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Washington Focus: According to the Los Angeles Times, one victim of the budget sequestration turns out to be the Historical Collections Division at the CIA, which was responsible for declassifying historical documents. Its duties will be assumed by the agency's FOIA office. CIA spokesman Edward Price explained that "as a result of sequestration, elements of one program office were moved into a larger unit to create efficiencies, but CIA will continue to perform this important work." Price added that the agency was committed to the "public interest mission" of declassifying significant historical documents. Columbia University Professor Robert Jervis, who chairs the CIA's Historical Review Panel which advices the agency on declassification lamented that "this is very unfortunate. There will be fewer releases. We shouldn't fool ourselves." According to the Times, instead of furloughing civilian employees, the CIA has cut spending on outside contractors, including those performing the labor-intensive work of declassifying CIA documents.

Court Rules Visitors' Records Not Subject to FOIA

The D.C. Circuit has finessed the issue of whether visitors' logs at the White House or the Vice President's office are agency records subject to FOIA because they are used by the Secret Service by ruling that because the records directly reflect information provided by the President or Vice President's staff they qualify as presidential records and are not agency records. The court also pointed out that to allow access to the visitors' logs would pose serious separation-of-powers issues. Writing for the court, Chief Circuit Court Judge Merrick Garland noted that "in order to avoid substantial separation-of-powers questions, we conclude that Congress did not intend to authorize FOIA requesters to obtain indirectly from the Secret Service information that it had expressly barred requesters from obtaining directly from the President."

The issue of whether visitor log records used by the Secret Service to monitor and control access to the White House qualify as agency records has been litigated several times previously in district court. In three different decisions, district court judges found that, even though a memorandum of understanding between the White House and the Secret Service classified the records as presidential and provided that the Secret Service give them to the White House after they were finished using them, because the Secret Service used the records in carrying out its statutory duties they were agency records when in the possession of the Secret Service. After Judge Royce Lamberth ruled in favor of CREW on the agency record status of the logs, a coalition of open government groups negotiated an agreement with the Obama White House that would provide discretionary access to the records. Although that system has been in place for several years, Judicial Watch viewed it as too restrictive and filed suit, arguing that such records were completely subject to FOIA through the Secret Service. Judge Beryl Howell agreed with Judicial Watch and the administration appealed Howell's decision to the D.C. Circuit.

Garland started with the Supreme Court's ruling in *Kissinger v. Reporters Committee*, 445 U.S. 136 (1980), in which the Court found that the Office of the President was not subject to FOIA, as the basis of his ruling. First, he indicated that "it is therefore undisputed that a requester could not use FOIA to compel the President or his advisors to disclose their own appointment calendars or visitor logs," adding that "in part, Congress exempted such records from FOIA—and later subjected them to the Presidential Records Act instead—in order to avoid serious separation-of-powers concerns that would be raised by a statute mandating disclosure of the President's daily activities." Relying again on *Kissinger*, he observed that "the second thing we know is that not all documents in the possession of a FOIA-covered agency are 'agency records' for the purpose of that Act."

The Supreme Court's decision in *Dept of Justice v. Tax Analysts*, 492 U.S. 136 (1989), established a four-factor test for assessing whether a record was an agency record—(1) the intent of the document's creator to retain or relinquish control of the record, (2) the ability of the agency to use and dispose of the record as it sees fit, (3) the extent to which agency personnel have read or relied upon the document, and (4) the degree to which the document was integrated into the agency's record system or files—which Howell used to assess the Secret Service's claim that the visitor logs were not agency records. While Howell found that all four factors weighed against the Secret Service, Garland was not so sure, pointing out that the MOU clearly restricted the agency's ability to use or dispose of the record as it saw fit and observing that while the agency clearly possessed the records at some point it was unclear whether the records could be considered to have been integrated into the agency's files.

In support of his conclusion, Garland trotted out a litany of cases involving disclosure restrictions placed on records by entities not subject to FOIA. Most of the cases involved restrictions placed on agencies by Congress. Garland found *United We Stand America v. IRS*, 359 F.3d 595 (D.C. Cir. 2004), in which the court found "sufficient indicia of congressional intent to control" portions of IRS records prepared in response to a congressional request to conclude that those portions of the records were not agency records subject to FOIA, to be a particularly apt analogy to the White House visitors log records. He noted that "this case also involves documents that an agency created in response to requests from, and information provided by, a governmental entity not covered by FOIA. . .Second, as in *United We Stand*, the non-covered entity—here, the White House—has 'manifested a clear intent to control' the documents. And that means the agency is not free to use and dispose of the documents as it sees fit. Third, disclosing the records would reveal the specific requests made by the non-covered entity—here, the Office of the President's requests for visitor clearance."

Garland then used separation-of-powers concerns as a further reason to conclude that the White House visitor logs were not subject to FOIA. Citing the avoidance canon—the principle that courts should avoid ruling on constitutional questions if there is an alternative way to resolve the potential conflict—Garland

explained that "construing the term 'agency records' to extend to White House visitor logs—regardless of whether they are in the possession of the White House or the Secret Service—could substantially affect the President's ability to meet confidentially with foreign leaders, agency officials, or members of the public. And that could render FOIA a potentially serious congressional intrusion into the conduct of the President's daily operations." To support his separation-of-powers argument, Garland compared this case with two Supreme Court cases involving the Federal Advisory Committee Act—*Public Citizen v. Dept of Justice*, 491 U.S. 440 (1989) and *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367 (2004)—both of which concluded that FACA could not constitutionally be applied in certain situations involving advice to the President or Vice President.

