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Washington Focus: A coalition of open government groups is trying to rally support to block a provision in the House version of the Farm bill (H.R. 2642) that would allow the government to withhold information about concentrated animal feeding operations. The letter addressed to members of the House-Senate conference notes that Exemption 6 (invasion of privacy) already provides adequate protection for information that should legitimately be protected. The letter points out that "beyond being unnecessary to protect the information of individuals and small family farms, the language included in the House-passed bill is exceedingly broad and vague. The provision does not define 'owners' or 'operators' and thus permits the information of large corporate operations to be kept from public view alongside the information of individuals and small family operations. As the Supreme Court reaffirmed in FCC v. AT&T, Inc., Congress never intended to extend the FOIA's protections for personal privacy to corporations and Congress must not do so now."

National Security Directives Not Agency Records

Applying the recent D.C. Circuit decision in *Judicial Watch v. Secret Service*, 726 F.3 208 (D.C. Cir. 2013), in which the court found that White House visitors' records were not agency records when they were used by the Secret Service because the White House had never intended to give up control of the records, Judge Beryl Howell has ruled National Security Presidential Directives do not qualify as agency records even when in the possession of agencies subject to FOIA because they remain subject to strict dissemination and use limitations placed upon them by the White House.

The case involved a request from EPIC to the National Security Agency for NSPD 54, "a confidential communication from the President of the United States to a select and limited group of senior policy advisors, cabinet officials, and agency heads on the subject of cybersecurity policy." A transmittal memo that accompanied the directive when it was disseminated "prohibited dissemination of the documents

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beyond its authorized recipients without White House approval and further instructed that even within receiving agencies, copies should be distributed only on a need to know basis." The directive was classified "Top Secret," but some portions were unclassified. EPIC requested an unredacted copy of NSPD 54 as well as any privacy policies related to the Comprehensive National Cybersecurity Initiative. The NSA disclosed portions of several documents, referred a document to the National Security Council, and withheld NSPD 54 under Exemption 5 (privileges), citing the presidential communications privilege. In an earlier ruling in the case, Howell found that even though the NSA had referred a document to the NSC, EPIC could not force the NSC to respond because it was not subject to FOIA.

Howell first noted that "the parties have focused their attention on whether the withholding of records responsive to the plaintiff's request under exemptions to the FOIA was proper, but such exemptions are irrelevant if the records requested are not 'agency records' within the meaning of the FOIA. If the records in question are not 'agency records,' courts do not have the power under the FOIA to order their disclosure." She continued, pointing out that "the parties gloss over the question of whether NSPD 54 is an 'agency record' at all, which is a threshold question the Court must resolve before turning to the applicability of any exemption. Under this Circuit's recent opinion in *Judicial Watch*, the answer to this critical question as to NSPD 54 is no, rendering all other arguments about the applicability of Exemption 5 moot."

Howell explained that under the Supreme Court's ruling in *Dept of Justice v. Tax Analysts*, 4892 U.S. 136 (1989), the test for determining whether a record was an "agency record" was whether the agency created or obtained the record and whether it had control of the record at the time of the FOIA request. She indicated that while the NSA had clearly obtained the record, it did not exercise control over the record. She noted that in the *Judicial Watch* decision, the D.C. Circuit had decided that presidential records were subject to the modified "control" test established in *United We Stand America v. IRS*, 359 F.3d 595 (D.C. Cir. 2004), for congressional records, holding that a record is under the control of an agency only when it has the "ability to use or disclose of the record as it sees fit." Howell noted the D.C. Circuit applied that test to the White House visitors' records and found that "because the White House, an entity not subject to the FOIA, 'has manifested its intent to control the entirety of the [visitors' logs]' the *United We Stand* test's application militates against a finding that the logs were 'agency records' under the FOIA."

It was clear, Howell indicated, that "NSPD 54 originated with the President or the NSC" and that "the President placed significant limits on the distribution of NSPD 54." She pointed out that "for the purposes of determining the indicia of control evidenced by the FOIA-exempt entity, the D.C. Circuit has consistently looked to the intent of the entity manifested at the time of transfer and the clarity of that intent with respect to the documents subject to the FOIA request." She explained that in *Judicial Watch*, the D.C. Circuit found the White House's intent to control dissemination of the visitors' records was more pronounced than the level of congressional control found in *United We Stand*. As a result, she observed that "in the instant case, *Judicial Watch* applies *a fortiori*. The White House has manifested its intent to control the entirety of NSPD 54 and its dissemination even within agencies to which the document was distributed, a level of control not present in *Judicial Watch*. . .Thus, under the *United We Stand* test, the defendant has shown a sufficiently 'clear. . . expression of [White House] intent to control' NSPD 54, making it a non-agency record for purposes of the FOIA."

