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Washington Focus: Washington Post reporter Al Kamen took a peek at what he referred to as the "sometimes surreal world of the Freedom of Information Act" in discussing the availability of inspector general reports. Kamen explained that reporter Craig Whitlock's recent piece on an IG investigation of Steven Calvery, director of the Pentagon's police force, was made possible because Whitlock knew of the report's existence and requested it under FOIA. Even so, he waited for seven months to get the report, which by that time was redacted. A DOD IG spokeswoman told Whitlock that "because such investigations involve information that may address the privacy concerns of the subject as well as witnesses and persons interviewed, reports of investigations frequently must be redacted extensively prior to release to the public." Kamen wondered how the public was likely to find out about the results of IG reports unless someone had prior knowledge. Tom Blanton, Director of the National Security Archive, suggested that an automatic request be made every three months for closed IG investigations. He observed that "if you keep the reports secret, you lose the deterrent effect on future bad behaviors."

Court Rejects Non-Specific Exemption 7(F) Claim

Judge James Boasberg has rejected the government's argument that Exemption 7(F) (safety of any individual) protects information whose disclosure might cause harm to undefined groups of people. His decision is the first since the Second Circuit's opinion in *ACLU v. Dept of Defense*, 543 F.3d 59 (2d Cir. 2008), which was vacated to prevent it from being considered by the Supreme Court and was traded for passage of the Open FOIA Act amending Exemption 3, to look closely at both the language and legislative history of Exemption 7(F) and conclude that it covers only individuals or identifiable groups of individuals rather than the universe of individuals.

In *ACLU v. Dept of Defense*, the government invoked Exemption 7(F) to protect American troops and citizens in Iraq

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and Afghanistan from potential attacks as the result of disclosure of graphic photographs of abuse of detainees. In Boasberg's case, EPIC had requested Standard Operating Procedure 303 from the Department of Homeland Security, an Emergency Wireless Protocol codifying the shutdown and restoration process for use by commercial and private wireless networks during national crises, including deterring the detonation of remote explosive devices. The agency first indicated it could find no responsive records. When EPIC appealed, the agency sent the request back for a further search. The agency then found the document, but withheld it under Exemption 7(E) (investigative methods and techniques) and Exemption 7(F). Boasberg, however, found that neither exemption covered the protocol.

Turning first to Exemption 7(E), Boasberg agreed with the agency that the record was created for law enforcement purposes. But he pointed out that "DHS's trouble comes at the second step, which requires that the disclosure would reveal 'techniques and procedures for law enforcement investigations or prosecutions.' They key question is whether the agency has sufficiently demonstrated how SOP 303, which articulates *protective* measures, is a technique or procedure 'for law enforcement investigations or prosecutions.'" He then looked at the legislative history of Exemption 7(E), which was amended in 1986. He noted that "prior to the 1986 amendments, to merit withholding, Exemption 7 first required 'investigatory records compiled for law enforcement purposes,' and subparagraph (E) then required that the records would 'disclose investigative techniques and procedures.' The 1986 amendments 'delet[ed] any requirement [in the first step] that the information be 'investigatory' and broadened the permissible withholding to 'records or information compiled for law enforcement purposes.' Congress, however, retained the investigatory requirement in 7(E) by keeping the requirement that information be 'for law enforcement investigations or prosecutions.' Congress thus specifically and intentionally chose to remove the investigatory requirement from the first step and to leave it in the second step."

Boasberg observed that "looking at the amended language, the Court agrees with the Government that Exemption 7's mention of 'law enforcement purposes' may certainly include preventive measures. The problem is that 7(E)'s reference to 'law enforcement investigations and prosecutions' does not." He pointed out that "if 'techniques and procedures for law enforcement investigations or prosecutions' is given its natural meaning, it cannot encompass the protective measures discussed in SOP 303. This term refers only to acts by law enforcement after or during the commission of a crime, not crime-prevention techniques." Boasberg noted that "the agency's last gambit is a *post hoc* attempt to classify SOP 303 as an investigative technique" by suggesting that preventing an explosion would facilitate the investigation of who built and tried to detonate the explosive. He pointed out that "this is too little, too late" and agreed with EPIC that SOP 303 could not be characterized "as an evidence-gathering technique."