Garland pointed out that the seminal decision on whether or not EOP was subject to FOIA, *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), avoided the separation-of-powers issue by excluding coverage of staff whose sole function was to advise the President. The *Soucie* standard was adopted by Congress in the 1974 FOIA Amendments and Garland observed that "it appears that not only this court, but Congress as well, wished to avoid the serious separation-of-power questions that too expansive a reading of FOIA could engender. When that is the case, it is doubly our obligation to seek a construction that avoids constitutional conflict."

Having removed the visitors' logs from FOIA, Garland then indicated that they qualified as presidential records under the Presidential Records Act. He noted that the visitors' records "are arguably 'created' by White House staff and White House pass readers on servers physically located in the White House Complex." Further: "They are generated whenever the President consults agency officials, negotiates with foreign heads of state, or speaks with private organizations or individuals at the White House. . .[The visitors' logs] thus track quite nicely with the definition of 'Presidential records' found in the PRA."

Judicial Watch argued that any separation-of-powers concerns could be mitigated by applying Exemption 5 (privileges) to the records. But Garland noted that "in another district court case presenting almost the identical question, they argued—and the court agreed—that [the White House] visitor records do *not* fall within Exemption 5 because they consist only of the names of the visitor, visitee, and date and time of the visit." He added that "there are no decisions in this court that address whether the presidential communications privilege contained in Exemption 5 extends to the names of visitors to the President and his staff. And it seems to us that deciding that question would be at least as difficult—and present separation-of-powers questions at least as serious—as deciding the question now before us. We see nothing to be gained by trading one difficult question for another." He indicated that "even if a significant subset of [White House visitors' records] would be protected by Exemption 5, the burden of identifying those records on a document-by-document basis is substantial enough to make that an ineffective way of mitigating the kind of separation-of- powers concerns at issue here."

Garland agreed that there was a small subset of EOP records that were subject to FOIA, including at least OMB and the Council on Environmental Quality, "whose 'sole function' is not to 'advise and assist the President.' These offices are 'agencies' under FOIA, and their records are 'agency records' subject to disclosure." As a result, any records pertaining to visits to those offices were agency records subject to disclosure under FOIA. (*Judicial Watch, Inc. v. United States Secret Service*, No. 11-5282, U.S. Court of Appeals for the District of Columbia, Aug. 30)

Views from the States…

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

Colorado

A court of appeals has ruled that the Parker Jordan Metropolitan District did not violate the Colorado Open Records Act when it refused to provide emails from a consultant and charged a group of investors $25 an hour for processing the request, including the creation of a privilege log. Because it was so small, the District was actually run by CliftonLarsonAllen, a management company, which was the custodian for its public records. The investors' group requested all records concerning a stream improvement project. Clifton told the investors' group that it would not produce emails from an engineering consultant unless they were in Clifton's possession. The management company also indicated it would charge $25 an hour for responding to the request. The trial court agreed with Clifton, although it found the company could not charge for producing a privilege log justifying withholding any records considered privileged. Finding that emails from the consultant that were not provided to Clifton did not qualify as public records, the appeals court noted that "communications not received, possessed, or maintained by the District, through Clifton, are not public records. However, the District must produce communications concerning the project sent to or received by the District, through Clifton, including those received from J3 Engineering Consultants." The investors' group argued that the District was required to have regulations for access to records and could not just settle on an hourly rate. The court disagreed, finding that $25 an hour was reasonable and that the District could require a prepayment deposit as well. The court further indicated that "a custodian may charge a reasonable fee for retrieving and researching records, including the time it takes to identify and segregate records that need not be disclosed." On the issue of charging for creating a privilege log, the court observed that "we perceive no conflict between a political subdivision's burden [to justify withholding records] under common law and CORA to assert a privilege and CORA's statutory provision allowing a reasonable fee for generating a record in response to a request." (*Mountain-Plains Investment Corporation v. Parker Jordan Metropolitan District*, No. 12CA1034, Colorado Court of Appeals, Division V, Aug. 15)

Connecticut

A trial court has affirmed a decision by the FOI Commission that the City of Danbury must disclose personnel information requested by attorney Elisabeth Maurer for use in since-concluded federal employment litigation. When the City refused to disclose most of the requested information, Maurer complained to the FOI Commission concerning a subset of the requested personnel records. The City provided the Commission with 1,888 pages of personnel records to view *in camera* and argued that it would not comply with Maurer's request for medical records because it was too burdensome. Danbury complied with the Commission's order concerning disclosure of the 1,888 pages, although it made unauthorized redactions on 794 pages. It continued to refuse to disclose the requested medical records. The Commission ordered disclosure of 213 personnel records because the individual employees had not objected to disclosure. Danbury argued that was because five of them were deceased and the sixth had filed an objection in an earlier identical case. Danbury argued that next-of-kin had filed objections on behalf of the five deceased employees. The court noted that "assuming that they are deceased, and that some next of kin did object, the disclosure of the requested records would not be an invasion of personal privacy. . .because no such privacy right exists with respect to the deceased." The court added that "Danbury identifies no applicable statute that extends privacy rights after death applicable to this case." As to the employee who had filed objections in an earlier case, the court pointed out that "assuming that he did file an earlier objection, the earlier objection was not relevant. This case

concerned the Attorney Maurer's February 16, 2011, records request only." Danbury argued that to search for responsive medical records would require a search through all employee personnel records. The court indicated that "the request [for medical records] in the instant case would certainly be time consuming, but not necessarily unreasonably burdensome. . .To the contrary, the record shows that a preliminary screen narrowed the field to 400 names. It is likely that further screening or polling could have narrowed the search further." Danbury also argued that it was against public policy to force the city to expend the time and money to comply with Maurer's discovery requests. But the court observed that "The fact that the lawsuit that was the source of the need for the information has since been dismissed might be a practical reason for dropping an FOI request. Nevertheless, the status of the lawsuit is irrelevant. Open government comes at a cost. Whether it is a waste of taxpayer money is an issue for the legislature, not this court." (*Office of Corporation Counsel of the City of Danbury v. Freedom of Information Commission*, No. HHB CV 12-6017045 S, Connecticut Superior Court, Judicial District of New Britain, Aug. 26)

