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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: House Committee on Oversight and Government Reform Chair Rep. Darrell Issa (R-CA) and ranking minority member Rep. Elijah Cummings (D-MD) have sent a detailed letter to the Justice Department's Office of Information Policy outlining areas of concern pertaining to the implementation of FOIA. The letter asks OIP to provide the Committee with information on updating agency FOIA regulations, improper assessment of fees, FOIA backlogs, excessive use of exemptions in light of the administrations presumption of openness, and compliance with the EFOIA requirement to post frequently requested records online no later than Feb. 22.

Court Affirms *Glomar* Response, Other Procedural Issues

For those who followed FOIA developments culminating in the 1996 congressional passage of the Electronic Freedom of Information Act Amendments, the 2010 appointment of Beryl Howell to the U.S. District Court for the District of Columbia has provided the opportunity to observe the judicial development of a judge whose earlier career included serving as staff counsel for Sen. Patrick Leahy (D-VT), during which time she was responsible for shepherding the EFOIA amendments through the Senate and, later, when a revised bill finally emerged from the House, through Congress. That meant that upon joining the bench, Howell knew much more about how FOIA was supposed to work than any of her colleagues. Now, after two years on the bench, she has emerged as the most thorough and thoughtful of the district court judges in the D.C. Circuit, providing analyses of procedural issues that have almost never been discussed in such detail before. And her most recent opinion is no exception, wrestling with issues pertaining to classification, *Glomar* responses, and the obligation of agencies to search for records.

The case was brought by Sharif Mobley, who was detained in Yemen and was currently in custody on murder charges. Mobley and his wife, Nzinga Islam, brought suit against the CIA and the Departments of State, Defense, and

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Justice for all records pertaining to his abduction and detention in Yemen. The CIA responded that it had located responsive material, all of which was denied, and that it could neither confirm nor deny any records that might reveal a classified connection to the CIA. Four months later, the agency amended its original response, explaining that its initial response "contained inaccuracies" and that its search found no records acknowledging any agency connection to Mobley. The State Department located 293 records, releasing 165 records in full, 75 records in part, and withholding 42 records in full. State referred 11 records to the Army's Office of the Provost General, which eventually withheld them in full under Exemption 1 (national security). The Defense Intelligence Agency located 41 records that originated from the Open Source Center, which "collects, monitors, processes, analyzes, and disseminates publicly available information from primarily foreign sources." DIA referred those records to the CIA, which released 28 records and withheld six records under Exemption 3 (other statutes) as constituting sources and methods. The FBI told Mobley it was searching its Central Records System. Mobley's attorney provided a privacy waiver for Islam, which the agency treated as a new FOIA request. Mobley's attorney sent the agency an email indicating Islam's privacy waiver "was not a new request; it was an additional waiver form for use when processing [Mobley's request], which was for records about Sharif Mobley *and his family*." Mobley's attorney sent the agency two subsequent emails instructing the agency to search both main, reference, and cross-reference files, and to search both the Baltimore and Washington field offices. The FBI ultimately located 85 pages, releasing all of them with redactions.

Mobley contended the agencies had failed to conduct adequate searches. He challenged the CIA's contention that the Open Source Center was comprised of mostly publicly available records, since only 12 of 28 released records were actually available through World News Connection. While the CIA agreed that Mobley should not be charged a fee for non-public records in the OSC database, it took the position that all OSC records were public and fees could be charged for their production. Howell noted that "the parties have presented no evidence regarding how burdensome it would be to distinguish between public and non-public records retrieved from the OSC, but this will often be self-evident with the publication origin of the document, apparent on its face. Thus, the CIA must search the OSC database for any records responsive to the plaintiff's FOIA/PA request and must release any non-exempt, responsive records to the plaintiffs."

Mobley claimed the FBI had failed to search various shared drives. But Howell pointed out that "Mobley's argument that the FBI was required to search all shared drives because Mobley 'specifically instructed FBI' to do so, fundamentally misconceives the standard for the adequacy of an agency's search under the FOIA. An agency search obligations are not dictated by a requester's demands to search particular components or databases. Rather, an agency' obligations are dictated by whether the scope of the search is 'reasonably calculated to uncover all relevant documents,'—a standard that an agency satisfies by searching 'all files likely to contains responsive materials (if such records exist).'" She added that "although the agency's justification for not searching shared drives is thin, Mobley's argument for why shared drives *are* likely to contain responsive records is even thinner."