Howell then considered the history of national security instruments, pointing out that 'the secretive nature of these documents is made apparent by the fact that the public only learns of them once they are released and can only guess at how many each President has issued." While several NSPDs had been disclosed voluntarily during litigation, she indicated that plaintiffs had lost the cases in which they had asked for the NSPDs directly. Summing up the sparse case law, she observed that "these cases indicate that NSPD 54 is the type of document that is generally not ordered disclosed under the FOIA. Such national security instruments appear

to have only been released voluntarily by the President or NSC that created them, or their release has been approved after a substantial period of time has passed, typically through Presidential libraries." She then noted that "the necessity of the President of communicating to a limited group of high-ranking Executive branch officials any instructions and guidance contained in NSPD 54 in order to effectuate the President 'carrying out the constitutional, statutory, or other official or ceremonial duties of the President,' appears to fall squarely within the same category of documents found to be outside the reach of FOIA in *Judicial Watch*. Indeed, the question in *Judicial Watch* appears to be a closer one than the question here, as the documents in *Judicial Watch* were created by an agency subject to the FOIA, namely, the Secret Service, whereas in the instant case NSPD 54 was created by a FOIA-exempt entity itself, namely, the NSC, and merely distributed to agencies subject to the FOIA."

In a footnote, Howell considered the effect of *Judicial Watch* on the need to claim the presidential communications privilege for records that appear to be agency records. She noted that "as the instant case demonstrates, however, under *Judicial Watch*, a President need not invoke the presidential communications privilege—or any other enumerated exemption—to avoid disclosure pursuant to the FOIA of records for which he or she has clearly exerted efforts to retain control and limit dissemination. . ." She pointed out that "*Judicial Watch* appears to create an alternative mechanism for the President to keep records secret without resorting to a FOIA exemption." (*Electronic Privacy Information Center v. National Security Agency*, Civil Action No. 10-196 (BAH), U.S. District Court for the District of Columbia, Oct. 21)

Views from the States…

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

Connecticut

The supreme court has upheld the FOI Commission's ruling that the Medical Examining Board improperly convened in executive session to consider the legal implications of a letter sent to the Attorney General suggesting the AG might have a conflict of interests in representing the Medical Examining Board on the issue of whether physicians could participate in executions of inmates by lethal injection. Michael Courtney, an attorney in the Office of the Chief Public Defender, requested a declaratory ruling from the board, accompanied with a letter he had sent to the Attorney General suggesting a potential conflict of interest in representing various parties. The board convened in executive session during one of its meetings to consider the letter. Courtney filed a complaint the next day with the FOI Commission contending the closed session was not permissible under the exception for consideration of a pending claim because no threat of a potential legal claim had been made against the board. Although the trial court ruled in favor of the board, the supreme court reversed, agreeing with the FOI Commission. The court noted that "because [the pending claim] exception requires actual or express articulation, the proper focus is not on what the board reasonably could have believed but, rather, on what the written notice actually states. The letter in the present case does not contain either a demand for legal relief or evidence of an intent to institute an action in an appropriate forum if the board does not grant that relief. Accordingly, it does not constitute notice of a pending claim." The court rejected the board's contention that the AG's potential conflict of interests constituted a claim. Instead, the court observed that "an agency can be a party to a claim, but only if the claim is directed at the agency itself. . .The letter clearly indicates that the alleged conflict is [that of the Attorney General], not the board's." (*Chairperson,*

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Connecticut Medical Examining Board v. Freedom of Information Commission, No. 19055, Connecticut Supreme Court, Oct. 15)

Delaware

The U.S. Court of Appeals for theThird Circuit has ruled that Delaware's state-sponsored arbitration program violates the First Amendment right of access to court proceedings to the extent that it allows trial court judges to provide confidential arbitration in business disputes. The arbitration program is open only when at least one party is a business entity organized under Delaware law, neither party is a "consumer," and the amount in controversy is at least $1 million. The program was designed to encourage businesses to locate or remain in Delaware by providing an attractive alternative to litigation. But ruling on a First Amendment challenge by the Delaware Coalition for Open Government, the court found that "following [a] broad historical approach, we find that an exploration of both civil trials and arbitrations is appropriate here." The court observed that "today, civil trials and the court filings associated with them are generally open to the public." As to arbitrations, the court indicated that "history teaches us not that all arbitrations are closed, but that arbitrations with non-state actors in private venues tend to be closed to the public." But the court concluded that "when we properly account for the type of proceeding that Delaware has instituted—a binding arbitration before a judge that takes place in a courtroom—the history of openness is comparable to the history. . .the Supreme Court found in *Richmond Newspapers*." The court explained the benefits of public access to such arbitration proceedings. "Allowing public access to state-sponsored arbitrations would give stockholders and the public a better understanding of how Delaware resolves major business disputes. . .In addition, public access would expose litigants, lawyers, and the Chancery Court judge alike to scrutiny from peers and the press." Striking down the confidentiality provision, the court concluded that "Delaware's proceedings derive a great deal of legitimacy and authority from the state. They would be far less attractive without their association with the state. Therefore, the interests of the state and the public in openness must be given weight, not just the interests of rich businesspersons in confidentiality." (*Delaware Coalition for Open Government v. Honorable Leo E. Strine, Jr. et.al*, No. 12-3859, U.S. Court of Appeals for the Third Circuit, Oct. 23)

