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Washington Focus: In a report prepared for the House Committee on Oversight and Government Reform, GAO has found that OGIS has fallen short of its implementation goals. The report noted that "since it was established 4 years ago, the office has not developed a methodology for conducting reviews of agencies' FOIA policies and procedures, or for compliance with FOIA requirements." The report indicated that OGIS had achieved positive results in about two-thirds of its mediation case reviews, but added that "the office lacks quantifiable goals and measures for its mediation activities." In a rather pointed blast, Judicial Watch, which has never been a fan of OGIS, observed that "many Americans may conclude that this agency is a pointless layer in the government FOIA bureaucracy.". . .DOJ spokesman Brian Fallon had a dust-up with USA Today reporter Brad Heath over Heath's FOIA request for information about why the administration didn't look into concerns expressed by Foreign Intelligence Surveillance Court judges about the scope of NSA surveillance activities. Heath questioned why DOJ had not responded to his request. Accusing Heath of bias, Fallon complained that "you are not actually open-minded to the idea of not writing the story" and added that "I prefer to hold on to the information and use it after the fact, with a different outlet that is more objective. . ."

Database of FOIA Briefs Not Protected As Attorney Work Product

Judge Beryl Howell has ruled that a Freedom of Information and Privacy Brief Bank database compiled by an EOUSA attorney and available only on the Justice Department's intranet is not protected by Exemption 5 (privileges) and must be disclosed. In a response to a September 2011 request for the database, EOUSA claimed it was maintained on DOJ's intranet, was only accessible to DOJ personnel, and was created by an EOUSA attorney for use in anticipated FOIA litigation. The database was described as containing selected filings in federal court in FOIA lawsuits; case caption information; a summary of the issues; key issues as identified by the EOUSA attorney; the author of the brief, the date on which is was filed, and the DOJ component in

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which the author of the brief worked; and, for some cases, supporting declarations that formed the factual foundation of the brief. The agency initially denied the database in its entirety under Exemption 5, Exemption 7(C) (invasion of privacy concerning law enforcement records), and Exemption 7(E) (investigative methods and techniques); however, in court the agency relied solely on the attorney work-product privilege.

Howell seemed bothered by the lack of substantive arguments by either party. She noted that "neither party addresses fully the application of the prerequisites for the invocation of Exemption 5 to the requested records, or the extent to which the attorney work product doctrine applies to attorney compilations of records, such as the Brief Bank, as a general aid and not in response to any specific claim."

Howell started with whether the Brief Bank even qualified under the threshold for Exemption 5 coverage. She observed that "briefs filed in federal courts, which are not 'agencies,' are, by definition, communicated outside the agency and, thus, do not meet the first condition of being either inter- or intra-agency memoranda." She noted that "the defendant glosses over this issue and relies on the fact that the Brief Bank 'is only accessible by DOJ personnel as it is maintained on an intranet website' in an effort to shoehorn the Brief Bank into the definition of an 'intra-agency memorandum.' This begs the question of whether the contents of the Brief Bank, no matter where those contents are stored, meet the first condition of Exemption 5." But she pointed out that "before addressing the specific categories of documents that make up the Brief Bank, the Court must first determine if whether the act, by a government attorney, of compiling the Brief Bank is sufficient to protect the entire contents under the work product doctrine and make the defendant's withholding under Exemption 5 proper."

Rejecting the agency's claim, Howell noted that "just as every document prepared by an attorney is not entitled to work product protection, not every compilation by an attorney is protected either." She explained that "when the act of culling, selecting or ordering documents reflects the attorney's opinion as to their relative significance in the preparation of a case or the attorney's legal strategy, then the work product doctrine may appropriately shield their disclosure. On the other hand, compilations that merely reflect information, which is already or may be available to an adversary, or has no implication for the adversary process, are not entitled to protection."

She focused on the level of selectivity employed by the government attorney in compiling the Brief Bank, indicating that "the Court is hindered by the paucity of information provided by the defendant about the level of selectivity." However, she concluded that "what little information that can be gleaned from the defendant's filings indicates that the Brief Bank is a 'resource' for the attorneys at EOUSA." She explained that "a highly selective Brief Bank with few briefs contained in it could hardly function as a 'resource' for the EOUSA FOIA and Privacy Act staff. Rather, to be as useful 'a tool to aide others in' litigating FOIA cases and serve as an effective resource, the Brief Bank would presumably contain briefs in cases from every federal circuit or district and be as comprehensive as possible. At the same time, the larger the collection of cases in the Brief Bank and the more voluminous the number of briefs, the more difficult it would be to show that disclosure of this compilation would reveal any effective information about any legal thought processes or strategies on the part of the defendant." She pointed out that "even if the Brief Bank contained only a few, highly selective briefs, coverage by the work product doctrine would still be a stretch. . .The Brief Bank is a resource to be used to craft pleadings that will be filed in FOIA litigation around the country. . .[T]he briefs and cases in the Brief Bank are, by definition, materials that have already been revealed in the course of FOIA litigation. . ."

Howell noted that "the defendant does not argue that the Brief Bank was compiled for any specific claim or case but [only] that [it] was compiled 'in anticipation of future FOIA litigation.'" She observed that "the 'prospect of litigation' cannot be read over-broadly to be so divorced from any specific legal claim such

that it renders this fundamental criterion for invocation of the work product doctrine meaningless." She added that "the mere inevitability of the defendant's involvement in FOIA litigation, for which the Brief Bank may be a useful tool, does not convert the Brief Bank into protected attorney work-product. The nature of the contents of the Brief Bank, consisting of publicly-filed cases and briefs addressing the myriad issues that have arisen in FOIA litigation, is necessarily general in order to serve as a resource to agency lawyers litigating FOIA cases. This very generalness not only defeats a finding that disclosure would reveal the thought processes of the attorney compiling the Brief Bank, but also defeats a finding that the compilation is sufficiently tethered to any anticipated litigation."