Boasberg indicated the government's argument fared no better when applied to Exemption 7(F). He pointed out that "DHS must show that production would 'endanger the life or physical safety of *any individual*. The agency argues that SOP 303's 'disclosure could reasonably be expected to endanger the physical safety of individuals near unexploded bombs.'. . .In other words, [the government contends that] the 'any individual' test is satisfied because those endangered are any individuals near a bomb. Although this interpretation holds some appeal, the Court must conclude that the agency reads the 'any individual' standard too broadly." He noted that "while DHS is correct that Exemption 7(F) is not limited to protecting *law-enforcement* personnel from harm, the agency still must identify the individuals at risk with some degree of specificity."

Boasberg found the Second Circuit's analysis in *ACLU v. Dept of Defense* persuasive. The Second Circuit explained that Exemption 7(F) was also amended in 1986 by deleting language that limited its application to law enforcement personnel and replacing it with "any individual." But in 1985 congressional testimony, the government specifically indicated the amendment was intended to cover "witnesses, potential

witnesses and family members whose personal safety is of central importance to the law enforcement process." Boasberg explained that "Congress ultimately settled on the broader term of 'any individual,' as opposed to, for example, 'any individual connected to or assisting law enforcement.'" He observed that "the Court, therefore, would be overly restrictive if it defined 'any individual' in the latter, cabined manner. Yet, bearing in mind the modest expansion intended and the prescription that exemptions must be read narrowly, the Court must require some specificity and some ability to identify the individuals endangered." Boasberg indicated that "the population is vaster here because it encompasses all inhabitants of the United States, while in *ACLU* it only covered people in Iraq and Afghanistan. Indeed, if the Government's interpretation were to hold, there is no limiting principle to prevent 'any individual' from expanding beyond the roughly 300 million inhabitants of the United States, as the Government proposes here, to the seven billion inhabitants of the earth in other cases."

While the Second Circuit completely rejected the reasoning of *Living Rivers v. Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003), nearly the only case upholding application of Exemption 7(F) to a loosely defined population, consisting of everyone living downstream from Hoover and Glen Canyon Dams, Boasberg was hesitant to dismiss the case completely. Instead he distinguished his case from *Living Rivers*. He pointed out that "here, the individuals at risk include anyone near any unexploded bomb, which could include anyone anywhere in the country. As the *Living Rivers* population was clearly specified and limited, the case, even were it binding, does not affect the Court's decision." (*Electronic Privacy Information Center v. Department of Homeland Security*, Civil Action No. 13-260 (JEB), U.S. District Court for the District of Columbia, Nov. 12)

Views from the States…

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

Connecticut

A trial court has upheld the FOI Commission's ruling that an exemption prohibiting disclosure of the names and addresses of persons issued a permit to carry a pistol or revolver includes identifying information about individuals whose carry permits are pending and have not yet been issued. Edward Peruta requested the pending application information and he appealed to the FOI Commission when his request was denied by the Department of Emergency Services and Public Protection, arguing that because the exemption specifically referred to issued permits it did not apply to applications for permits that had not yet been issued. The Commission relied on two previous decisions concerning gun permit records, one in which it ruled that identifying information of individuals who had been denied a permit but were currently appealing the decision was confidential, and another in which the Commission ruled that disclosure of identifying information for pending applications would frustrate the purpose of the exemption for permit holders. The court noted that the legislature considered doing away with the protection for permit holders in the aftermath of the Sandy Hook shootings, but the proposed amendment died in committee. The court explained that the exemption's reference only to issued permits was "not plain and unambiguous because the plaintiffs' construction of it would lead to absurd or bizarre results." The court added that "a more reasonable construction of the statute is that the legislature intended to protect the confidentiality of the names and addresses of individuals who are ultimately issued a pistol carry permit. The identity of individuals who fall into that universe or class of persons cannot be finally