Addressing the propriety of the CIA's *Glomar* response, Howell provided a detailed analysis of the agency's actions. Mobley argued the CIA had waived its ability to use a *Glomar* response because its first letter indicated it had responsive records. Howell noted that "the prior disclosure. . .only disclosed that the CIA was 'able to locate responsive material,' and the context of the letter clearly conveyed that this 'responsive material' was limited to responsive records that would reveal an *unclassified* connection to the CIA. This implication was clear because in the very next paragraph, the letter stated that the CIA could neither confirm nor deny the existence of 'responsive records that would reveal a *classified* connection to the CIA. Any other reading of this letter would be nonsensical because it would entail reading the letter to state simultaneously that the CIA both *refused to confirm* and *confirmed* the existence of responsive records reflecting a classified connection to the CIA."

Mobley also argued the CIA had failed to comply with Executive Order 13,526 on classification because the executive order required agencies to provide the date information was classified and when it would be subject to declassification and the agency *Glomar* response did not contain that timeline information. The agency responded that it was not required to create a record to respond to a FOIA request. Howell observed that "there is more than a little tension between these two principles: Compliance with Executive Order 13,526, in the context of a *Glomar* response, would appear to require agencies to create a record in response to a FOIA request (*i.e.*, a piece of paper that contains all classification markings required by the Executive Order), and yet agencies are generally not required to create records in response to a FOIA request." Howell resolved this dilemma by concluding that "the requirement in Executive Order 13,526 to establish a declassification timeline is not an absolute prerequisite to classifying information. Rather, a timeline for declassification and other classification markings are only required once information has already been properly classified. Thus, although an agency may not be in full compliance with Executive Order 13,526 by failing to establish a declassification timeline for *Glomar* facts, that failure does not prevent the agency from relying on FOIA Exemption 1 to issue a *Glomar* response to a FOIA request." Howell then rejected Mobley's claim that the CIA improperly considered him of national security interest. Howell observed that "it is not the Court's proper place to decide who should or should not be the subject of intelligence gathering activities. . . [T]he CIA's explanation for its *Glomar* response in the instant case. . .is both plausible and logical. . ."

Mobley challenged State's claim that some information from a foreign government needed to be withheld under Exemption 1. Howell agreed with the agency and indicated that "the State Department's explanation of why this information was conveyed in confidence is both logical and plausible, considering the nature of the information. . ." She added that the agency's declaration "supports the principle that, in the often fragile arena of foreign relations, an implied understanding of confidentiality is necessary to ensure that nations can communicate their impressions, concerns, negotiating positions, or other sensitive matters without fear that those matters will then be publicly disclosed." State also withheld some information under Exemption (d)(5) of the Privacy Act, which covers records compiled in anticipation of a civil action or proceeding. Mobley argued the exemption did not apply because the government was not a party to any anticipated litigation. But Howell pointed out the exemption applied to information prepared "by either a potential party to such a proceeding or by a potential *material participant* in that same proceeding." Mobley also questioned whether the anticipation of litigation was legitimate because the likelihood of success was remote. Howell observed that "the legal merits (or lack thereof) of an anticipated litigation are not the standard by which courts measure the reasonableness of a party's anticipation. Rather, the reasonableness of a party's anticipation of litigation is measured by the objective probability that litigation will be *initiated*, not the probability that such litigation, once initiated, will succeed."

Mobley claimed the FBI could not invoke Exemption (j)(2) of the Privacy Act unless the records pertained to a legitimate law enforcement mission. Noting that the FBI tried to justify the law enforcement legitimacy of the disputed records, Howell explained that "the FBI is not required to justify any particular law enforcement mission implicated by a particular document, so long as the document in question was located in a system of records that has been properly exempted from the disclosure provisions of the Privacy Act." Mobley argued the FBI could not withhold the names of agency personnel that had been disclosed in a record provided by the State Department. Howell pointed out that 'such an argument is without merit because the alleged prior disclosure of this information was done by the State Department, not the Department of Justice." She added that "since the information allegedly disclosed was released by the State Department, and not the FBI, the FBI has every right to withhold the names or personal identifying information of individuals who have not submitted privacy waivers to the FBI pertaining to Mobley's request." (*Sharif Mobley v. Central*

