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Washington Focus: Writing on the Firedoglake blog, Kevin Gosztola takes the Department of Homeland Security to task for its attempt to obtain a protective order for records regarding a joint pilot program between DHS and the National Security Agency designed to monitor Internet traffic with several defense contractors to detect any potentially malicious programs. Although the outlines of the program were revealed in the Washington Post, DHS refused to provide EPIC with any documents. When ordered by Judge Gladys Kessler to process the records, the agency sought an order prohibiting EPIC from making any documents public until the agency was satisfied that no classified information had inadvertently been disclosed, which Kessler denied. She ordered the agency to provide a Vaughn Index by June. Gosztola noted that "one can only imagine what the process would be like if the government routinely utilized some power to further pervert the FOIA process by providing documents with restrictions that they not be made public for an indefinite period. It would conveniently shift responsibility and liability to the requester and make it possible to obstruct transparency while at the same time allowing agencies to claim they had made documents 'public' because they did in fact, fill the request."

Court Rules Federal Records Act Does Not Cover Destroyed Records

In a ruling that provides further evidence that the remedies in the Federal Records Act are completely useless, Judge James Boasberg has ruled in favor of the SEC in litigation brought by CREW contending the agency violated the FRA by pursuing a policy of destroying records of closed preliminary investigations. Because the agency had agreed to stop the policy, Boasberg had previously ruled that CREW's challenge to the policy was moot. However, he allowed CREW to continue its claims under the Administrative Procedure Act and the Mandamus Act pertaining to whether the agency had violated the FRA by failing to take steps to recover some or all of the improperly destroyed records. But based on the agency's newly introduced statutory interpretation argument, Boasberg concluded the statute's enforcement provision did not cover destroyed records. Instead, he found that while the

ACCESS REPORTS

first clause of § 3106 of the FRA required an agency to notify the Archivist in the event of any unlawful removal, defacing, alteration, or destruction of records, the second clause, which was crucial in this case, required that agencies request that the Attorney General take action to initiate recovery of records only when records had been improperly removed.

Based on reports that the SEC routinely destroyed records of closed preliminary investigations, CREW filed a FOIA request in September 2011 asking for the agency's reasons for not proceeding with various preliminary investigations, including inquiries involving Bernie Madoff, Goldman Sachs, and AIG. Before the SEC responded, CREW filed suit alleging violations of the FRA. Boasberg found that several of those claims were moot after the SEC abandoned its document-destruction policy. However, he allowed the APA and Mandamus Act claims concerning the recovery of records to continue.

Under § 3106 of the FRA, the head of an agency is required to notify the Archivist of any unlawful removal, defacing, alteration, or destruction of records and, with the help of the Archivist, initiate action through the Attorney General to recover records unlawfully removed. For the first time in the litigation, the SEC argued that the requirement to recover records through an action by the Attorney General applied only to records unlawfully removed from the agency and not to those unlawfully destroyed by the agency. Explaining the SEC's argument, Boasberg observed that "under the SEC's interpretation of § 3016, there are four possible triggers for the notification duty: 'removal, defacing, alteration or destruction' and only one for the enforcement duty, 'removal.' If 'removal' includes 'defacing, alteration and destruction,' why list those other terms?" He added that "the SEC maintains that because destruction is mentioned in the first clause, but not the second, this Court must assume that Congress' choice to exclude it was intentional."

CREW argued that such an interpretation went against the FRA's legislative history, which suggested that the enforcement duty also applies to the destruction of records. But Boasberg pointed out that "CREW's arguments in this regard run up against a fundamental problem, however: legislative history cannot trump a statute's plain meaning. By its plain terms, the second clause of § 3106 refers only to 'removed' documents. The simplest and clearest reading available—and, indeed, the only reading available to this Court—is that the mandatory enforcement duty is only triggered by the *removal* of documents." CREW also argued that two of the multiple D.C. Circuit decisions in *Armstrong v. Bush* recognized a private right of action to enforce the FRA. But Boasberg noted that "while these two cases analyze whether an agency's duties under the FRA may be enforced by a private litigant through the APA, neither addressed the specific statutory question at issue here. In addition, both were forward looking, seeking to prevent the future destruction of records. By contrast, it appears that no court has yet spoken to the issue of whether § 3106 imposes a restoration duty regarding already-destroyed records."