Kentucky

The Attorney General has ruled that while the Lexington-Fayette Urban County Government has possession of transactional data of pawnbrokers required to be submitted to the police on a daily basis, since the transactional data contains personal financial information under the federal Gramm-Leach-Bliley Act its disclosure is prohibited by the federal law. The police originally told Jeff Lawless that the records were the property of the pawnbrokers. However, the pawnbrokers told Lawless he would have to get the information from the police. The AG agreed that the police controlled the records, noting that "we do not accept LFUCG's argument that transactional information stored with [the vendor operating] Leads Online under an agreement with the Division of Police is the 'property of Leads Online.' Under its service agreement with the Division, Leads Online is designated the Division's agent 'for the sole purpose of collecting, maintaining, and disseminating data from participants.' Absent state and local law requiring pawnbrokers to furnish transactional information to the appropriate law enforcement agency, and agreements with law enforcement agencies to manage that data on the agencies' behalf, Leads Online has no authority to 'collect, maintain, and disseminate data from participants.'" However, the AG pointed out that "although Kentucky law is silent on the application of Gramm-Leach-Bliley to pawnbrokers, the federal act clearly prohibits disclosure of 'nonpublic personal information' [collected as part of a financial transaction] and that in tandem with state law requiring pawnbrokers to provide the data to police acts to prohibit disclosure of the pawnbroker data." The AG observed that "the public does have an interest in ensuring that the Division of Police is properly executing this statutory duty regardless of whether the Division or its agent, Leads Online, maintains the data.

That public interest is, however, trumped by federal law declaring the data private. The Open Records Act, recognizing no difference between requesters or their intended use of the data, yields to that law." (Order 13-ORD-164, Office of the Attorney General, Commonwealth of Kentucky, Oct. 16)

Missouri

A court of appeals has ruled that the Information Technology Services Agency of the City of St. Louis, which provides technological support for city agencies, including payroll information, does not have legal custody or control of payroll data for city agencies for purposes the Sunshine Law. The *St. Louis Post-Dispatch* requested payroll information for all city employees and the trial court ruled that ITSA must disclose the information. The city appealed, arguing that ITSA did not have legal custody or control of the payroll records. The appeals court agreed. The court noted that "the legislature's clear intent [was] that the custodians of records *for the agency whose records are sought* has the responsibility of the dissemination or non-dissemination of those records. It does not stand to reason that ITSA's custodian of records should bear the responsibility as the gatekeeper of the personnel records of the employees [of various city agencies] in determining which records are or are not subject to the Sunshine Law. . ." The court added that "ITSA functions merely as a data processor for [city agencies] that enroll its services. ITSA does not become a surrogate custodian of records [under the Sunshine Law] for [city agencies] when it has their personnel data in its possession for payroll data processing purposes." The court had also been asked to decide whether accrued leave pay was subject to disclosure. The court found that such records were subject to disclosure "when the accrued time is available to the employee in the form of a payment from state treasury funds or convertible into money coming from the 'public coffers.'" (*State of Missouri, ex rel. Gregory F.X. Daily v. Information Technology Services Agency of the City of St. Louis and St. Louis Post-Dispatch*, No. ED98789, Missouri Court of Appeals, Eastern District, Division Two, Oct. 15)

Nevada

The supreme court has ruled that records of the Foreclosure Mediation Program, which is run by the Administrative Office of the Courts, are confidential and are not subject to disclosure. Civil Rights for Seniors made several Public Records Act requests for the records. While the AOC agreed to release statistical data, it declined to provide identifying information and contended that the records were largely confidential or privileged. It also argued that as part of the judicial branch it was not subject to the Public Records Act. The trial court agreed, finding the AOC was not subject to the access law and that the records were confidential. The supreme court noted that "we need not decide whether the Act applies to the judiciary in general, or the AOC in particular, because we conclude that even if the Act does apply to the judiciary, the records in question are confidential as a matter of law." The court observed that "because all discussions during the mediation are confidential, post-mediation documents memorializing or relating to those discussions are also confidential as a matter of law." The supreme court also rejected the argument that the records were public court records. The supreme court indicated that "the requested documents are not maintained in connection with a judicial proceeding. Indeed, the FMP process is completed before, and often in lieu of, the initiation of a proceeding in any court." (*Civil Rights for Seniors v. Administrative Office of the Courts*, No. 60945, Nevada Supreme Court, Oct. 31)

