Volume 39, Number 2
January 16, 2013

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: A sidelight of the national debate on gun control after the mass shooting in Newtown, CT occurred when the Journal News, a local newspaper covering Westchester and Rockland Counties in New York, published an interactive map of handgun permit holders in the two counties. When the newspaper pledged to expand its map to Putnam County, county clerk Dennis Sant indicated that he would refuse to disclose the records, even though they were clearly releasable under New York's Freedom of Information Law. Bob Freeman, director of the State Committee on Open Government told reporters that the law requires that names and addresses of permit holders "shall be a public record." Freeman noted that "in my opinion, there is not a lot of room for interpretation." Greg Ball, the state senator for Putnam County, introduced a bill to exempt the records from FOIL. In response to the newspaper's plans, Ball said that "this is clearly a violation of privacy and needs to be corrected immediately." New York recently adopted very strict gun control legislation, but under the new law gun permits are no longer considered public records.

Court Rules Legal Memo On Targeted Killings Protected

Recognizing the surreal quality of her decision, Judge Colleen McMahon has ruled that the Justice Department's Office of Legal Counsel is not required to disclose the legal analysis for its conclusion that the President can constitutionally authorize the targeting of a U.S. citizen who is not actively involved in battlefield combat because the memo, if it exists, is protected by Exemption 1 (national security), Exemption 3 (other statutes), and Exemption 5 (deliberative process privilege). McMahon noted that "this Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical

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situation in which I cannot solve a problem because of contrary constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret."

Ruling in a case that consolidated a broad request from the ACLU about the policy of targeted killings with two specific requests from *New York Times* reporters Scott Shane and Charlie Savage for Legal Counsel's analysis supporting the legality of such actions, McMahon's ruling focused specifically on the legal analysis. OLC had consistently said that it would neither confirm nor deny the existence of such records, but had softened its position somewhat by using what McMahon referred to as a "No Number, No List" response, in which it admitted to having records but refused to either identify the number of records or their general subject matter. However, OLC and the Defense Department both admitted the existence of a classified legal opinion responsive to the Shane and Savage requests that contained legal advice to the Attorney General concerning military operations.

Neither the ACLU nor the *Times* argued that the memo could have been protected by any of the three exemptions. Rather, their argument centered on whether the government had waived its ability to withhold the memo because of multiple references to its conclusions by President Barack Obama, Attorney General Eric Holder, Defense Secretary Leon Panetta, and other high-ranking government officials, including at the time of the killing of Anwar Al-Awlaki in Yemen in September 2011.

McMahon dispensed with the plaintiffs' first contention that legal analysis was not something that could be properly classified. The government argued that "E.O. 13256 does not contain a specific carve-out for legal analysis; rather E.O. 13526 applies to any information that 'pertains to' the various items listed in Section 1.4. Therefore, legal analysis that 'pertains to' military plans or intelligence activities (including covert action), sources or methods—all of which are classified matters—can indeed be classified." McMahon agreed, noting that "I see no reason why legal analysis cannot be classified pursuant to E.O. 13526 if it pertains to matters that are themselves classified."

Having reached that conclusion, McMahon next looked at whether Holder's speech at Northwestern University Law School, in which he spoke about the legality of targeted killings, waived the protection of the OLC memo. McMahon observed that "the Northwestern Speech discussed the legal considerations that the Executive Branch takes into account before targeting a suspected terrorist for killing. Indeed, the speech constitutes a sort of road map of the decision-making process that the Government goes through before deciding to 'exterminate' someone 'with extreme prejudice.' It is a far cry from a 'general discussion' of the subject matter." However, she added that "but the Holder speech is also a far cry from a legal research memorandum. . .[H]e did not cite to a single specific constitutional provision (other than the Due Process Clause), domestic statute (other than the use of force authorization), treaty obligation, or legal precedent." McMahon remarked that "no lawyer worth his salt would equate Mr. Holder's statements with the sort of robust analysis that one finds in a properly constructed legal opinion addressed to a client by a lawyer." She pointed out that "nor can it be said that Mr. Holder revealed *the exact* legal reasoning behind the Government's conclusion that its actions comply with domestic and international law. In fact, when you really dissect the speech, all it does is recite general principles of law and the Government's legal conclusions." Rejecting the plaintiffs' call for *in camera* review, she said that "it is plain that the Attorney General's discussion of the legal underpinnings of the Government's targeted killing program in the Northwestern Speech, which cites almost no specific authority, could not possibly be *the exact* legal analysis purportedly contained in the OLC Memo (unless standards at OLC have slipped dramatically). I do not need to review the OLC Memo *in camera* to know that its legal analysis would be far more detailed and robust." McMahon found the memo was also protected by Exemption 3, citing both the National Security Act and the CIA Act.

