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Washington Focus: A coalition of open government groups has sent a letter to President Barack Obama urging him to make authoritative legal interpretations available to the public and to address this issue at the Open Government Partnership meeting in London. The letter notes that "while the government has an obligation to protect properly and appropriately classified information, democracy does not thrive when our national security programs and the intelligence community's actions are shrouded in secrecy. The public must, at the very least, have a shared understanding of the bounds and limits of the laws of our land and be able to have an informed debate about our policies."

Ninth Circuit Reverses Itself On HUD Exemption 6 Case

After rehearing a case in which it rejected the Department of Housing and Urban Development's application of Exemption 6 (invasion of privacy) to withhold the names of the individuals who made two anonymous complaints pertaining to possible violations of the Real Estate Settlement Procedures Act—which prohibits referral fees for real estate settlement services—by Prudential Locations in Hawaii, the Ninth Circuit panel has reversed itself and decided the names were properly withheld in the first place. What is most remarkable about the decision is that Circuit Court Judge Marsha Berzon, who wrote the original decision, issued a vigorous dissent. Although probably shouting into the wind at this point, Berzon made an impassioned argument for the days when agencies were expected to evaluate whether a legally cognizable invasion of privacy existed in the first place and, further, whether the public interest in disclosure outweighed a minor claim of invasion of privacy.

The case involved a 2003 anonymous letter alleging that Prudential Locations salespersons received monetary kickbacks for referring business to Wells Fargo Home Mortgage of Hawaii, a joint venture between Prudential Locations and Wells Fargo Bank, because they were eligible to win a Mercedes if they referred at least $1 million to Wells

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Fargo. The letter asked HUD if this was a violation of RESPA. The author neither asked for anonymity nor authorized HUD to disclose his or her name. HUD opened an investigation, concluded that the sales incentives were improper, and in 2005 fined Prudential Locations $48,000. In 2008, HUD received an anonymous email alleging Prudential Locations was charging extra fees to agents who did not use Wells Fargo. This time the author asked for anonymity. HUD investigated the allegation and in 2009 found it was not substantiated. While the second investigation was underway, Prudential Locations made a FOIA request for the records of the two investigations. HUD disclosed 400 pages, but redacted information that might identify the authors of the two complaints, citing Exemption 6. Prudential Locations filed suit. HUD argued that it relied on industry competitors and insiders for information about violations of RESPA and if the names were revealed such people would be unwilling to cooperate for fear of retaliation. The district court agreed and ruled in favor of HUD. The Ninth Circuit reversed, finding the agency "could not redact information under Exemption 6 absent an additional showing concerning the identity of the complainants and the privacy interests that were likely to be infringed." However, on rehearing, the panel reversed its original decision, finding HUD had adequately justified why it withheld the complainants' identities.

In a per curiam decision, the court indicated that "we are skeptical that a communication sent by an individual to a federal enforcement agency complaining about illegal business activity is sufficiently 'similar' to a 'personnel or medical file' of that individual for the communication to qualify under Exemption 6." But, the court noted, it would assume without deciding that the communications were "similar" files. Relying on two more recent cases in which the Ninth Circuit found privacy interests for individuals who provided information during an investigation, *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 ((9th Cir. 2008), and *Lahr v. National Transportation Safety Board*, 569 F.3d 964 (9th Cir. 2009), the court pointed out that "in light of the repeated public pronouncements of HUD's confidentiality policy, we conclude that the authors of both the 2003 Letter and 2008 Email had reasonable expectations that HUD would protect their confidentiality even without a specific request that it do so." The court agreed that disclosure could result in retaliation against the complainants. Noting that the text of both letters had been disclosed, the court rejected Prudential Location's public interest claim. The court observed that "there is nothing in the texts of the 2003 Letter or the 2008 Email, or in the actions of HUD in investigating the allegations of statutory violations, to suggest that knowledge of the identities of the authors would significantly 'shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to.'" Prudential Locations argued that if HUD considered the complainants' identities to be confidential, it should have invoked Exemption 7(D) (confidential sources). Finding the argument somewhat oblique, the court observed that if HUD had considered the records to be law enforcement records it could have invoked Exemption 7(C) (invasion of privacy concerning law enforcement records) instead, which has a lower threshold for protecting personal privacy.

