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Washington Focus: The Twin Cities Daily Planet has posted a piece applauding the role the Office of Government Information Services played in resolving the publication's three-year struggle with the Coast Guard to get contracts between the agency and Talon Security. The Daily Planet originally submitted its request in June 2010, finally contacting OGIS in December 2012. Reporter Matt Ehling noted that OGIS got a commitment from the Coast Guard in May 2013 and the agency finally responded in July. Praising OGIS, he observed that "while we have used litigation to force agency compliance in the past (and likely will do so again in the future), OGIS proved to be a valuable resource that obviated the need for litigation in this situation. Its utility should be noted by other requesters who are faced with similar types of delays or compliance problems."

Despite Volume of Records Involved, Court Finds DOJ Affidavits Inadequate

Readily acknowledging how expensive it will be to process CREW's request for records concerning the Justice Department's closed investigation into allegations of bribery and conflict of interest involving former Rep. Jerry Lewis (R-CA), including its decision not to prosecute him, Judge James Boasberg has concluded that EOUSA and the Criminal Division have both failed to adequately explain their exemption claims for more than 25,000 pages. Boasberg observed that "as the D.C. Circuit has noted, FOIA's evidentiary burden is likely to create significant costs for government agencies as they respond to requests, but 'the costs must be borne. . .if the congressional policy embodied in FOIA is to be well served.'" But the sheer volume of documents gave him pause. "The Court must follow this Circuit's law on FOIA, although this is the type of case that Congress might wish to bear in mind when debating whether to further extend that statute. Here, the government has spent nearly 2,000 personnel hours—and will spend another significant amount of time responding to this Opinion—because one public-advocacy group was interested in a closed criminal investigation. At a time of sequestration and further budget

cuts, it may be worth considering how much of the government's time should be spent in chasing down thousands of documents and then formulating detailed justifications about their withholding. The Court is loath to pile additional responsibility on DOJ, but finds its hands are tied: despite the Department's extensive and laudable efforts, it has yet to comply with FOIA's statutory requirements."

Noting that the *Vaughn* index—an explanation of the documents withheld and the reasons for withholding them providing sufficient detail so that the plaintiff can understand the agency's decisions and challenge them in court—was the touchstone of the agency's ability to carry its burden of proof, Boasberg indicated that "the *Vaughn* Index requirement, however, is not as rigid as it might seem at first blush." He pointed out that there was some flexibility in the presentation of a *Vaughn* Index, noting that "this flexibility, however, is layered on a background presumption going back several decades that document-by-document explanations of withheld information are required." But he explained that "this Circuit's cases seem to hint at the idea of a sliding scale inversely correlating the number of withheld documents and the level of detail required to justify their withholding. That said, they also make clear that an agency is only permitted to provide an alternative to the document-by-document *Vaughn* Index where doing so would provide the Court and the requester with an equally strong basis for evaluating the agency's exemption claims in detail." He indicated that a short *Vaughn* Index could contain abbreviated descriptions, but noted that "while the government need not furnish repetitive descriptions of the same type of document and may describe commonalities among its withholdings, it must avoid resorting to explanation in generalities." He observed that a representative sampling of documents was another way to control the volume of documents required to be described.

Turning to the *Vaughn* indices at hand, he pointed out that "whatever the form, however, the substance of the government's submission must meet a consistent standard." He observed that "the *Vaughn* Index and declaration submitted by EOUSA falls well short of this standard, often because of the vast quantities of documents for which Defendant offers only one short paragraph of justification." Indeed, he noted, "the *Vaughn* Index filed by EOUSA does not offer a useable point of reference to negotiate these thousands of pages of withholdings. . ."

Many of the records had been withheld on the basis of Exemption 5 (privileges) and Boasberg readily agreed that many of the records pertaining to the decision whether or not to prosecute were quite likely to qualify as privileged. But he observed that "this Court, however, is not at liberty to draw such conclusions based on mere inferences and guesswork." For records claimed under the deliberative process privilege, he noted that "the declaration makes no reference whatsoever to required elements of the deliberative-process privilege, including the dates the documents were created, the relative positions in the chain of command of the author and recipient, the deliberative process involved, the role played by the documents in that process, and the nature of the author's decisionmaking authority. Without at least some of this information, the Court is simply unable to pass on EOUSA's deliberative-process claims at this juncture." The same problems were present with claims made under the attorney work-product privilege. He noted that "EOUSA seeks to withhold nearly 4,000 documents under this privilege, but fails to provide any information regarding the dates of creation or the authors or recipients of any of the documents."