Florida

A court of appeals has ruled that the current text of the Sunshine Law does not provide a right to speak at public meetings. Barbara Herrin, a local activist, tried to speak at a meeting of the Deltona City Commission, but the Commission refused to allow public input at the meeting. Herrin sued and the trial court sided with the Commission. The appeals court noted that Herrin's case depended largely on early decisions interpreting the Sunshine Law that no longer reflected the case law on the right to participate at a public meeting. Instead, the court pointed out that "the statute does not mention the right to be heard or participate. The phrase 'open to the public' most reasonably means that meetings must be properly noticed and reasonably accessible to the public, not that the public has the right to be heard at such meetings." The court observed that a new amendment allowing public participation was slated to go into effect in October. The court indicated that "under [Herrin's] interpretation of the Sunshine Law, [this new section] would be superfluous. We do not believe that to be the case." (*Barbara J. Herrin v. City of Deltona*, No. 5D12-1887, Florida Court of Appeal, Fifth District, Aug. 16)

Pennsylvania

The supreme court has ruled that because the standard of review contained in the 2007 Right to Know Law is inconsistent—establishing the Office of Open Records as the primary review mechanism for complaints against state agencies while providing trial courts the first level of review for complaints against local agencies—statutory construction supports an appellate court's conclusion that OOR decisions should be reviewed *de novo* rather than by employing the deferential standard that OOR claimed was proper. The RKTL created OOR as the statutory appeals mechanism for requests to state agencies, requiring requesters to file an initial complaint with OOR, which was tasked with making a determination on the complaint within 30 days. Reporter Brian Bowling had appealed an adverse decision from OOR to the Commonwealth Court, which concluded that a *de novo* standard of review should be applied. Further, the court indicated that it had the jurisdiction to consider evidence beyond the appeals record. OOR argued that the court's review should be deferential and limited to the evidence considered by OOR. The supreme court, however, disagreed, finding that *de novo* review was more in standing with established court review. Bowling argued that even though OOR was tasked with making determinations on complaints, the RKTL did not require OOR to hold hearings or even to issue a written determination; if OOR failed to respond within 30 days the complaint was deemed to be denied. The court noted that "the typical adjudicatory process in this Commonwealth often involves at least two tiers, with a presiding or hearing officer or examiner taking evidence and making a recommended decision, and a reviewing appellate board (the agency head) serving as the actual finder of facts and the body that makes the final determination of the agency. The RTKL does not provide for the possibility of the

procedure typically practiced before the adjudicatory arm of Commonwealth agencies; rather, it provides only for determination made by appeals officers, who themselves are not constrained by the due process formalities that apply to traditional agency determinations and who are not subject to further agency review." The supreme court pointed out that because the RTKL required courts to determine issues like attorney's fees, courts needed to be able to expand the record to encompass such issues, supporting use of a *de novo* standard. Acknowledging the inconsistency in the RTKL, a dissenting judge suggested that the legislature, rather than the courts, correct the problem, noting that "the courts are not in a position to make the necessary adjustments to the RTKL in the case by case method available to us. . ." (*Brian Bowling v. Office of Open Records*, No. 20 MAP 2011, Pennsylvania Supreme Court, Aug. 20)

Tennessee

The federal Sixth Circuit has dismissed Richard Jones' challenge to the citizenship requirement in the state's public records act in light of the recent Supreme Court ruling in *McBurney v. Young*, 133 S.Ct 421 (2012), in which the Court found that Virginia's citizens-only restriction did not violate the U.S. Constitution's Privileges and Immunities clause. The court noted that *McBurney* had rejected the argument that a non-citizen's right to advocate on issues of national public interest was improperly restricted by the citizens-only requirement and concluded that "Jones does not, and cannot, contend that FOIA restrictions prohibit him from actually engaging in the political process. . .The fact that Tennessee has placed administrative limits on access to public records in no way impinges on those rights." The court added that "it cannot be said that unrestricted access to public documents is basic to the maintenance and well-being of the union." A concurring judge indicated that he did not read the *McBurney* decision quite so broadly. The judge observed that "the Court added that the plaintiffs in *McBurney* had not contended that national unity suffered as a result of the citizens-only FOIA provisions at issue. Presumably, then, a more narrowly framed right of access to public information might be protected, if supported by specific evidence of harm to 'the maintenance or well-being of the Union.'" (*Richard Jones v. City of Memphis, Tennessee*, No. 12-5558, U.S. Court of Appeals for the Sixth Circuit, Aug. 16)