Berzon's focused on the lack of information in the record. She noted that "the present record is inadequate to confirm the existence of *any* personal privacy interest, let alone to balance it against the public interest in naming those informants whose tips our government deems credible enough to merit investigation." She pointed out that "a nontrivial privacy interest does not exist merely because the government asserts it." She added that "the government in this case has submitted no evidence whatever concerning the relevant circumstances or privacy concerns of the individuals who filed the complaints of wrongdoing with HUD. In the face of this vacuum, the majority in effect holds that the government carries its burden of demonstrating a nontrivial privacy interest *simply* by specifying that the individual whose names is being withheld reported alleged wrongdoing to a government official. FOIA Exemption 6 requires more."

Berzon rejected the majority's reliance on *Forest Service Employees* and *Lahr*, explaining that "none of them upheld application of Exemption 6 *solely* because the identified individuals provided information to the government. In each case, the government revealed more than that about the circumstances of those

individuals whose names the government sought to withhold. And it was that additional information that established the danger of exposure of personal information or of harassment in the informants' personal lives." She indicated that "the majority's opinion thus breaks new ground by finding in the names of voluntary informants a *per se* personal privacy interest. Still worse, the majority's *per se* rule departs from statute as well as precedent, because it does nothing to verify that the purported privacy interest protected by nondisclosure is *personal* in nature." Noting that there were other plausible explanations for the motivations of the complainants on one hand and Prudential Locations on the other, she observed that "the reasonable possibility of such motivations renders the majority's preferred interpretation 'subject to reasonable dispute' and hence beyond the scope of [the court's] authority in reviewing a summary judgment record as barren as this one."

Berzon agreed with Prudential Locations that knowing whether a complainant was biased or self-interested qualified as a public interest. She indicated that "knowing who alleges illegality can be helpful in assessing the scope of. . .possible corruption. Without names, the public is hampered in evaluating the prevalence of self-interested informants or the magnitude of their manipulation."

She found that Prudential Locations' Exemption 7(D) claim had some merit. She observed that "Exemption 7(D)—not Exemption 6—ought to control the government's request to withhold information concerning its informants." She noted that "where 'the Government has other tools at hand to shield' information it seeks to withhold, judicial distortion of other of FOIA's narrow exemptions, to avoid the requirements of the most directly applicable one, is unnecessary as well as illegitimate." (*Prudential Locations LLC v. U.S. Department of Housing and Urban Development*, No. 09-16995, U.S. Court of Appeals for the Ninth Circuit, Oct. 9)

Views from the States…

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

Illinois

A court of appeals has ruled that the Attorney General properly rejected Jamal Shehadeh's request for all guidance used in complying with the FOIA because it was unduly burdensome. In response to Shehadeh's request, the Attorney General invoked Section 3(g), indicating that 9,000 pages were considered potentially responsive and would require a page-by-page review. The AG suggested Shehadeh narrow his request. Instead, Shehadeh appealed the AG's response to the Public Access Counselor, arguing that because the agency failed to respond within five business days as required by the statute it had lost the right to claim an exemption. The Public Access Counselor upheld the AG's decision and Shehadeh filed suit. The trial court then upheld the agency's position as well and Shehadeh appealed. Shehadeh argued the AG had failed to show his request was unduly burdensome. But the appeals court noted that "we agree with the Attorney General that plaintiff's FOIA request was patently broad on its face, as it sought *any* publication or record that would or could be used by *any* public body to comply with Illinois's FOIA provisions." The court agreed with Shehadeh that there was no statutory requirement to narrow a request, but observed that "nothing in FOIA precluded the Attorney General from continuing to assert the unduly burdensome exemption after plaintiff refused to narrow his request." The court rejected Shehadeh's claim that the agency was required to justify that processing the request would be unduly burdensome. Instead, the court pointed out that "Section 3(g) of

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FOIA requires only that a public body specify in writing the reasons compliance would be unduly burdensome and the extent to which compliance would burden the operations of the public body." The court added that "requiring the Attorney General's staff to review 9,200 records would impede the staff's ability to respond to other FOIA requests and perform its other duties in a timely fashion." (*Jamal Shehadeh v. Lisa Madigan*, No. 4-12-0742, Illinois Appellate Court, Fourth District, Oct. 4)