Although Boasberg had previously ruled that the agency could not categorically withhold personal information, he explained that its current argument that the inherent privacy interests in withholding clearly outweighed the minimal public interst in disclosure was "an almost identical position to that which it argued earlier in this case." While CREW argued that the agency should be bound by Boasberg's earlier decision concerning the scope of the privacy exemptions, Boasberg dismissed the government's current argument by noting that while "the documents and portions of documents withheld under Exemptions 6 and 7(C) may well be exempt from disclosure, . . .the government has yet to provide Plaintiff and this Court with sufficient information to come to such a conclusion." He added that "as Plaintiff does not challenge the government's

withholding of the names and identifying information of law-enforcement officials and other government attorneys, or third parties other than Rep. Lewis, Defendant need only provide such supporting documentation where it seeks to withhold information concerning Rep. Lewis himself."

The agency also withheld nearly 4,000 documents under Exemption 3 (other statutes), citing Rule 6(e) on grand jury secrecy. Boasberg observed that "while, once again, it is entirely possible that all the documents at issue here can be withheld under Exemption 3, the Court is unable to make such a determination on the record currently before it. . .Because the Court in unable to resolve this issue at the altitude Defendant seems to desire, it will again deny Defendant's Motion for Summary Judgment and grant Plaintiff's Cross-Motion with respect to the Exemption 3 withholdings." (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, Civil Action No. 11-1021 (JEB), U.S. District Court for the District of Columbia, July 25)

Views from the States…

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

California

A court of appeals has ruled that identifying information about University of California police officers identified in two reports prepared by consultants in the aftermath of a pepper spray incident at UC Davis are not protected by the exemption for police personnel records. Two reports were prepared for the University to provide recommendations for how such incidents could be avoided in the future. Neither report examined the performance of individual police officers. While the reports were intended to be public, the Federated University Police Officers Association sued the University to block disclosure, claiming that identifying police officers violated the police personnel exemption in the California Public Records Act. To settle the litigation, the University agreed to redact identifying information and the reports were made public. The *Los Angeles Times* and the *Sacramento Bee* then requested unredacted versions of the reports. The trial court ruled that the police personnel records did not apply and the union appealed. The appeals court noted that the exemption protecting records from an investigation of citizens' complaints was at issue as well as the police personnel records exemption. The court found the report did not deal with citizens' complaints, pointing out that "while the reports make policy level recommendations, they expressly do not make any recommendations regarding whether it was appropriate to admonish or discipline any police officer in connection with the pepper spray incident. These facts demonstrate that the reports are not the result of a de facto investigation [of a citizen's complaint] and disclosing the redacted officers' names would reveal nothing about officer discipline." As to the police personnel records exemption, the court observed that "the officers' identities and actions with respect to the pepper spray incident were witnessed by hundreds of people and memorialized and widely distributed in the numerous photographs and videotape recordings taken by members of the public. The incident was the subject of numerous news accounts describing the actions of various officers, in some cases identifying the officers by name. The fact that certain officers involved in this incident might face an internal affairs investigation or discipline because of their actions does not transmute all of this information into disciplinary documentation or confidential personnel information." (*Federated University Police Officers Association v. Superior Court of Alameda County; Los Angeles Times Communications LLC, et al., Real Parties in Interest*, No. A136014, California Court of Appeal, First District, Division 4, July 23)

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Kentucky

The Attorney General has found that the City of Newport improperly withheld traffic reports from Capitol Radio based on its belief that the company was selling the reports to attorneys for solicitation purposes. Although the Attorney General had previously found that Capitol Radio, a national radio broadcaster of local traffic reports, qualified as a newsgathering organization, its opinion implied that such a company could lose its media classification if it was using reports for commercial purposes. As a result, the City of Newport investigated Capitol Radio's activities further. Although Capitol Radio provided further sworn affidavits affirming that it used traffic reports only for broadcast purposes, the Newport police, based on a contact from a third party concerning their intent to contact an attorney, concluded that Capitol Radio must have disclosed that information. Finding that the City of Newport had not met its burden to show that Capitol Radio was using the traffic reports for commercial purposes, the Attorney General noted that "the city's inferences, drawn from [its] affidavit and the difficulty it encountered in verifying that Capitol Radio broadcasts the news in the Newport region, are not sufficient to overcome direct proof submitted by Capitol Radio." (13-ORD-117, Office of the Attorney General, Commonwealth of Kentucky, July 18)