Turning to Exemption 5, McMahon rejected the plaintiffs' contention that the government had waived the privilege for the memo by adopting its reasoning. McMahon was not persuaded. She noted that "the various public statements on which Plaintiffs rely in this case are obviously grounded in legal analysis that was performed by someone for someone. But there is no suggestion, in any of those speeches or interviews, that the legal reasoning being discussed is the reasoning set out in the OLC Memo, a document which the Government acknowledges exists. . .OLC has never been mentioned in any public statement; none of the speeches attribute any legal principles announced to OLC or to any opinion it has issued." McMahon admitted that the OLC memo was the only one identified by the government, but because the government had refused to identify any other legal memos, she observed that "it is impossible even to know *whether* any other legal opinions aside from the OLC Memo exist, let alone whether senior Administration officials were actually relying, in whole or in part, on some other opinion or opinions that might (or might not) exist when they made their public statements." She indicated that *in camera* review was pointless. "Even if the OLC Memo contains language *identical* to that uttered by the Attorney General and others in the various public statements on which Plaintiffs rely, that would still not necessarily constitute proof that the Government had adopted *this document in particular* as its policy." (*New York Times and American Civil Liberties Union v. United States Department of Justice*, Civil Action No. 11-9336 (CM) and 12-794 (CM), U.S. District Court for the Southern District of New York, Jan. 2)

Views from the States…

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

Iowa

A court of appeals has ruled that a settlement agreement between the University of Iowa and an employee must be disclosed to the Associated Press. The AP requested copies of settlement agreements between the university and faculty members from January 2009 to January 2011. In preparing to respond to the request, the university contacted one faculty member whose June 2010 settlement with the university called for him to resign in June 2011. The terms of the settlement agreement provided that it "shall remain confidential to the extent permitted by law." When he learned the university intended to disclose the settlement agreement, the faculty member filed suit to block the disclosure, arguing that the settlement was covered by the exemption for personnel records. The trial court ordered disclosure and the faculty member appealed. The appeals court pointed out that "after considering the language of [the personnel records exemption] and applicable case law, we conclude the agreement in this case does not fit cleanly within the category of 'personal information in confidential personnel records,' which is exempted from disclosure under the statute The agreement does not come within the category of information that courts have found the legislature intended to be kept confidential under the statute, such as employee addresses and birth dates, disciplinary records, or in-house job performance documents. The agreement is clearly more closely aligned with the settlement agreement that we determined to be subject to disclosure in [a previous supreme court decision]." Although the court expressed agreement with the AP's contention that once a record was found not to fit within the personnel records exception it must be disclosed, the court decided to balance the interests in disclosure against the faculty member's interest in privacy. Finding that the interests in disclosure outweighed any privacy interest, the court observed that "the agreement for confidentiality was 'to the extent

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permitted by law,' thereby implicitly stating that no greater confidentiality than that permitted by the open records law was intended by the parties
. . .We conclude the gravity of the invasion into plaintiff's personal privacy does not exceed the public's interest in the use of public funds." (*John Doe v. University of Iowa*, No. 12-0357, Iowa Court of Appeals, Jan. 9)