Having found the entire database did not qualify as attorney work product, Howell examined its components, which consisted of court documents and summary documents. Noting that court documents did not qualify as either inter- or intra-agency memoranda, she then focused on the summary documents. She pointed out that "as the defendant describes the summary documents, they merely summarize briefs or cases and key issues identified in them. This description does not suggest that the summary documents reveal any legal strategy or other case-specific legal considerations that might have implications for future litigation if revealed to adversaries." She observed that "the summary documents do not contain 'arguments'—those are presumably contained in the briefs which are already publicly filed. Simply put, the Brief Bank is merely a catalog of publicly available documents with some neutral descriptions of its contents. . ." (*Ryan Shapiro v. United States Department of Justice*, Civil Action 12-1883 (BAH), U.S. District Court for the District of Columbia, Sept. 18)

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 "harmonized" the apparent conflict between the Lanterman Act, which provides broad confidentiality for information about services given to mentally ill and developmentally disabled patients, and the Long-Term Care Act, which provides for public access to citations given to facilities found to have abused such patients, by granting access to more substantive information about violations while still preserving the confidentiality of identifying information about mentally ill and developmentally disabled patients. The Center for Investigative Reporting requested citations from 2002 to the present. The Department of Public Health informed CIR that records were kept for four years and provided citations from 2007 -2011heavily redacted under the confidentiality provisions of the Lanterman Act. CIR filed suit, claiming that the Long-Term Care Act required Public Health to disclose citations in response to a Public Records Act request. The trial court found that the two statutes' conflicting policy goals could not be reconciled and concluded that the Long-Term Care Act's requirement that citations be made public created an exception to the confidentiality provisions of the Lanterman Act. The trial court ordered disclosure of the citations with the names of patients redacted. However, the appeals court decided that the statutes cold be reconciled. It pointed out that a recent amendment to the Welfare and Institutions Code providing private groups advocating for the rights of the mentally ill an exception to the confidentiality provisions of the Lanterman Act indicated that "it is clear the Legislature intends to maintain confidentiality in the Lanterman Act context. Furthermore, if nearly all of this information could have been obtained through a simple PRA request, these statutory enactments and amendments would have been unnecessary." The court found that

rather than redacting virtually all the information in a citation, "the Long-Term Care Act's public accessibility provisions can be harmonized with the Lanterman Act's mental health-based confidentiality provisions, by having the citations describe with particularity, for example, *what* was the harm, *what* was the abuse, *what* was the lack of respect or dignity afforded, and, *what* was the action that the facility did or failed to do. In addition, Public Health must also identify 'the *particular place or area of the facility* in which [the violation] occurred.'" (*State Department of Public Health v. Superior Court of Sacramento County; Center for Investigative Reporting, Real Party in Interest*, No. C072325, California Court of Appeal, Third District, Aug. 18)

District of Columbia

A court of appeals has ruled that the Metropolitan Police Department properly redacted personally identifying information in emails sent to "Chief Concerns," an internal police department email account set up to allow employees to communicate job-related concerns to Police Chief Cathy Lanier, because the public interest had been served by disclosure of the substance of the emails. The Fraternal Order of Police requested the emails, which the department ultimately disclosed with personally identifying information redacted. The trial court ruled that the public interest in knowing what employees were concerned about outweighed the minimal privacy interest. The appeals court, however, reversed. The court noted that "although disclosure of the contents of the emails constitutes only a *de minimis* privacy invasion when the identities are redacted, the privacy interest that would be compromised by linking the personal information to particular, named individuals is greater than *de minimis*." As to the public interest, the court indicated that "the unredacted portions of the documents that have already been released inform the public of the substance and content of the individual officers' concerns. Disclosure of the redacted identifying information would not shed any additional light on the government's conduct." The court rejected FOP's argument that disclosure might show that employees' concerns were treated differently on the basis of rank. The court observed that "the speculative nature of FOP's asserted hypothetical public interest is simply insufficient for us to give it weight as a public interest." The court concluded that "in light of the disclosures already made by the District, there is no relevant, non-speculative public interest to be weighed against [the] threatened invasion [of personal privacy]. Therefore, *any* invasion of privacy threatened by disclosure is 'clearly unwarranted.'" (*District of Columbia v. Fraternal Order of Police, Metropolitan Police Department Labor Committee*, No. 12-CV-85, District of Columbia Court of Appeals, Sept. 12)

Florida

A court of appeals has ruled that an agency cannot be relieved of its responsibilities under the Public Records Act by transferring responsive records to another agency. The case involved a request from Robert Chandler to the City of Sanford Police Department's Volunteer Program Coordinator for an original copy of an email sent by the Coordinator to George Zimmerman, a former neighborhood watch volunteer then on trial for the murder of Trayvon Martin. Since Zimmerman's prosecution had been transferred from the local State Attorney's Office to another State Attorney's Office, the city informed the current prosecutor of the request and received back a PDF file containing a number of emails between the Coordinator and Zimmerman with Zimmerman's email address redacted. When Chandler filed suit, complaining the records were not what he had requested, the City of Sanford told the trial court that its records on Zimmerman had been transferred to the prosecuting State Attorney who, in turn, provided the redacted information. When the City told the trial court that it was uncertain as to whether it still had the original email, the trial court decided the City was no longer a proper party and told Chandler to sue the State Attorney if he was still unsatisfied. Noting the right of access to government records was part of the state constitution, the appeals court pointed out that "the City asserts that it was under an order from the executive branch, specifically the State Attorney, not to produce the original, unredacted email,. However, despite this instruction from the State Attorney, as a matter of law, the

City remained the governmental entity responsible for the public records. While the court is sympathetic that the City was placed between a proverbial 'rock and a hard place,' the City cannot be relieved of its legal responsibility for the public records by transferring the records to another agency." (*Robert Scott Chandler v. City of Sanford*, No. 5D12-3735, Florida Court of Appeal, Fifth District, Sept. 13)

Indiana

A court of appeals has ruled that the disclosure of death certificates containing the cause of death is statutorily limited to parties that either have a direct interest in the death or where the information is necessary for the determination of personal or property rights or compliance with state or federal law and, thus, are not subject to disclosure under the Public Records Act. The *Evansville Courier & Press* requested the certificates from the Vanderburgh County Health Department, which denied the request. Although the Public Access Counselor ultimately concluded that the health department's response was improper, the trial court sided with the health department. Noting that the state registrar was prohibited from routinely disclosing such information, the appeals court pointed out that "the outcome urged by the Courier & Press leads to a curious result: a death certificate request with no showing of direct interest or necessity made to the state registrar would be denied while the same request would be granted by a local health officer. Surely the legislature did not intend such an end run. . ." Nevertheless, the court explained that a local health officer was required to disclose death certificates that contained information about the decedent but did not require the cause of death. Recognizing that "what is being sought in this lawsuit is access to cause of death information," the court observed that "we acknowledge the interest in using cause of death information to identify public health risks perhaps otherwise overlooked by public agencies. Nonetheless, we are not at liberty to ignore the legislature's intent as demonstrated through its statutes." (*Evansville Courier & Press and Rita Ward v. Vanderburgh County Health Department*, No. 82A04-1302-PL-57, Indiana Court of Appeals, Aug. 30)