Pennsylvania

A court of appeals has ruled that records pertaining to the investigation of Jerry Sandusky by Penn State University that were provided to the Secretary of Education as part of his statutory duties as a board member of Penn State's Board of Trustees are subject to the Right to Know Law even though Penn State is not an agency for purposes of the law. The Department of Education denied Ryan Bagwell's request for records by citing various exemptions. When Bagwell appealed to the Office of Open Records, OOR dismissed the complaint for lack of jurisdiction after concluding that the records originated from Penn State and were not subject to the RTKL. Bagwell then appealed to the court. Disagreeing with OOR's reason for dismissing the complaint, the court noted: "That the PSU Board is not an agency does not determine the outcome in this case. This is because both parties to correspondence do not have to be agencies. Rather, only one party needs to be an agency to lead to RTKL disclosure. Therefore, the relevant inquiry is whether the recipient, the Secretary of Education, when acting as a PSU Board member, is acting on behalf of a Commonwealth agency." The court added that "here, OOR has jurisdiction because the Request is directed to a Commonwealth agency, which admittedly possesses the records." The court pointed out that "for records to be 'of' an agency, they do not need to originate with or be created by that agency. Here, the records are in the Department's possession. The records were received by the Secretary pursuant to the Department's role of supporting and influencing education at the state-related institution. Accordingly, the 'of' an agency criterion is met." Having concluded that OOR had jurisdiction, the court remanded the complaint back to OOR for determination. The court observed that "because we treat OOR as the fact-finder in the first instance, we leave to the thoughtful discretion of OOR to determine what defenses to disclosure are properly before it, whether to allow more evidence, who may participate, and what time frame is appropriate for disposition. . ." (*Ryan Bagwell v. Pennsylvania Department of Education*, No. 1916 C.D. 2012, Pennsylvania Commonwealth Court, July 19)

The Federal Courts…

Judge Collen Kollar-Kotelly has ruled that Lawrence Rosenberg failed to **exhaust his administrative remedies** when he did not appeal EOUSA's decision to require a substantial prepayment of fees before processing his request concerning a 2008 raid on the Agriprocessors meatpacking plant in Iowa and the subsequent prosecution of Sholom Rubashkin, and its refusal to search for records on third parties without further clarification. Kollar-Kotelly also dismissed Rosenberg's claim against the Marshals Service since he