New York

In a case requesting access to email correspondence sent on his private accounts by former Attorney General Eliot Spitzer to the media concerning a civil enforcement action against AIG for fraud, an appeals court has ruled that Spitzer is a necessary party and sent the case back to the trial court to either join Spitzer or allow him to intervene. The court noted that "resolution of the disputed FOIL demand directly impacts the

personal property of Spitzer, now a private citizen who is not before this Court and whose significant private rights and property cannot be said to be protected by the current [Attorney General], which admittedly does not represent Spitzer's private interests." (*In the Matter of Howard I. Smith v. New York State Office of the Attorney General*, New York Supreme Court, Appellate Division, Third Department, Oct. 17)

A court of appeals has ruled that the personal privacy of non-union workers outweighs any public interest in ensuring that a non-union contractor is paying its workers the prevailing wage. In response to a union employee's request for payroll records for workers on a public works project for the New York State Thruway, the agency provided payroll data but redacted personally identifying information. Upholding the redactions, the court noted that "the scenario of nonunion employees of a nongovernmental employer being contacted at their homes by someone from a union who knows their names, their home addresses, the amount of money they reportedly earn, and who wants to talk about that income would be, to most reasonable people, offensive and objectionable. A significant privacy interest is implicated." As to the public interest, the court observed that "the redacted payroll records that respondent provided to petitioner—with employee titles and corresponding wage rates—provide sufficient information to confirm whether the contractor complied with wage requirements." (*In the Matter of John J. Massaro v. New York State Thruway Authority*, New York Supreme Court, Appellate Division, Third Department, Nov. 7)

Washington

The supreme court has ruled that a qualified gubernatorial communications privilege protects various records involving decisions of former Gov. Christine Gregoire and that as long as the governor's office provides a privilege log describing the documents the privilege cannot be overcome except by a demonstration of a specific, individualized need. The Freedom Foundation sought a group of records concerning decisions for which Gregoire had previously claimed privilege in response to Public Records Act requests. While Gregoire waived privilege as to some of the documents, she continued to claim privilege for others and provided the trial court with a privilege log and a letter explaining her claims. The trial court found the records were privileged under the U.S. Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974) and because Freedom Foundation had not argued that it had a specific need for the records, the trial court affirmed the governor's privilege claim. At the supreme court, Freedom Foundation argued that the expansiveness of the gubernatorial communications privilege was contrary to the limited scope of the PRA's exemptions and the government's burden to prove an exemption applied. The court noted that "the Foundation's reading of [the PRA] fails to recognize that the governor raises a constitutional privilege." The court indicated that "refusal to recognize the gubernatorial communications privilege would subvert the integrity of the governor's decision making process, damaging the functionality of the executive branch and transgressing the boundaries set by our separation of powers doctrine." The court pointed out that "like any other privilege, we must limit the gubernatorial communications privilege to its purposes, here ensuring the governor's access to frank advice in order to carry out her constitutional duties. The privilege does not exist to shroud all conversations involving the governor in secrecy and place them beyond the reach of public scrutiny." However, the court explained that judicial review of a proper privilege claim was limited and observed that "separation of powers considerations require us to abstain from examining material the governor has determined is privileged unless the requesting party demonstrates some particularlized need for the materials, for judicial examination necessarily intrudes into the executive branch's need for confidentiality." The court concluded in this case that "the governor's assertion of privilege therefore creates a presumption of privilege, allowing the governor to withhold the documents absent a sufficient showing by the Foundation." (*Freedom Foundation v. Christine O. Gregoire*, No. 86384-9, Washington Supreme Court, Oct.17)