Texas

A court of appeals has ruled that an audit of the administrative services provided the City of Lubbock by ICON and AAG is completed for purposes of the Public Information Act and must be disclosed because it falls within the category of "core information" required to be disclosed under the statute. ICON and AAG provided administrative services for Lubbock's self-funded healthcare plan. When its performance was questioned, Parker Group, the parent company, filed a defamation suit against several city employees, alleging they had falsely accused the company of mishandling its contracts with the city. To defend itself against the defamation suit, the city hired Sally Reaves, a non-accountant, to conduct an audit and prepare a report. While Reaves was working on her report, the defamation suit was settled, but arbitration between the parties continued. After Reaves submitted her report, the city received several PIA requests. Parker Group claimed the report was based on sealed information in the defamation suit and convinced the appeals court to stay disclosure. Parker Group subsequently filed another suit challenging the Attorney General's decision that the Reaves audit report was public core information. The trial court ruled against Parker Group and the company appealed. Parker Group argued that the audit report was not complete because it lacked an attachment that had originally been intended to be included as part of the appendix. But, noting that the applicable core information category referred to a "completed" report rather than a "complete" report, the appellate court pointed out that "a completed audit' denotes an audit that has been brought to an end and a 'complete audit' would be a whole audit or the entire audit. Accordingly, under the [core information provision], an audit is core public information if it has been, simply stated, finished. And while a 'completed audit' may also be 'complete'—as in containing the whole or entire—it is not required to be so under the plain terms of [the core

information provision].” (*ICON Benefit Administrators II, L.P. v. Greg Abbott*, No. 03-11-00459-CV, Texas Court of Appeals, Austin, Aug. 22)

A court of appeals has ruled that Gene Giggleman did not substantially prevail on his claim under the Public Information Act when the trial court issued a preliminary ruling granting his fee request in a case that became moot once the Board of Veterinary Medical Examiners provided the records he sought during the Board’s further jurisdictional challenge. Based on an undercover complaint from PETA, the Board opened an investigation into Giggleman’s role with a company called U.S. Global Exotics. Under the Board’s investigatory rules, it was required to provide a copy of a complaint to the individual under investigation. The Board gave Giggleman a copy of PETA’s complaint, but withheld attachments PETA had provided. Giggleman claimed that he was entitled to the attachments since they were part of the complaint. The Board asked the Attorney General for an opinion on whether it could withhold the attachments as confidential under the Occupation Code. The AG approved the withholding and Giggleman filed suit against the Board, claiming he was entitled to the attachments under the PIA as well as attorney’s fees. The trial court ruled in favor of Giggleman and issued a preliminary order granting attorney’s fees. However, no final order was ever entered and the Board disclosed the attachments to Giggleman. Finding that Giggleman had properly pled the issue of attorney’s fees, the appeals court decided that he had not substantially prevailed because he had not received a ruling on the merits. Noting that the Texas Supreme Court had recently adopted the U.S. Supreme Court’s decision in *Buckhannon* as the basis for an award of attorney’s fees under the PIA, the appeals court indicated that “the district court’s final judgment did not award Giggleman any relief on his mandamus claim. In fact, Giggleman’s mandamus claim was rendered moot before final judgment when the Board had eventually produced the disputed exhibits to him, obviating any justiciable controversy regarding his entitlement to the writ.” The court observed that “the evident basis for the district court’s conclusion that Giggleman had nonetheless ‘substantially prevailed’ is that the Board did not produce the exhibits until after the court had already granted him summary judgment on his mandamus claim.” (*Texas State Board of Veterinary Medical Examiners v. Gene Giggleman*, No. 03-12-00318-CV, Texas Court of Appeals, Austin, Aug. 22)

The Federal Courts…

Judge Rudolph Contreras has ruled that the CIA and the Defense Department did not **waive** their right to protect the names of several agency employees under **Exemption 3 (other statutes)** when the two agencies identified the individuals to the filmmakers during production of *Zero Dark Thirty* about the killing of Osama bin Laden. Acknowledging that the individuals’ identities could normally be withheld under FOIA, Judicial Watch argued that by identifying them to the filmmakers the government had waived its right to withhold their names. Contreras pointed out that under D.C. Circuit law Judicial Watch’s waiver claim could only succeed if the agencies had made the information publicly available. He noted that “because the public domain doctrine is a doctrine of futility, triggered only when it would serve no purpose to enforce an exemption, it is of almost no use to a plaintiff attempting to learn something that it does not already know.” But he observed that “Judicial Watch does not know—and, outside of this suit, apparently has no way of learning—the names of these individuals. That fact is strong evidence that those names are not in the public domain.” After finding that Judicial Watch had failed to show that the names of the individuals were in the public domain, Contreras indicated that Judicial Watch was arguing that he adopt a Ninth Circuit test articulated in *Watkins v. Bureau of Customs & Border Protection*, 643 F.3d 1189 (9th Cir. 2011) holding that “when the government has made ‘a no-strings-attached disclosure of. . .confidential information to a private third party’ it has waived its ability to withhold that information under FOIA.” Contreras noted that “even if that description of the disclosures were accurate. . .it would not be enough to establish waiver in this circuit.” He observed that “if the filmmakers had

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publicized the names that they learned and the government now seeks to withhold, this would be a much harder case. . .But this is not that case. The names have not been 'released to the general public' and Judicial Watch cannot meet its 'initial burden of pointing to specific information in the public domain that duplicates that being withheld.'" Judicial Watch also suggested that waiver could occur when the government disclosed exempt information for an unimportant reason. But Contreras pointed out that "Judicial Watch would apparently recast its burden of production as an obligation to either 'point to specific information in the public domain that duplicates that being withheld' or identify a disclosure that, although not publicly documented, was made for an unimportant reason. As should by now be obvious, that is not the law of this circuit." (*Judicial Watch, Inc. v. U.S. Department of Defense and Central Intelligence Agency*, Civil Action No. 12-cv-49 (RC), U.S. District Court for the District of Columbia, Aug. 28)