failed to file an administrative appeal. EOUSA divided Rosenberg's multi-part request into two parts, one concerning the prosecution of Rubashkin by the U.S. Attorney's Office in the Northern District of Iowa, and the other for information concerning third parties. It told Rosenberg that it would not process the request for third party information without waivers for the individuals. Rosenberg did not appeal the denial, but filed suit against several agencies in March 2012. In June 2012, EOUSA informed Rosenberg that the Northern District of Iowa office had estimated that at least 33 backup tapes would have to be restored at a cost of $37,684, and that further required hosting and processing would cost another $120,000. The EOUSA letter indicated that his request would not be considered received until the agency either heard back from him within 30 days or he appealed the decision to OIP. Rosenberg did not contact EOUSA or appeal its decision. The Marshals Service located 166 pages, referred 98 pages to EOUSA or ICE, and on Nov. 2, 2011, disclosed 58 pages in full or part. Rosenberg did not appeal the Marshal Services' response. Rosenberg argued that §552(a)(6)(B)(iii)(I), which prohibits agencies from charging fees if they miss any time limit, barred EOUSA from assessing fees. But Kollar-Kotelly indicated that the prohibition did not apply if unusual or exceptional circumstances existed. She observed that "because unusual circumstances apply to the Plaintiff's request, the EOUSA is entitled to impose search fees on Plaintiff despite failing to comply with the timing requirements of paragraph (6)." Rosenberg contended that since the agency had failed to notify him that unusual circumstances existed, as required by §552(a)(6)(B)(i)-(ii), it could not claim unusual circumstances. But Kollar-Kotelly explained that "the plain text of 552(a)(4)(A)(viii) requires only that unusual circumstances *as defined by* paragraph (6)(B) or (C) exist, not that unusual circumstances exist *and* that the agency properly seek additional time to respond to the request in light of unusual circumstances." Rosenberg then claimed that the agency was precluded from assessing fees because it had failed to request them before litigation or during the administrative process. Kollar-Kotelly noted that "the fact that a fee request was made after the Plaintiff commenced litigation does not excuse the Plaintiff from paying the requested fees." In response, Rosenberg asserted that earlier case law had been superseded by the 2007 provision prohibiting an agency from charging fees if it missed the time limit. Kollar-Kotelly disagreed, pointing out that "the 2007 amendments limited the situations in which an agency can impose fees, but has no effect on the principle set forth in [earlier case law] that when a fee request is valid, a plaintiff must comply, even if the agency did not submit the fee request until after the plaintiff filed suit." As to Rosenberg's contention that the agency had failed to argue the fees issue at the administrative level, Kollar-Kotelly observed that "the EOUSA cannot be faulted for failing to raise arguments during administrative proceedings when the Plaintiff elected to bypass administrative proceedings altogether." Rosenberg also claimed the fee estimate was unreasonable. But Kollar-Kotelly pointed out that "the fees are based on estimates of the hours that would be required for each step in the process of restoring the back-up tapes that may contain responsive documents. The fees are in accordance with Department of Justice regulations, and the EOUSA provided the Plaintiff the opportunity to reformulate his request or specify that he would only pay up to a certain amount." Turning to EOUSA's denial of his request for third-party personal information, Rosenberg's primary argument was that EOUSA had failed to take into account that many of the 101 individuals named in his request were public officials whose privacy interests were diminished. Kollar-Kotelly indicated that "the Plaintiff [does not] suggest he could not identify which of the individuals he included in his own FOIA request were 'public officials' not subject to Privacy Act withholdings. The fact that the Plaintiff would have liked an explicit list of the paragraphs [in his request] the EOUSA included within the scope of [the third-party information request] before drafting his appeal does not excuse his failure to exhaust his administrative remedies." As to the Marshals Service request, Rosenberg contended that he thought the agency's response letter indicated that it was still working on the request rather than constituting a final response. Saying that "there is no evidence to suggest the Marshals Service ever indicated to the Plaintiff that a search for potentially responsive documents was ongoing," Kollar-Kotelly rejected Rosenberg's claim that records produced during the litigation indicated that the Marshals Service was still in the process of responding to his request. However, Kollar-Kotelly observed that "to the contrary [the agency's] unrefuted declaration indicates that the agency re-reviewed records during the course of this

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litigation. Though the June 2012 production [of records] is arguably relevant to the adequacy of the agency's initial search, it does not call into question the finality of the agency's [response] letter." (*Lawrence Rosenberg v. United States Department of Immigration and Customs Enforcement*, Civil Action No. 12-452 (CKK), U.S. District Court for the District of Columbia, July 23)

