The Eleventh Circuit indicated that "in light of 'Congress' clear expression of its intent to protect the confidentiality of the requested export licensing information' by enacting the EAMCA to extend the EAA's expiration date, and of the fact that the EAA had been maintained in effect by executive order during the lapse, the court reasoned that an 'overly technical and formalistic reading of FOIA to disclose information clearly intended to be confidential' would deprive Exemption 3 of 'meaningful reach and application.'" In *Wisconsin Project*, the D.C. Circuit concluded that "the IEEPA qualifies as an Exemption 3 statute.' But Henderson noted that 'this is simply incorrect—as Judge Randolph observed in dissent, '[t]he [IEEPA], which does not itself exempt anything from disclosure, flatly fails to qualify as an Exemption 3 statute.'" He added that "because the EAA is expired, the IEEPA is not an Exemption 3 statute, and Executive Order 13222 is not a statute, Commerce cannot rely on Exemption 3 to withhold materials responsive to EFF's request."

Without the protection of Exemption 3, the agency was forced to fall back on Exemption 4 and Exemption 5. Although the agency claimed disclosure would make it difficult to get information from exporters in the future, Henderson indicated that "because would-be exporters have no choice but to submit the information [requested by the agency], disclosure would be unlikely, as a general matter, to impair the government's ability to obtain the information necessary to adjudicate applications in the future." Although the agency had submitted an affidavit from the head of a trade organization pertaining to competitive harm, Henderson noted that "without more detailed information about the contents of the withheld export license applications, it is impossible for the Court to determine whether any of the material they contain already has been disclosed." Henderson observed that some information likely qualified for protection under Exemption 5, but added that the agency had not provided enough detail for him to make such a determination.

Henderson found the agency had conducted an adequate search. Although EFF argued the agency should have searched a category of export license applications for interception technology, Henderson pointed out that the category had been created after EFF's request. He noted that "while agencies should work with FOIA

requesters to define the parameters of their requests, FOIA requesters must phrase their requests with sufficient particularity to enable the agency conducting the search to determine what records are being requested. Litigation is not an appropriate forum for expanding the scope of a FOIA request or hashing out the scope of an ambiguous one." (*Electronic Frontier Foundation v. Department of Commerce*, Civil Action No. 12-3683 TEH, U.S. District Court for the Northern District of California, July 12)

Views from the States…

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

California

The supreme court has ruled that Orange County's land parcel data in GIS-file format is subject to the California Public Records Act and must be disclosed to the Sierra Club. Although many counties had moved to providing access to GIS databases under the PRA, Orange County told the Sierra Club, that, while it would disclose the information in a non-electronic format under the PRA, it would only provide access to the GIS-file format if the Sierra Club paid a licensing fee and agreed to licensing restrictions on dissemination and disclosure. The Sierra Club sued and Orange County argued that the GIS database fell under an exception that provided that computer mapping systems were not subject to the PRA. Both the trial court and appellate court agreed with Orange County, but the supreme court reversed. The appeals court relied on a definition of "system" to conclude that a computer mapping system must be broader than just a computer program. But the supreme court noted that "this interpretation, though reasonable, is not compelled by the ordinary meaning of 'system,' a rather general word that is just as reasonably construed to refer only to mapping software." The supreme court agreed with the Sierra Club that "because the statute refers to 'computer mapping systems' as a species of 'computer software,' the term 'computer mapping systems' should be construed in light of the meaning of 'computer software.'" Since "computer programs" and "computer graphics systems" were the two other subsections under "computer software," the court explained the terms had to be harmonized with each other to the greatest extent possible. The Sierra Club argued that if Orange County was correct in assuming that mapping software included data in a compatible format then the exclusion for computer graphic systems would include not only graphic software, but any data designed to be read by graphic software. The court noted that "almost all data stored in computers are formatted in some manner to be used with application software. It seems implausible that the Legislature [after having required that electronic records be accessible in any electronic format in which they were maintained] would have intended to exclude large categories of computer databases (mapping and graphics) merely because the files they contain are formatted to be read and manipulated by mapping and graphics software." The court observed that "the ordinary meaning of 'computer software' supports Sierra Club's contention that the public records exemption for computer mapping systems covers GIS mapping software but not GIS-formatted data. . . Accordingly, we believe the better view, based on statutory text and context, is that GIS-formatted databases are not covered by the statutory exclusion of computer software, including computer mapping systems, from the definition of a public record." The court concluded that the legislative history did not tip the scales either way, but pointed out that "because legislative history is inconclusive on the question presented, our review of the history does not alter the conclusion we previously reached." But the constitutional requirement to interpret exceptions to access narrowly did convince the court. The court observed that "our holding simply construes the terms of [the computer mapping systems exception] in light of the constitutional mandate that a statute 'shall be. . .narrowly construed if it