The Federal Courts…

Closely tracking a recent decision from the Sixth Circuit on the identical issue, the Third Circuit has ruled that the FBI's use of demographic data on race and ethnicity in assessing potential terrorist threats in various geographic regions is protected by **Exemption 7(A) (ongoing investigation or proceeding)** and has rejected the ACLU's argument that a *Glomar*-like procedure should be used to assess the appropriateness of an exclusion claim by the agency. A 2008 FBI Domestic Investigations and Operations Guide authorized the agency to engage in limited profiling for threat assessment. To find out more about how the FBI was using this authority, the ACLU made a series of requests pertaining to various geographic regions. The recent Sixth Circuit case involved threat assessments in Detroit, while the Third Circuit case primarily focused on Newark. In response to the New Jersey request, the agency disclosed 312 pages with redactions and withheld 284 pages under **Exemption 1 (national security)**, Exemption 7(A), and **Exemption 7(E) (investigative methods and techniques)**. The district court upheld all the agency's exemption claims and rejected the ACLU's argument concerning the way in which an exclusion claim should be assessed. But at the Third Circuit, the court found that Exemption 7(A) protected all the records and declined to consider the remaining exemptions. While the ACLU agreed that the records were compiled for law enforcement purposes, it argued that the agency had failed to show that disclosure of demographic information, much of which was publicly available, would interfere with an ongoing investigation, particularly in light of the fact that the agency had disclosed similar information in response to other requests. The court, however, noted that "common sense itself suggests that different data related to different ethnic populations in different cities used in completely different FBI investigations can vary greatly in sensitivity." Finding the FBI's affidavits were more than sufficiently detailed, the court indicated that "it is hard to imagine how the FBI could provide a more detailed justification for withholding information under this exemption without compromising the very information it sought to protect." The court dismissed the ACLU's contention that disclosure of publicly available data would not be harmful. Instead, the court observed that "this argument misses the obvious point that while the demographic data itself may be public, its use by the FBI is certainly not. The [agency's affidavits] reveal what should be obvious to anyone: that the harm from disclosure lies in revealing, indirectly, the FBI's targeting preferences and investigative techniques—not in revealing demographic information that is already available to the public." Although the FBI had provided the district court with an *in camera* affidavit concerning whether it had excluded any information under subsection (c), the ACLU argued that the agency should be required to respond to the group's query as to whether an exclusion applied and then the parties could argue that issue in court. The court noted that 'we find no legal authority compelling the District Court to employ the ACLU's proposed procedure" and added that "the *in camera* procedure employed by the District Court allows it to examine the actual information withheld if and when it is actually withheld." (*American Civil Liberties Union of New Jersey v. Federal Bureau of Investigation; Department of Justice*, No. 12-4345, U.S. Court of Appeals for the Third Circuit, Oct. 23)

Judge Beryl Howell has ruled that six documents concerning a 2004 treaty agreement between the United States and Mexico that would provide for the payment of Social Security benefits to Mexican nationals are not protected by **Exemption 5 (deliberative process privilege)** because they are not pre-decisional and reflect the final policy position of the State Department. In a previous ruling in a suit brought by Trea Senior Citizens League, Howell had told State to provide further justification for withholding certain documents. This time around, Trea Senior Citizens League continued to challenge only six documents that had been withheld under Exemption 5 by either State or the Social Security Administration. Howell began by noting that the agencies had misunderstood what constituted a predecisional document for purposes of the deliberative process privilege. She indicated that the agencies contended that "the disputed documents related to the Agreement

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simply relay advice to the President, since the Agreement itself is not yet final." But she explained that "the key to determining whether a document is pre-decisional is not necessarily in what stage of implementation, or on whose desk, the policy currently rests—because a final policy may never be acted upon—but instead is simply focused on whether the document 'was generated before the adoption of an agency policy.'. . .Despite the defendant's contention that the Agreement 'remains a matter of continuing concern,' there can be little doubt that the Agreement was formally adopted as agency policy when representatives of the United States and Mexico bound their respective nations to the terms of the Agreement, even if further implementation requires additional steps, including transmittal to and final acceptance by the United States Congress. . .There is perhaps no more final expression of agency policy than signing a major international agreement on behalf of the United States of America." Although neither party had cited it, Howell found the D.C. Circuit's decision in *Public Citizen v. OMB*, 598 F.3d 865 (D.C. Cir. 2009), was directly on point. In *Public Citizen*, she explained, the D.C. Circuit had found that when "an agency seeks to change a policy, it logically starts by discussing the existing policy, and such discussions hardly render documents explaining the existing policy pre-decisional" and added that "a document that does nothing more than explain an existing policy cannot be considered deliberative." Applying the logic of *Public Citizen* to the records in this case, she pointed out that "while the Agreement may, as defendant asserts, 'be changed by the State Department and/or the President,' those changes do not make the records at issue, by their nature, pre-decisional or deliberative." She added that "the defendant has adopted the Agreement by signing it on behalf of the United States. Thus, like the policy documents at issue in *Public Citizen*, the Agreement is sufficiently 'final' for determining whether documents pertaining to the Agreement are pre-decisional and deliberative." She sent the documents back to State to apply her decision. As to the SSA documents, however, she noted that they "represent the final explanation of the Agreement as understood by the SSA, the agency responsible for eventually implementing the Agreement. Consequently, these three documents are not properly withheld under Exemption 5." (*Trea Senior Citizens League v. United States Department of State*, Civil Action No. 10-1423 (BAH), U.S. District Court for the District of Columbia, Oct. 30)