The Sixth Circuit has ruled that the FBI may claim **Exemption 7(A) (interference with ongoing investigation or proceeding)** to withhold demographic racial and ethnic data used to assess vulnerabilities and threats of terrorism in ethnic communities. Because the ACLU feared the FBI might be claiming an **exclusion** under subsection (c)(3) which allows the FBI to exclude certain classified information, the court also discussed the proper procedures for making such a claim. Although the ACLU argued that 7(A) applied to ongoing specific investigations, the court explained that "the class of harms covered by Exemption 7(A) is not so narrow. . .[B]y its plain terms Exemption 7(A) does not limit what type of 'interference' may justify withholding. The FBI's declaration—that release of this information may reveal what leads the FBI is pursuing and the scope of those investigations, permitting groups to change their behavior and avoid scrutiny—amply states a type of interference coved by Exemption 7(A)." The court added that "the FBI is not attempting to keep demographic data from the census secret—which it could not, by definition—but its methods of selecting what data to analyze and the analysis of that data." The ACLU contended that race and ethnicity could not be the primary grounds for investigation. The court responded that "this is true, but does not change the outcome. The disclosure of any significant factor involved in FBI decision-making could interfere with enforcement proceedings." The ACLU argued the fact that other FBI field offices had disclosed ethnic identity information suggested that the Detroit field office's exemption claim was inappropriate. The court indicated that "there is no actual contradiction between those releases and the FBI's affidavits in this case. . .[A]ccording the FBI a presumption of good faith, the Detroit Field Office's release of a document identifying a generic threat from Middle-Eastern and South-Asian terrorist groups compels a conclusion that the FBI has only withheld documents of greater specificity." Because of its concern that the FBI may have excluded some information, the ACLU argued that the parties should litigate the issue of whether the information sought would be excludable under (c)(3). The court rejected the suggestion out of hand, noting that "open-ended hypothetical questions are not well suited to the litigation process, and the alternative procedure—*in camera* review of the actual basis for withholding (if any)—more directly serves the FOIA's goals of public disclosure and independent review." (*American Civil Liberties Union of Michigan v. Federal Bureau of Investigation; United States Department of Justice*, No. 12-2536, U.S. Court of Appeals for the Sixth Circuit, Aug. 21)

Judge John Bates has ruled that the Justice Department may not invoke a *Glomar* response neither confirming nor denying the existence of records of its investigation of former Sen. John Ensign (R-NV) under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** because the public interest in disclosure of records pertaining to DOJ's decision not to prosecute Ensign outweighs his privacy interest. After Ensign admitted to an extramarital affair with the wife of his former chief of staff Doug Hampton, DOJ began an investigation into whether Ensign violated federal law prohibiting certain Senate aides from lobbying senators for a year after they leave the Senate. In late 2010, Ensign announced that DOJ had told him that its investigation was complete and no charges would be brought. The Senate Ethics Committee also appointed a

special counsel to investigate similar charges against Ensign. The day before Ensign was scheduled to be deposed, he resigned. The special counsel completed her report and concluded that some of Ensign's actions were illegal and recommended that the Ethics Committee refer the matter to DOJ. The agency again declined to bring charges against Ensign. CREW then requested records about the DOJ investigation, including its decision not to charge Ensign. DOJ responded that it would neither confirm nor deny the existence of records, a decision that was upheld on appeal to OIP. Bates first assessed Ensign's privacy interests. He noted that "Senator Ensign has not been criminally charged. He has also resigned from the Senate. Both of these facts lend weight to his privacy interest: having retreated to private life, Senator Ensign is no longer in the spotlight and 'renewed publicity brings with it a renewed invasion of privacy.'" Bates indicated that "although Senator Ensign does not have a substantial privacy interest in the fact that he was targeted in a criminal investigation, he retains a cognizable privacy interest in the contents of the file. . .In addition to reopening old wounds, disclosure of DOJ's investigative file could result in new revelations of misconduct, even if that misconduct did not rise to the level of a criminal violation." DOJ argued that the privacy of third parties identified in Ensign's file would be invaded. But Bates observed that "those individuals lack a privacy interest in the *substance* of the files, unless the substance could reveal their identities. At bottom, the privacy interests of third parties other than Senator Ensign are adequately protected by redaction, and should not be weighed in the balance of public and private interests." Bates rejected CREW's first public interest claim that disclosure would shed light on Ensign's behavior as a public official. Bates pointed out that "contributing to greater public awareness of Senator Ensign's conduct does not in itself serve FOIA's central purpose of opening *agency* action to public scrutiny." But he noted that "CREW wants records showing what efforts DOJ took to investigate serious allegations of criminal misconduct backed by 'substantial credible evidence" which resulted in the resignation of a U.S. Senator. He observed that "DOJ purports to acknowledge that CREW is not required to allege DOJ misconduct in order successfully to articulate a public interest, but if disclosure of the requested records in these circumstances would not serve the public interest of promoting the citizens' right to be informed about 'what their government is up to,' it is hard to imagine DOJ ever accepting any public interest other than misconduct." Balancing Ensign's privacy interest against the public interest, Bates indicated that "CREW has articulated a substantial public interest. Application of DOJ's categorical rule is therefore not appropriate." He ordered the agency to provide a *Vaughn* Index, noting that submission of a *Vaughn* Index "will not harm Senator Ensign's privacy interests in not being identified as the subject of an investigation—that ship has sailed." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 12-1491 (JDB), U.S. District Court for the District of Columbia, Aug. 23)