New Jersey

A court of appeals has ruled that a trial court judge conducted an appropriate de novo review of exemption claims made by the Department of Law and Public Safety's Division of Criminal Justice and that the records as redacted should be disclosed to Ted Rosenberg. Rosenberg had been the solicitor of Palmyra Borough. A member of the town council told Rosenberg that he was being pressured by his employer to vote against Rosenberg's reappointment. When the councilman reported this to DCJ, it started an investigation. After being denied access to the investigatory records under the Open Public Records Act, Rosenberg tried again under the common law right of access. Finding that he qualified as an interested party under the common law right of access, a trial court judge denied access, but the appeals court found he had not conducted a proper review of the documents. A subsequent trial court judge finally reviewed the records in detail and ordered DCJ to release those records that were not exempt. The judge provided a spreadsheet for DCJ to use, but indicated that since the spreadsheet contained privileged information DCJ was not required to disclose it to Rosenberg. DCJ appealed the judge's decision. The appeals court indicated the judge had done an appropriate detailed review and rejected all the agency's arguments. As a result, the court ordered the spreadsheet disclosed as well. The court noted that "the judge's spreadsheet was sealed to protect the confidentiality of the materials. Having determined there is no basis in the record to disturb the trial court's decision, we now direct the release of the spreadsheet to plaintiff, subject to DCJ redacting those portions of the spreadsheet [the judge] determined were not subject to release because of applicable privileges." (*Ted M. Rosenberg v. Department of Law and Public Safety, Division of Criminal Justice*, No. A-6244-10T3, New Jersey Superior Court, Appellate Division, Oct. 11)

Ohio

A court of appeals has ruled that Hamilton County Juvenile Court Judge Tracie Hunter must disclose unredacted docket information including full names of juveniles appearing before her in delinquency hearings. Cincinnati *Enquirer* reporter Kimball Perry requested Hunter's docket for December 2012. The juvenile court administrator provided the information in an email but indicated that names of juveniles had been replaced by initials. When the juvenile court stuck by its decision, the *Enquirer* filed suit. Noting that the Rules of Superintendence provided for public access to court records, the court pointed out that "the Rules of Superintendence do not state that a court may substitute initials for the names of juveniles in delinquency cases." The court observed that "the Ohio Supreme Court has stated that the need for confidentiality is less compelling in delinquency cases than in cases involving abused, dependent or neglected children. Consequently, delinquency proceedings are neither presumed open nor closed. Judge Hunter sets forth only a blanket claim of the need for confidentiality in juvenile cases rather than any specific need for confidentiality in the case documents sought by the Enquirer. That blanket claim is not sufficient to overcome the presumption in favor of open access to court records." (*State of Ohio, ex rel. Cincinnati Enquirer v. Hon. Tracie M. Hunter*, No. C-130072, Ohio Court of Appeals, First District, Hamilton County, Oct. 9)

Pennsylvania

A court of appeals has ruled that the City of Wilkes-Barre must pay ten percent of the cost of litigation brought by the *Citizens' Voice* newspaper to enforce an order by the Office of Open Records requiring the City

to provide tow reports and receipts pertaining to city-directed tows conducted by LAG Towing pursuant to a 2005 contract between LAG and the City. When the *Citizens' Voice* requested the records from 2005 to 2011, the City forwarded the request to LAG. LAG told the City it would not respond because it believed the receipts were not agency records. The newspaper filed a complaint with the OOR, which ruled in its favor and ordered the City to retrieve and process the records. The newspaper filed suit to enforce the order. During trial, LAG's owner indicated that his practice was to destroy any receipts after a month, although he had started saving the records after receipt of the newspaper's request in July 2011. The trial court found that LAG had engaged in willful and wanton misconduct by arguing the records were confidential when it knew the records probably no longer existed. It assessed LAG with 90 percent of the newspaper's litigation costs and the City with 10 percent after finding the City had failed to determine whether the records existed. The City then appealed the 10 percent award. The appeals court noted that under the Right to Know Law in cases where a contractor was performing government functions, "the agency is required to take reasonable steps to secure the records from [a third party] and then make a determination if those records are exempt from disclosure. If the third party refuses to produce the records because they are not directly related to the governmental contract, the third party may refuse to turn those records over to the governmental agency on that basis. The agency shall then inform the requester of the reason for the denial and the requestor can take an appeal to the OOR." The court explained that "in this case, the City did not fully discharge its duty under the RTKL by merely forwarding the records' request to LAG and then forwarding LAG's response to the Newspaper regarding the records' existence or exemption status under the RTKL. . .[A]s the possessor of the records, the City had a duty to independently ascertain the existence or nonexistence of the records in LAG's possession. The City's actions in this case, acting merely as a conduit between the Newspaper and LAG, were not sufficient to discharge its duties under the RTKL." (*Andrew Staub v. City of Wilkes-Barre and LAG Towing*, No. 2140 C.D. 2012, Pennsylvania Commonwealth Court, Oct. 3)