Boasberg then turned to whether the SEC had fulfilled its legal obligations under § 3106. He first explained that "while courts are empowered to 'compel agency action unlawfully withheld or unreasonably delayed,' a court may only do so when the action is withheld *unlawfully*—that is, when the agency has failed to act in response to a clear legal duty. If the duty required a 'ministerial or non-discretionary act,' a court may order the agency to take that specific action, but if the duty is simply to 'take action upon a matter' but 'the manner of its action is left to the agency's discretion,' the court 'has no power to specify what the action must be.'" He noted that "to the extent § 3106 and *Armstrong I* impose a duty on the agency to restore destroyed records, such a duty is clearly. . .left to the agency's discretion. *Armstrong I*'s language makes clear that the agency has choices regarding 'the manner of its action.'" He observed that "while *Armstrong I* suggests that judicial review of agency inaction under the FRA may be permissible in certain circumstances, that case's gloss on § 3106 appears to give the agency broad discretion regarding what internal remedial steps it may take in response to a loss of records. When reading *Armstrong I* together with [subsequent precedents],

this Court believes its review of the intra-agency corrective actions taken by the SEC in this case is extremely limited. . .”

Reviewing the steps the SEC took to address the destruction policy, Boasberg pointed out that “while [the agency’s actions were] clearly not as extensive as CREW would have liked, [they] were not so woefully insufficient as to render the SEC’s claims to have fulfilled its duties ‘so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’ Rather, the record suggests an agency aware of the potential enormity of the task at hand, but attempting to clarify the scope of the problem, making some efforts to retrieve documents that might still exist, identifying additional sources of information regarding the relevant documents, and counseling employees regarding future document preservation.” He indicated that “the SEC’s actions here appear to be well within the broad discretion that *Armstrong I* provides.” He concluded that “upon the showing the SEC has made, whether Plaintiff or this Court believes the SEC should have engaged in further recovery efforts is simply beside the point. The SEC took a series of internal steps that appear well within the kinds of enforcement actions that § 3106 and *Armstrong I* contemplate. . .”

While Boasberg did not find it necessary to rule on the matter, he expressed sympathy with the agency’s argument that requiring the Attorney General to bring action against an agency would have constitutional problems. He observed that “requiring the Attorney General to bring suit against another federal agency—which is typically represented by the Department of Justice—would be highly unusual, and it is difficult for this Court to overlook the ‘constitutional oddity of a case pitting two agencies in the Executive Branch against one another.’ Indeed, such a lawsuit would likely be moot in any case: while modern technology may allow some ‘destroyed’ records to be recovered, others are likely to be permanently unrecoverable. Neither would be true in the removal context because documents that have been physically removed are still physically recoverable, and because the legal redress the Attorney General would seek would take the form of a [possession] action against the holder of the records, rather than a suit against the agency head.” (*Citizens for Responsibility and Ethics in Washington v. U.S. Securities and Exchange Commission*, Civil Action No. 11-1732 (JEB), U.S. District Court for the District of Columbia, Jan. 17)

Thoughts from the Outside…

The following is one in a series of views and perspectives on FOIA and other information issues. The views expressed are those of the author.

The FOIA Amendments of 2017: Searching and Talking
By Robert Gellman

Since its passage in 1966, the Freedom of Information Act has been amended roughly every ten years. The first major amendments came in 1974, with later changes coming in 1986, 1996, and 2007. If we take this history as a guide, it is not too early to start debating the next set of major amendments. And perhaps no area could benefit more from new ideas than an agency’s obligation to conduct a search for responsive records.

Certainly requesters have been unhappy with many aspects of FOIA, with complaints traditionally focused on delays, denial of fee waivers, and assorted administrative shenanigans. Repeated legislative fiddling here has had limited effect. The FOIA is a resource intensive law, and more changes to timelines for responses are not likely to produce faster results at agencies that have many requests, large backlogs, and limited staff. Further, I have said for a long time that it is not possible to legislate good administration of the

law. You need some degree of good faith by all involved. Unfortunately, good faith on FOIA matters is distributed unequally among federal agencies and FOIA personnel.