Judge Emmet Sullivan has ruled that the FTC acted properly in denying Cause of Action a **fee waiver** and refusing to categorize the organization as a representative of the news media for fee purposes. In resolving fee issues spanning three sequential requests, Sullivan also found that the agency had properly withheld several memos under **Exemption 5 (privileges)**, but that computer screenshots of the organization's website were not privileged. COA's first request asked for information about the drafting and implementation of the agency's "Guides Concerning the Use of Endorsements and Testimonials in Advertising." COA also asked for a fee waiver, which was denied. The organization again asked for a fee waiver and added a request to be considered a representative of the news media. The agency denied both requests, indicating that COA was put in the general fee category, and released 100 pages. Subsequently, the agency affirmed its decision of its denial on the fee issues in response to COA's administrative appeal. COA then asked for all FOIA requests since January 2009 where the FTC granted a fee waiver and records pertaining to how those decisions were made. The organization also asked for a fee waiver and to be considered a representative of the news media. The agency once again denied COA's fee requests, disclosing 100 pages, but withholding 12 pages under Exemption 5. In its third request, COA asked for records concerning the Guides, the agency's fee policies, and how the agency decided to deny COA's fee requests. The agency disclosed 75 pages and withheld 16

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pages consisting of several memos written by a paralegal to an attorney, including two screenshots of COA's website, under Exemption 5. COA appealed the withholdings and reasserted its claim for a fee waiver. The agency upheld the withholdings and found the fee issue moot since no fees were assessed. COA then filed suit, primarily claiming that the FTC improperly denied their fee requests. Sullivan found that on its first request COA had shown that the disclosure of the records was in the public interest, but failed to show that it had the ability to disseminate the information widely. Sullivan noted that "throughout its voluminous correspondence with the FTC regarding its first FOIA request, [COA] identified only two methods of dissemination, which it discussed only in footnote: its website and articles published by news media that have relied upon COA's past work on other issues. Plaintiff did not provide any estimate of the number of people likely to view its website, nor did it demonstrate other ways in which it would disseminate the information itself, without relying on another source." Turning to its second request, Sullivan found again that COA failed the dissemination prong, but added that "it is clear that Plaintiff's primary interest in the second request was its desire to better prepare itself for an appeal of its fee waiver denial of its first request" and, thus, "plaintiff has not demonstrated that the public was the primary beneficiary of the requested information." Sullivan agreed with the agency that COA did not qualify as a representative of the new media. Noting that the leading cases on the news media category concluded that the National Security Archive and EPIC qualified because of their publishing capabilities, Sullivan explained that "Plaintiff performs its activities to aid in government accountability and is thus more like a middleman for dissemination to the media." While Sullivan agreed that the paralegal's memos were protected by both the deliberative process and attorney work-product privileges, he indicated that the computer screenshots were not. "Even if the paralegal took the screenshots in order to help the supervising attorney make an informed decision on Plaintiff's fee waiver request, the paralegal did not express any opinions in taking the screenshots. When he took the screenshots, the paralegal was simply capturing images of Plaintiff's website at the direction of his supervising attorney." He added that "when documents are purely factual, Exemption 5's attorney work-product privilege no longer applies." (*Cause of Action v. Federal Trade Commission*, Civil Action No. 1:12-cv-00850-EGS, U.S. District Court for the District of Columbia, Aug. 19)

In finding that various DOJ components conducted **adequate searches** and properly applied a variety of exemptions in responding to David Barouch's request for all records about himself, Judge Amy Berman Jackson has explored aspects of the effects of **exhaustion of administrative remedies** on both the requester and the agency. While Jackson found that Barouch had not appealed the Bureau of Alcohol, Tobacco and Firearms' denial of records to OIP, she indicated that Barouch was not required to appeal a subsequent denial by ATF of records referred to it from EOUSA because he had already filed suit. She noted that "it is true that plaintiff did not exhaust his administrative remedies with respect to these documents in a literal sense. But a FOIA requester will be deemed to have 'constructively exhausted' his administrative remedies 'if the agency fails to comply with the applicable time limit provisions.' The documents processed by ATF were actually in the possession of EOUSA, which had not responded to plaintiff's request when plaintiff filed his complaint in this action, despite the expiration of the applicable time limit for the agency to respond. EOUSA concedes this. It would be anomalous to review plaintiff's challenges to EOUSA's withholdings of documents that were identified by EOUSA in the spring of 2012 and that were processed by EOUSA, but to decline to review on exhaustion grounds the determination of other agencies to which EOUSA sent some of the documents it identified at the same time. Since the exhaustion requirement under FOIA is not jurisdictional, the Court finds that plaintiff has constructively exhausted his administrative remedies with respect to the documents uncovered by EOUSA after the initiation of this action, regardless of whether they were processed by EOUSA or by another agency, such as ATF." Jackson also found that Barouch could not challenge the decision of several agencies to withhold records under the Privacy Act because he had failed to exhaust his administrative remedies under that statute. She pointed out that "but 'the Privacy Act contains no equivalent to FOIA's constructive-exhaustion provision.' Despite defendant's concession, 'a claim that the court lacks jurisdiction

under Article III of the Constitution may not be waived. . .and the court is obligated to address it *sua sponte*.' Accordingly, the Court must find that plaintiff failed to exhaust his administrative remedies with respect to his request to EOUSA. . ." In so ruling, Jackson seems to have completely misunderstood the relationship between FOIA and the Privacy Act, apparently concluding that because the Privacy Act does not have a constructive exhaustion provision a plaintiff must first exhaust administrative remedies. However, the Privacy Act does not require a plaintiff to appeal the agency's decision and the only reference to an appeal in the statute is that agencies may provide appeal rights to facilitate an individual's request. (*David Jack Barouch v. U.S. Department of Justice*, Civil Action No. 12-0129 (ABJ), U.S. District Court for the District of Columbia, Aug. 23)