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Intelligence Agency, Civil Action No. 11-2072 and No. 11-2073 (BAH), U.S. District Court for the District of Columbia, Feb. 7)

Views from the States…

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

California

A court of appeals has ruled that it does not have jurisdiction to hear an appeal of the Carlsbad Police Department's denial of access to records concerning identity theft incidents because Mincal Consumer Law Group failed to file an extraordinary writ petition with the appeals court as required by the California Public Records Act. When the police told Mincal that it considered its police logs to be non-accessible historical data after 30 days, Mincal filed suit. The trial court upheld the department's position, at which time Mincal filed an appeal. At the appeals court, the police department argued the appeals court did not have jurisdiction because Mincal had failed to file for an extraordinary writ within 20 days of the trial court's order as required by the statute. The appeals court explained that under the CPRA "an order of the trial court supporting the decision of a public official refusing disclosure of material requested under the Act 'is not a final judgment or order within the meaning. . .of the code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ.' This provision of the Act. . .unambiguously forecloses an appeal and instead authorizes a writ as the sole and exclusive means to challenge the trial court's ruling." The court indicated that the legislature had mandated this appeals process to prevent public bodies from appealing a decision ordering disclosure and using continuances to frustrate disclosure. However, the court pointed out that "the Legislature expressly specified that an order *denying* disclosure falls within the short statutory time limit. Thus, it is of no import that this case does not concern the City's ability or need to delay disclosure of its records." (*Mincal Consumer Law Group v. Carlsbad Police Department*, No. D060415, California Court of Appeal, Fourth District, Division I, Feb. 13)

Kentucky

A court of appeals has ruled that the Webster County Board of Education violated the Open Meetings Act when it authorized its attorney to file suit against an ad valorem property tax increase without taking an official vote. Although the Board initially claimed that it had gone into closed session to discuss potential litigation with its attorney, the court agreed with the Webster County Clerk that because a public body cannot take final action during a closed session the Board could not have authorized its attorney to file suit. Abandoning the litigation exception at the appellate level, the Board argued that a state law that pertained to school board meetings allowed it to make the decision by consensus. But the appeals court noted that "since consensus or collective decision is one wherein all parties agree, and, since no vote was taken that evening, we concur with the trial court that it is not possible to determine if a consensus or collective decision was made." The court also rejected the Board's contention that it had ratified the earlier improper action at a subsequent meeting. Instead, the court observed that "ratification cannot be allowed to legitimize unauthorized conduct at an improperly closed session. Hence, because no vote was taken during an open session and because consensus was not established, the action of the board cannot be ratified. As aptly explained by the trial court, the Board could not ratify an action that never took place." (*Webster County Board of Education v. Valerie Franklin, County Clerk of Webster County*, No. 2012-CA-000811-MR, Kentucky Court of Appeals, Feb. 8)

New York

A court of appeals has ruled that the *New York Times* prevailed on several administrative issues concerning its requests for databases used by the New York City Police Department, but that the newspaper was not entitled to various data elements. The court first found that the 20-day time period for responding applies only when an agency grants or denies a request or invokes circumstances preventing it from responding on time. The court noted that the FOIL "mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were inconsistent with the statute." Addressing the availability of handgun licenses, the court pointed out that "the fact that [a statutory provision] makes the name and address of a handgun license holder 'a public record' is not dispositive of whether respondent can assert the privacy and safety exemptions to FOIL disclosure, especially when petitioners seek the names and addresses in electronic form." The court added that "nor, since the zip codes of the license holders were disclosed, would the additional disclosure of their exact street addresses appear 'to further the policies of FOIL, which are to assist the public in formulating intelligent, informed choices with respect to both the direction and scope of governmental activities.'" The court sided with the newspaper on the issue of whether it had exhausted administrative remedies. The court observed that "here, [the police department] made clear that it would not grant [the newspaper's] request for [a certain] database and any further attempt at internal administrative review would be futile." The trial court had ruled that the futility exception did not apply to FOIL litigation. But the appeals court indicated that "FOIL does not contain an express provision that judicial review of a final administrative determination is a party's 'exclusive remedy' for an allegedly erroneous administrative rejection of a request for information under the statute. Accordingly, in the context of FOIL, a futility exception exists to 'the judicially-created rule that administrative remedies must be exhausted.'" (*In re New York Times Company v. City of New York Police Department*, New York Supreme Court, Appellate Division, First Department, Feb. 5)