I do not think all the blame for FOIA's problems falls totally on agencies, although they deserve much of the responsibility. Congress deserves blame, of course. But some problems are the result of poor requester behavior. For example, some requesters make too many requests. There was time in the past when a single requester was reportedly responsible for ten percent of the backlog at the FBI. Those requests may have been lawful, but they were an abuse of what might be called *requester discretion*. For example, requesters sometimes make requests that are too broad and that result in agency game-playing in response. It may be understandable at a human level when an agency looks for a way out of responding to a request for "all records about the Afghanistan war."

The result of poor judgments on both sides has been to make the process worse. Agencies interpret poorly framed requests narrowly to avoid work. In turn, requesters make more expansive requests. The result is a vicious circle where bad behavior on one side elicits more bad behavior on the other. Eventually the government gets a judicial decision that blesses its own bad behavior because the requester was more unreasonable. The government then uses that decision as precedent to restrict its responses to other requesters.

What we need most is something that is hard to legislate. The FOIA process would be better in most cases if the requester and the agency actually talked to each other and negotiated a reasonable way to satisfy the requester's desires in an efficient manner. To the extent such negotiating takes place today, it does not happen nearly often enough. The Justice Department and a few other agencies have reached out to the requester community to talk about the request process, but we need more of this at an individual request level.

I do not have a general legislative solution to these problems. What I propose is a response to the *search problem* that arises more and more in reported cases. A secondary goal, however, is to elicit more cooperation and discussion between agency and requester.

The Search Problem

What is the *search problem*? As agency records have grown more electronic over the decades, one of the most important elements of responding to any FOIA request is translating a FOIA request into a computer search strategy and then applying that strategy to specific agency databases. Not surprisingly, the particulars and adequacy of an agency computer search are increasingly the subject of court decisions. Recent cases include:

1. *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, https://s3.amazonaws.com/s3.documentcloud.org/documents/481429/nys-1-2010cv03488-opinion.pdf, where Judge Shira A. Scheindlin wrote a thoughtful opinion that took note of the parallels between FOIA requests and discovery requests in civil litigation. "Nonetheless, because the fundamental goal underlying both the statutory provisions [of the FOIA] and the [discovery provisions in the] Federal Rules is the same – i.e., to facilitate the exchange of information in an expeditious and just manner – common sense dictates that parties incorporate the spirit, if not the letter, of the discovery rules in the course of FOIA litigation. Thus, attorneys should meet and confer throughout the process, and make every effort to agree as to the form in which responsive documents will ultimately be produced." Note 33.

2. *National Security Counselors v. Central Intelligence Agency*, https://s3.amazonaws.com/s3.documentcloud.org/documents/519415/dc-1-2011cv00445-opinion.pdf,

where Judge Beryl A. Howell issued a monumental opinion on a host of FOIA issues, including a discussion of an agency's obligation to search electronic databases.

3. *Safety Research & Strategies, Inc. v. Department of Transportation*, https://ecf.dcd.usccourts.gov/cgi-bin/show_public_doc?2012cv0551-18, where the content and availability of search terms used by the agency was at issue, and the court held that the plaintiff was entitled to know the search terms and type of search performed. This was not new law.

My basic idea is to make search terms and strategies relevant at the administrative level. A generation ago, constructing computer searches was the domain of specialized librarians and computer database professionals. Today, almost every computer user has experience using search engines to find information. That requester experience may be useful.

Still, many requesters lack knowledge about how agencies organize information resources. That is not always the case, of course. Over the years, the requester community developed vast knowledge about how the FBI organizes its records. It is possible for a requester to draw on that expertise and target a request at the resources most likely to contain the records that the requester wants. I would like to think that a precise request benefits the agency as well as the requester.

The Amendment

My proposed FOIA amendment does several things. First, it allows a requester to propose one or more *search strategies* as part of the request. I define a *search strategy* to mean "the logic, algorithm, search fields, keywords, and any other filtering criteria used to conduct a computer search for records." An agency has to use a requester-proposed search strategy or say why it did not.