A court of appeals has ruled that most records concerning Charles Coley's 1974 conviction for murder are still protected by the investigative materials exemption. Coley requested the records pertaining to his trial, particularly statements of several witnesses and an immunity agreement with Andre Anderson. The Philadelphia District Attorney denied access and the trial court upheld its decision. The appeals court largely agreed. The court noted that the witness statements "are 'investigative materials' exempt from disclosure under. . .the Right to Know Law. The witness statements also constitute 'investigative information' which cannot be disseminated to a private individual and, therefore, are exempt from disclosure under. . .the Criminal History Information Act." But the court was not so certain about the immunity agreement. The court pointed out that "because we are not able to determine whether the agreement contained investigative information . . . we must remand for further proceedings and an explanation of the contents of the document. We decline to assume that immunity agreements are *per se* 'investigative materials' or always contain 'investigative information.'" Concurring with the court's holding, one judge indicated that "an immunity agreement, at its core, is a deal, a transaction between the district attorney and the police that immunizes an individual from prosecution. Those transactions should be subject to public scrutiny just like other government agreements to make sure that value was received and to judge the performance of public officials." (*Charles Coley v. Philadelphia District Attorney's Office*, No. 317 C.D. 2013, Pennsylvania Commonwealth Court, Oct. 7)

Vermont

The supreme court has affirmed the trial court's ruling that the personal privacy of several employees of the Rutland Police Department found to have viewed pornography on their work computers is outweighed by the public interest in the incident and its subsequent investigation. The supreme court noted that "there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct." The court observed that "certainly, one cannot reasonably expect a high level of

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privacy in viewing and sending pornography on work computers while on duty at a public law enforcement agency. To the extent that such activities are considered a 'personal pursuit,' the purported claim to privacy in exclusively personal pursuits enjoyed at public expense on public time is one of those situations where, as recognized by the Legislature, the employee's right to privacy must properly give way to the public's need for the information 'to review the action of a governmental officer.'" The court concluded that "given the minimal privacy interests at stake, and the weighty public interest in disclosure, we agree with the trial court that the balancing of relevant interests favors disclosure of these documents without the need for redaction of the employees' personally identifying information." (*Rutland Herald v. City of Rutland and AFSCME Council 93, Local No. 1201*, No. 2012-368, Vermont Supreme Court, Oct. 11)