Texas

A court of appeals has ruled that the Greater Houston Partnership, a nonprofit set up to promote the economic stability and growth of the Houston area, is a government entity because it received $1.67 million from the City of Houston to help improve the economic prosperity of Houston and the Houston Airport system and that check registers for 2007 and 2008 are subject to disclosure under the Texas Public Information Act. When GHP received a request for the check registers, it told the requester it was not a governmental entity covered by the PIA. GHP then asked the Attorney General to uphold its position. However, the AG ruled that GHP was a governmental entity and GHP filed suit against the Attorney General. The trial court ruled in favor of the AG and GHP appealed. In a 2-1 decision, the appeals court affirmed the AG's decision. The appeals court majority pointed out that whether GHP was a governmental entity turned on whether it was supported in whole or in part by public funds. The majority used a three-prong test developed by a federal court in *Kneeland v. NCAA*, 850 F.2d 224 (5th Cir 1988), when considering whether the NCAA qualified as a governmental entity under state law. Under the *Kneeland* test, a non-public entity can qualify as a governmental entity if its relationship with the government is more expansive than the typical pay for services contract, if the entity shares an agency-type relationship with the government, and if the entity provides services traditionally provided by government. As to GHP's contract with Houston, the majority observed that "although some of these seemingly aspirational provisions also list specific tasks to be performed in furtherance of the stated obligation, those tasks are not measurable or limited in any way." The majority found that GHP and Houston shared a common purpose under the contract and added that "the overall purpose of this contract involves the economic development of a metropolitan area, a task which itself is considered by some to be a function of the government. Thus, while perhaps not a large aspect of its obligations, GHP does take on duties that would be more traditionally tasked to governmental bodies." GHP argued that the court did

not have jurisdiction because GHP was no longer a governmental entity by the time it was ordered to disclose the records. The majority rejected that claim, pointing out that "interpreting the PIA's provisions to apply only to entities that can be considered governmental bodies at the time disclosure is ordered would defeat the PIA's overarching purpose of making public information available to the public. The fact that an entity can change or try to change its nature should not make public information inaccessible to the public." The dissent indicated that when considered within the context of the entire statute, GHP clearly was not "supported" by public funds. (*Greater Houston Partnership v. Greg Abbott*, No. 03-11-00130-CV, Texas Court of Appeals, Austin, Jan. 31)

Virginia

The supreme court has ruled that the James City County Police Department properly withheld information contained in officer Ryan Shelton's personnel file, but that it must disclose a list of individuals arrested by Shelton. The case involved a request from Adam Ewing, who had been arrested by Shelton, for records concerning his previous arrests. The department told Ewing that the arrest information was not contained in a consolidated record and that records in Shelton's personnel file were exempt. The department later indicated that it had misread Ewing's request and agreed to disclose 47 criminal incident reports from 2011 involving Shelton. Ewing argued that the exception for personnel records did not apply in this case. But the court noted that "the provisions of [the Virginia Freedom of Information Act] include not only the disclosure provision of VFOIA but also the exclusion provisions of the chapter. . .Personnel records covered by [the personnel records exemption] are, like all public personnel records, subject to [its] protections." The department argued that the list of arrested individuals was a request for "information" rather than "records." Saying this claim was "untenable," the court pointed out that "the statute does not indicate any impediment to using the name of the arresting officer paired with a reasonable timeframe as the vehicle for a request. . .The statute thus requires the production of Ewing's requested information as to identities of individuals arrested *by* Officer Shelton." While the court considered records of Shelton's arrests to constitute disclosable criminal incident information, arrests made based only on Shelton's "information" fell under the exemption for criminal investigative files. The court observed that "arrests occurring merely on Shelton's 'information' or with him serving as a witness, for which Shelton has not signed or been otherwise designated as the arresting officer, fall into the category of criminal investigative files and are exempt under these provisions." (*Emmett H. Harmon v. Adam L. Ewing*, No. 121118, Virginia Supreme Court, Feb. 8)