Judge Barbara Rothstein has ruled that NASA must provide access to records related to temperature data correction and emails received by Dr. Gavin Schmidt to the Competitive Enterprise Institute. CEI made three FOIA requests concerning the temperature data correction made by the Goddard Institute of Space Studies in response to the discovery by statistician Stephen McIntyre that NASA had been overstating temperatures in the United States since 2000, another concerning the processing of that request, and the third for correspondence sent or received by Schmidt, a professor at Columbia University currently working as a physical scientist at GISS, concerning contributions made by Schmidt to the blog RealClimate.org. When NASA failed to respond to the requests after two years, NASA's Inspector General investigated the delay prompted by a letter from two Senators. The IG found the delay was caused by "insufficient staffing in the Goddard FOIA office, inadequate oversight of Goddard's FOIA procedures, and lack of management attention to issues identified by the FOIA office." In December, 2009, the agency responded to the requests with an "Initial Determination on Partial Response." CEI appealed the partial response in January 2010 and NASA issued a final determination in March 2010 on all three requests. The agency disclosed about 2400 pages altogether. NASA claimed CEI had **failed to exhaust its administrative remedies** because it did not appeal the agency's final determination. But Rothstein found that CEI's appeal of the partial determination satisfied the exhaustion requirement because "NASA had the 'opportunity to consider the very issue' that CEI raises in this action; namely, the adequacy of the search and the adequacy of the production. Therefore, the agency had the opportunity to apply its expertise to the matter and to develop a factual record." She added that "if the agency wanted an opportunity to review its response further, it should have declined to accept and process CEI's appeal." CEI challenged the **adequacy of the search**, contending the agency should have disclosed what was referred to as the "Steve" directory. NASA claimed the "primary" files in the "Steve" directory "are only intelligible if read by a computer program or a commercial visualization tool" and that the CEI request

had not asked for computer programs and data files. However, Rothstein noted that "because CEI's requests broadly seek 'records' and 'other relevant covered material' related to changes made to the temperature data, the requests are 'reasonably susceptible to the broader reading' that the requested records include computer programs and data files related to the temperature revisions." She indicated that "the FOIA's definition of 'record' includes information maintained in electronic format. Additionally, the fact that the directory is only intelligible to a computer does not remove the directory from the category of 'agency records.'" She observed that "although CEI had access to visual representations of this data through the charts and graphs posted on public websites, these representations are not the same as the data used to create them." Rothstein then found that emails sent to Schmidt at his Columbia University email account were not subject to disclosure because they did not qualify as agency records since the agency did not control their use or retention. She indicated that "emails located only in Dr. Schmidt's @columbia.edu email account are personal materials that the agency was not required to search." But she added that "of course, not all of Dr. Schmidt's emails from or to his @columbia.edu email address are personal materials exempt from being searched. But the @columbia.edu emails that were agency records (those emails that were exchanged between Dr. Schmidt's @columbia.edu account and a NASA email account) were captured by the agency's search of employee email accounts. . . Accordingly, NASA's search was reasonable even though it did not search Dr. Schmidt's @columbia.edu email domain, because emails located only on that domain are personal materials." NASA contended that none of Schmidt's emails that mentioned RealClimate were agency records. Rothstein disagreed. She noted that "any email that was sent to or from a NASA email account is within the agency's control" and added that "the record contains concrete evidence that the agency used such emails to conduct agency business. This makes them agency records." (*Competitive Enterprise Institute v. National Aeronautics and Space Administration*, Civil Action No. 10-883 (BJR), U.S. District Court for the District of Columbia, Oct. 30)

A federal court in California has ruled that various components of the Justice Department failed to justify their responses to requests from EFF concerning electronic surveillance programs and techniques. The DEA, the FBI, and the Criminal Division declined to disclose parts of records they contended were not responsive. After the court told them to reconsider whether information in close proximity to clearly responsive information might also be responsive, the DEA disclosed an additional fourteen pages, but the FBI and Criminal Division stuck with their original positions. Judge Richard Seeborg found that "the Government's reading may indeed be reasonable insofar as it describes what the requests expressly call for—i.e., the 'subject' of the requests. The agencies' obligation to produce, however, extends to material that *relates* to that subject, or , again, which in any sense sheds light on, amplifies, or enlarges upon that material which is found in the same documents.'" Seeborg noted that "having failed to rebut the presumption, the agencies shall produce all material previously withheld as non-responsive or outside the scope of the requests where no other exemption claim has previously been asserted as to such material. . ." Seeborg approved of the FBI's withholding of financial information from a draft proposal from the RAND Corporation under **Exemption 4 (confidential business information)**, pointing out that "the very nature of the document supports a conclusion that it contains cost projections and other details of the proposal that constitute commercial information of RAND within the meaning of the exemption." But he found the DEA had failed to substantiate its Exemption 4 claims for documents about how devices like the Blackberry worked. Referring to one document, he observed that "a conversation between DEA and a communications company. . .contains no indication that information was provided with any expectation of confidentiality, or that it was at all sensitive or not publicly known." Most of the withheld records had been claimed under **Exemption 7(E) (investigative procedure and techniques)**. Upholding most of the agencies' claims, Seeborg noted that because EFF's FOIA request concerned the vulnerabilities of various surveillance programs "it is hardly surprising that documents responsive to these requests could include virtual recipe books for persons with an interest in circumventing the law as to where law enforcement's vulnerabilities lie." But he balked at a claim made by the Criminal