In a companion decision, Judge Colleen Kollar-Kotelly has ruled that Lawrence Rosenberg failed to **exhaust his administrative remedies** when he filed suit four days after receiving ICE's acknowledgement of his administrative appeal. Rosenberg had requested documents concerning the raid on Agriprocessors' meatpacking plant and the subsequent prosecution of Sholom Rubashkin in September 2011. The agency determined that part of Rosenberg's request was duplicative of a 2009 request filed by Rubashkin's previous counsel. The agency located 166 pages and three spreadsheets responsive to the 2009 request, withholding parts of 155 pages and the three spreadsheets in February 2012. Rosenberg filed an administrative appeal March 16, 2012, which ICE acknowledged on March 22, indicating that because of the large volume of appeals, "there may be some delay in resolving this matter." Rosenberg called the ICE FOIA office on March 23 inquiring as to how long it would take to receive a response to his appeal. After the FOIA office indicated his appeal had just been received, Rosenberg, according to ICE, threatened to sue over the agency's slow response and hung up. He then filed suit the same day. Rosenberg argued that he had exhausted his administrative remedies because ICE's acknowledgement letter constituted a denial of his request to expedite his appeal. He also argued that pursuing the appeal would be futile and that Rubashkin would be irreparably harmed if exhaustion was required. Kollar-Kotelly noted that "the only thing the letter purported to do was to acknowledge receipt of the Plaintiff's appeal and indicate there may be some delay in processing the appeal. The letter did not purport to address any of the substantive issues raised in the Plaintiff's appeal." Rosenberg argued the letter constituted the agency's determination that it would be unable to meet the statutory time limit. But Kollar-Kotelly pointed out that "this argument assumes that which the Plaintiff seeks to prove: that the March 22 letter was a determination by the agency. The fact that 'ICE's letter spoke to Plaintiff's time concerns, even though it made clear that it would not act in an urgent or expedited manner' at best means the letter constituted the consummation of the agency's decisionmaking process as to the timing of the Plaintiff's appeal. The letter did not purport to convey *any* agency position regarding the merits of the Plaintiff's appeal, much less the agency's final decision." She observed that "assuming *arguendo* ICE's March 22, 2012, letter amounted to a denial of a request for expedited consideration of the Plaintiff's appeal, at best the Plaintiff has exhausted his administrative remedies *as to the request for expedited treatment of his appeal*." She added that "even if a party exhausts his administrative remedies as to a particular aspect of his claim, the court's review is limited to those objections and arguments that were subject to full administrative review." She indicated that "Plaintiff filed suit just three days after ICE received his appeal and before the agency had the opportunity to consider any of the Plaintiff's substantive arguments regarding the scope of the agency's search, applicability of certain withholdings, and need for a *Vaughn* index. The Plaintiff filed suit before the agency issued a final determination on the merits of his appeal, and weeks before the agency was required by statute to issue a final determination, thus denying the agency the opportunity to review its initial determination, correct any errors, or create an adequate record." Dismissing Rosenberg's futility argument, Kollar-Kotelly pointed out that "the fact that the agency has elected to await the Court's disposition of the present motions before drafting a *Vaughn* index or otherwise reconsidering its response to the Plaintiff's request does not show futility." Further, "the agency has indicated that it is willing to produce a *Vaughn* index and reconsider certain issues if additional information is provided by the Plaintiff." She also noted Rosenberg was in part responsible for the delay. She observed that "in lamenting the amount of time that has elapsed since the Plaintiff submitted his request to ICE, the Plaintiff omits the fact that rather than file suit after ICE failed to initially comply with the statutory deadlines, he waited over five months for the agency to respond." She concluded that "the agency's interest in having the opportunity to correct its own errors and create an adequate record for review outweigh the Plaintiff's interest in immediate judicial review, particularly in light of the Plaintiff's extensive delay in

pursuing his own claims." (*Lawrence Rosenberg v. United States Department of Immigration and Customs Enforcement*, Civil Action No. 12-452 (CKK), U.S. District Court for the District of Columbia, July 22)

Sorting out a misunderstanding between the parties as to the scope of the request, a federal court in California has ruled that the Defense Department has not adequately explained whether or not it has information identifying the military units of foreign students who attended the Western Hemisphere Institute for Security Cooperation. In April, District Court Judge Phyllis Hamilton rejected the agency's claim that personally identifying information of foreign students and instructors was protected by **Exemption 6 (invasion of privacy)**. In the aftermath of that ruling, the agency informed Theresa Cameranesi for the first time that it did not have information identifying the military units of foreign students. Cameranesi contended, however, that she had requested both names and military units and that the agency had implied in its response that both categories of information were being withheld under Exemption 6. Hamilton explained that there was some question as to whether Cameranesi had **exhausted her administrative remedies** since she had only appealed the agency's exemption claims. She pointed out that "technically, the issue of the adequacy of the search was not administratively exhausted, as it was not raised in plaintiffs' appeal. On the other hand, it evidently was not clear to plaintiffs' before they filed the present action that defendants were taking the position that they did not have access to military unit information and were thus unable to provide it." She found that "plaintiffs did raise the issue of the adequacy of the response in the appeal, but defendants did not clearly respond and plaintiffs did not further pursue it." She indicated that "defendants must do more than simply submit a declaration stating that 'we do not collect unit information.'" She noted that "while in this case the issues of the adequacy of the search and the adequacy of the response have been somewhat conflated in the parties' analysis, they are two distinct issues, which must be further fleshed out in cross-motions for summary judgment." The agency also asked Hamilton to clarify if her previous order applied to U.S. military personnel as well as foreign military personnel since long-standing DOD policy protected the identities of active duty personnel. Hamilton observed that "the [previous] order made clear that [the DOD policy did not apply] to foreign military personnel—just to U.S. military personnel. However, because the plaintiffs had not specifically argued that the information regarding U.S. military personnel should be released notwithstanding [the DOD policy], the court did not separately address or decode that issue in [its earlier] order." (*Theresa Cameranesi v. U.S. Department of Defense*, Civil Action No. C-12-0595 PJH, U.S. District Court for the Northern District of California, July 29)