Second, a requester could ask for a search of a specified *agency information resource* (defined as "any identifiable agency database, information system, or other information resources that contains records that may be the subject of a request"). An agency would have to search a requester-specified resource or say why it did not.

Third, an agency that rejects a search or resource request would have to state in writing as part of its final response the reason the agency determined that use of the requested search strategy or search of the requested resource was unworkable, not reasonably likely to produce records, or otherwise inappropriate.

Fourth, in all cases, an agency would still have to search agency information resources and use search strategies that the agency deems appropriate, just as today.

Fifth, my proposal allows (but does not require) an agency that receives a request that identifies an agency information resource or that includes a requester-proposed search strategy to contact the requester to invite adjustments that would make the search "more efficient and more likely to produce records that the requester sought." This is the part of the proposal that specifically seeks to encourage cooperation between a requester and an agency.

Sixth, an agency that conducts a computer search in response to a FOIA request would be required to disclose, as part of its response, the resources searched and the specific search strategies used.

Finally, each agency would be required to publish on its website and update every six months the name and description of each agency information resource that it routinely uses to search for records responsive to requests.

The Discussion

The full text of my proposal appears at the end of this article. Will this change to the law help? Frankly, I am not certain, but I think it is a good starting point for discussion. Agencies and requesters may have perspectives that can help refine the idea. I observe that the same issues raised here under federal law may also have relevance at the state level.

In order to stimulate debate, Harry Hammitt has graciously consented to allow me to reprint this article on the FOI-L listserv, where many requesters and others with an interest in FOIA discuss state and federal matters pertaining to open government laws. The FOI-L list is at https://listserv.syr.edu/scripts/wa.exe?A0=FOI-L, and anyone can join the list through the website.

The Text of the Amendment

The text of the proposed FOIA amendment:

Amend 5 U.S.C. § 552(f) by adding at the end the following:

> (3) "agency information resource" means any identifiable agency database, information system, or other information resource that contains records that may be the subject of a request under subsection (a)(3)(A); and
>
> (4) "search strategy" means the logic, algorithm, search fields, keywords, and any other filtering criteria used to conduct a computer search for records under subsection (a)(3)(A).

Amend 5 U.S.C. § 552 by adding at the end a new subsection (m):

> (m)(1) If, as part of a request under subsection (a)(3)(A), a requester identifies one or more agency information resources for the agency to search or one or more search strategies for the agency to use in complying with the request, the agency searching for the records responsive to the request must, in addition to using other agency information resources and other search strategies that the agency deems appropriate, search the identified agency information resources and must use the identified search strategies unless the agency states in writing as part of a final response to the requester the reason the agency determined that complying with the requested search of an agency information resource or use of a search strategy was unworkable, not reasonably likely to produce responsive records, or otherwise inappropriate.
>
> (2) When an agency receives a request under subsection (a)(3)(A) that identifies an agency information resource or search strategy, the agency may promptly contact the requester in writing, by telephone, or by electronic mail to invite the requester to consider adjustments to the identified agency information resource or search strategy that will facilitate complying with the request in a manner that the agency reasonably determines is likely to make the search more efficient and more likely to produce records that the requester sought.

(3) When an agency conducts a computer search of an agency information resource to find records responsive to a request under subsection (a)(3)(A), the agency shall disclose to the requester as part of its response to the request any (A) identifiable agency information resource that the agency searched; and (B) each search strategy actually used when conducting the search of each agency information resource.

(4) An agency shall maintain on its website the name and description of each agency information resource that it routinely uses to search for records responsive to requests under subsection (a)(3)(A) unless the name or description of the agency information resource would be exempt from disclosure under subsection (b). An agency must update its list of agency information resources every six months.