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determined until the permit application process is complete. Under the Commission's reasonable construction of the statute, if a person applies for but is ultimately denied a permit, his name and address must then be disclosed upon request. If, however, that person is granted a permit, then his or her name and address must remain confidential throughout the entire permitting process." (*Edward Peruta v. Freedom of Information Commission*, No. HHB-CV 13 5015745 S, Connecticut Superior Court, Judicial District of New Britain, Nov. 8)

Florida

A court of appeals has ruled that value added measurement data, which shows the difference between a student's predicted score on the state assessment test and the student's actual score, is not protected by an exemption for teacher evaluations. The VAM is prepared by the Department of Education and eventually becomes part of individual teachers' personnel files and is used as one element in schools' annual teacher evaluations. Because the data was used in preparing teacher evaluations, the trial court found the exemption for teacher evaluations protected disclosure of the data. The appellate court, however, disagreed. The court noted that "while [the exemption] provides that the evaluation of a public school teacher is not subject to disclosure under the public records law, it does not follow that any information or data used to prepare the evaluation is likewise exempt from disclosure." The court observed that "the VAM data is only one part of a larger spectrum of criteria by which a public school teacher is evaluated; it is not, by itself, the 'employee evaluation.'" (*Morris Publishing Group, LLC v. Florida Department of Education*, No. 1D13-1376, Florida District Court of Appeal, First District, Nov. 12)

Georgia

The supreme court has ruled that a recently created exemption for records of a training program disclosing an economic development project prior to a binding commitment, relating to job applicants, or identifying any proprietary hiring practices applies retroactively to pending litigation concerning participation at a training program at a technical college for a Kia facility. After the trial court found the exemption could not constitutionally be applied to pending litigation, the Technical College System and Kia appealed. The supreme court first considered whether the exemption applied at all. The plaintiffs argued that the exemption applied only prior to a commitment and not afterwards. The court rejected that argument, pointing out that the prior binding commitment modified only the disclosure of the existence of a development project and not to the job applicants or hiring practices. The court then examined whether the Open Records Act created a public or private right. The court found that "based on the text of the former Open Records Act, its structure, its historical context, our prior characterization of the Act, and the treatment of similar statutes in other jurisdictions, we conclude that the right of access afforded by the former Act is a public right of the People as a whole. As such, it could not vest in any particular persons, whether upon the making of a request for public records, or upon the filing of an action to enforce the public right. Accordingly, there is no constitutional impediment to the retroactive modification of the Act by subsequent legislation." However, the court pointed out that it was not clear whether all the records requested fit under the exemption. The court sent the case back to the trial court to determine if any records could be disclosed. (*Nathan Deal v. Krystal Coleman, et al.*, No. S13A1085, Georgia Supreme Court, Nov. 18)

Louisiana

A court of appeals has ruled that the trial court did not abuse its discretion when it assessed New Orleans Police Superintendent Ronal Serpas a $5,000 civil penalty for his failure to respond to a request from the Innocence Project for records concerning the investigation of Bennie Brown, whose felony conviction became final in 1993. Serpas failed to respond to the Innocence Project's request within the statutory three-

day time limit. The police department informed the Innocence Project 65 days later that it would not produce the records because they were considered exempt police investigative records. The court noted that Serpas' argument was that "police reports which supplemented an initial investigative report remained exempt from disclosure, even in cases such as this one where there was a final judgment of conviction." But the court indicated that "as we [have] explained, the exception excluding supplemental police reports from being public records is temporal in nature. . ." Finding the trial court had not abused its discretion by assessing the $5,000 penalty, the appeals court pointed out that "in light of the ongoing attempts by the Innocence Project to obtain some feedback from the superintendent, and to avoid unnecessary and costly legal action, it is clear that Superintendent Serpas simply ignored the request, and thereby subjected himself to the possibility of penalties." (*Innocence Project of New Orleans v. New Orleans Police Department*, No. 2013-CA-0921, Louisiana Court of Appeal, Fourth Circuit, Nov. 6)