A federal court in New Jersey has ruled that EOUSA properly withheld information from its file on D.V.S. Raju, who was indicted along with Natarajan Venkataram on conspiracy, bribery, and money-laundering charges, under **Exemption 5 (privileges)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. While Venkataram was convicted and imprisoned, the government indicted Raju, but later decided not to prosecute him. Venkataram requested the agency's records concerning its decision not to prosecute Raju. The agency responded to Venkataram's request with a *Glomar* response, contending that it could neither confirm nor deny the existence of records on Raju because to do so would be an invasion of privacy. Rejecting the categorical response, the court told the agency to process the request and make whatever exemption claims it found appropriate. After processing the records, the agency disclosed 352 pages in full and withheld 205 pages entirely under Exemption 5 and Exemption 7(C). The agency claimed that both the attorney work-product privilege and the deliberative process privilege applied to the records. Venkataram contended the agency had waived its right to claim the exemption by failing to cite it in its original response. But the court noted that "this argument is without merit. In a FOIA case, a district court may consider new claims of exemption raised for the first time on remand. . .On remand, Defendant did just that; Defendant created a *Vaughn* index which, for the first time, evinced a document-by-document analysis, and Defendant

was well within its right to assert any and all exemptions it believed covered each document." Assessing the agency's Exemption 5 claim, the court pointed out that "the withheld documents were created prior to the final decision not to prosecute Mr. Raju and that they contain or reveal opinions or recommendations about whether to prosecute Mr. Raju." Turning to the privacy exemption, the court acknowledged that information about Raju's indictment was no longer private. The court observed that "Mr. Raju's interest in keeping private that he was subject to an investigation was greatly diminished, if not extinguished, when he was formally indicted." But the court explained the records went beyond that public fact. "Disclosure of factual information tending to corroborate the criminal allegations against Mr. Raju, or of any admission of guilt or statement discussing Mr. Raju's alleged involvement in criminal activity, goes beyond what is available in the public record and would represent a significant intrusion on Mr. Raju's privacy." The court rejected Venkatraram's claim that disclosure was in the public interest because it would shed light on government prosecutorial discretion. The court indicated that "there certainly is a public interest in learning about the Department of Justice's exercise of prosecutorial discretion, but the public value of disclosing these contested documents is limited because the records represent only a single data point. It is hard to extrapolate about the operations of an agency from one exercise of discretion." The court observed that "moreover, the Plaintiff has articulated a personal interest in disclosure that likely motivated his request and outweighs the purported public interest," mainly, using the information to challenge his conviction. Finding that Raju's privacy interests outweighed any public interest in disclosure, the court noted that "based in part on Plaintiff's own statements, the Court concludes that the primary purpose of this FOIA request is to serve private litigation interests, not the core transparency function of FOIA itself." (*Natarajan Venkataram v. Office of Information Policy*, Civil Action No. 09-6520 (JBS/AMD), U.S. District Court for the District of New Jersey, July 25)