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Division for records concerning how an anonymizing technology worked. He observed that "the investigator cites Wikipedia for part of the description of how the software operates. It is difficult to imagine what law enforcement techniques, procedures, or guidelines CRIM sought to protect from disclosure by this redaction. Clearly the underlying information about anonymizing technologies is publicly available." (*Electronic Frontier Foundation v. Department of Justice*, Civil Action No. 10-4892 RS, U.S. District Court for the Northern District of California, Nov. 1)

A federal court in Colorado has ruled that while PacifiCorp has shown that the EPA has neither justified its **search** for records concerning regional haze requirements relevant to an ongoing rulemaking nor that **Exemption 5 (privileges)** applies to portions of the records, the company has not shown that it would suffer irreparable harm from the agency's inability to process and disclose its FOIA requests in time for the company to provide further public comments. After the EPA provided a cursory response to PacifiCorp's requests and failed to respond to the company's administrative appeals, PacifiCorp filed suit asking for a preliminary injunction requiring the agency to respond to its request in time for it to make further public comments on the proposed rule. Noting that injunctive relief was disfavored by the Tenth Circuit, the court nonetheless assessed whether PacifiCorp had established its right to injunctive relief. Because PacifiCorp provided evidence that the EPA had used personal email accounts in corresponding with interested parties, the court noted that "through its submission of copies of personal e-mail communications by at least one of Defendant's officials with a representative of Environmental Defense Fund, the Plaintiff has shown a substantial likelihood of success in establishing that the scope of Defendant's search was insufficient to constitute a complete and full response to Plaintiff's requests." The agency contended that "Plaintiff's FOIA requests, by their own terms, relate to matters that are currently being litigated by Defendant." But the court pointed out that "while this may be true, this does not mean that everything 'related' is privileged and therefore exempt." The court rejected the agency's claim that it was not required to provide a *Vaughn* index except in response to a summary judgment motion. Instead, the court observed that "the purpose of providing a *Vaughn* index, or something equivalent, is to permit the Court to determine whether a sufficient factual basis exists to support the agency's refusal to disclose the information at issue. Such determination, however, is at issue in ruling on not only a motion for summary judgment but also a motion for preliminary injunction. While the cases relied on by the parties generally addressed a *Vaughn* index in the context of motions for summary judgment, there is no controlling decision which limits its application to such context and the Court finds the application is not so limited." But turning to the issue of irreparable harm, the court indicated that "Plaintiff has not shown that an adequate search would produce any additional relevant documents, or that the production of any currently withheld non-privileged document would provide useful information to support additional public comments regarding the final rule or for inclusion in the administrative record for review. At this juncture, Plaintiff can only speculate that some relevant, useful information may have been withheld, or not located and produced." The court was surprised by the agency's forthright admission that it routinely failed to respond to requests on time. The court noted that "Defendant candidly and inexplicably acknowledges it did not, and does not, comply with the deadlines—a violation of its statutory duties—yet questions why Plaintiff would need the requested information on a 'rushed timeline' before the November 21, 2013 final rule deadline. While Defendant's failure to comply with its obligations cannot be sanctioned, in order to obtain the extraordinary relief Plaintiff seeks it must nonetheless meet the requirements for granting such relief." (*PacifiCorp v. United States Environmental Protection Agency*, Civil Action No. 13-02187-RM-CBS, U.S. District Court for the District of Colorado, Oct. 28)

Judge Amy Berman Jackson has ruled that the Justice Department has shown that records withheld under **Exemption 3 (other statutes)** because disclosure was prohibited by Rule 6(e) on grand jury secrecy were properly withheld from Josef Boehm, who was convicted on drug charges. Jackson had originally sent the

claim back to the agency because it had not adequately explained why the information would reveal matters occurring before the grand jury. This time, Jackson indicated that "here, the FBI and EOUSA are withholding information that identifies the particular records subpoenaed by the federal grand jury as well as the substantive information actually obtained and considered by the grand jury pursuant to those subpoenas. This approach is proper under Exemption 3 because disclosure of the documents would reveal the contents of a grand jury subpoena, which is prohibited in this circuit, and they would shed light on how the grand jury went about its work." Jackson was previously skeptical of EOUSA's **Exemption 7(D) (confidential sources)** claims and had told the agency to provide better justification. This time she noted that "EOUSA has done little more than reassert that the information was gathered in the course of a criminal investigation and that some of the information may relate to plaintiff's alleged drug transactions, leaving the Court with misgivings about whether EOUSA's showing is now sufficient." However, she indicated that "the Court need not resolve the question of whether EOUSA satisfied its burden to establish confidentiality under Exemption 7(D) because all the information withheld pursuant to that exemption has also been properly withheld under[**Exemption 7(C) (invasion of privacy concerning law enforcement records)**]." She added that "these names and identifying information, however, are precisely the type of information protected by Exemption 7(C), and this Court previously held that the privacy interest in one's name and indentifying information outweighed public interest in disclosure in this case." (*Josef F. Boehm v. Federal Bureau of Investigation*, Civil Action No. 09-2173 (ABJ), U.S. District Court for the District of Columbia, Oct. 18)