The Federal Courts…

Judge James Boasberg has ruled that the Department of Health and Human Services had already released all research data pertaining to a federally-funded study of the carcinogenic effects of formaldehyde and that the American Chemistry Council waived its argument that the agency had improperly narrowed its request by limiting its search for research data solely to the 2010 Zhang Study. The Council submitted a multi-part request for records on the potential health effects of formaldehyde, including research data generated by federal grantees that was subject to FOIA under the terms of the Shelby Amendment, implemented by OMB Circular A-110. The agency released 108 pages and indicated that it considered the Zhang Study data, which was already publicly available, to be the only data the Council had requested that was subject to the Shelby Amendment. The Council filed suit, arguing that the agency had improperly limited its search for research data and had not conducted an **adequate search** of its own records. Addressing the limits the agency imposed on which parts of the request asked for research data, Boaberg indicated that "because Plaintiff's FOIA request generally referred to 'records,' as opposed to specifically differentiating between research data and other types of agency records, Defendants 'interpreted Item 2(f) to be the only part

of the Request that sought "research data" from the Zhang Study.' Plaintiff takes issue with that interpretation, insisting that the 'use of the term "Records" throughout its request" also encompassed data. The Court disagrees that Plaintiff's general reference to 'records' reasonably described a request for data. To invoke Circular A-110, which pertains to data but not records, Plaintiff knew it should specifically request data." Boasberg added that "asking for records 'related to' the data is not the same as asking for the data." Although he acknowledged that this was a close call, Boasberg then pointed out that the Council had **failed to exhaust its administrative remedies** by not making the interpretative argument in its administrative appeal. The Council argued that its request was sufficiently clear that it was seeking a broader range of data. But Boasberg noted that "if Plaintiff had believed that the catchall [phrases used in the request] posed additional requests for research data, it should have wondered why the Agency had not explained its position on data responsive to item 2's catchall [phrase]. Instead, in its Appeal Letter, ACC simply never mentioned research data beyond 2f." Boasberg added that "plaintiff is a sophisticated entity whose FOIA correspondence (including its appeal) was authored by its Assistant General Counsel. Even if HHS's interpretation of the request was wrong, Plaintiff forfeited its right to challenge that interpretation because it failed to exhaust its administrative remedies on the issue before the Agency." As to the agency's interpretation of its obligations under A-110, Boasberg indicated that "HHS had previously provided public access to the full-length Zhang Study through the website of its component, the National Institutes of Health. The data requested in item 2f, moreover, are already fully incorporated in the Zhang Study. As a result, Circular A-110 does not require them to re-request that data from the Zhang Study's grantees. Such a ruling, of course, does not preclude ACC from subsequently filing a more precise FOIA request that specifically seeks data from the grantees beyond item 2f." Boasberg required the agency to supplement its affidavits on the adequacy of the search of its own records. He observed that "plaintiff has sufficiently alleged that the Agency's search was not adequately calculated to recover all relevant documents. Defendants, furthermore, acknowledge that they have not yet submitted the requisite affidavits necessary to carry their burden on the adequacy of their search." (*American Chemistry Council, Inc. v. United States Department of Health and Human Services*, Civil Action No. 12-1156 (JEB), U.S. District Court for the District of Columbia, Feb. 13)

Judge Beryl Howell has ruled that the State Department has failed to show that it followed the procedural steps required by the Executive Order on classification for classifying documents after receipt of a FOIA request, and that it has not justified its **Exemption 5 (deliberative process privilege)** or **segregability** claims. The TREA Senior Citizens League requested information about the Social Security Totalization Agreement between the United States and Mexico. After the League filed suit, State ultimately located 124 records. The agency disclosed 44 records in full and 43 records in part. It withheld 21 records under **Exemption 1 (national security)** and Exemption 5. The League argued that several documents appeared to have been classified after receipt of its request. Howell noted that "this argument by the plaintiff, in the Court's view, raises a question as to whether the defendant complied with the requirements of Executive Order 13,526 § 1.7(d) in classifying certain originally unclassified documents (or portions thereof)." She added that "as a result of the defendant's failure to address the fact that certain withheld and disputed documents were originally unclassified but were later classified at an unspecified time, the defendant's compliance with §1.7(d) remains a genuine issue of material fact." Howell indicated that "should the State Department continue to withhold these documents (or portions thereof) under Exemption 1, the agency will be required to submit a supplementary declaration that clarifies (1) whether any of these documents (or portions thereof) were classified after the plaintiff submitted its FOIA request on July 7, 2008; and (2) if so, whether the defendant complied with Executive Order 13,526 § 1.7(d) in classifying the documents (or portions thereof)." Howell rejected the League's argument that the other classified records were in the public domain. She observed that "the plaintiff repeatedly urges the novel proposition that, once a government agency publicly releases *any* information about a particular issue, that agency has waived its ability to later withhold any other information