New York

A trial court has ruled that an affidavit submitted by the New York City Police Department failed to justify the department's withholding of records concerning a 1987 murder in Long Island City under the exemption for interference with an ongoing investigation. The court noted that "while NYPD has claimed a blanket exception to all the records requested in the FOIL Request, it has failed to provide any information on the generic types of documents, or categories of documents, which are allegedly exempt. These entirely conclusory statements contained in a mere one and a half page affidavit, in which only three of the five paragraphs are even relevant to the issues at hand, do not meet NYPD's significant burden to articulate a factual basis for the exemptions claimed." The court rejected the department's request to have the record sealed under the New York Civil Rights Law. The court pointed out that "in the absence of any evidence or argument, the statute does not permit the court to grant NYPD's request, as there has been an insufficient showing of good cause. Further, NYPD fails to even suggest a reason why the records requested in the FOIL Request cannot be redacted so as to delete details tending to identify the victim's identity. . ." (*Loevy & Loevy v. New York City Police Department*, New York Supreme Court, New York County, Jan 9)

Pennsylvania

A court of appeals has ruled that information about photo identification cards and drivers' licenses issued in the past four years by the Department of Transportation are exempt from disclosure under the Right to Know Law. Marian Schneider requested the information. Her request was denied by Transportation on the basis that disclosure of the information was prohibited by several statutes, including an exemption in the Right to Know Law forbidding disclosure of social security numbers or driver's numbers. Schneider appealed to the Office of Open Records, which affirmed the agency's denial. On appeal, Schneider argued that a driver's license was not a driver's record, which she claimed was best characterized as a record of driving infractions. But the court disagreed, noting that a driver's name, date of birth, and address were part of the driver's record. The court observed that "because this information is contained on a driver's license, it is non-disclosable if we agree with PennDOT that the license itself is a type of driving record. We do agree and so hold. An individual's authorization to operate a vehicle is a type of driving record and required to be kept confidential under [the statute]." Schneider next argued that non-driver photo IDs, which were provided for individuals who did not drive, were not driver's records. The court explained that "a number of the non-driver photo IDs issued relate directly to an individual's driving record. The only material difference between a driver's license and the non-driver photo ID is that the latter indicates that the holder lacks authority to drive. Stated otherwise, it is a negative driving record." The court added that "not all non-driver photo IDs are issued because a driver's license has been surrendered or suspended. Nevertheless, it 'relates to' a driving record in all cases because it informs the third-party that the holder, for whatever reason, is not allowed to drive." Schneider contended that because she was doing research on the effects of the state's Voter ID law, the records fell under an exception to the federal Drivers Privacy Protection Act. But the court agreed with the Office of Open Records' conclusion that the exception in the federal law was insufficient to require its disclosure under the Right to Know Law. Instead, the court pointed out that Schneider might have a right of access if she requested the records for research purposes under the Motor Vehicle Code. (*Advancement Project and Marian K. Schneider v. Pennsylvania Department of Transportation*, No. 2321 C.D. 2011, Pennsylvania Commonwealth Court, Jan. 14)

After remanding the case back to the trial court for further determination of whether employee information of a private contractor performing a governmental function related to that function, a court of appeals has ruled that employee information for A Second Chance, Inc., a non-profit that operated Allegheny County's foster care program under contract, was not related to a governmental function. Although television reporter James Parson argued the employee data was necessary to monitor compliance with the contract, the court found that the information was not necessary. The court agreed with the trial court that "the 'directly relates' test, as applied to cases such as the instant case, focuses on *what* services are performed and *how* they are performed, not on *who* performs them." The appeals court noted that "the information requested does not concern accountability or fitness and is not directly related, or even relevant to [the contractor's] performance of a governmental function." The court added that "a private contractor is not subject to the [Right to Know Law] the same way as the government agency and a private contractor's employee information is likewise not subject to the RTKL in the same way. All records 'of' contractors who perform a governmental function are not accessible under [the statute]. Instead, records of a government contractor may be subject to the RTKL only if the function is governmental in nature, and the precise information sought directly relates to performance of that governmental function." (*Allegheny County Department of Administrative Services v. James Parsons and WTAE-TV*, No. 73 C.D. 2012, Pennsylvania Commonwealth Court, Jan. 14)