In two companion decisions, Judge Royce Lamberth has ruled that EPIC is eligible for **attorney's fees** for litigation against the Department of Homeland Security and the Transportation Security Administration for records concerning whole body imaging technology, but that because it only succeeded on part of its challenge the award should be reduced accordingly. As a result, Lamberth found EPIC had succeeded on only one-seventh of its claims against DHS and 40 percent of its claims against TSA. Because EPIC's legal team included several attorneys who had not yet been admitted to the D.C. Bar, Lamberth indicated they could only be compensated at the level of paralegals. As to attorneys who were bar members of another state and not admitted to the D.C. Bar, Lamberth explained that "this Court declines to monetarily penalize a FOIA plaintiff just because a licensed attorney who had not yet acquired a D.C. license signed a brief, even if that is not in accordance with local rules. Instead, the Court will apply the junior attorney rates that EPIC seeks." Lamberth scolded EPIC for requesting fees for overlapping work in both cases. He pointed out that "if a plaintiff were to get fees from two different adversaries for the same hours, there would be a windfall of 100% beyond compensation for the attorney's efforts." Turning to EPIC's entitlement to fees, Lamberth noted that "while the parties dispute the public benefit garnered from the 18 pages of production caused by the summary judgment motion, this Court is satisfied that EPIC sought the documents for public purposes. . ." But Lamberth then observed that "even though EPIC is entitled to fees, the Court will reduce those fees by six-sevenths because of EPIC's limited success. DHS withheld documents based on three exemptions [Exemption 4 (confidential business information), Exemption 5 (deliberative process privilege), and Exemption 6 (invasion of privacy], and EPIC won on its motion to compel disclosure with respect to only one of those exemptions [Exemption 4], leading to only 18 pages of new documents. . .[T]he Court finds that on the merits, EPIC dedicated 6 pages out of 42 of argument, or one-seventh, to the winning issue. Therefore, EPIC will receive one-seventh of fees on the merits." After rejecting some billing hours, including a 50 percent reduction for double billing, Lamberth reduced EPIC's fee request from $22,242 to $3,028.86. In the TSA litigation, although EPIC only received portions of ten pages, Lamberth found their overall success rate was higher, explaining that "this Court finds that EPIC dedicated about 13 pages of argument our of 33, or [40] percent to Exemption 5 (the winning issue)." As a result, Lamberth awarded EPIC $9,373 in attorney's fees. (*Electronic Privacy Information Center v. United States Department of Homeland Security*, Civil Action No. 10-1992

(RCL) and *Electronic Privacy Information Center v. United States Transportation Security Administration*, Civil Action No. 11-290 (RCL), U.S. District Court for the District of Columbia, Oct. 15)

The Tenth Circuit has ruled that the district court erred when it found that William Pickard bore the burden of showing why information about an acknowledged DEA informant should be unsealed. At trial on drug charges, one of Pickard's accomplices testified as a confidential informant. While the district court ordered the government to provide the confidential informant's file to the defense, the court also sealed the file. Eight years later, Pickard filed a motion to unseal the records so they could be used in ongoing FOIA litigation. The district court acknowledged that some of the sealed information had been made public, but it denied Pickard's motion to unseal the DEA records. The appeals court noted that "consistent with [the] presumption that judicial records should be open to the public, the party seeking to keep records sealed bears the burden of justifying that secrecy." The court indicated that "the burden is on the Government, as the party opposing disclosure of the DEA records, to articulate a sufficiently significant interest that will justify continuing to override the presumption of public access to the DEA records at issue here." The court pointed out that "we can imagine possible government interests that might be in play here that could justify continuing to keep at least a portion of these DEA records sealed. But the Government did not expressly articulate such an interest, and it is the Government's burden to do so." The court observed that "the fact that some of the sealed information has already been made public suggests that much of the information in the DEA records could be unsealed." The appeals court sent the case back to the district court for reconsideration in light of its decision. (*United States of America v. William Leonard Pickard*, No. 12-3142 and No. 12-3143, U.S. Court of Appeals for the Tenth Circuit, Nov. 5)