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limits the right of access.'" (*Sierra Club v. Superior Court of Orange County; County of Orange, Real Party in Interest*, No. S194708, California Supreme Court, July 8)

A court of appeals has reversed the trial court's ruling that Tim Crews, publisher of a newspaper with a small circulation in Glenn County, should pay attorney's fees of $53,000 to the Willows Unified School District because his PRA request was clearly frivolous. Crews decided to investigate whether District Superintendent Steve Olmos had used public resources in an attempt to recall the Glenn County Superintendent of Schools. He asked the District for all emails sent to and from Olmos for the previous year. Although the District said it could respond to his request, the parties quibbled over whether the emails should be disclosed with metadata or in PDF format. Crews ultimately agreed to accept PDFs, but subsequently argued that he did so only because he understood it would speed the District's response. Crews finally filed suit at about the same time the District began releasing records. The trial court ultimately reviewed some 3200 pages *in camera*, upholding all the District's exemption claims. The trial court then ruled in favor of the District and found that because Crews' litigation was completely unnecessary he should be required to pay the District's attorney's fees for pursuing clearly frivolous litigation. But while the appeals court was sympathetic to the trial court's sentiments, it found the litigation was not frivolous. The appeals court noted that "the District—from the beginning—asserted it would withhold documents subject to an exemption or privilege. Crews's focus in the PRA case appears to have changed from securing *any* documents to testing whether the District had properly withheld documents. Here, no reasonable attorney could have declared the PRA action to have been frivolous in challenging the propriety of withholding documents claimed to be exempt or privileged." The court concluded that "although Crews was ultimately unsuccessful in securing any withheld documents, his efforts were not frivolous." (*Tim Crews v. Willows Unified School District*, No. C066633, California Court of Appeal, Third District, July 17)

Connecticut

A trial court has ruled that Roger Emerick failed to file suit within the 45 days provided by the FOIA. Emerick requested records from the Department of Public Health. After the Department denied his request, he complained to the FOI Commission, which affirmed the agency's denial and issued a final decision on November 14, 2012. However, due to technical difficulties, the Commission's November 14 meeting was not recorded. Emerick requested reconsideration based solely on the fact that the meeting had not been recorded. The FOI Commission granted him reconsideration and reaffirmed its decision at its meeting on December 12. Emerick once again appealed, this time based on new evidence. At its January 9, 2013 meeting, the Commission denied Emerick's request for reconsideration. The Commission's notice of denial of the reconsideration was mailed to Emerick on January 17. He then filed suit on February 27. The court noted that "this date is well beyond the time parameters prescribed in [the statute], which requires that an administrative appeal be filed with the Superior Court and served upon the Commission within forty-five days *from the denial* of the petition for reconsideration." The court added that "the language of [the statute] clearly and plainly mandates that the statutory appeal period for filing and serving an administrative appeal commences from the denial of the reconsideration, not from the date of mailing by the agency of such denial. The legislature in enacting [the statutory provision] omitted from this subsection the language 'after mailing,' which language the legislature included in [other] subsections of the [statute] for commencing the statutory appeal period for final decisions or final decisions after reconsideration, respectively. Had the legislature intended that appeal period to commence after the date of mailing of the denial of a motion for reconsideration, the legislature would have included such language in [the statutory provision]." (*Roger Emerick v. Freedom of Information Commission*, No. HHB-CV-13-5015785-S, Connecticut Superior Court, Judicial District of New Britain, July 16)