Kentucky

The supreme court has ruled that the City of Fort Thomas must provide more justification for withholdings its entire file on the investigation of the murder of Robert McCafferty by his wife Cheryl under the law enforcement files exemption. Although Cheryl McCafferty waived her right to appeal her conviction, the court agreed with Fort Thomas that even the possibility of a collateral challenge to her conviction provided a sufficient basis for concluding that the file was still open. But although the Attorney General and the trial court had accepted the City's claim that because the case was still open the entire file was exempt, the supreme court agreed with the appellate court that the law enforcement files exemption required the City to justify such a blanket exemption claim. The court noted that "the law enforcement exemption does not create a blanket exclusion for all law enforcement records pertinent to a prospective law enforcement action. Such records are exempt from the Act, rather, only if their disclosure would harm or interfere with a prospective enforcement action in some significant and concrete way. . .[T]he agency must articulate a factual basis for applying it to particular records or particular classes of records, and any non-exempt records should be disclosed." The City's argument relied heavily on an earlier supreme court decision, *Skaggs v. Redford*, where the court upheld a blanket exemption that specifically applied to prosecutors' files. The court explained that "the *Skaggs* Court had before it only such prosecutorial files and it should not be understood as implying anything about other sorts of law enforcement records." Finding that the Cincinnati *Enquirer* was not entitled to attorney's fees, the court observed that "the City's position, while rejected in this Opinion, was by no means an indefensible one." (*City of Fort Thomas v. Cincinnati Enquirer*, No. 2011-WC-000725-DG, Kentucky Supreme Court, Aug. 29)

A court of appeals has ruled that the City of Owensboro acted in bad faith when it told both reporter James Mayse and the Attorney General that it had no records pertaining to a complaint against police officer

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Marian Cosgrove that initiated an investigation of her behavior and ended in her resignation. After the City consistently told Mayse it had no complaint records pertaining to Cosgrove, he appealed to the Attorney General. The AG required the City to provide records for an *in camera* review and questioned why certain forms in the file did not constitute a complaint. The City explained that Cosgrove's investigation was the result not of a citizen complaint, but an initiating document filed by a police officer. The AG found the initiating document was required to be disclosed now that the investigation was closed. The City then brought suit to challenge the AG's order. The trial court ruled against the City and found its actions were "willfully defiant" and done in "bad faith." After filing an appeal, the City disclosed the disputed documents and argued that any issue concerning their status was moot. The appeals court agreed, limiting the appeal to whether Mayse should receive attorney's fees. To receive attorney's fees, Mayse needed to show that the City acted in bad faith. The appeals court indicated that "in essence, the City repeatedly made false denials of the existence of any complaints regarding Cosgrove. This action exemplifies 'willfulness.'" (*City of Owensboro v. James Mayse*, No. 2012-CA-001829-MR, Kentucky Court of Appeals, Aug. 30)

A court of appeals has ruled that the Department of Revenue must allow Timothy Eifler to inspect records showing the number of taxpayers registered to pay the Utility License Tax. The Department claimed that tax information was confidential, but in response to Eifler's complaint, the Attorney General concluded the Department could provide the information in redacted form. The trial court agreed and the Department appealed. The appeals court noted that under the Open Records Act "when a public record contains information that is both exempted and non-exempted from disclosure, it is required to separate the material but make it available for examination." The court added that "in this case, the redaction of private information on the tax returns could be accomplished as well. We agree with the [trial] court that the Department's interpretation of [the tax return exemption] is overbroad. The courts continue to favor openness of records and the ability to redact private information which is exempt under the statute. We agree with the [Attorney General] and the [trial] court that the records sought by Eifler are not exempt under the ORA." (*Department of Revenue v. Timothy J. Eifler*, No. 2012-CA-000302-MR, Kentucky Court of Appeals, Sept. 20)

Texas

A court of appeals has ruled that a requester cannot go to court to challenge an agency's position until the Attorney General has issued a decision in response to the agency's query about the legality of its position. The case involved a request by Randall Kallinen and Paul Kubosh for information concerning a study of traffic light cameras commissioned by the City of Houston. The City released some documents and withheld others. It also requested a decision from the Attorney General regarding the applicability of the exemptions it was claiming. Before the AG issued a decision, Kallinen and Kubosh filed suit, arguing that the court had jurisdiction to hear their challenge to the City. The trial court ruled in favor of Kallinen and Kubosh and awarded attorney's fees. After the trial court rejected the City's claim that it did not have jurisdiction to hear the case, the City appealed. The appeals court agreed that once an AG's decision was requested the AG's response was a condition for court jurisdiction. The appeals court noted that "it is illogical to presume that information is public while its very status is being challenged." The court added that "not only does the statute clearly provide *when* a mandamus suit may be filed, but it is equally clear that the Attorney General must render a decision on the nature of the information in question. Pointing out that the AG had previously found that its response was mandated, the court concluded that "although district courts have subject matter jurisdiction under the [Texas Public Information Act], that jurisdiction only arises after the Attorney General has ruled." (*City of Houston v. Randall Kallinen and Paul Kubosh*, No. 01-12-00050-CV, Texas Court of Appeals, Houston, Aug. 29)

A court of appeals has ruled that an investigation report conducted by Dallas Areas Rapid Transit in response to a racial discrimination complaint filed by a DART employee against two other DART employees

is core information that must be disclosed without redaction. DART, arguing the report was exempt under common law concepts of privacy, anti-retaliation statutes, and the informer's privilege, asked the Attorney General to allow it to withhold the report. The Attorney General found that it qualified as core information that was required to be disclosed unless confidential under another state or federal law ordered DART to disclose the report. Instead, DART filed suit. The trial court agreed with the AG, but allowed names and identifiers to be redacted. Both DART and the AG then appealed. The appeals court rejected DART's arguments. Ruling on whether common law privacy protected the report, the court noted that "the investigation report contains only information regarding what public employees observed while at their public place of employment during work hours. In other words, not only is the information not about the interviewees themselves, it is not the type of information that is intimate or highly embarrassing." While the court explained that anti-retaliation statutes protected individuals who made workplace complaints, "these provisions do not expressly, or even implicitly for that matter, make the information surrounding the investigation confidential." As to the informer's privilege, the court pointed out that because the investigation was not conducted by an office with law enforcement authority, the privilege did not apply." The court agreed with the AG that the entire report was required to be disclosed and ordered it disclosed without redactions. (*Greg Abbott v. Dallas Area Rapid Transit*, No. 03-11-00630-CV, Texas Court of Appeals, Austin, Aug. 30)