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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 ruled that the federal Copyright Act qualifies as a federal law exemption under the state's Freedom of Information Act. The case involved a request by Stephen Whitaker for some 400,000 photographic images provided to the Department of Environmental Protection under a licensing agreement with Pictometry International, which held the copyright. When the agency rejected Whitaker's access request, he filed a complaint with the Freedom of Information Commission, which found that the Copyright Act did not qualify as an exempting statute because it did not actually prohibit the disclosure of records and that the agency could not avoid its obligations under FOIA through a licensing agreement. However, the FOI Commission also concluded that Pictometry's software was proprietary and that Whitaker was only entitled to access to images stripped of metadata. While the trial court upheld the Commission's decision, the supreme court reversed on all counts. Finding the Copyright Act protected the records, the court noted that "the legislature intended that, to the extent that the application of the act conflicts with applicable federal law, *the act* does not apply. We conclude, therefore, that, to the extent that the act and the Copyright Act impose conflicting legal obligations, the Copyright Act is a 'federal law' for purposes of the federal law exemption. Accordingly, although the federal law exemption does not entirely exempt copyrighted public records from the act, it exempts them from copying provisions of the act that are inconsistent with federal copyright law." The Commission suggested that DEP's provision of the images to Whitaker would constitute a fair use under the Copyright Act. But the court observed that "neither the commission nor this court, however, has jurisdiction to determine whether a particular use of copyrighted material infringes on the copyright holder's rights under Federal copyright law, or instead constitutes a fair use of the material. Rather, that determination must be made in federal court." The court rejected the Commission's finding that to allow DEP to charge Whitaker a $25 per image fee, which the agency incurred under the licensing agreement whenever it provided a photo for public disclosure, would violate the FOIA's requirement that fees be reasonable. The court pointed out that the fee provision "was not intended to bar public agencies from charging for the cost of copying copyrighted materials in addition to the fees specifically authorized. . .Rather, [this fee] is a *licensing* fee, i.e., a fee for the use of another entity's private property." The court remanded the case back to the Commission to determine if

ACCESS REPORTS

Whitaker was even interested in images stripped of metadata and whether such a process was even feasible without prohibitive cost. (*Pictometry International Corporation v. Freedom of Information Commission*, No. 18724 and No. 18725, Connecticut Supreme Court, Jan. 29)

Maryland

The Court of Appeals has ruled that the Maryland State Police must provide the Maryland NAACP with redacted records concerning the number of complaints against officers for racial profiling. Pursuant to a 2003 federal court consent order requiring the State Police to provide the NAACP with quarterly detailed reports on complaints alleging racial profiling, the NAACP filed a supplementary request under the Public Information Act containing multiple parts including the identification of complaints. Although the NAACP indicated that it was not interested in identifying information except to the extent that a code could be used to identify officers against whom multiple complaints were filed, the State Police argued the records were protected by the personnel records exemption. The NAACP sued and the trial court ruled in favor of the organization and ordered the State Police to disclose the records in redacted form. The State Police appealed, arguing that the records were still protected personnel records even if identifying information was redacted. An appellate panel ruled that the records did not qualify as personnel records and ordered them disclosed, even though the panel found they could have been withheld under the investigatory files exemption. However, the panel noted that the records could not be both investigatory and personnel records at the same time. At the Court of Appeals, the court agreed that the records should be disclosed, but disagreed with the appeals panel that the records were either investigatory or personnel, but not both. The court pointed out that "the fact that the requested records in this case might have been covered by [the investigatory records exemption] would not preclude their status as personnel records covered by [that exemption]." The Court of Appeals then went on to disagree with the reasoning of the appeals panel when it found that the NAACP had merely suggested that identifying information be redacted. The Court of Appeals observed that "redaction of the records was *not* simply a 'suggestion' by the NAACP. Instead, the requirement that the records be redacted was the principal part of the [trial court's] order from which the present appeals were taken. . ." The Court of Appeals then rejected the State Police's argument that the records would remain personnel records whether or not they were redacted. But the Court of Appeals indicated that "after the names of State Police troopers, the names of complainants, and all identifying information are redacted, the records clearly do not fall within the statutory language of 'records of an individual.' There would no 'individual' identified in the redacted records." The Court of Appeals noted that the statutory requirement to disclose segregable non-exempt materials would be pointless if redaction did not change the disclosability of the records. The Court observed that "if a record falling within one of the Act's exemptions is redacted in accordance with [the segregability requirement] and, if it is still exempt as argued by the State Police and held by the Court of Special Appeals, no effect whatsoever would be given to the [segregability requirement]. The State Police's and the Court of Special Appeals' position would largely render [the segregability requirement] nugatory. . .As shown by this Court's [previous] opinions, [the segregability requirement] is not nugatory." (*Maryland Department of State Police v. Maryland State Conference of NAACP Branches*, No. 41 September Term, 2010, Maryland Court of Appeals, Jan. 24)