Maine

The supreme court has ruled that transcripts of several 911 calls made during a shooting incident do not qualify under the investigative records exception of the Freedom of Access Act and must be disclosed to MaineToday Media. The case involved three 911 calls during an altercation between three tenants and their landlord that resulted in the deaths of two of the tenants. The *Portland Herald* requested the transcripts from the Biddeford Police Department, the Maine State Police, the Attorney General's Office, and the Bureau of Consolidated Emergency Communications. The agencies took the position that, even though the landlord had been charged, the incident was still under investigation. The trial court upheld the agencies' position, but the supreme court reversed. Although 911 tapes are not available, transcripts of calls must be disclosed once any identifying information is redacted. The agencies contended that the transcripts qualified as exempt investigative records compiled by a criminal justice agency under the Criminal History Record Information Act. But the supreme court pointed out that the records were the property of the Bureau of Consolidated Emergency Communications. The court noted that "the Bureau is part of the Public Utilities Commission. . . Although the Bureau's product is certainly used for criminal justice purposes on a daily basis, the Bureau manages the telecommunications necessary for the provision of emergency services, and does not meet the definition of a criminal justice agency." The supreme court acknowledged that the records nevertheless probably qualified under the CHRIA because they were compiled by criminal justice agencies. But the supreme court explained the agencies needed to identify a specific harm that would occur if the transcripts were disclosed. The court observed that "the State identified no such specific concerns, but instead offered an explanation for the denial that merely reiterated the language of the statute itself." The court pointed out that "if the Maine Legislature had intended to exempt from disclosure all E-911 transcripts, or even all E-911 transcripts that related to active homicide cases, it could have, as it did with juvenile fire setter records and ambulance medical reports, for example." (*MaineToday Media, Inc. v. State of Maine*, No. Cum-13-155, Maine Supreme Judicial Court, Nov. 14)

Michigan

A court of appeals has ruled that the trial court abused its discretion when it sanctioned the State Police Department for its response to Barry King's request for records concerning Christopher Busch, a suspect in the killing of four children in Oakland County in 1976-77, and its decision to reduce the fees charged to King for processing the records. King, whose son Timothy was one of the victims, filed his request, asking for records on Busch, through his law firm. The letter was signed by an attorney other than King, but indicated that King was the client. King's son Christopher also filed a similar request. The State Police indicated fees for the request would be $11,525.49 and asked King to pay $5,762.74 upfront. King filed suit and Christopher was later added as a plaintiff. The State Police initially argued that King did not have standing to sue because he

was not the requester of record. King complained to the trial court that he paid more than $11,000 but received only $4,000 worth of records, since many of the records were not specifically related to Busch. The trial court eventually upheld most of the agency's exemption claims, but awarded $2,500 in attorney's fees and sanctions against the State Police for arguing that King did not have standing. The court also ordered the State Police to return $6,000 to King as an overcharge for the fees. Both parties appealed. King argued the agency had improperly withheld the results of Busch's polygraph test, the contents of which, King contended, had been made public by the Oakland County prosecutor. The appeals court found no evidence that the results of the polygraph test had been made public and upheld the agency's decision to withhold them, noting that "it is undisputed that defendant was the recipient of information, reports, or results from a polygraph examiner. Defendant therefore was prohibited from providing, disclosing, or conveying such information, reports or results to a third party except as required by law or administrative rules. Plaintiffs identify no law or rules that would require disclosure." The court then rejected the trial court's sanctions award. The court pointed out that "although defendant challenged Barry King's standing in its affirmative defense, defendant did not file a dispositive motion raising the issue, and the trial court did not decide that issue. Plaintiff thus did not prove the truth of the matter. . .as there was no hearing or trial in which plaintiffs were required to do so." On the matter of fees, the court explained that the agency charged $9,267 to retrieve and review records. The court observed that "neither plaintiffs nor the trial court have identified a factual basis in the record to challenge defendant's calculation of this amount or offered a reason to conclude that retrieving, examining, and separating these documents was not necessary to honor plaintiffs' requests." The State Police argued that King's lawsuit was premature because it had granted his request. The court, however, disagreed. The court indicated that "although defendant contends that it granted the requests, its response letters reflect that the requests were effectively granted in part and denied in part, as the letters contemplated the separation of exempt material and thereby implicitly denied the requests with respect to such material." (*Barry L. King and Christopher K. King v. Michigan State Police Department*, No. 305474, Michigan Court of Appeals, Nov. 12)