A court of appeals has ruled that rate-filing information submitted by insurance companies to the Texas Department of Insurance is public under the Insurance Code and must be disclosed regardless of whether it might qualify as a trade secret for purposes of the Public Information Act. When TDI received four requests for rate-making information submitted by insurers, it notified the insurers and sought an opinion on the disclosability of the information from the Attorney General. The AG concluded that because the Insurance Code specifically made the information public the TDI could not withhold it under any PIA exemptions. The court agreed, noting that "[the Insurance Code provision] does not refer to the PIA or incorporate any of its procedures or exceptions. It does not describe any exceptions, nor suggest that there are any. And it does not contemplate any intermediate process between the filing of the rate information and the rate filing being open to public inspection. In fact, by specifically requiring that rate filings be '*open* to public inspection,' as opposed to the PIA's requirement that public information be '*available* to the public,' the text of [the Insurance Code provision] suggests that the access to the rate-filing information is unrestricted." Rejecting the notion that disclosure was contrary to PIA exemptions, the court observed that "nothing in the text of the PIA exceptions provides or authorizes withholding or limiting access to public information where the claimed right of access is based on a law other than the PIA." Dismissing both statutory and constitutional arguments made by the insurers, the court observed that "we must conclude that Appellee Insurers' arguments would ultimately require this Court to go against the applicable statute and infer that the Legislature did not mean to make rate-filings open to public inspection as of the date of filing, but instead meant to limit the rate-filings' disclosure depending on any available PIA exceptions, despite clear statutory language allowing for open public inspection." (*Attorney General of Texas v. Farmers Insurance Exchange*, No. 03-11-00179-CV, Texas Court of Appeals, Austin, Aug. 29)

Washington

A court of appeals has ruled that the City of Lakewood violated the Public Records Act by failing to provide David Koenig the statutorily required brief explanation for its reasons for withholding individual driver license numbers from records Koenig had requested pertaining to several local accidents. The court pointed out that "the PRA's brief explanation requirement provides that an agency response to a PRA request 'include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.'" The court indicated that "the City did no more than identify the information that was withheld and cite the statutes that it believed exempted the

information." The court held that "the City failed to comply with the brief explanation requirement and Koenig prevails on this issue. Under [the PRA], Koenig was entitled to costs and attorney fees when the City violated the brief explanation requirement. . .Accordingly, Koenig is entitled to an award of attorney fees, including fees on appeal. . ." (*City of Lakewood v. David Koenig*, No. 42972-1-II, Washington Court of Appeals, Division 2, Sept. 4)

The Federal Courts…

After showing considerable sympathy to her case, Judge Rudolph Contreras has ruled that Blythe Taplin, an attorney for the Capital Appeals Project representing death row inmate Rogers Lacaze, failed to provide sufficient evidence to show that the FBI had records on Adam Frank that would corroborate Taplin's theory that Frank committed the murders for which Lacaze was convicted. Lacaze came to the Kim Anh Vietnamese Restaurant in New Orleans with New Orleans Police Officer Antoinette Frank, who often worked an off-duty security detail at the family-owned restaurant. A shoot-out at the restaurant resulted in the death of New Orleans Police Officer Ronald Williams, who was also on security detail at the restaurant, and two family members who worked at the restaurant. Two other family members hid and survived the attack. Lacaze and Antoinette Frank were charged with murder, but tried separately. The survivors identified Lacaze at trial and prosecutors introduced other circumstantial evidence. Lacaze testified that while he went to the restaurant with Frank, she later dropped him off at his girlfriend's apartment and he played pool with his brother at a local pool hall until the early morning. However, the manager of the pool hall testified that while Lacaze's brother was there, Lacaze was not. The defense suggested that Antoinette Frank's brother, Adam, was the real murderer. Lacaze was convicted and sentenced to death. Based on evidence from local law enforcement that Adam Frank was wanted by the FBI, Taplin requested any FBI records related to Frank. The agency issued a *Glomar* response, neither confirming nor denying the existence of records on Frank. Contreras noted that "if the FBI did in fact investigate Mr. Frank in relation to the Kim Anh murders, then under the general rule he is presumed to have a substantial interest in ensuring that the FBI keeps the fact of his investigation a secret." Pointing to Frank's acknowledged criminal record, including a current 65-year sentence for armed robbery, Contreras indicated that "these facts weaken the rationales supporting Mr. Frank's privacy interest in non-disclosure. . .In fact, given that Mr. Frank is, apparently, such a dangerous individual, members of the public might be surprised if the FBI did *not* have documents about him." He explained that "if it was publicly known that the New Orleans field office sought Mr. Frank, it follows that no added stigma would accrue in confirming that this FBI interest resulted in the creation of documents. While it is the law of this circuit that another agency's disclosure cannot altogether preclude the FBI from asserting a *Glomar* response, the rule does not speak to the much narrower issue of whether such a disclosure can diminish a third party's privacy interest for purposes of Exemption 7(C)." Contreras acknowledged that a prisoner's personal interest in obtaining exculpatory information did not qualify as a public interest, but he pointed out that the D.C. Circuit, in *Roth v. Dept of Justice*, 642 F.3d 1161 (D.C. Cir. 2011), had found a public interest in disclosure of potentially relevant information in death row cases. He observed that "in light of the public's general interest in the exoneration of individuals who have been sentenced to the 'ultimate punishment,' the public interest in Mr. Lacaze's potential innocence may outweigh Mr. Frank's diminished privacy interest in the non-disclosure of FBI documents that could link him to the Kim Anh murders." Having come so far, however, Contreras concluded that Taplin had not provided sufficient evidence to show a link. He noted that "Ms. Taplin must also show that a reasonable person could believe that the FBI is withholding evidence that corroborates her theory. Ms. Taplin does not provide any evidence, or even allegations, that meet this burden. While the complaint points to documents suggesting that the FBI has *some* files on Adam Frank, it does not show that the agency is likely to have any that link him to the Kim Anh murders." (*Blythe Taplin v. U.S. Department of Justice*, Civil Action No. 12-1815 (RC), U.S. District Court for the District of Columbia, Sept. 10)