The Federal Courts…

A federal court in New Hampshire has ruled that the Department of Health and Human Services properly withheld a number of records pertaining to a sole source contract awarded to Planned Parenthood to provide family clinic services in New Hampshire after the state declined to use its own federal funds provided under Title X of the Public Health Service Act because it decided Planned Parenthood might use the funds to subsidize abortion services under **Exemption 4 (confidential business information)**, **Exemption 5 (privileges)**, and **Exemption 6 (invasion of privacy)**. The state failed to find any organization to replace Planned Parenthood and, as a result, gave back $360,000, which was equal to its projection of what Planned Parenthood would have receive in the second half of 2011. Because the state's decision left a gap in health care provision in the state, HHS decided to award Planned Parenthood a sole source contract to continue its family clinics in New Hampshire with the payments coming directly from the federal government. New Hampshire Right to Life made a multi-part FOIA request to HHS for records concerning the sole source contract to Planned Parenthood and later filed suit. When HHS indicated it would withhold only seven of 244 pages of Planned Parenthood's Manual of Medical Standards and Guidelines, Planned Parenthood filed suit to enjoin disclosure of the entire manual. HHS decided to withhold much of the manual and Right to Life made a second FOIA request for correspondence between Planned Parenthood and the agency concerning its decisions as to which documents to disclose. Right to Life argued that Exemption 4 did not apply because Planned Parenthood was a non-profit organization. But the court noted that "the scope of 'commercial information' under exemption 4 does not depend on the character of the *entity* that submitted it to the agency, but on the character of the *information* itself." The court explained that Planned Parenthood's manual "'provides a model for operating a family planning clinic,' while the other documents contain information on more discrete aspects of that operation, including setting rates, managing employees, and collecting accounts. This is plainly information serving a 'commercial function,' i.e., guiding the operations of an entity engaged in 'commerce' as that term is commonly understood." Right to Life argued that federally subsidized clinics did not meet the definition of commerce. The court disagreed, observing that "many kinds of entities—including, just to name a few, universities, hospitals, and farms—receive federal grants or other forms of federal subsidies for their operations, and it cannot seriously be argued that, as a result, those operations are not 'commerce.'" Turning to whether the information was also confidential under Exemption 4, the court rejected Right to Life's argument that the public interest in disclosure could outweigh the confidential nature of the information. Right to Life claimed that it was speculative to assume that Planned Parenthood competed for federal grants to run clinics. But the court indicated that "Planned Parenthood faces 'actual competition' for grants from hospitals and community health clinics." The court added that "even if those entities did not compete with Planned Parenthood for *grants*. . .those entities competed with Planned Parenthood for *patients*." The court found Planned Parenthood's fee and collections policy was confidential, but that its personnel policies were not. Saying it was "difficult for the court to view [personnel policies] as 'confidential,'" the court pointed out that "in most fields, including health care, information on how much an employer pays its

employees, the benefits it provides, the conditions under which it expects them to work, and the like is commonly shared with perspective employees. . .” The court rejected the agency’s claim that records created to prepare an agency official to speak with a state official about the agency’s decision were protected by the deliberative process privilege. Instead, the court observed that “the purpose of the call was simply to inform [the state official] about what HHS would do in response to [the state’s] decision, presumably as a matter of agency rule or policy.” On Exemption 6, the court found that the resume of Planned Parenthood’s medical director was not protected because there was a public interest in knowing about who was running the program. However, phone numbers and other personal information about Planned Parenthood employees was properly protected, but that, once that information was redacted, salary information about staff positions should be disclosed in the public interest. (*New Hampshire Right to Life v. Department of Health and Human Services*, Civil Action No. 11-cv-585-JL, U.S. District Court for the District of New Hampshire, Sept. 30)

Judge James Boasberg has ruled that the Office of the Director of National Intelligence properly withheld information about the way the National Counterterrorism Center worked with other agencies to share data, guidelines and legal memoranda under **Exemption 3 (other statutes)**. EPIC requested the information and ODNI withheld it citing a variety of exemptions. But Boasberg noted that since the records were protected by Exemption 3 there was no reason to assess whether they could be withheld under other exemptions as well. The agency withheld the records under Section 102(A)(i)(1) of the National Security Act, which allows the Director of National Intelligence to protect sources and methods. While Section 102(A)(i)(1) has been long recognized as qualifying under Exemption 3, EPIC argued that certain information in the records did not fall within the provision’s coverage. Boasberg found EPIC’s interpretation of the provision’s coverage too narrow and noted that “although at first glance the records at issue here may appear technical—and thus of little help to potential adversaries—the Court, after its *in camera* review, is persuaded that this ‘superficially innocuous information’ could compromise intelligence operations. There is little doubt that the names of particular datasets and the agencies from which they originate would allow interested onlookers to gain important insight into the way ODNI and its partners operate. Information regarding the number of records deleted, similarly, could help counterintelligence personnel deduce the scope of U.S. intelligence operations.” He indicated that “having reviewed the relevant records *in camera*, and taking into account the ‘special deference owed to agency affidavits on national security matters,’ the Court concludes that Exemption 3 protects the information ODNI has withheld.” EPIC also argued the agency had failed to conduct an adequate **segregability** analysis and that some information in the record was clearly non-exempt. Boasberg rejected the argument, noting that “based on [the agency’s affidavit] and careful *in camera* review, the Court concludes that there is no material that could have been released in the 21 documents withheld in full.” He added that “even if [the court] found that pieces of information in the 21 documents withheld in full were not exempt from disclosure, the remaining information would amount to ‘an edited document with little informational value.’ Indeed, all that would be left would be a date here, an internal direction there. Although the cost of releasing the information would be minimal, the Court sees no reason to impose any further burden on the agency. Because the 21 documents in question contain no segregable material that could prove of interest, the Court finds that any such token release is unnecessary.” (*Electronic Privacy Information Center v. Office of the Director of National Intelligence*, Civil Action No. 12-1282 (JEB), U.S. District Court for the District of Columbia, Oct. 9)