Nevada

The supreme court has ruled that the files of individual retired employees maintained by the Public Employees' Retirement System of Nevada are confidential by statute, but that information not contained in individual records may be disclosed subject to applicable exemptions in the Public Records Act. Reno Newspapers requested the records, which were denied based on the agency's assertion that they were considered confidential. The trial court found the public interest in disclosure outweighed the individuals' privacy interests and ordered the records disclosed with home addresses and social security numbers redacted. The Retirement System appealed. The agency argued the statutory provision making the records confidential applied to all records unless a retired employee waived their privacy interests. But the court noted that "[the agency's] position exceeds the plain meaning of the [the statute's] restrictions, which must be narrowly construed to protect only individuals' files. In concluding that only individuals' files have been declared confidential as a matter of law, we specify that [the statute's] scope of confidentiality does not extend to all information by virtue of its being contained in individuals' files. Where information is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files. Rather, it is the individuals' files themselves that are confidential pursuant to [the statute]." But the court added that "this is not to say, however, that information contained in separate media that is otherwise confidential, privileged, or protected by law may be disclosed. While we hold that [the statutory provision] protects only the individuals' files maintained by PERS, other statutes, rules, or caselaw may independently declare individuals' information confidential, privileged, or otherwise protected. . .At this point, PERS has not identified any statute, rule, or caselaw that would foreclose production of the information requested by [the newspaper]." The court concluded that "the [trial] court correctly interpreted [the statute's] scope of confidentiality and did not abuse its discretion in ordering PERS to provide the requested information

to the extent that it is maintained in a medium separate from individuals' files." But the court noted the trial court's order went too far. "However, to the extent that the [trial] court ordered PERS to create new documents or customized reports by searching for and compiling information from individuals' files or other records, we vacate the [trial] court's order." (*Public Employees' Retirement System of Nevada v. Reno Newspapers, Inc.*, No. 60129, Nevada Supreme Court, Nov. 14)