In a response largely devoid of any legal analysis, the University of Maryland has defended itself against charges that the Board of Regents violated the Open Meetings Act when it considered and approved of the University joining the Big Ten. In a letter to the Maryland Open Meetings Compliance Board, the University argued that the meeting was unnecessary because University President Wallace Loh had the independent authority to accept the agreement without Board approval, that an assessment of the complex confidential business information in the agreement required Board consideration in a closed session, that the Board met with its attorney, and that the press knew about the substance of the meetings anyway without any official public notice. The University noted that because "the growing intensity of press coverage. . .posed a

threat to UMD's ability to achieve the most favorable possible terms in that bargain, if not to the deal itself (if may have been scuttled if details became public). . .the Board did not provide official notice of its meetings on November 18 and 19, 2012. Nonetheless, those exigent circumstances did not stop the press from learning in advance the fact that those meetings would occur and what would be discussed and from learning in near-real-time what occurred during those meetings and where they were held." The University's argument is apparently because the information became public through leaks it obviated the necessity to follow the procedures for notice of a meeting and reasons for closing it. While there may be an argument to be made that the public was not harmed because the substance of the meetings became public anyway, the University offered no explanation for why it failed to follow the legal requirements of the Open Meetings Act. (*Response of the University System of Maryland Board of Regents to the Complaints of Ralph Jaffe and Craig O'Donnell*, Office of the Attorney General, Jan. 22)

Pennsylvania

A court of appeals has ruled that the five-day time limit for responding to a Right to Know Law request does not commence until the request is received by the agency's open records officer. Sean Donahue had sent an email request to the Office of the Governor on March 7, 2012. On March 19 the Office of General Counsel informed Donahue that because he had failed to send his request directly to the open-records officer that individual had not received the request until March 12. The Office responded to the request by granting it in part and denying it in part. Donahue appealed to the Office of Open Records, which ruled that since the agency had failed to respond within five days Donahue's request was deemed denied. Ultimately, OOR denied Donahue's request for lack of specificity. The Governor's Office filed suit, arguing that the OOR's interpretation of the time limits requirement was incorrect. The court agreed with the Governor's Office. The court noted that "the statutory language is unambiguous: once the open-records officer for an agency, *not* any agency employee, receives a written request for records, the agency has five business days to respond to the request." OOR argued the statute required merely that the agency receive the request. But the court pointed out that "this interpretation would require us to ignore the language. . .specifically referring to receipt of a written request 'by the open-records officer for an agency.'" The court rejected OOR's contention that such a strict interpretation would lead agencies to delay receipt of requests by the open-records officer. The court observed that "no rule of law requires this Court to presume that an agency will act in bad faith in complying with its statutory duties. Rather, we presume here that every agency attempts to comply with the RTKL in good faith." (*Office of the Governor v. Sean Donahue and the Office of Open Records*, No. 376 M.D. 2012, Pennsylvania Commonwealth Court, Jan. 23)

Tennessee

A court of appeals has ruled that payroll records of contractors for the Convention Center Authority in Nashville are not protected by either an explicit or implicit exemption to the Public Records Act. A union had requested payroll records for third-party contractors working on the convention center project to determine if they were being paid the prevailing wage as required by state law. Rejecting the claim that the contractor employees qualified for an exception for public employees, the court noted that "we cannot agree that the employees of private contractors are properly considered 'public employees' merely because they are constructing a public building or because the entity ultimately responsible for the project is a public entity." The court added that "the workers whose records are at issue in this case are not employees of the CCA, and they do not fall within the purview of 'other public employee' under [state law]." The court pointed out that "the determination of the extent to which personal identifying information, including social security numbers and residential addresses, should be exempt from disclosure under the Public records Act as a matter of public policy is one which we must leave to the General Assembly." The court also rejected the Convention