Judge Robert Wilkins has ruled that the Department of Housing and Urban Development properly withheld records under **Exemption 5 (deliberative process privilege)**, but that the agency failed to conduct an **adequate search** because it did not follow up on leads within responsive documents supporting claims made by the Neighborhood Assistance Corporation of America that the email accounts of both HUD Secretary Shaun Donovan and Chief of Staff Laurel Blatchford contained further responsive records. NACA requested records related to HUD's performance review of NACA, as well as a separate audit of NACA conducted by HUD's Inspector General. The agency withheld 21 documents under Exemption 5. Although NACA did not challenge the agency's claim that the documents were deliberative, it argued instead that because the agency's reviews were politically motivated the governmental misconduct exception applied. Reviewing the sparse D.C. Circuit case law on the exception, Wilkins noted that "to preclude application of the deliberative process privilege in the FOIA context, the claimed governmental misconduct must be severe enough to qualify as nefarious or extreme government wrongdoing." NACA first argued that the IG report was prompted by congressional pressure in response to the organization's lobbying efforts. But Wilkins observed that "to the extent HUD-OIG's audit was prompted or accelerated by [various] legitimate complaints and inquiries from Congress, this hardly amounts to the sort of improper, politically-motivated action that NACA makes it out to be." NACA also contended that HUD improperly influenced the IG's report. NACA relied on the fact that the final audit report differed substantially from the draft report. Wilkins indicated that "the disconnect in NACA's argument is that there is no evidence showing that these changes were the result of anything other than permissible cooperation between HUD and HUD-OIG in finalizing the audit report. That is, while HUD officials may have brought new information and concerns to the attention of HUD-OIG following their review of the draft audit report, so long as the OIG auditors then reviewed those issues independently and made their own determinations and findings, no misconduct can have occurred." As to the adequacy of the agency's search, NACA argued that HUD had improperly limited its search concerning the performance review to the Office of Housing's Single Family Program Support Division, which had been responsible for conducting the review. Wilkins pointed out that "assuming this approach was proper initially, it does not follow that, during the course of its review, HUD could then ignore indications that responsive documents were likely to be located elsewhere." He explained that "upon learning that Secretary Donovan was personally involved with the decision to withhold NACA's grant based on HUD's ongoing performance review, HUD should have pursued that lead by searching the Secretary's email messages for other responsive records related to HUD's performance review of NACA." He added that "since Ms. Blatchford appears to have directly reviewed and approved the Department's response concerning NACA's performance review, it seems likely that she might possess additional records responsive to NACA's request." He noted that "it may be that HUD's search of these sources yields no additional records, but until HUD pursues these leads, the Court cannot say that an adequate search has occurred." (*Neighborhood Assistance Corporation of America v. United States Department of Housing and Urban Development*, Civil Action No. 11-cv-1175 (RLW), U.S. District Court for the District of Columbia, Sept. 24)

Ruling based on a sampling of documents pertaining to the prolonged detention of potentially illegal immigrants, a federal court in New York has held that ICE failed to show that either **Exemption 5 (privileges)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, or **Exemption 7(E) (investigative methods and techniques)** applies to the documents. The ACLU had already come to a stipulated agreement with ICE concerning the scope of the records and all that remained was to determine if any of the records were properly exempt. ICE acknowledged that its small number of Exemption 5 claims did not apply to any of the sampling records but was meant to suggest the kinds of privileged information that might be present in the larger universe of records. Judge Richard Berman noted that "therefore, the issue is

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not ripe for adjudication." He added that "plaintiff appears to present a persuasive case that the redacted information does not qualify for the deliberative process privilege exemption because it is 'part of the agency's routine operating decisions and. . .*not* communications relating to policy formulation.'" Because the ACLU indicated that it was not seeking any personally identifying information, the agency focused its Exemption 7(C) arguments on the possibility that too much information about an individual could lead to that person's identification. Berman pointed out that "Defendants' 'mosaic theory,' i.e. that the information sought by the ACLU 'is so collectively unique that even without a name or alien number, it is still a personally identifying characteristic,' is, in this case at least, unpersuasive." Besides, Berman explained, the public interest in disclosure outweighed any individual privacy concerns. He observed that "production of the disputed information to Plaintiffs is clearly in the public interest and will enable the ACLU to shed further light on ICE's detainee practices and procedures (and strengths and inadequacies) and would appear to far outweigh any potentially implicated privacy interest." He rejected ICE's Exemption 7(E) claims as well. He noted that "release of factual information concerning a (non-identified) detainee's criminal record, which is often publicly available, would not compromise ICE's ability to conduct (further) investigations and does not implicate 'techniques and procedures.'" (*American Civil Liberties Union v. U.S. Department of Homeland Security*, Civil Action No. 11-3786 (RMB), U.S. District Court for the Southern District of New York, Sept. 9)

Judge Amy Berman Jackson has ruled that PEER has **standing** to contest the denial of a **fee waiver** by the National Marine Fisheries Service for a request made on behalf of Jonathan Lee Combs concerning his termination as a contractor under the agency's Fisheries Observer program, but that the organization failed to show that disclosure of the information would shed light on government operations or activities. PEER submitted a request for all records on Combs, indicating that it was making the request on behalf of Combs, and attaching an authorization from Combs to disclose his records. PEER asked for a fee waiver and explained that disclosure of the records would shed light on how NMFS ran its fishery observer program. NMFS denied the fee waiver and reaffirmed its decision on appeal. PEER then filed suit. NMFS argued for the first time in court that Combs was the official requester and that PEER did not have standing to argue for a fee waiver. Jackson rejected the claim, noting that "NMFS's apparent understanding that PEER was the FOIA requester at all times until PEER filed this lawsuit undercuts its assertion now that Combs is actually the FOIA requester." NMFS argued that because the information pertained to Combs he was the real party in interest. However, Jackson noted that "while the Court agrees with the legal proposition that the requesting party is the individual named in the request, it does not agree with NMFS's application of this proposition. The plain language here. . .plainly indicates that PEER is the real party-in-interest. The fact that the requested information pertains to a third-party individual does not deprive the requesting party of standing to challenge the agency action." Turning to the four factors used to assess entitlement to a fee waiver, Jackson indicated that PEER was barely able to show that the records concerned the operations of government and that it had the ability to disseminate the information. She observed that "here, PEER requests routine agency communications about a single individual in the observer program and does not articulate exactly how these communication relate to general agency operations or the observer program as a whole." But she found that PEER had failed to show the informative value of the records or how their disclosure would contribute to public understanding of the government. PEER argued that the records might show misconduct, but Jackson dismissed that claim, pointing out that "the documents PEER requested do not concern misconduct. Thus, even if the Court were to assume that NMFS is guilty of all the legal and ethical violations that PEER and Combs allege, the requested documents are still not likely to increase public understanding about the functions of the government. At the very most, the documents would shed light only on a personnel issue concerning one individual." (*Public Employees for Environmental Responsibility v. U.S. Department of Commerce*, Civil Action No. 12-1293 (ABJ), U.S. District Court for the District of Columbia, Sept. 11)