The Federal Courts…

Judge Beryl Howell has ruled that the Justice Department properly withheld five documents concerning subpoenas issued to attorneys Victoria Toensing and Joseph diGenova pertaining to a client who was being investigated by a federal grand jury under **Exemption 5 (privileges)** and one under **Exemption 3 (other statutes)**. Toensing and diGenova argued that because DOJ attorneys acted improperly in taping interviews and trying to get them disqualified to represent their client EOUSA's claims that the records were protected by the attorney work product privilege did not apply. However, Howell pointed out that the application of the attorney work product privilege in the FOIA context depended entirely on whether the documents qualified under the privilege and that concerns about improprieties in their creation were irrelevant. Howell explained that the Supreme Court in *FTC v. Grolier*, 462 U.S. 19 (1983), concluded work product privileged documents remained protected under Exemption 5 unless they were routinely disclosable. Even if privileged documents had been disclosed to a specific party during litigation based on a showing of need, those documents continued to be privileged for FOIA purposes. She noted that "while attorney misconduct or unprofessional behavior may vitiate the work product doctrine in some circumstances, in the FOIA context, such an argument is unavailing." She indicated that after *Grolier* "courts must determine if 'the documents would be "routinely" or "normally" disclosed upon a showing of relevance.' Quite simply, whether the people who created these documents engaged in some misconduct or failed to comply with Department of Justice guidelines is irrelevant to determining whether the documents are appropriately withheld under Exemption 5, since exceptions to discovery privileges are not properly considered under Exemption 5." The plaintiffs contended that the agency's *Vaughn* index was inadequate to support its claim of the attorney work product privilege because it did not contain the date on which the record was created or the name of the author of the document. Again, Howell pointed out that "in the instant matter, the dates of the documents and the names of their authors are irrelevant to a determination of whether the documents are protected as attorney work product. Each document is identified as having been prepared by Department of Justice attorneys and each document's description adequately explains the nature of the document and why it is subject to the privilege. Thus, the defendant has shown, based on the supplemental *Vaughn* index provided, that [the five documents] would be shielded as attorney work product in civil litigation, barring vitiation due to an exception or other circumstances, and, as such, are exempt from disclosure under the FOIA." Howell found the sixth document was protected by Rule 6(e) on grand jury secrecy. Toensing and diGenova argued that they had been improperly subpoenaed to testify before the grand jury and that the subpoena had been made public during their litigation to quash the subpoena. Howell rejected the claim, noting that "the plaintiffs' belief that they were wrongly subpoenaed is simply irrelevant to the applicability of exemptions under the FOIA. . .[T]he plaintiffs' argument would allow the release, under the FOIA, of grand jury records pertaining to an indictment or grand jury subpoena as soon as either such document was made public, a result not sanctioned under the limited disclosure exceptions set out in Federal Rule of Criminal Procedure 6(e)(3)." (*Victoria Toensing, et al. v. United States Department of Justice*, Civil Action No. 11-1215 (BAH), U.S. District Court for the District of Columbia, Nov. 14)

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Judge Richard Leon has ruled that the SEC properly denied Chiquita Brands' request for confidentiality pertaining to records concerning the company's payments to terrorists in Colombia. In processing a request for the records from the National Security Archive, the agency informed Chiquita that records for which it had sought confidential treatment could potentially be disclosed. The company argued that disclosure could affect the fairness of civil litigation against the company in Florida, as well as a criminal investigation in Colombia. The SEC ruled against Chiquita and Chiquita filed a reverse-FOIA action. Leon noted that Chiquita's claim was made under **Exemption 7(B) (fairness of judicial proceedings)** rather than **Exemption 4 (confidential business information)**. But, Leon pointed out, under *Washington Post v. Dept of Justice*, 863 F.2d 96 (D.C. Cir. 1988), Exemption 7(B) applied only when a trial or adjudication was pending or truly imminent, and when it was more probable than not that disclosure of the records would seriously interfere with the fairness of the proceedings. While the SEC found Chiquita had satisfied the first prong of the *Washington Post* test, it concluded the company had not shown that disclosure would seriously interfere with the fairness of either proceeding. Leon agreed. He indicated that as to the Florida litigation, "Chiquita failed to specifically articulate how disclosure of the Chiquita Payment Documents would confer an unfair advantage upon plaintiffs in the discovery process. Chiquita conceded, in fact, that it is prepared to produce the documents if the discovery stay is lifted. The only harm mentioned was that Chiquita would be disadvantaged by not having the opportunity to obtain a protective order preventing public dissemination of these documents. This is not sufficient under the *Washington Post* test to invoke Exemption 7(B). Chiquita also speculates that, upon disclosure of the Chiquita Payment Documents, the Archive—which is not a party to the Florida Litigation—might work with plaintiffs to coordinate a public smear campaign against Chiquita. Again, this does not suffice." He added that "with respect to the Florida Litigation, there is no certainty about the degree of publicity that may result from disclosure." Turning to the Colombian investigation, Leon noted that "the SEC properly rejected Chiquita's argument that judicial officials in Colombia would be unable to exclude improper inferences in reaching a decision. Judicial officials, unlike jurors, are trained and experienced in distinguishing between proper evidence and adverse publicity." (*Chiquita Brands International, Inc. v. United States Securities and Exchange Commission*, Civil Action No. 13-435 (RJL), U.S. District Court for the District of Columbia, Nov. 19)