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related to the same issue." She pointed out that "the D.C. Circuit has specifically rejected the argument made by the plaintiff, holding that 'prior disclosure of similar information does not suffice; instead the *specific* information sought by the plaintiff must already be in the public domain by official disclosure.'" Howell rejected State's deliberative process claims, finding them too vague. She noted that the agency's declaration did not "adequately establish the nature of the decisionmaking process involved in a number of the withheld documents." Addressing one of the documents, she indicated that "assuming that this document was used in the process of negotiating the Totalization Agreement—which itself is unclear—it is utterly uncertain what *role* this document may have played in such negotiations." Howell also rejected the agency's segregability analysis. She observed that "although the Court does not doubt the agency's statement that 'all of the documents. . .have been carefully reviewed for reasonable segregation of non-exempt information,' absent a sufficient *Vaughn* index, an agency must provide other facts, beyond its good-faith assurances, that would establish that it released all reasonably segregable, non-exempt information." (*TREA Senior Citizens League v. U.S. Department of State*, Civil Action No. 10-1423 (BAH), U.S. District Court for the District of Columbia, Feb. 7)

A federal court in New York has ruled that former President George W. Bush and former Vice President Dick Cheney have a privacy interest in special access research requests made to the National Archives that is protected under **Exemption 6 (invasion of privacy)**. Gawker Media reporter John Cook requested all research requests filed on behalf of Bush and Cheney since 2009. NARA denied the request under Exemption 6 and Cook filed suit. Finding the research requests qualified as "similar files," the court noted that "because the research requests contain the names and potentially the contact information of the researchers who have been designated by the former President and Vice President, the records that Mr. Cook requests can be identified as applying to those researchers. . .In addition, because the researchers are acting on former President George W. Bush and former Vice President Dick Cheney's behalf, the records that Mr. Cook requests can be identified as applying to the former President and Vice President. The records are detailed in the sense that they comprise approximately 1,000 pages of research requests made pertaining to the former President and Vice President's time in office." The court found that the privacy interest outweighed the public interest in disclosure. The court observed that "the Court agrees with the government that President Bush and Vice President Cheney have a great privacy interest in 'not having the subject about which they think and gather information being involuntarily broadcast to the general public.' It is evident that researchers have an expectation of confidentiality when they conduct research at NARA facilities and making NARA research requests accessible through FOIA will inevitably have a chilling effect on academic research." (*John Cook v. National Archives and Records Administration*, Civil Action No. 11-8624 (KTD), U.S. District Court for the Southern District of New York, Feb. 1)

In an unpublished decision, the Ninth Circuit has ruled that the FBI properly denied a **fee waiver** to Aidan Monaghan, who writes a blog on the 9/11 attacks, for records on two of the planes that crashed that day. Monaghan filed suit when the FBI failed to respond within the time limits. He argued that the FBI's letter denying his fee waiver, which was sent during the course of litigation, was an after-the-fact rationalization and not a legitimate part of the administrative record. The court disagreed, noting that "the fact that an agency's response was untimely does not preclude inclusion of that response in the administrative record for consideration by the courts. . .Here, the FBI's untimely response was not an attempt to manipulate the record on judicial review. To the contrary, with the exception of timeliness, the response appears to be the FBI's attempt to comply with FOIA. . .[It] was written by the section chief of the Record/Information Dissemination Section, not by an attorney from the legal team defending the lawsuit." The court found that Monaghan had failed to show why disclosure would be in the public interest. The court pointed out that "it is unclear how documents that address 'broad public skepticism' and 'public doubts' regarding the crashes of [the two flights]