Texas

A court of appeals has ruled that an individual's own medical records contained in a Board of Chiropractic Examiners' investigatory file of complaints pertaining to a chiropractor are not subject to disclosure under the Public Information Act. The Attorney General had ruled that two provisions in the statute regulating chiropractors provided for access to personal medical records by individual patients. As a result, the AG concluded that the Board of Examiners could not withhold medical records from the individual even though they were otherwise protected by the investigatory files exception. But the court disagreed, finding the AG had misapplied a rule of statutory construction for statutory provisions that are *in pari materia*, meaning that they share a common purpose or object. The court concluded the provisions were not designed to achieve the same purpose. The court pointed out that though the [disputed sections] were certainly intended to create an exception to the patient confidentiality established in the [statute], they were not intended to create an exception to the confidentiality afforded the Board's investigation files. . ." (*Texas State Board of Chiropractic Examiners v. Greg Abbott*, No. 03-11-00735, Texas Court of Appeals, Austin, Jan. 16)

Wisconsin

The supreme court has ruled that invoices of the law firm that represented Juneau County under its liability insurance policy are public records under the contractor provision of the Public Records Law and must be disclosed to the Juneau County *Star-Times*. The law firm was hired to represent the County in an action filed by a former deputy sheriff. The law firm was hired by the insurance company. Invoices for the work performed by the law firm were sent to the insurance company which paid them directly to the law firm. Neither the law firm nor the insurance company sent invoices to the County. When the newspaper requested the invoices, the County claimed the records did not fall under the contractor provision of the access law. The trial court agreed with the County, but the appeals court reversed. Ruling on slightly different grounds than the appellate court, the supreme court found the invoices were covered by the contractor provision and ordered them disclosed. The supreme court noted that "by procuring the liability insurance company to retain counsel for it, the County in the present case has in effect contracted with the law firm for legal services and has created an attorney-client relationship with the law firm similar to the relationship that would have been created had the county and the law firm contracted directly. . .[W]hen a public authority contracts for legal services, a record created and kept by the attorney may be subject to the Public Records Law." The court

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pointed out that "because the liability insurance policy is the basis for the tripartite relationship between the County, the insurance company, and the law firm, and is the basis for an attorney-client relationship between the law firm and the County, we conclude that the invoices were produced or collected during the course of the law firm's representation of the County and the insurance company pursuant to the liability insurance policy; the liability insurance policy is the contract entered into by the County and the insurance company." (*Juneau County Star-Times v. Juneau County*, No. 2010AP2313, Wisconsin Supreme Court, Jan. 8)

The Federal Courts…

A federal court in New York has ruled that two memos prepared by the Justice Department's Office of Legal Counsel for the President concerning his constitutional authority to make recess appointments are protected under **Exemption 5 (deliberative process privilege)** and that the memos did not lose their protection when they were cited in a subsequent OLC memo prepared for President Barack Obama on his recess appointment authority. Obama decided to make several appointments in January 2012 during the Senate's winter break, even though the Senate routinely held pro forma sessions designed to prevent a technical recess. OLC published a 23-page memo explaining the reasoning why the President's constitutional authority trumped the Senate's pro forma sessions. The memo, known as the Seitz Memorandum, cited two earlier OLC opinions on the recess appointment authority from 2004 and 2009. In response to reporters' questions, White House Press Secretary Jay Carney referred them to the OLC memo. *New York Times* reporter Charlie Savage then filed a FOIA request with OLC for the two memos. OLC denied the request, indicating that the memos were privileged. While the *Times* admitted the two memos qualified for the deliberative process privilege, the newspaper argued that the privilege had been waived when the government relied on the memos' rationale as part of its public explanation of Obama's actions. But the court disagreed. Instead, it pointed out that "the adoption-or-incorporation exception is not sufficient to overcome the deliberative process privilege. There is no evidence suggesting that the President expressly adopted or incorporated by reference the reasons of the [two memos]." The court noted that "at the most basic level, this timeline suggests that the President did expressly adopt the main conclusion of the Seitz Memorandum, *i.e.*, that it was constitutional for him to make recess appointments during pro forma sessions held by the Senate. But this does not show that he adopted the *reasoning* that led OLC to conclude the pro forma sessions did not preclude recess appointments, let alone the specific reasons for which the [two memos] were cited." Turning to Carney's statements, the court pointed out that "even assuming Carney's statements might be sufficient to show adoption of the publicly disclosed Seitz Memorandum, they are not specific enough to show adoption of the reasoning of the [two] predecisional [memos] that the New York Times seeks." (*The New York Times Company v. United States Department of Justice*, Civil Action No. 12-3215 (JSR), U.S. District Court for the Southern District of New York, Jan. 7)