Judge John Bates has ruled that EPIC is entitled to $30,000 in **attorney's fees** for its FOIA suit against the Secret Service concerning its proposed program to monitor social media. Bates found that six of the seven documents the agency was withholding should be disclosed with redactions. He then asked EPIC and the agency to confer and reach an agreement on a reasonable fee award. The parties failed to reach an agreement and the attorney's fees dispute came back to Bates to decide. Bates first found EPIC was eligible for fees, noting that "EPIC obtained nearly all of the relief it was seeking, as the Court ordered DHS to produce all reasonably segregable portions of six of the seven documents that remained in dispute. . .[A] FOIA requester can still 'substantially prevail' even when it obtains less-than-full relief." Bates indicated that DHS did not seriously dispute that EPIC was eligible for fees, but did contest whether EPIC was entitled to an award. Bates pointed out that "as FOIA requests go, the public benefit derived from this one was exceptional. EPIC obtained and disclosed documents relating to a matter subject to an ongoing national debate: the tension between individual privacy interests and the national-security needs of our government in the digital age. Regardless of one's views on the merits, there is no doubt that EPIC's FOIA request made a contribution to this national conversation." He then found that EPIC's interest in the records favored an award while the reasonableness of the agency's position did not favor either party. Turning to the award itself, Bates found EPIC was entitled to fees for litigating both the merits of the case and whether it was entitled to attorney's fees. Bates reduced the requested charges for some of EPIC's attorneys who either were not yet admitted to the bar during the litigation or did not yet have the requisite years of experience to qualify for higher hourly rates. DHS argued EPIC could not charge for time spent reviewing records received during the request. But Bates observed that "EPIC is only seeking fees for review of documents produced during this litigation, and

DHS 'has failed to provide any evidence that this time billed by Plaintiff's attorneys was not spent for the purpose of litigating this case.'" The agency also argued that EPIC should not be awarded for the arguing for the release of the document Bates found was properly exempt. But Bates pointed out that "EPIC's work on this case cannot be thinly sliced on a document-by-document basis. The controversy over each individual document was not just 'related' to the others—it was entirely overlapping. Any work that EPIC did in arguing for the release of the [withheld] document would also have assisted it in its argument to release [the disclosed documents]." (*Electronic Privacy Information Center v. U.S. Department of Homeland Security*, Civil Action No. 11-2261 (JDB), U.S. District Court for the District of Columbia, Nov.15)