Illinois

A court of appeals has ruled that electronic communications of members of the Champaign city council received during council meetings are public records subject to disclosure. Reporter Patrick Wade requested all electronic communications received by council members during their meetings. The city denied some of the records, claiming that communications on personal devices were not subject to FOIA. Wade filed a complaint with the Public Access Counselor in the Attorney General's Office. The Public Access Counselor ruled that any electronic communications that pertained to public business were subject to FOIA, regardless of whether they were received on city-owned devices or personally-owned devices. The City filed an administrative appeal of the PAC's decision. The trial court upheld the PAC's decision. Wade filed a counterclaim for attorney's fees, which the court awarded as well. The appellate court found the PAC's decision was too broad because it failed to differentiate between the public body, whose communications were subject to FOIA, and individual members, who did not themselves qualify as a "public body." Restricting the breadth of the PAC's decision, the court noted that "a message from a constituent 'pertaining to the transaction of public business' received at home by an individual city council member on his personal electronic device would not be subject to FOIA. However, that communication would be subject to FOIA if it was forwarded to enough members of the city council to constitute a quorum for that specific body, regardless of whether a personal electronic device, as opposed to a publicly issued electronic device, was used. At that point, it could be said the communication was 'in the possession of a public body.' However, as the City conceded, a communication to an individual city council member's *publicly issued* electronic device would be subject to FOIA because such a device would be 'under the control of a public body.'" The court then indicated that Wade's request only covered communications during council meetings. As to those records, the court explained, "if the communication, which pertains to the transaction of public business, was sent or received during the time a city council meeting was in session. . .then the communication is a 'public record' and thus subject to FOIA." The court then concluded that Wade was not eligible for attorney's fees because he had complained to the PAC rather than suing the City. The court observed that "here, it is undisputed that Wade sought review of the City's denial under [the section providing for review by the PAC] of FOIA, not [the section for filing a court action]. However, unlike [the section for filing a court action], [the section providing for review by the PAC] does not contain a provision allowing attorney fees and costs for requesters seeking administrative relief." (*City of Champaign v. Lisa Madigan*, No. 4-12-0662 and No. 4-12-0751, Illinois Appellate Court, Fourth District, July 16)

Ohio

A court of appeals has ruled that a map made by the Toledo Police showing where gangs operate in the city does not qualify under the exemption for investigatory work product. After a reporter from the *Toledo Blade* was denied access to the map, the newspaper sued. The court noted that "the map itself is simply a map of the city of Toledo on which various geographic areas are outlined in different colors" and added that "it is undisputed from the record that release of the map would not reveal any specific confidential investigatory technique or procedure." The court indicated that "the map in question was not created in connection with any particular case. . .Rather, the map was created to be used as a tool or reference. It does not record actual crimes or note the addresses of locations believed to be associated with criminal activity. . .In short, respondent has not established that the map was created 'in connection with an actual pending or highly probable criminal prosecution' as that phrase is defined by the Supreme Court of Ohio. As such, the map is not exempt from disclosure." One judge dissented, noting that "any judicial construction of [the investigatory work product exemption] must be balanced against the compelling need to let police investigators do their jobs *effectively*. . .In my view, if the gang map is not such an item, I don't know what would be." (*State of Ohio ex*

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rel. Toledo Blade v. City of Toledo, No. L-12-1183, Ohio Court of Appeals, Sixth District, Lucas County, July 12)

South Carolina

The supreme court has ruled that the open meetings requirements of the FOIA do not violate the associational rights of the First Amendment. Rocky Disabato requested records from the South Carolina Association of School Administrators, a non-profit advocacy group supported primarily by public funds. SCASA refused to comply with Diabato's request arguing that it was not a public body and, further, that FOIA violated its associational rights under the First Amendment by requiring it to hold public meetings. The trial court, assuming that SCASA was subject to FOIA, concluded that the open meetings requirements of FOIA improperly impinged on SCASA's associational rights under the First Amendment. Relying on the Supreme Court's decision in *Doe v. Reed*, 130 S. Ct. 2811 (2010), in which the Court used an exacting scrutiny standard to uphold disclosure provisions of the Washington Public Records Act against a First Amendment challenge, the South Carolina Supreme Court concluded that "the FOIA's impacts on SCASA's associational rights are subject to the lesser standard of review. . .whereby a reasonable and nondiscriminatory restriction on association that furthers an important governmental interest is constitutionally permissible." Rejecting SCASA's claim that FOIA's application to non-profit corporations went far beyond traditional governmental notions of transparency, the court pointed out that "the application of the FOIA beyond traditional governmental entities is limited to statutorily defined public bodies, which are only those entities supported by public funds. The FOIA also serves these important governmental interests when applied to such entities due to the importance of ensuring transparency and accountability in the expenditure of public funds." The court added that "if public bodies are not subject to the FOIA, governmental bodies could subvert the FOIA by funneling State funds to non-profit corporations so that those corporations could act, outside the public's view, as proxies for the State." The dissent suggested that the public funding requirement be dropped as a basis for bringing such non-governmental entities under FOIA. The dissent observed that "the burden that is imposed on unrelated exercise of a speaker's First Amendment rights by the definition of 'public body' has no substantial relation to the governmental interest at stake. It applies solely by virtue of the fact that the organization has received public funds, regardless of any relationship between the organization's publicly and privately funded activities." (*Rocky Diabato v. South Carolina Association of School Administrators*, No. 2011-198146, South Carolina Supreme Court, July 17)