A federal court in New York has ruled that the Defense Department and the FBI properly withheld all video and photographic images of Mohammed al-Qahtani, widely believed to be the intended 20th hijacker on

9/11, who was captured by Pakistani forces in December 2001 and has been incarcerated at the U.S. facility at Guantanamo Bay ever since, under **Exemption 1 (national security)**. The FOIA suit was filed by the Center for Constitutional Rights, which, along with others, represents al-Qahtani in a *habeas corpus* action in district court in Washington. In that role, CCR was privy to non-public information and filed the FOIA suit to force the government to make images of al-Qahtani public. Although the *New York Times* had published a photo of al-Qahtani, no official government disclosure has ever been made of his image. The Defense Department's affidavits argued that disclosure of al-Qahtani's image would allow terrorists to use and manipulate the image for propaganda purposes, would discourage any level of cooperation on the part of detainees, and could be used as a method of communication between terrorists. The court agreed, noting that "we find it both logical and plausible that extremists would utilize images of al-Qahtani to incite anti-American sentiment, to raise funds, and/or to recruit other loyalists. . ." and to "compromise the Government's cooperative relationships with other Guantanamo detainees." CCR argued this was unlikely given the large amount of information that was already public about al-Qahtani. But the court indicated that "the Government's release of *written* information concerning al-Qahtani does not diminish its explanations for withholding *images* of al-Qahtani. To the contrary, the written record of torture may make it all the more likely that enemy forces would use al-Qahtani's image against the United States' interests." In its response to CCR, the CIA had invoked a *Glomar* response neither confirming nor denying the existence of records. CCR argued again that the CIA's involvement with al-Qahtani's detention was public. But the court observed that "the referenced statements cannot satisfy the 'strict test' for official disclosure because they were not made by the CIA itself." (*Center for Constitutional Rights v. Department of Defense, et al.*, Civil Action No. 12-135 (NRB), U.S. District Court for the Southern District of New York, Sept. 12)

Judge Emmet Sullivan has declined to reconsider his ruling that disclosure of program-by-program information, which pertains to job assignments of volunteers within a country, from a survey of Peace Corps volunteers is protected by **Exemption 6 (invasion of privacy)** while country-by-country information is not. Charles Ludlam argued that Sullivan's previous ruling had improperly decided an issue outside the scope of the litigation. Sullivan disagreed, noting that he previously found that "defendant met its burden for invoking Exemption 6 by demonstrating that an individual's privacy interest was implicated in *both* country-by-country and program-by-program survey results. Thus, the burden shifted to plaintiff to show that there is a significant public interest in the disclosure of *both* types of requested data. For country-by-country results, the Court credited the arguments and support presented by the plaintiff and found that the public interest in information about the performance of the Peace Corps staff outweighed the privacy interests that are implicated. However, the Court concluded that plaintiff failed to demonstrate a substantial public interest in program-by-program results to warrant disclosure. If breakdown of survey results at the country-by-country level presents a substantial likelihood that concrete facts about a particular individual could be inferred, as the Court previously found, it follows that the breakdown at the program-by-program level within a particular country presents even more risk of invading personal privacy." (*Charles Ludlam v. United States Peace Corps*, Civil Action No. 11-1570 (EGS), U.S. District Court for the District of Columbia, Sept. 19)

Judge Royce Lamberth has become the second district court judge in the D.C. Circuit to conclude that the D.C. Circuit's decision in *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), allows a requester to go to court after the agency misses either of its 20-day statutory time limits, even if the agency responds to the requester before he or she files suit. Roger Waldner requested records concerning two companies that were related to a criminal case in which Waldner accepted a plea agreement. EOUSA responded to his first request four months later and his second request one year after that. Concluding that an administrative appeal would be futile, Waldner filed suit instead. The agency argued that he failed to **exhaust his administrative remedies**

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before filing suit. Lamberth disagreed. He noted that "had the government sent its response letters to Waldner's June 27, 2011 and June 28, 2011 requests prior to August 17, 2011 and August 19, 2011—within 20 days after the receipt of the requests—the government would have foreclosed constructive exhaustion and triggered the requirement that Waldner file an administrative appeal before proceeding to federal court. That did not happen here, and as such, the Court considers Waldner to have constructively exhausted administrative remedies under FOIA." Lamberth then turned to Waldner's contention that the agency's **search** was inadequate because it should have turned up more documents. Finding the search was thorough, Lamberth indicated that "Waldner even conceded that the government conducted its search using appropriate methods and in a manner reasonably calculated to produce the information he requested. This ends the inquiry. Whether Waldner believed the government had more documents or the exact documents he requested based on conversations leading to his plea agreement is not the standard by which to determine whether the government has satisfied its FOIA obligations. (*Roger Waldner v. United States Department of Justice*, Civil Action No. 1:13-00032 (RCL), U.S. District Court for the District of Columbia, Sept. 23)