A federal court in Alabama has refused to reinstate its original ruling that the Department of Health and Human Services was required to provide Medicare physician reimbursement data to Jennifer Alley because it was not protected by **Exemption 6 (invasion of privacy)** or a 30-year-old injunction issued by a federal district court in Florida prohibiting the disclosure of such records for Florida physicians. The decision was appealed to the Eleventh Circuit, which reversed the district court's ruling relying solely on the existence of the Florida injunction, which, the appellate court found, acted as a complete prohibition of disclosure under the Supreme Court's ruling in *GTE Sylvania v. Consumers Union*, 445 U.S. 375 (1980). On remand, the district court then ruled that the records were protected. Alley then joined the successful effort to vacate the injunction. The Middle District of Florida found the injunction was no longer based on good law and vacated it prospectively in May 2013. Alley then petitioned the district court in Alabama to reinstate its original order in light of the Florida federal court's decision to vacate the injunction. Recognizing Alley's frustration, Judge Karon Owen Bowdre explained that "the injunction *was in effect at the time of the court's Final Order*, and the district court's order of May 31, 2013 in *FMA* vacating that injunction specifically stated that the vacatur only had *prospective* effect. Thus, despite the vacatur, the injunction remains in effect as of the date of this court's Final Order and still would apply to the Plaintiff's previous FOIA requests." She added that "*GTE Sylvania* is still good law, and it still supports this court's summary judgment in favor of HHS based on the *FMA* injunction that was in effect at the time of that judgment and that was vacated effective May 31, 2013 prospectively but not retroactively." Bowdre pointed out that "a new FOIA request will require HHS to address the request without the *FMA* injunction blocking the way and while starting with a new request may take time, that factor of time is not in and of itself an extreme or unexpected hardship sufficient to justify [court-ordered] relief." (*Jennifer D. Alley and Real Time Medical Data, LLC v. United States Department of Health and Human Services*, Civil Action No. 07-0096-E, U.S. District Court for the Northern District of Alabama, Eastern Division, Nov. 18)

Judge Rosemary Collyer has ruled that various components of the Justice Department have not yet shown that they conducted adequate **searches** for multiple requests submitted by prisoner Vincent Marino. Marino submitted multiple requests to various DOJ components, suggesting he was being framed by a conspiracy of several well-known criminals cooperating with federal prosecutors. He asked for records about himself, but a primary focus of his requests to the FBI, EOUSA, and the Criminal Division was his conviction on attempted murder and sealed records from the trial. Although Marino indicated he was willing to pay $1,000 in fees, EOUSA told him that to process his request would cost $8,960 and closed several of his requests when he failed to commit to paying fees. Marino filed suit and the agencies moved for summary judgment. Collyer first found that OIP, the Office of the Attorney General, and the Office of Enforcement Operations had not explained why they failed to respond to Marino's request. She noted that "attached to the [agency's affidavit] are numerous FOIA requests from Mr. Marino to these components of DOJ. Defendants do not contend that Mr. Marino mailed his letters only to some of the recipients listed in his letters, nor do they claim that the letters were somehow insufficient for purposes of triggering a response from the recipient agencies.

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Consequently, the Court finds that OIP, OAG, and OEO overlooked Mr. Marino's requests and did not establish that they conducted adequate and reasonable searches for records responsive to Mr. Marino's requests." She found EOUSA had acted improperly by insisting Marino commit to paying $8,960 in fees. She noted that EOUSA "ignores the July 24, 2012 letter Mr. Marino sent to EOUSA in response to its July 13, 2012 request for more specificity as to the records Mr. Marino sought. In that letter, Mr. Marino revised his FOIA requests and expressly limited the search fee he was willing to incur to $1,000. Ignoring this information, EOUSA continued to press Mr. Marino to pay $8,600 for the completion of [its] search. . . EOUSA never acknowledged the $1,000 maximum that Mr. Marino requested in July 2012. . .Accordingly, Defendants' arguments, which strictly focus on Mr. Marino's eligibility for a fee waiver, are not relevant to the issue presented." Although Marino's requests to the FBI and the Criminal Division asked for records about himself and sealed documents from his trial, Collyer indicated that the Criminal Division searched only for records about Marino and the FBI focused only on the sealed documents request, telling Marino that it did not have those records. Collyer pointed out that "neither agency has explained why it was appropriate to ignore half of Mr. Marino's FOIA request." (*Vincent Michael Marino v. Department of Justice*, Civil Action No. 12-865 (RMC), U.S. District Court for the District of Columbia, Nov. 12)

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Master Card / Visa / American Express
Card # _____-_____-_____-_____ Expiration Date (MM/YY):_____/_____
Card Holder:_____ Phone # (_____) _____-_____

Name:_____ Phone#: (____) _____-_____
Organization: _____ Fax#: (____) _____-_____
Street Address: _____ email: _____
City: _____ State:_____ Zip Code: _____