A federal court in California has ruled that the FDA has shown that disclosure of information about egg production capacity for a number of Texas egg producers would likely cause competitive harm to the producers and was properly withheld under **Exemption 4 (confidential business information)**. The Animal Legal Defense Fund requested the records from the FDA. The agency's Dallas office processed the request, located 12 inspection reports and related documents, and disclosed all the records with redactions, primarily made under Exemption 4. Although ALDF provided expert testimony rebutting that of the FDA and the Texas egg producers, the court agreed that disclosure of much of the production capacity information would likely cause competitive harm. ALDF argued that disclosure of some data elements could not be used to undercut egg producers' prices. The court responded by noting that "Plaintiff, however, ignores the fact that competitors can acquire or accurately estimate other pieces of information to combine with the totality of redacted information to cause competitive harm." The court observed that "while Plaintiff is correct that other information beyond the redacted information is needed to undercut competitors, Defendant has shown that such other information can be estimated from other publicly available sources. . ." ALDF also argued that the redacted information was not necessary to offer customers a better deal. But the court explained that "the test for competitive harm is not whether the information is necessary, but whether release of the information is likely to cause substantial competitive harm." Allowing the agency to withhold most of the information, the court concluded that the agency had not shown why disclosure of the number of birds per cage would cause competitive harm and ordered the agency to disclose that information. (*Animal Legal Defense Fund v. United States Food and Drug Administration*, Civil Action No. C-12-04376, U.S. District Court for the Northern District of California, Aug. 23)

A federal court in Ohio has ruled that Mark Miller must **exhaust his administrative remedies** before he can amend his complaint in his FOIA suit against the FEC. Miller asked for an advisory opinion sent to the Schmidt for Congress Committee. Because of staff vacancies, the agency failed to respond to Miller's request within 20 days. Although Miller alleged that he filed an administrative appeal by email, the agency could find no record of receiving the appeal and was unaware of its existence until Miller filed suit alleging that the agency had failed to respond to his request within the statutory deadline. The agency disclosed a redacted version of the opinion and argued to the court that Miller's case was moot since he had received a response. Miller argued that his suit was not moot because the issue of the application of exemptions and an award of attorney's had not yet been addressed. The court, however, agreed with the agency, noting that "federal courts require a person who submitted a FOIA request to exhaust administrative remedies when the agency responded to the request in an untimely manner, but before a lawsuit was initiated. The Court believes that the same standard should apply here when the FEC responded to [Miller's request] after Miller initiated this suit. Miller first should appeal administratively to the FEC its decision to redact and withhold certain responsive documents pursuant to statutory exemptions." The court dismissed Miller's claim for attorney's fees, indicating that he was required to file a separate motion on that issue. The court observed that "Miller faces a

difficult challenge to prove that he substantially prevailed in this case. The evidence here indicates that the FEC was preparing a response to [his] FOIA request prior to the initiation of the lawsuit." (*Mark W. Miller v. Federal Elections Commission*, Civil Action No. 1:12-cv-242, U.S. District Court for the Southern District of Ohio, Western Division, Aug. 15)

A federal court in Connecticut has ruled that various components of the Justice Department conducted an **adequate search** for records related to Adrian Peeler's conviction on drug charges and that the agency properly withheld information under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Peeler asked for call information associated with a specific phone number and, while the DEA located Peeler's case file, it could find no information pertaining to the phone number. Some records were eventually disclosed to Peeler and he filed suit. He argued that common sense dictated that there must be more records, particularly since he had responsive records the agency had not located. But the court noted that "plaintiff must assert more than his good-faith belief or 'common sense' notion that more records exist in order to created a genuine factual dispute as to the adequacy of Defendant's search." The court observed that "Defendant's search of its records and databases is, as a matter of law, a reasonably adequate search intended to identify and locate responsive records." The agency had withheld personally-identifying information of third parties. Peeler argued the agency had redacted several data fields from a table of phone calls the disclosure of which would not allow identification. Giving the agency the benefit of the doubt, the court pointed out that "certainly the release of information in the name, address, and phone number columns would result in the identification of third-party individuals involved in the investigation. Furthermore, the Court concludes that even the release of the information at a higher level of generality, such as that found in the 'City' and 'State' columns has the potential to make the identification of the information in the 'Name' and 'Address' columns easier, and therefore threatens the privacy interests of the individuals whose information has been withheld." (*Adrian Peeler v. United States Department of Justice, Drug Enforcement Agency*, Civil Action No. 3:11cv1261 (JBA), U.S. District Court for the District of Connecticut, Aug. 15)

Judge Colleen Kollar-Kotelly has ruled that the NSA properly issued a *Glomar* response neither confirming nor denying the existence of records in response to Glen Carter's request for any information about himself picked up by NSA surveillance. Carter did not argue that much of the agency's information was classified and protected by **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Instead, he contended that since the agency's surveillance swept so broadly it likely had picked up non-exempt data about his activities as a Christian activist in Canada. Kollar-Kotelly noted that "if there were any personal information about Plaintiff in NSA's records, its very existence—without more—reveals classified intelligence information." She added that "NSA establishes that any further response to Plaintiff's FOIA request would result in disclosure of intelligence information which, in light of the NSA's intelligence responsibilities, amounts to the disclosure of the sources of and methods by which its intelligence is collected." (*Glen Carter v. National Security Agency*, Civil Action No. 12-0968 (CKK), U.S. District Court for the District of Columbia, Aug. 26)