Authority's claim that the payroll records were protected under federal law. The court observed that "federal cases construing the question presented in this case are not instructive where the Public Records Act does not contain a balancing of interest test similar to that imposed by [the federal] FOIA." (*Martin D. Patterson v. Convention Center Authority of the Metropolitan Government of Nashville*, No. M2012-00341-COA-R3-CV, Tennessee Court of Appeals, Jan. 17)

The Federal Courts…

Judge Reggie Walton has ruled that the Department of Homeland Security properly claimed **Exemption 5 (deliberative process privilege)** to withhold an Assessment Referral Notice prepared by an Immigration Asylum Officer recommending that Paulette Anguimate be denied asylum. Anguimate submitted a FOIA request for the records concerning her asylum application. When the agency denied some of the records based on Exemption 5, she filed suit. She was granted asylum by an immigration judge in November 2012. Walton found the agency had justified that the memo was privileged. He noted that "the portions of the Assessment containing the Asylum Officer's analysis of the credibility of the plaintiff's claims and recommendation that she be denied asylum [is] quintessential deliberative information. . ." Walton rejected Anguimate's contention that disclosure would not harm the agency. He pointed out that "it is not the role of the courts to 'second-guess congressional judgment on a case-by-case basis;' rather, once it is determined that the two elements of the deliberative process privilege are satisfied, the judicial inquiry is complete." He also rejected her argument that the assessment constituted secret law. He observed that "on the contrary, given that the plaintiff was ultimately *granted* asylum, it appears that the agency's final position on the asylum issue was the *opposite* of what the Asylum Officer recommended in the Assessment. The Assessment is best characterized, then, as an interlocutory opinion issued prior to the initiation of the plaintiff's immigration court proceedings." (*Paulette Anguimate v. United States Department of Homeland Security*, Civil Action No. 12-791 (RBW), U.S. District Court for the District of Columbia, Jan. 23)

Judge John Bates has ruled that the Justice Department properly responded to a request from Micheline Hammouda for records concerning her murder-for-hire conviction. Hammouda originally requested all DOJ records from the Office of Information Policy. OIP told her it was not likely to have records about her and provided her a list of other DOJ components. Hammouda appealed OIP's decision, which was affirmed. She also sent her request to the FBI, which eventually found 76 pages referencing Hammouda. The agency disclosed 60 pages in whole or in part and withheld 16 pages under various exemptions. OIP upheld the FBI's actions as well. Hammouda then filed suit. In court, she alleged that she also had submitted a request to EOUSA and that since her request to OIP encompassed all DOJ components, EOUSA should be added to her suit as well. But Bates noted that "she has either misunderstood or simply ignored OIP's response letter that explained its limited function and correctly advised her to contact the DOJ components that might have records responsive to her request." He added that "since plaintiff did not (1) mention her request to EOUSA in the complaint, (2) name EOUSA as a defendant in this action, or (3) seek to amend the complaint earlier in this litigation to add a claim against EOUSA, the Court finds that any claim predicated on plaintiff's request to EOUSA is beyond the scope of this action." Hammouda complained that the FBI had withheld some records under **Exemption 7(A) (inference with ongoing investigation or proceeding)**. She argued that since the events resulting in her conviction took place 11 years earlier there could be no ongoing investigation. Explaining that Hammouda's claim "neither creates a genuine dispute of material fact nor rebuts the presumption of good faith accorded to [the FBI's] declaration," Bates indicated that "the investigatory records are 'indexed under other names' and mention plaintiff only tangentially." (*Micheline Hammouda v. United*

States Department of Justice, Office of Information Policy, Civil Action No. 12-0130 (JDB), U.S. District Court for the District of Columbia, Jan. 31)