The Fourth Circuit has ruled that documents provided to the Army by Clark Realty Capital to support fraud allegations against Pinnacle, which served as the property manager of privately-operated base housing at Fort Benning and Fort Belvoir, were properly withheld under **Exemption 4 (confidential business information)** and that attorney-privileged documents shared between the Army and Clark Realty were protected by **Exemption 5 (privileges)**, even though they did not qualify under the inter- or intra-agency threshold, because they fell within the common interest doctrine exception. Clark and Pinnacle formed a partnership to run the base housing at Fort Benning and Fort Belvoir. Clark served as the managing partner and Pinnacle served as property manager for the housing. In 2010, Clark decided to replace Pinnacle as the property manager based on allegations of fraud. To do so, Clark need to initiate litigation against Pinnacle but was required under the operating agreement to obtain the Army's approval. Clark provided the Army with

documents making its case against Pinnacle and the Army agreed to allow Clark to go forward with its suit. Although the Army was not a party to Clark's litigation, Pinnacle filed a FOIA request for all documents related to the litigation. Of 1,000 pages of records, the Army withheld 344 pages based on Exemption 4 and Exemption 5. The Army claimed that disclosure of the records Clark had provided to support its allegations of fraud against Pinnacle would impair the agency's ability to get such records in the future. Pinnacle argued there was no impairment because Clark was required to provide the records to obtain the Army's permission. Explaining that Pinnacle's argument "misses the point," the Fourth Circuit noted that "it is true that Clark was contractually obligated to get the Army's approval to terminate Pinnacle's property management contracts and to sue Pinnacle. However, Clark was under no obligation to take the action in the first place, nor was it obligated to provide the Army with a certain quantity or quality of information pursuant to the parties' operating agreements. A chilling effect on these decisions—the decision to initiate litigation and the decision to provide thorough and exhaustive documentation—would no doubt impair the government's ability to obtain necessary information about possible fraud and mismanagement. In the context of a public-private partnership, if the cost of reporting fraud and mismanagement involved public disclosure of confidential financial and business information, private companies would be less apt to report fraud, and less fraud would, therefore, be uncovered. In this case, the fact that Clark had to get the Army's approval under the parties' agreements if it *chose* to initiate litigation is not determinative in the impairment calculus in our view." On the Exemption 5 claims, Pinnacle contended that under the Supreme Court's ruling in *Klamath*, correspondence between Clark and the Army could not qualify as inter- or intra-agency because Clark's interests were adverse to those of the Army. However, relying on its decision in *Hunton & Williams v. Dept of Justice*, 590 F.3d 272 (4th Cir. 2010), in which the court concluded the parties had formed a common public interest, the appeals panel pointed out that "the communications [claimed under Exemption 5] occurred after the Army was persuaded that it was in the public interest to terminate Pinnacle's contracts and initiate litigation. Therefore, in light of *Hunton & Williams*, because terminating Pinnacle was in the public interest according to the Army, Clark's self-interest in terminating Pinnacle does not preclude a finding that communications between Clark and the Army may qualify as intra-agency communications. *Klamath* is no barrier to the result we reach." (*American Management Services, LLC v. Department of the Army*, No. 12-1274, U.S. Court of Appeals for the Fourth Circuit, Jan. 9)