Judge Reggie Walton has ruled that the Bureau of Prisons properly withheld personally identifying information from those records pertaining to claims filed against the agency that either did not result in a court case or did not involve a public official under **Exemption 6 (invasion of privacy)**. In finishing up a 2005 case brought by Prison Legal News for records concerning claims brought against BOP, Walton noted that the agency had redacted personal information for claims brought0.0.0. under the Federal Tort Claims Act because they involved allegations of injury or death and EEOC claims that .alleged some form of discrimination. Prison Legal News argued the agency had undercut its privacy claims by providing personal information for many of the claims. But Walton pointed out that the agency had explained that it released information about administrative claims when it could be connected with claims that subsequently were filed in court. Walton observed that "the fact that the defendant did not redact names from all of the documents does not undermine its reliance on Exemption 6." Walton rejected Prison Legal News' arguments concerning the public interest in disclosure. Prison Legal News contended that there was a public interest in being able to follow up of various claims to better understand how they were handled. Walton, however, noted that "while the plaintiff's stated interest in being better able to match certain documents with certain other documents identifies a particular purpose for how the information will be used, it does not constitute a proper interest under Exemption 6." He then indicated that "the defendant here has disclosed the names of individuals who were acting in their official capacity as well as the names of individuals who were involved in public litigation. The requested information thus consists entirely of the names and other personal identifying information of individuals who were not acting in an official capacity. The plaintiff has identified no well-publicized scandal or other information, such as a public letter censuring particular employees, to serve as the public interest in disclosing the names and other identifying information." (*Prison Legal News v. Charles E. Samuels, Jr.*, Civil Action No. 05-1812 (RBW), U.S. District Court for the District of Columbia, July 23)

The Ninth Circuit has ruled that the district court should not have granted the Islamic Shura Council of Southern California's **motion for sanctions** against the FBI because the agency had already rectified its failure to tell the court that it had invoked the subsection (c) exclusions in issuing a no records response to the Council. While the district court lambasted the agency for its behavior, the agency subsequently explained its position more thoroughly to the court and ultimately convinced the court that any records had been properly withheld. However, because it believed the agency's behavior was egregious, the district court granted the Council's motion to sanction the agency. The Shura Council argued that it had complied with the requirements of Rule 11, which allows a court to take action to deter baseless filings. But the Ninth Circuit noted that "what Shura Council fails to observe, however, is that the FBI has already 'corrected' the challenged pleadings and provided all the information it was obligated to provide to the district court before Shura Council filed its motion for sanctions." The court observed that "no party disputes, however, that the FBI provided the district court with a complete and accurate account of the facts of this case during the *in camera* sessions." Dismissing the sanctions motion, the court pointed out that "we recognize that because of the *in camera* nature of the proceedings, Shura Council could not have moved for sanctions before the inadequacy of the FBI's original response was made known to the court. Nevertheless, the motion for sanctions was made after 'judicial rejection of the offending contention.' The motion for sanctions should not have been granted." (*Islamic Shura Council of Southern California v. Federal Bureau of Investigation*, No. 12-55305, U.S. Court of Appeals for the Ninth Circuit, July 31)

Information Items…

Bin Laden Records Removed from DOD to CIA

A passage explaining that DOD had transferred all records in its possession pertaining to the raid that killed Osama bin Laden to the CIA was removed from a draft report by DOD's Inspector General on orders by Adm. William McRaven, the top special operations commander. A spokesman for McRaven told the Associated Press that the records were always considered to belong to the CIA. Spokesman Preston Golson said: "Records of a CIA operation such as the bin Laden raid, which were created during the conduct of the operation by persons acting under the authority of the CIA Director, are CIA records." Golson also indicated McRaven ordered the records' removal to protect the names of personnel involved in the raid, not to avoid possible FOIA disclosure. Under federal records regulations, agencies may only transfer records to other agencies with written approval of the National Archives. Archives spokesperson Miriam Kleiman indicated that because the CIA claimed the records were theirs there would be no need to ask for permission to transfer them. The AP noted that the transfer had real world consequences pertaining to how DOD responded to contemporaneous requests for records on the bin Laden raid. In response to several FOIA requests for records about the Navy's role in transporting and burying bin Laden's body at sea, the maintenance logs for the helicopters used in the raid, and emails pertaining to the raid sent or received by McRaven in the previous year, the agency responded that it could find no responsive records. The AP noted that "the department did not say they had been moved to the CIA." However, as the article pointed out, the D.C. Circuit has already affirmed the ruling of a district court judge that any photos from the bin Laden raid were properly classified and withheld.

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