A federal court in Massachusetts has ruled that the CIA conducted an **adequate search** for records concerning its video reconstructing the crash of TWA Flight 800 and that it properly withheld records under **Exemption 5 (deliberative process privilege)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. As part of the investigation of the crash of TWA Flight 800, the CIA was tasked with assessing eyewitness testimony suggesting that the plane was hit by a missile and explaining why the crash could have appeared that way from the ground. The CIA produced a video called 'TWA Flight 800: What Did Eyewitnesses See?" that aired on CNN explaining how two internal explosions to the plane could have been perceived as something externally hitting the plane. Thomas Stalcup, who believed the investigation was a government cover-up, requested documents related to the CIA's analysis, including interviews with eyewitnesses. Stalcup argued that the agency could not invoke Exemption 5 because of the governmental misconduct exception. While the court did not rule on the application of a governmental misconduct exception to FOIA, he rejected Stalcup's claims by noting that "he asserts that the CIA, in concert with the NTSB and the FBI, perpetrated a fraud on the public by conducting an inaccurate and untruthful investigation concerning the cause of the crash. . .He has not, however, provided any basis for his assertion that the specific documents at issue would shed light on the alleged governmental misconduct. . .Both documents significantly post-date the point at which plaintiff contends a decision was made to mislead the public by preparing the allegedly erroneous video. . ." Stalcup contended that there was no privacy interest in the names of eyewitnesses because such information was routinely disclosed in police reports. The court indicated that the privacy of eyewitnesses "is not conditioned on any promise or expectation of confidentiality." The court rejected Stalcup's claim that disclosure of the names of the eyewitnesses was in the public interest. The court observed that "Plaintiff already has access to the content of the eyewitness reports that actually describe the substance of what the eyewitnesses saw. The only way the release of the names of the eyewitnesses could further advance the public interest of letting citizens 'know what their government is up to' is if those eyewitnesses were contacted and asked to make further statements. Such contact is the exact invasion of privacy against which Exemption 7(C) is intended to protect. As such, it cannot justify the release of the information." (*Thomas Stalcup v. Central Intelligence Agency*, Civil Action No. 11-11250-FDS, U.S. District Court for the District of Massachusetts, Sept. 5)

In a case that shows how crucial it is for plaintiffs to consider who is the named party at both the request and litigation stage, Judge Royce Lamberth has rejected the International Boundary and Water Commission's claim that PEER is not entitled to $40,000 in **attorney's fees** because $32,000 of the requested attorney's fees were attributable to Robert McCarthy, a former IBWC attorney who PEER defended in a whistleblower case against the agency. IBWC argued that McCarthy was essentially acting as a pro se attorney. But Lamberth,

recognizing the legal impact of labels, pointed out that "it is only the party-in-interest—in other words, the party in whose name the action was brought by or against—that concerns the court; no one else is considered a *pro se* litigant for attorneys'-fees purposes. Further, an organization cannot be a *pro se* litigant because it is always represented by counsel, be it in-house or other." Lamberth indicated that "here, McCarthy was *not* the party-in-interest, and IBWC cannot foist the *pro se* exception to attorney's fees upon him just because he may have had an 'interest.'" He pointed out that "even if we assume that McCarthy was interested in the underlying litigation and therefore not completely detached, this Court will not analyze levels of detachment to determine the applicability of the *pro se* exception. If it did, other people for whose work attorneys' fees might not attach include parents, friends, or, frankly, anyone who cares deeply about the issues being litigated." (*Public Employees for Environmental Responsibility v. United States International Boundary and Water Commission*, Civil Action No. 10-00019 RCL, U.S. District Court for the District of Columbia, Sept. 11)

In dismissing Michael Worsham's attack on the constitutionality of the income tax, a federal court in Maryland has ruled that **Exemption 5 (deliberative process privilege)** does not apply to drafts written by IRS staff in updating "The Truth About Frivolous Tax Arguments," an IRS document published on its website, because it is not a policy document but a largely factual recitation. Worsham requested information about how the publication was put together and sued when the agency failed to respond. The agency located 215 pages of responsive records and withheld 104 pages entirely under Exemption 5. The IRS argued that the withheld documents were predecisional because they were drafted in preparation of the final version of The Truth for posting on the agency's website and that they were deliberative because they were prepared by junior officials for the Associate Chief Counsel for Procedure and Administration who was authorized to approve the final version. Judge Ellen Lipton Hollander observed that "The Truth is akin to a 'frequently asked questions' document. It presents to the public the IRS's established position, and the established position of the courts, as stated in judicial decisions compiled by the IRS, regarding various commonly recurring legal arguments against the validity of the income tax." She noted that the IRS's argument that The Truth was a policy document because it helped educate the public "would prove too much." Hollander added that "if 'education of the public' regarding an agency's established policy was recognized as a basis for the deliberative process privilege, any draft of *any* document prepared for public consumption, even an entirely postdecisional document, would be subject to the privilege." But Hollander indicated that "I cannot conclude that all of the redacted material generated in the drafting and revision of The Truth is unprotected by the deliberative process privilege because, without review, the possibility cannot be foreclosed that communications made in the course of drafting and revising The Truth could reveal agency policymaking processes." As a result, she ordered the IRS to submit the withheld records for *in camera* review. (*Michael C. Worsham v. U.S. Department of the Treasury*, Civil Action No. ELH-12-2635, U. S. District Court for the District of Maryland, Sept. 17)

A federal court in Florida has ruled that the TSA properly invoked **Exemption 3 (other statutes)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** to withhold records of an incident that occurred at Fort Lauderdale-Hollywood International Airport when Jonathan Corbett refused to submit to a body-scanner and a manual pat-down search. As a result, he was not allowed to board his flight. Corbett requested information concerning the incident from both TSA and the Broward County Aviation Department. TSA withheld information about the body-scanner under 49 U.S.C. § 1149(r), which requires the agency to withhold information classified as sensitive security information, and identifying information about TSA employees and responding law enforcement officers under Exemption 6 and Exemption 7(C). Broward deferred to TSA and told Corbett that it had no disclosable

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records. Corbett then sued. The court noted that "courts have unanimously concluded that Section 114(r) qualifies as a withholding statute for purposes of FOIA Exemption 3" and pointed out that "courts have further found that district courts have no authority to review the actual substance of SSI designations, as the jurisdiction to do so lies exclusively within the Court of Appeals." The court then explained that "the material withheld, as described by the TSA, falls within the scope of Section 114(r), as its disclosure would be 'detrimental to the security of transportation.' Based on that limited scope of review, the Court finds that the TSA's SSI redactions were not improper." The court agreed that disclosure of identifying information about law enforcement officers would constitute an invasion of privacy. The court observed that "the TSA justifiably redacted pursuant to Exemption 6 the names and faces of TSA employees and responding law enforcement officers involved in the security confrontation. The Court agrees that the employees and officers have a privacy interest in their personal identifying information, in particular because disclosure of that information could subject them to unnecessary harassment or stigmatization in connection with this matter." As to whether Broward County had violated the Florida Public Records Act, the court indicated that "Broward acted pursuant to federal regulations and [its agreement with TSA] when it consulted the TSA regarding Plaintiff's records request, and it acted at the direction of the TSA in denying the existence of surveillance footage. The Court therefore has difficulty in concluding that Broward's actions could be unlawful under the FPRA." (*Jonathan Corbett v. Transportation Security Administration*, Civil Action No. 12-20863-CV-LENARD/O'SULLIVAN, U.S. District Court for the Southern District of Florida, Sept. 3)