A federal court in New York has ruled that the Department of Homeland Security properly invoked **Exemption 5 (deliberative process privilege)** and **Exemption 7(E) (investigative methods and techniques)** to withhold three emails concerning Abdul Ahmed's residency status. Ahmed, a Yemeni citizen and lawful permanent resident of the U.S. since 1990, had submitted a naturalization application for U.S. citizenship in 2008. He was interviewed in 2009, but his citizenship application remained pending. In 2010 after returning from a trip to Yemen, he was served with a notice to appear for removal proceedings. Those proceedings were postponed several times and, to prepare for his defense, Ahmed made a FOIA request for his records. DHS released 586 pages in whole and 135 in part while withholding 150 pages in full. By the time the court ruled only the three emails remained in dispute. Upholding the agency's exemption claims, the court pointed out that the emails contained discussions of techniques and procedures used by the Fraud Detection and National Security Directorate of U.S. Citizenship and Immigration Services for vetting and processing applications that might pose national security concerns. Another email discussed Ahmed's case and how the agency might proceed with its adjudication. The court noted that "each of the FDNS documents is predecisional, as each contains content intended to 'facilitate an identifiable final agency decision' –Ahmed's naturalization application—by requesting or providing information related to Ahmed and national security. These documents also are clearly deliberative, as the field office needed to obtain the information requested from FDNS headquarters before adjudicating Ahmed's naturalization application, and the response provided by headquarters was recommendatory in nature." The court rejected Ahmed's claim that the discussions

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constituted secret law. Instead, the court observed that "any opinions provided in these documents appear to the Court to reflect the subjective opinion of the individual author and not of the agency itself." The court added that "the documents do contain content setting forth agency techniques for vetting subjects that might pose a national security threat, as well as procedures applicable to adjudicating applications by these individuals; however, the Court finds that these techniques and procedures serve law enforcement purposes and therefore are protected by Exemption (b)(7)(E), not Exemption (b)(5)." (*Abdul Hakeim Thabet Ahmed v. United States Citizenship and Immigration Services*, Civil Action No. 11-6230, U.S. District Court for the Eastern District of New York, Jan. 2)

Judge Richard Leon has ruled that the IRS properly withheld records from its examination file of Life Extension Foundation under a variety of exemptions. The agency withheld 52 pages under **Exemption 5 (deliberative process privilege)** concerning its investigation of the Foundation's tax-exempt status. Agreeing with the agency, Leon noted that "the memorandum are predecisional and deliberative in nature, and thus subject to the deliberative process privilege. Both documents. . .despite plaintiff's arguments to the contrary, contain inter-agency material that was generated as part of a continuous process of agency decision-making, namely what determination the IRS should make with regard to plaintiff's tax-exempt status." The Foundation argued that the agency had failed to show that it had considered disclosing **segregable** portions of the memos. But Leon pointed out that "the IRS's supporting declarations provide sufficient descriptions of the contents of the withheld documents, as well as the specific pages affected by each exemption claim and make clear that all withheld documents were reviewed line-by-line to identify reasonably segregable materials. . .This showing is thus sufficient to allow the Court to determine that no portion of the fully-withheld documents could be segregated and subsequently released." The agency also withheld 11 pages under **Exemption 7(D) (confidential sources)** and furnished an *in camera* affidavit explaining the basis for its exemption claim. Leon observed that "the detailed *in camera* submissions from the IRS confirm that the withheld documents are part of an investigatory record compiled for law enforcement purposes, that sources supplied the information under circumstances which indicate assurances of confidentiality, and that disclosure of any portion of the document would reveal the identity of confidential sources. In other words, the court is satisfied that the sources provided information under at least an implied promise of confidentiality, and that disclosure of this information via release of these 11 pages, which contains identifying information throughout, could reasonably be expected to disclose their identities." (*Life Extension Foundation, Inc. v. Internal Revenue Service*, Civil Action No. 12-280 (RJL), U.S. District Court for the District of Columbia, Jan. 16)