The Federal Courts…

Judge Rosemary Collyer has ruled that the FBI conducted an **adequate search** for records pertaining to the Occupy Wall Street demonstrations and properly withheld records under a variety of exemptions. Truthout made six requests to the agency, although only five were subject to the group's suit. Two requests were submitted in October 2011, two more in November 2011, and the fifth was submitted in June 2012. Although the agency initially claimed it had no responsive records for the first two requests, it eventually located and disclosed records for all five requests. The agency searched its Central Records System using a number of geographic locations preceded by the word "Occupy." That search turned up no records. But, Collyer explained, "because the Occupy Movement had been widely publicized, the FBI also conducted text searches of [the Electronic Case Files]. Because decisions regarding how to index names within a document can vary, the text search was more comprehensive." Truthout complained that the agency had failed to search its electronic and physical surveillance records, the FBI's email system, and field offices. Collyer noted, however, that "the FBI searched CRS because records responsive to Plaintiffs' requests would normally be found in this comprehensive system. Also, a search of CRS includes records at both FBIHQ and field offices,

would have identified main files and cross references, and would have identified files in [the electronic and physical surveillance systems], and in shared drives." She observed that "the FBI was not required to search every record system; it was only required to conduct a reasonable search of those systems of records *likely* to possess the requested information. The FBI's search of CRS satisfied this standard." Approving the agency's claims under **Exemption 6 (invasion of privacy)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)** together, Collyer noted that "the FBI withheld the names and identifying information of federal and state law enforcement officers and personnel, as well as that of individuals who provided information to the FBI under implied assurances of confidentiality or who were merely third parties mentioned in the records." To protect the confidentiality of informants, the agency also provided an *in camera* affidavit concerning the potential use of the exclusions in subsection (c). Collyer determined that "any § 552(c) exclusion, if employed, was amply justified." Because the agency had responded to other requests for records on the Occupy Wall Street demonstrations in a shorter time than its response to Truthout, the group asked Collyer to refer the agency for sanctions. She rejected the notion, pointing out that "plaintiffs' claim of wrongful delay and arbitrary action by the FBI is unfounded. The [other two organizations] each made only one FOIA request, while Plaintiffs made *six* separate FOIA requests. Further many of Plaintiffs' requests contained specific criteria, such as date parameters, thereby compelling the FBI to take additional time to sort through its records to remove nonresponsive records. In addition, the FBI took the extra step of conducting text searches of the ECF to identify potentially responsive material. The FBI cannot be faulted for being thorough in its searches." (*Truthout and Jeffrey Light v. Department of Justice*, Civil Action No. 12-1660 (RMC), U.S. District Court for the District of Columbia, July 17)

A federal court in Missouri has ruled that FEMA properly withheld identifying information about flood claimants from Steve Ehlmann, County Executive of St. Charles County, under **Exemption 6 (invasion of privacy)**. Ehlmann made the request so that he could use the information in speaking publicly about the problem of costly serious repetitive loss claims in the county. The agency apparently processed the request originally under the **Privacy Act**, releasing identifying information under a routine use exception, but telling Ehlmann that he was prohibited from disclosing the information. As a result, Ehlmann then asked FEMA to process his request under FOIA. This time the agency came back with information identifying the history of claims in the county, but with all identifying information about specific properties redacted. The court agreed with FEMA that protecting the privacy of flood insurance claimants outweighed any public interest in disclosure of the identifying names. The court noted that "the information provided to Ehlmann by FEMA allows the public to see what FEMA is doing in implementing the [National Flood Insurance Program] in St. Charles County. The disclosure of the owners' names and addresses of the specific properties addressed in FEMA's disclosure documents will not serve any substantial public interest or shed additional light on FEMA's management of the NFIP in St. Charles County. The disclosure of the names and addresses would be an unwarranted invasion of the insureds' privacy. . .[R]evealing the addresses of the properties would, through a quick review of property records, disclose the names of the owners of the properties." (*Steve Ehlmann v. United States Department of Homeland Security*, Civil Action No. 4:12 CV 1392 RWS, U.S. District Court for the Eastern District of Missouri, July 15)