A federal court in New York has ruled that Summary of Findings reports prepared by the Fraud Detection and National Security Unit at U.S. Citizenship and Immigration Services are protected by **Exemption 5 (deliberative process privilege)**. Applications for immigration benefits are assigned to a CIS adjudicator. If the adjudicator suspects possible fraud, he or she refers the application to FDNS for investigation. The findings and recommendations of the FDNS investigator are memorialized in an SOF report and referred back to the CIS adjudicator for a decision. John Assadi, the attorney for several applicants, requested the SOFS pertaining to his clients. Agreeing with the agency, the magistrate judge noted that "the FDNS does not have decision-making authority—the decision to award immigration benefits lies with the CIS adjudicator, not [FDNS]. . .Thus, because the FDNS lacks decision-making authority, the SOFs are necessarily predecisional." The magistrate judge added that "the SOFs enable the CIS Adjudicator to consider all relevant facts when determining whether immigration benefits should be awarded. In light of the role an SOF has in the adjudication process, it is also deliberative and protected by the privilege." The magistrate found that there was no **segregable** information in the SOFs. He pointed out that "all facts within an SOF are selective and deliberative, and disclosure would shed light on an otherwise exempt evaluation process." The agency had also redacted personal information under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Noting that FDNS investigators had a recognizable privacy interest, the magistrate judge indicated that "given [that FDNS investigators] are responsible for only investigating and creating documents that summarize and evaluate their findings, and the lack of decision-making authority afforded to them, disclosure of their names is not likely to shed light on how the CIS adjudicator conducts the government's business." Assadi argued that he had a right of access to his clients' information. The magistrate, however, disagreed. He pointed out that "Assadi's status as counsel of record to the individuals who are the subject of the SOFs does not promote the public's interest in disclosure. Moreover, [the Notice of Entry of Appearance as Attorney form used by CIS] explicitly states that it may not be used for purposes of FOIA requests." (*John Assadi v. United States Citizenship and Immigration Services*, Civil Action No. 12-1374 (RLE), U.S. District Court for the Southern District of New York, Jan. 22)

Judge Emmet Sullivan has ruled that prisoner Lowell Thomas Lakin **failed to exhaust his administrative remedies** when his appeal of the denial of his request to EOUSA did not arrive at the Office of Information Policy within the 60 days proscribed in its FOIA regulations. Lakin asked for any records about himself but EOUSA informed him that he had waived his right to make a FOIA request as part of a 2008 plea agreement. He appealed the denial to OIP, but the letter did not arrive until 10 days after the time limit for appealing had run. He filed suit contesting OIP's actions, arguing that the "prisoner's mailbox rule," which considers filings by prisoners received on the date delivered to prison authorities, applied. But Sullivan explained the prisoner's mailbox rule applied only when the date for filing was ambiguous, which was not the case here. He indicated that "the applicable regulation specifically states that an appeal of a FOIA request 'must be *received* by the Office of Information Policy within 60 days of the date of the letter denying [the FOIA] request.'" He observed that "because the appeal [of EOUSA's September 8, 2009 denial] was not received until November 17, 2009, plaintiff did not comply with the regulation." (*Lowell Thomas Lakin v. United States Department of Justice*, Civil Action No. 11-594, U.S. District Court for the District of Columbia, Jan. 20)

A federal court in New York has ruled that Gilbert Roman failed to **exhaust administrative remedies** when he requested records from the CIA on the Arc of the Covenant, the Stargate Collection, and David Morehouse. The CIA asked the court to dismiss Roman's suit for lack of subject matter jurisdiction, but the court indicated that "this Court agrees with the numerous district courts in this Circuit that have concluded that a failure to exhaust an administrative claim under FOIA does not deprive the district court of subject matter jurisdiction, but rather is a prudential doctrine that should be addressed either on a Rule 12(b)(6) motion to dismiss or a motion for summary judgment." However, the court agreed with the agency that Roman's request lacked sufficient specificity. The court observed that "because plaintiff has submitted an 'extremely broad' and 'vague' request that failed to comply with the CIA's FOIA guidelines requiring requests to be 'described sufficiently' so that an agency employee 'may locate documents with reasonable effort,' plaintiff has failed to exhaust his administrative remedies and summary judgment must be granted to defendant." (*Gilbert Roman v. Central Intelligence Agency*, Civil Action No. 11-5944 (JFB)(WDW), U.S. District Court for the Eastern District of New York, Jan. 18)

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