Judge Ketanji Brown Jackson has ruled that the Fish and Wildlife Service did not conduct an **adequate search** for the administrative record of a 1999 delisting petition submitted under the Endangered Species Act. Conservation Force requested the entire administrative record for a 1999 petition filed to delist the straight-horned markhor, a wild goat found in Pakistan, as an endangered species. Under the ESA, FWS is required to

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assess the merit of a delisting petition within 90 days and then, if it concludes the petition has merit, to publish a final decision within 12 months. The agency found the markhor delisting petition had merit, but never published a final decision. After failing to force the agency to act on the petition, Conservation Force requested the entire administrative record. The agency produced the administrative record up to the 90-day decision and indicated it had not withheld any information. However Conservation Force argued that the entire administrative record also included any records compiled since that decision. Jackson agreed. She explained that "the Service found that the 1999 delist petition had merit at the 90-day stage; therefore, the agency had a mandatory statutory duty to make a 12-month finding. This the agency did not do, but that by no means establishes that the Service did not take final action with respect to the 1999 downlist petition. What is more, courts in this district have found that the type of inaction at issue here—an agency's failure to make a 12-month finding—constitutes final agency action for the purposes of review under the Administrative Procedures Act and there is no reason why such inaction should be treated differently for the purpose of the agency's duty to produce record documents under the FOIA." She noted that "the Service's failure to publish a 12-month finding, in violation of its statutory duty to do so, constitutes a final agency action in this case such that documents that the Service generated or considered in regard to the 199 downlist petition *after* the 90-day finding was made (including but not limited to documents that were part of the mandatory notice and comment period for the 12-month finding) are part of the 'entire Administrative Record' for purposes of Plaintiff's FOIA request." Jackson rejected the agency's claim that a parenthetical in the FOIA request identifying the specific petition served to limit the scope of the request. Instead, she pointed out that "a liberal reading is nonetheless required, and any fair construction of Plaintiff's FOIA request cannot foreclose the possibility that Plaintiff wants the whole record, even if the language also mentions a subset of that category of documents. Indeed, when the request is liberally construed, the most that can be said about Plaintiff's FOIA request is that it is ambiguous: it *either* directs the Service to the particular type of document sought within the broader category of the entire administrative record (as the Service argues) *or* indicates Plaintiff's heightened interest in a particular subset of the larger category of materials that is being specifically requested. And assuming that the FOIA request is subject to both of these reasonable readings, the Service had a duty under the FOIA to select the interpretation that would likely yield the greatest number of responsive documents." (*Conservation Force v. Daniel M. Ashe*, Civil Action No. 12-1428 (KBJ), U.S. District Court for the District of Columbia, Oct. 10)

A federal court in Virginia has ruled that the FTC, after several attempts, conducted an **adequate search** for records concerning its regulation of alcoholic beverages and properly redacted many of the records under **Exemption 5 (deliberative process privilege)**. Attorney John Carter requested information on the agency's regulation of alcoholic beverages in May 2011. The agency completed its response in October 2011, withholding a considerable amount of information under Exemption 5. The agency denied Carter's appeal and he filed suit. In a February 2013 opinion, the court found the FTC's search was inadequate because it did not include the Bureau of Economics where Carter had indicated he expected responsive documents to be located. The agency conducted a search of the Bureau of Economics as instructed and presented a representative sample for *in camera* review. This time around the court was satisfied with the agency's processing efforts and exemption claims. The court noted that "many of the files [withheld under Exemption 5] consisted of draft versions of documents that were disclosed to Plaintiff in final form as well as other documents such as hand written notes or line-edited documents. Each of these documents demonstrated an ongoing deliberative process within the agency that is not subject to disclosure." The court added that "despite the FTC's continued revelations regarding the inadequacy of its initial FOIA search, the Court's present review is based on the final results. Ultimately, the FTC satisfied the requirement that it exempt from disclosure only those documents defined under one of the enumerated FOIA exemptions." (*Carter, Fullerton & Hayes v. Federal Trade Commission*, Civil Action No.1:12-448, U.S. District Court for the Eastern District of Virginia, Alexandria Division, Oct. 4)