After previously finding that the DEA improperly invoked a *Glomar* response neither confirming nor denying the existence of records on an alleged DEA informant who testified at Jeffrey North's trial, Judge Colleen Kollar-Kotelly has resolved the issue by finding that the agency conducted an **adequate search** for records of any contact with the informant in regard to North. Kollar-Kotelly noted that the agency's affidavit "explained [that the informant's] statements, if they existed, would appear in relevant investigative files and [the informant's] confidential source file. All investigative files are maintained in the [Investigative Reporting and Filing System] and indexed by [the Narcotics and Dangerous Drugs Information System]. The DEA searched NADDIS for the Plaintiff's name and [the informant's] name. None of the investigative files located during these searches indicated the Plaintiff and [the informant] were criminal associates. The affiant personally reviewed [the informant's] confidential source file, and did not locate any responsive documents. The DEA's search was reasonably calculated to uncover all relevant documents, thus satisfying the agency's obligations under the Freedom of Information Act." (*Jeffrey North v. United States Department of Justice*, Civil Action No. 08-1439 (CKK), U.S. District Court for the District of Columbia, Sept. 9)

Judge Richard Leon has ruled that the Department of the Navy properly redacted information from ten email chains concerning the burial of Osama bin Laden at sea under **Exemption 1 (national security)**. Judicial Watch argued the information did not qualify for classification. Leon disagreed, noting that "the information redacted from [the documents] includes sensitive information about timing, personnel, procedures, and protocols. As such, disclosure could harm our national security by compromising military operational secrets that could be used to thwart future operations. There is also plausible reason to believe that disclosing the redacted information could harm our national security by inciting al-Qai'da members to retaliate against United States citizens and interests. In the past, al-Qai'da has attempted to recruit and incite violence by claiming that Osama bin Laden, its former leader and founder, did not receive an appropriate Islamic burial. Reasonably analogous disclosures, including an erroneous report by *Newsweek* that American soldiers had desecrated the Koran, have led to widespread violence and anti-American protests in the Middle East." Leon also found that the agency could withhold headings on the ten responsive documents that were added during processing of the request. He noted that "because these headings post-date the Navy's search for documents in response to plaintiff's FOIA request, they are by definition non-responsive." He added that "the headings are

protected under the attorney work-product privilege of FOIA Exemption 5. . ." (*Judicial Watch, Inc. v. Department of the Navy*, Civil Action No. 12-1182 (RJL), U.S. District Court for the District of Columbia, Sept. 19)

Judge Reggie Walton has ruled that EOUSA conducted an **adequate search** for records pertaining to DNA evidence used at Darryl Davis' trial on federal charges in Tennessee. EOUSA released a number of records and referred other records to the FBI, which released them with redactions. Davis argued that the EOUSA documents referred to a subpoena for the collection of DNA evidence but that the agency had failed to provide him with a copy. Dismissing Davis' allegations, Walton noted that "even though the EOUSA has located a document which refers to additional materials of interest to the plaintiff, neither the EOUSA nor the FBI is obligated to search for them. No agency is 'obligated to look beyond the four corners of the request for leads to the location of responsive documents.' Nor does the FOIA require an agency to retrieve documents which previously may have been in its possession. In any event, in this case the FBI is not obligated to conduct a search at all. The plaintiff submitted his FOIA request to the EOUSA, and the FBI's obligation is limited to the processing of the documents referred to it by the EOUSA." (*Darryl Lamont Davis v. United States Department of Justice*, Civil Action No. 12-1076 (RBW), U.S. District Court for the District of Columbia, Sept. 19)

The Eleventh Circuit has declined to extend what is known as the prison mailbox rule—appeals filed by prisoners are considered received when given to prison authorities rather than when received by the clerk of the court—to FOIA appeals. Prisoner Mario Bonilla argued that he had **exhausted his administrative remedies** by providing his FOIA appeal to prison authorities within the 60-day time limit for appealing to the Justice Department's Office of Information Policy. But the court found that Bonilla had not been able to show that the appeal had been received by OIP within the time limit and declined to extend the prison mailbox rule under the circumstances. The court noted that "prison authorities were not a party to the lawsuit and Bonilla was the only person in a position to provide information concerning the date that he gave his appeal letter to prison authorities. Because he did not even assert in the district court the date when he gave his letter to prison officials, the prison mailbox rule—even if applicable—would not have availed him." (*Mario Simbaqueba Bonilla v. U.S. Department of Justice*, No. 12-14700, U.S. Court of Appeals for the Tenth Circuit, Sept. 11)

A federal court in Louisiana has ruled that U.S. Citizenship and Immigration Services has so far failed to justify its invocation of **Exemption 5 (deliberative process privilege)**. Rafael DaSilva requested his Alien File along with email correspondence from the three staffers concerning him. USCIS produced 1, 300 pages. After DaSilva filed suit, the agency admitted that it had overlooked the request for emails and produced more than another 1,000 pages. DaSilva challenged a number of the redactions made under Exemption 5, arguing that "the *Vaughn* index is insufficient because it states these documents are 'somehow *both* an 'intra-agency' document *and* an 'inter-agency' document." The court observed that "DaSilva has provided no relevant legal authority with respect to such arguments. Nonetheless, the Court concludes that the *Vaughn* index is insufficient to justify the complete withholding of these documents based on the asserted deliberative privilege." Criticizing the lack of specificity in the agency's *Vaughn* index, the court noted as to one withholding that "there is potentially more than one agency decision at issue in this case. Given that the handwritten notes are apparently not dated and that the *Vaughn* index does not provide information by which the Court could ascertain their date, it is impossible to determine the agency decision to which these documents contributed. Accordingly, while the notes may be exempt from disclosure, 'the court has no basis to find that the documents meet the strict criteria of Section 552(b)(5).' The Court defers ruling [on these

documents] pending an *in camera* review of the documents to determine whether they are subject to the deliberative privilege." As to the withholding of emails, the court pointed out that "the *Vaughn* index's discussion of the emails withheld in whole or in part generally consists of repetitive conclusory statements. While there is nothing unlawful about using a 'cut and paste' word processor function to repeat the same argument, doing so is not helpful where that argument is not specific enough to justify summary judgment." (*Rafael Ellwanger DaSilva v. U.S. Citizenship and Immigration Services*, Civil Action No. 13-13, U.S. District Court for the Eastern District of Louisiana, Sept. 4)

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