In granting summary judgment to the Department of Health and Human Services after the agency rectified problems involved in its **search** and its use of **Exemption 6 (invasion of privacy)**, Judge Amy Berman Jackson touched on an issue that gets little attention in the FOIA process—the use of records disclosed previously to another FOIA requester. Dr. Brian Hooker, who had requested records from the Centers for Disease Control pertaining to two Danish studies on the incidence of autism, argued that the agency had failed to provide most of the records disclosed to a previous requester. Hooker argued that

although the previous requester received 293 pages the agency failed "to provide him with 228 of those pages—which allegedly deal directly with the incidence of autism in Denmark—and their failure to search the records of individuals at [the National Immunization Program] who were listed as email originators or recipients on those 228 documents demonstrates that defendants did not conduct an adequate search in response to [his] FOIA request." But Jackson pointed out that "the discrepancy between the documents produced to [Jeffrey] Trelka and those produced to plaintiff does not demonstrate the inadequacy of defendants' search because the scope of the two requests was different. Plaintiff's FOIA request sought correspondence relating to two specific studies published by authors in Denmark. By contrast Mr. Trelka sought: (1) 'all email correspondences between CDC NIP researchers and officials and Dr. Harald Heijbel and Peet Tull regarding thimerosal exposure levels in childhood vaccinations in Sweden;' and (2) all email correspondences between CDC NIP researchers and Diane Simpson, Paul Stehr-Green, Michael Stellfeld, and Preben-Bo Mortenson 'regarding thimerosal exposure in Denmark and Sweden.'" She noted that "with respect to the 228 pages at issue, plaintiff has not alleged that these documents relate to the two autism studies that were the subject of his FOIA request; he only contends that they 'deal directly with the autism incidence in Denmark.' But defendants were not obligated to expand the scope of plaintiff's request to include all correspondences regarding the incidence of autism in Denmark, and their failure to do so does not undermine the adequacy of their search." While Jackson agreed with the agency's position, what is troubling in situations like this is the consistent reluctance of agencies to disclose even non-exempt information. While the records are not directly responsive to Hooker's request, they certainly seem germane enough to merit disclosure. (*Brian S. Hooker v. U.S. Department of Health and Human Services*, Civil Action No. 11-1276 (ABJ), U.S. District Court for the District of Columbia, July 9)

A federal court in Virginia has ruled that the FAA conducted an **adequate search** for emails requested by David Pardo and that the agency was not required to search its back-up tapes without a specific request to do so. The agency searched based on the subject matter and the parties specified by Pardo. It found about 20 pages of emails which it disclosed to Pardo. During the appeals process, Pardo suggested that the search would be inadequate if it did not include a search of back-up tapes, but he did not specifically request such a search, even though the agency had given him a fee estimate for such searches. The court noted that "plaintiff did not submit an additional or supplemental search request regarding the disaster recovery tapes, but instead, in his appeal of his initial request, stated his belief that a responsive search by the FAA under FOIA would include backup tapes. If Plaintiff at any point determined that the scope of his initial FOIA request was insufficient, he had the opportunity to then submit an additional request. In the event that the Plaintiff chose to do so, the FAA provided him with a cost estimate and various options to search the disaster recovery tapes." Pardo argued that the agency could not charge fees because it failed to respond within the statutory deadline. The court dismissed the claim, noting that "Plaintiff's asserted opinion in an appeal document as to how the FAA should conduct its search does not create a new request, nor does it begin to run the 20 day period outside of which Plaintiff would not be required to pay the fees associated with the search of the disaster recovery tapes." (*David Pardo v. Federal Aviation Administration*, Civil Action No. 1:13-cv-14, U.S. District Court for the Eastern District of Virginia, Alexandria Division, July 10)

Judge Richard Leon has ruled that EOUSA properly withheld 23 pages of documents referred to it by the Organized Crime Drug Enforcement Task Force under **Exemption 5 (privileges)**. Anthony White sent a request to the Justice Department for records pertaining to himself. The request was forwarded to the Criminal Division, which contacted White for clarification. White sent back a form indicating he wanted a variety of offices searched, including OCDETF. The Criminal Division found no records, but during the processing of the request OCDETF became an independent DOJ component and processed White's request for direct response. Its search found 23 pages from EOUSA, which processed the records and withheld them entirely