A federal court in Maine has ruled that there remains a genuine dispute over whether EOUSA properly assessed prisoner David Widi **fees** covering the agency's search for records pertaining to Widi. EOUSA responded to Widi's request by indicating that its 3.5 hour search had located potentially responsive documents and that Widi had been assessed $42 in fees. He responded by indicating that he would pay the fees. However, the next correspondence he got from EOUSA indicated that grand jury materials were not disclosable and other records had been referred to other agencies. No records were disclosed and Widi appealed to OIP. More than six months later, OIP upheld EOUSA's fee determination. Widi argued that OIP did not address whether EOUSA had properly withheld the documents. The court found that there was a dispute over whether EOUSA had made it clear that Widi owed fees. Further, the court noted that Widi "is correct that this record raises a genuine dispute as to whether OIP wrongly failed to reach the merits of his claim of improper withholding because its disposition of his appeal was untimely, and therefore search fees were disallowed." (*David J. Widi, Jr. v. Paul McNeil*, Civil Action No. 2:12-00188-JAW, U.S. District Court for the District of Maine, Sept. 27)

A federal court in Florida has ruled that the Joseph and Maureen Bory are entitled to $66,000 in **attorney's fees and costs** in their FOIA suit against the U.S. Railroad Retirement Board for an explanation of how Joseph Bory's retirement benefits were calculated. Although the agency argued the Borys' brought their litigation for personal reasons, the court agreed with the Borys that the suit had increased understanding of the agency's benefit calculations within the railroad retiree community. The court noted that Bory had made efforts "to keep the railroad retirement community apprised of the progress of this litigation with the hope that some changes would occur in the process by which the Railroad Retirement Board handles proceedings concerning calculations of benefits. Plaintiffs' persistence in this litigation, involvement with the railroad retiree community, and communications about the lawsuit confer a public benefit, in addition to a private one. Plaintiffs financed this litigation themselves, and their expressions of intent to benefit other railroad retirees and change the agency's culture, as well as to understand why their benefits were reduced, are supported by the record." The court also found the agency's position unreasonable. The court observed that it had rejected the agency's claims that "it had produced the entire file, [and that] it did not have to notify the requester of the right to appeal, [as] unfair and inconsistent with the purposes of the FOIA." (*Joseph and Maureen Bory v. U.S. Railroad Retirement Board*, Civil Action No. 3:09-cv-1149-J-12MCR, U.S. District Court for the Middle District of Florida, Jacksonville Division, Sept. 25)

A federal court in Florida has ruled that Syed Abid Iqbal has sufficiently alleged a violation of subsection (e)(7) of the **Privacy Act**, which limits agencies' ability to collect information about the exercise of an individual's First Amendment rights, but that he has failed to show he was adversely affected by the collection. Among other claims, Iqbal alleged the Justice Department violated the Privacy Act by collecting information about his prayer activities. The court agreed that he had sufficiently alleged a claim, but ultimately agreed with the agency that he had not shown an adverse effect which caused him actual damages. The court noted that "while Plaintiff has [alleged] that DOJ placed him on a government watch list in 2011, Plaintiff has not indicated that he suffered any pecuniary loss as a result. . .The same is true of Plaintiff's allegation concerning his 2009 bankruptcy and lost wages. The Court simply cannot plausibly infer any causal link between the alleged subsection 552a(e)(7) violation and Plaintiff's bankruptcy." (*Syed Abid Iqbal v. Department of Justice*, Civil Action No. 3:11-cv-369-J-37JBT, U.S. District Court for the Middle District of Florida, Jacksonville Division, Sept. 26)

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