are 'meaningfully informative' on government operation or activities, and it is not the FBI's responsibility to infer a connection." The court also questioned Monaghan's ability to disseminate the information, noting that "Monaghan's sub-blog is not easily accessible through general searches conducted on common search engines. Monaghan does not dispute this, nor does he provide any information regarding the website traffic or number of hits that either his sub-blog or the 911blogger.com website attract." The court added that "the only way to verify [Monaghan's vague dissemination claims] would be to read the news reports, listen to the documentary programs, and buy and read the book. It is not the FBI's responsibility to go on a scavenger hunt." Monaghan also argued that the district court had erred by dismissing his case for failure to exhaust his administrative remedies. The appeals court acknowledged that Monaghan constructively exhausted his administrative remedies when the FBI failed to respond on time, but once the district court ruled in favor of the agency "Monaghan became obligated to pay the fees related to his request, regardless of the FBI's untimeliness." In response to the FBI's motion to dismiss, Monaghan had brought up the issue of fee preclusion for the first time, arguing that since the FBI had failed to meet the statutory time limits it could no longer charge fees. But the appeals court concluded Monaghan was too late. The court noted that "because the parties had agreed to resolve all fee issues during the first part of the bifurcated trial, and the FBI's response put Monaghan on notice of his obligation to pay, any fee preclusion arguments should have been raised at summary judgment." One judge dissented, pointing out that "the preclusion argument was raised in response to the motion to dismiss, which was an appropriate time to raise it, as it was a defense to the FBI's assertion that Monaghan had failed to exhaust by paying all the fees demanded. . ." Although the fee preclusion provision does not apply when unusual circumstances exist, the dissent observed that "the FBI [is not absolved] of the obligation to inform FOIA requesters that the agency cannot comply with the application deadline because of unusual circumstances. As no such notice was provided, the unusual circumstances exception does not apply." (*Aidan Monaghan v. Federal Bureau of Investigation*, No. 11-16214, U.S. Court of Appeals for the Ninth Circuit, Jan. 28)

A federal magistrate judge in Florida has refused to reconsider its decision that records pertaining to the revocation of Enrique Mantilla's visa are not covered by § 222(f) of the Immigration and Naturalization Act because that **Exemption 3 (other statutes)** provision applies only to issuance or refusal of a visa, not revocation of a visa. But the magistrate judge agreed with State that some of the remaining records pertained to an ongoing DEA investigation and could be withheld under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. State argued that "those portions of the records which pertain to the plaintiff's visa revocation" should be protected because "there is no reasonable distinction between refusal and revocation of a visa, that the same types of records are used to make both initial visa determinations and revocations determinations and therefore the reasons for protecting records pertaining to initial visa determinations also apply to records pertaining to revocations, and that the general rule that FOIA exemptions be narrowly construed does not apply in this instance because the provision here is not a FOIA exemption but an INA provision." The agency cited *Beltrana v. Dept of State*, 821 F. Supp. 2d 167 (D.D.C. 2011) to support its position. But the court pointed out that "*Beltrana* is not an intervening change in controlling law and could have been cited by the defendants in support of their prior summary judgment motion. Moreover, the defendants have not shown the availability of new evidence or the need to correct clear error or manifest injustice." The court noted that "due to an error, the Department of State failed to contact the Drug Enforcement Administration regarding the applicability of other exemptions to the documents sought by the plaintiff. As a result, the DEA was not previously aware of the plaintiff's request for these documents. . .The disclosure of these documents could pose a risk to [a] confidential source and [a] named third party." Reviewing the Exemption 7(A) claim, the magistrate judge agreed that documents related to the DEA investigation were properly withheld. (*Enrique Puyana Mantilla v. United States Department of State*, Civil Action No. 12-21109, U.S. District Court for the Southern District of Florida, Feb. 1)

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Judge Robert Wilkins has tied up a loose end remaining in a case brought by prisoner Lawrence Novak for records concerning himself. The Justice Department found records from the Solicitor General's Office that were withheld under **Exemption 5 (privileges)**. However, since the Solicitor General had not explained the applicability of the exemption, Wilkins ordered the office to justify the exemption claim. OSG responded that the records "were prepared by OSG attorneys during the pendency of the criminal prosecution of Plaintiff by the United States Attorney's Office for the District of Massachusetts specifically to advise the Solicitor General in his decision on whether to appeal a District Court decision suppressing evidence in a criminal trial." Novak contended the government had already argued this claim publicly in court and that the information was already in the public domain. But Wilkins noted that "the plaintiff misunderstands the nature of Exemption 5. Assuming that arguments set forth in the OSG documents also were made in court, at most the OSG's final determination would have been publicly disclosed. Exemption 5 protects both the material prepared by an attorney in anticipation of litigation and the internal pre-decisional discussions within the agency leading to the OSG's final determination." (*Lawrence P. Novak v. Department of Justice*, Civil Action No. 11-04666 (RLW), U.S. District Court for the District of Columbia, Feb. 12)

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