A federal court in Georgia has ruled that the FAA conducted an **adequate search** for records related to back pay awarded to air traffic supervisors and managers working at the Atlanta Tower between 2002 and 2004. Both the air traffic and human resources offices were searched and a number of responsive records were located, although some potentially responsive forms had not been retained. Gerald Cunningham argued the agency had not shown that it conducted an adequate search and suggested it had acted in bad faith. The court found that "the searches relating to the Plaintiff's requests were conducted in databases and files reasonably expected to contain relevant records. The searches were also tailored to the content that the

Plaintiff requested, as well as the relevant dates stipulated in his request." Rejecting Cunningham's argument that the search was inadequate because it did not find certain records, the court indicated that "this Court [has previously] rejected the argument that a search is inadequate merely because no records were found." Dismissing the claim that the agency had failed to save SF-52 forms, the court noted that such a failure was "immaterial to the adequacy of the search itself. The fact that the SF-52 forms, if still in existence, would have appeared during an adequate search does not render the search inadequate. . .Further undermining the Plaintiff's argument is that the SF-52 forms were not destroyed following his FOIA request. They were never saved to begin with." (*Gerald Cunningham v. Federal Aviation Administration*, Civil Action No. 1:12-CV-3577-TWT, US.S. District Court for the Northern District of Georgia, Aug. 29)

Judge Ketanji Brown Jackson has ruled that the Secret Service conducted an **adequate search** for records concerning a possible investigation of Abdul Love for counterfeiting. Love was arrested for possession of cocaine by the Waukegan, Illinois police. Convinced that Silas Peppel, an acquaintance, had set him up to mitigate his own punishment for participating in a counterfeiting ring in which Peppel and Love were both implicated, Love uncovered a 2005 report that detailed a Carbondale, Illinois police investigation of a local counterfeiting operation. The report indicated that Peppel had been interviewed and said he wanted to talk to the Secret Service. The police report indicated that Secret Service Agent Paul Foster was contacted, agreed to take over the investigation, and was given a copy of materials related to the police investigation. Love then requested information on the results of that investigation from the Secret Service. The agency searched its Common Index twice but found no records. It also searched its Springfield, Illinois office and contacted Foster. Again, no records were found. Love argued that the search was inadequate because the agency failed to confirm that all records from its defunct Belleville, Illinois office were integrated with those in the Springfield office. But Jackson pointed out that "nothing in the record of this case indicates that the defunct Belleville field office ever maintained any records responsive to Plaintiff's FOIA request, much less that the integration of any such records into the Springfield office's recordkeeping system was mishandled once the Belleville office closed." Love also suggested that the fact that DEA found responsive records indicated that the Secret Service search was inadequate. Jackson noted that "but none of the records that Plaintiff received from DEA references any Secret Service investigation into counterfeiting or otherwise. And it is well established that the existence of records maintained by another agency is not dispositive of either the issue of the adequacy of an agency's search or the question of good faith." (*Abdul Love v. United States Department of Homeland Security*, Civil Action No. 12-1046 (KBJ), U.S. District Court for the District of Columbia, Aug. 16)

A federal court in Oregon has adopted the recommendations of the magistrate judge concerning Jerry Menchu's FOIA/Privacy Act request to the Department of Health and Human Services pertaining to the investigation of the harassment complaint that resulted in his being prohibited from the premises of Legacy Health System, but has agreed to consider the agency's new basis for withholding interview notes under the **Privacy Act**. Menchu was banned from Legacy based on a complaint that he was stalking and harassing another employee. He filed a discrimination complaint with the Office of Civil Rights. OCR interviewed the Legacy employee who made the complaint against Menchu. Menchu ultimately made a FOIA/PA request for the records and the agency disclosed most of them, but withheld the interview notes, claiming they were exempt under subsection (k)(2), the Privacy Act's law enforcement exemption. The agency argued the notes were not accessible to Menchu under the Privacy Act because they were about the other Legacy employee. But the magistrate judge noted that "the Notes were in fact created during an investigation of Menchu and are about him, his conduct and what he is alleged to have done." The magistrate judge found that since Menchu was arguing that he had been denied a federally-protected right the agency was required to disclose the record

unless it could show that the complaining Legacy employee had spoken based on assurances of confidentiality. However, the magistrate judge indicated that "a paragraph found on the front page of the [interview notes] advises that while responses to questions may be released under [FOIA], the Agency generally does not release names or personal information about witnesses. This is clearly not 'an express promise that the identity of the source would be held in confidence. Additionally, the court notes that the source's initials are found in the Agency's letter of decision and that Menchu appears already to know the identity of the Legacy employee. . ." Nevertheless, the district court judge stayed the magistrate judge's decision to allow the agency to argue that the notes could be withheld under subsection (d)(5), which protects access to any information compiled in reasonable anticipation of a civil action or proceeding. The judge noted that "courts have construed this exemption to shelter documents prepared in anticipation of *quasi-judicial* hearings when those hearings are adversarial, include discovery proceedings, and are subject to the rules of evidence." (*Jerry Alexander Menchu v. United States Department of Health and Human Services*, Civil Action No. 3:12-cv-01366-AC, U.S. District Court for the District of Oregon, Aug. 14)

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