A federal court in Oregon has ruled that Stephen Raher is entitled to **fees** for the expert witness he used to rebut the Bureau of Prisons' claims that information in contracts with private detention facilities for foreign nationals serving federal criminal sentences was protected by **Exemption 4 (confidential business information)**. The court indicated that "for whatever reason, BOP apparently relied on its two primary submitters (CCA and GEO Group) to supply reasons for withholding information under Exemption 4 and never thoughtfully re-examined its position in response to the evidence and arguments made by Raher. . .[T]he first Vaughn index did not provide sufficient justification or explanation to adequately analyze the applicability of Exemptions 2 and 4. The additional evidence submitted by BOP in response did not cure this problem, and BOP violated FOIA's segregability requirement by withholding entire documents (including tables of contents) merely because parts of them contained pricing information." Affirming Raher's request for $21,393, the court observed that "BOP no doubt had many other more important matters to manage, but its refusal or inability to communicate or cooperate with Raher and the court has unreasonably prolonged these proceedings." (*Stephen Raher v. Federal Bureau of Prisons*, Civil Action No. 09-526-ST, U.S. District Court for the District of Oregon, Jan. 2)

A federal court in Oregon has ruled that the FAA properly withheld emails from Jeffrey Lewis under **Exemption 5 (deliberative process privilege)** and that Lewis neither showed bad faith on the part of the agency nor that he had appealed the agency's finding that expanded searches would cost more than $900. Lewis, an air traffic controller, was terminated in 2008. He made over 130 FOIA requests to the FAA, seven of which were the subject of his suit. Upholding the Exemption 5 claims, the court noted that "the redacted materials precede the decision on what disciplinary action should be taken against Lewis and contain recommendations made. . .with regard to the appropriate disciplinary action." While Lewis argued the agency had mishandled some of his requests, his main contention had to do with why the agency had terminated him. The court pointed out that "while these allegations may establish a contentious relationship between Lewis and the Administration, they do not impugn the affidavits offered by the Administration or provide tangible evidence that the Administration acted improperly in redacting information under Exemption 5." Although Lewis had discussed some charges with agency officials, the court found he had not appealed the agency's demand that he commit to paying fees before further searches were conducted. The court observed that documents provided to the court by Lewis "establish only a conversation about the underlying requests and the possibility of delaying or narrowing the requests to lessen the amount assessed, not a clear complaint about the amount assessed, a request for a waiver of the amount assessed, or an agreement by Lewis to pay the amounts assessed." (*Jeffrey Nathan Lewis v. Federal Aviation Administration*, Civil Action No. 3:11-CV-1458-AC, U.S. District Court for the District of Oregon, Jan. 7)

A federal court in Michigan has allowed former Assistant U.S. Attorney Richard Convertino to depose a representative of the *Detroit Free Press* in an attempt to learn the identities of individuals in the Justice Department who leaked information about an internal investigation of Convertino to *Free Press* reporter David Ashenfelter. Convertino filed a **Privacy Act** suit against DOJ, but because he was unable to show who had leaked the information he subpoenaed Ashenfelter. The reporter moved to quash the subpoena on First Amendment grounds and ultimately succeeded in asserting his Fifth Amendment rights against self-incrimination. With Ashenfelter no longer available, Convertino went after the newspaper as the next best source of information. The newspaper also asserted its First Amendment rights and claimed that Ashenfelter was the only one who knew the leaker's identity. The court rejected the First Amendment argument. The newspaper claimed that it did not save reporters' notes, but the court pointed out that "[the newspaper's] policy may indicate that the Free Press discards its reporters' notes, but does not show that the Free Press has relinquished its legal rights to those documents—indeed, it would seem that claiming the right to dispose of something proves quite the contrary." Ordering the paper to provide a witness for deposition, the court observed that "without further information, the court is unable to determine whether there is, in fact, a current or former employee of the Free Press with knowledge of Ashenfelter's source. But even if no such individual exists, the court will require the Free Press to produce a corporate representative to testify to that effect in a deposition. . .Identifying Ashenfelter's source is critical to Convertino's case, and deposing a corporate representative of the Free Press is an important tool for uncovering that source." (*Richard G. Convertino v. United States Department of Justice*, Civil Action No. 07-13842, U.S. District Court for the Eastern District of Michigan, Jan. 15)

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