under Exemption 5 and **Exemption 7 (law enforcement records)**. White challenged both the **adequacy of the search** and the exemption claims. Finding that the Criminal Division, including OCDETF, had conducted an adequate search, Leon noted that "since the documents EOUSA processed were 'sent as a referral from OCDETF,' EOUSA did not perform a search and had no obligation to do so in the absence of a request made directly to it." Leon observed that "EOUSA is not a party defendant in this action but rather provides material evidence with regard to OCDETF's referral of responsive records. Hence, the outcome of this case has no bearing on any request plaintiff might submit to EOUSA." Indicating that the attorney work-product privilege protected records prepared by or for an attorney in anticipation of litigation, Leon found the records fell within the privilege. He pointed out that EOUSA "describes the OCDETF forms as 'documents. . .assembled by, or at the direction of, an attorney. . .made in the course of an investigation and in anticipation of one or more prosecutions.' The attorney uses the forms to 'track and describe the status of investigations and collect statistics on investigation.'" Since he found the records were properly withheld under Exemption 5 there was no need to determine if they fell under Exemption 7 as well. (*Anthony G. White, Sr. v. Department of Justice*, Civil Action No. 11-2045 (RJL), U.S. District Court for the District of Columbia, July 9)

Judge Emmet Sullivan has ruled that the Air Force conducted an **adequate search** for records pertaining to its High-Frequency Active Auroral Research Program and that requester Gilbert Roman **failed to exhaust his administrative remedies** as to one component of the agency's response. Roman asked for the location of all HAARP devices and the date of any tests. The agency sent the request to Kirtland AFB and the Air Force Historical Research Agency. Kirtland sent the request to the HAARP facility in Gakona, Alaska, where the manager created a fact sheet, which was then released to Roman. Roman appealed, claiming that there were many more HAARP sites that should be searched. Subsequently the research office found no records but sent abstracts of seven documents that referenced HAARP. Roman did not appeal the response from the research office. Roman then filed suit. The agency argued that Roman had failed to exhaust his administrative remedies as to the responses from both Kirtland and the research office. The agency contended that since Roman had asked a question rather than requesting records, his request was improper. But Sullivan noted that "Defendant's response to Plaintiff's request, and Plaintiff's claim that Defendant is improperly withholding due to their alleged inadequate search, gives jurisdiction to the Court to rule on the matter." As to the response of the research office, Sullivan dismissed Roman's claim, indicating that "although Plaintiff did file an appeal within [60 days], it did not encompass AFHRA's response to his request. Rather, the appeal letter refers only to. . .the case number assigned by Kirtland AFB. It contains no reference to. . .the case number assigned by AFHRA." Sullivan then found the agency had conducted an adequate search. He pointed out that "after Plaintiff appealed, Defendant performed a second search that involved paper records. In Defendant's second search, [the HAARP manager], who is 'familiar with all aspects of the [HAARP] program including the location of the facility,' searched the records 'for any references to a [HAARP] facility other than the one at Gakona, Alaska.' It was reasonable for Defendant to take a general approach in its search to find a reference to any possible HAARP facility since Plaintiff claimed in his appeal that more than one facility exists and his original request specifically asked for information regarding HAARP." (*Gilbert Roman v. Department of the Air Force*, Civil Action No. 12-1381 (EGS), U.S. District Court for the District of Columbia, July 9)

Judge Emmet Sullivan has ruled that the National Reconnaissance Office is immune from Gilbert Roman's suit asking for monetary damages for the agency's violation of Roman's First Amendment rights as the result of its refusal to disclose records concerning functional magnetic resonance imaging technology in response to several FOIA requests from Roman. Sullivan explained that "the Defendant is not subject to liability for damages because it is a federal agency. . .The Court is unaware of any waiver of sovereign immunity that would permit Plaintiff to seek money damages from Defendant for allegedly failing to provide

documents responsive to Plaintiff's FOIA request." Although Roman had only asked for monetary damages, Sullivan went on to examine whether Roman had any viable claims under FOIA. Concluding that Roman was complaining about three separate requests he made to NRO, Sullivan first indicated that one of the requests had already been adjudicated in the Eastern District of New York. Finding that Roman's claim as to this request was barred by the doctrines of *res judicata* and collateral estoppel, he pointed out that "here, the issues concerning Plaintiff's May 14, 2009 FOIA request are identical to the issues in the New York case: whether Defendant conducted an adequate search for the records Plaintiff sought, and if Defendant properly responded. In the New York case, the court fully considered the issues and found that the NRO fully complied with the FOIA in conducting its search for the requested documents and did not improperly withhold documents." Sullivan dismissed Roman's claims as to the other two requests since he had failed to appeal the agency's determination in either instance. (*Gilbert Roman v. National Reconnaissance Office*, Civil Action No. 12-1370 (EGS), U.S. District Court for the District of Columbia, July 9)

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