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Washington Focus: The Reporters Committee has written to Sen. Patrick Leahy (D-VT) asking that the Senate Judiciary Committee provide oversight of the Justice Department's current policy on disclosure of federal mug shots. Citing the Jan. 30 letter the Reporters Committee sent to Attorney General Eric Holder complaining about the Marshals Service's decision to no longer comply with its obligation to disclose mug shots in response to requests from states within the Sixth Circuit, the Reporters Committee requested Leahy look into why DOJ had assigned its Public Affairs Division to respond. The letter to Leahy noted that "because the concerns raised in the letter [to Holder] implicate the Department of Justice's broader policy of disclosing criminal booking photographs in response to FOIA requests, assignment of our complaint to the Public Affairs Division was improper. The Reporters Committee believes that our concerns can be best addressed by Attorney General Holder, as he directs the Department's FOIA policies and authored the 2009 Department of Justice FOIA Guidelines for all federal agencies."

Expedited Processing Claim Mooted By Agency Response

Judge Beryl Howell has ruled that journalist Greg Muttitt's expedited processing claims are now moot and that the State Department conducted an adequate search for records concerning the development of Iraq's energy policy and national hydrocarbon law. She also found the agency had properly withheld records under Exemption 1 (national security), but had not yet shown that other records could be withheld under Exemption 5 (deliberative process privilege).

Muttitt submitted five requests for records to State for cable traffic to and from the U.S. Embassy in Baghdad. He also asked for any emails relating to the work of Meghan O'Sullivan, who Muttitt identified as having served as a presidential envoy to Iraq between June-October 2007. The agency denied Muttitt's requests for a fee waiver and expedited processing for all five requests. Ultimately, the State Department located 94 documents responsive to the five

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requests. Muttitt challenged the agency's fee waiver and expedited processing decisions, the adequacy of its search, and its exemption claims.

Although Muttitt admitted that his challenge to the specific fee waivers was moot, he argued that his complaint implied that the agency had a pattern and practice of denying fee waivers and that in his filings he had urged the court go beyond the parameters of the disputed requests and consider the agency's practices. He also argued that, because FOIA's provision concerning expedited processing stated that a district court did not have jurisdiction to review a denial of expedited processing after the agency had provided a complete response to the request, the agency's response could not yet be considered "complete" because the adequacy of its search was being contested.

While giving Muttitt high marks for creativity, Howell found his challenge by implication totally unpersuasive. She pointed out that "permitting the plaintiff to raise a policy-or-practice claim for the first time at summary judgment based solely on vague language in his Prayer for Relief would run contrary to Rule 8's purpose because the language cited by the plaintiff in his First Amended Complaint, by itself, does not put the defendant on notice of policy-or-practice claims related to the denial of requests for expedited processing or public-interest fee waivers." She added that "the simple fact that the plaintiff pleaded separate causes of action for policy-or-practice claims regarding *other* matters confirms that the plaintiff's failure to include a policy-or-practice cause of action about *these* matters (*i.e.*, expedited processing and fee waivers) was a conscious choice that the plaintiff simply now regrets. Yet, the plaintiff cannot cure the problem by attempting at the summary judgment stage, to reverse-engineer causes of action that were never pled. A plaintiff cannot ensconce claims between the lines of an otherwise garden-variety Prayer for Relief, only to embellish those obscurities into new causes of action for the first time at summary judgment."

Turning to the issue of whether Muttitt was entitled to any relief on his expedited processing claims, Howell indicated that in *Edmonds v. FBI*, 417 F.3d 1319 (D.C. Cir. 2005), the D.C. Circuit ruled that the because the district court had granted Edmonds' expedited processing request, the agency was required to disclose all non-exempt records by a date certain. She pointed out that the only statutory relief under the expedited processing provision was to move a requester to the front of the processing queue. Applying *Edmonds* to Muttitt's case, Howell noted that "the Court reads the Circuit's opinion in *Edmonds* to mean that the only scenario in which a court can properly grant relief to a FOIA requester 'on the merits' of an expedited processing claim is when an agency has not yet provided a final substantive response to the individual's request for records. After that point, the timing of any further processing of an individual's request (either expeditiously or otherwise) necessarily occurs at the direction of the court—pursuant to a scheduling order not the expedited processing provision of the FOIA. For this reason, the Court construes the phrase 'complete response' in 5 U.S.C. § 552(a)(6)(E)(iv) to mean a final determination under § 552(a)(6)(A), *i.e.*, a final administrative determination whether to release records that are responsive to the individual's request. In order for its response to be 'complete,' an agency need not, as the plaintiff argues, obtain a judicial declaration that its search efforts were adequate or that its withholding determinations were warranted. Once an agency has made its final determination under § 552(a)(6)(A), the *timeliness* of that determination is no longer a live controversy fit for judicial review."

Muttitt contended the agency's search was inadequate because it had not shown that it searched archived records for emails to or from O'Sullivan or that it had additionally searched retired records. Howell dismissed both claims. She noted that "the problem with the plaintiff's argument [concerning archived emails], however, is that it presumes the existence of an *electronic*, as opposed to a paper, recordkeeping system where important e-mails are transferred once an individual's e-mail account is deactivated." She observed that "the agency's own regulations give it the option of keeping such records in electronic, paper, or microform format, and the defendant's declaration establishes that the State Department has thus far elected to archive any retained e-

mail records in paper format." Finding Muttitt's retired records claim to be based solely on a semantic ambiguity, Howell pointed out that "the clear context of the agency's declaration. . .confirms that the agency's search encompassed all retired files likely to contain responsive records."

Muttitt claimed that the State Department had revealed certain facts contained in classified cables through its *Vaughn* index and those facts had to be segregated and disclosed. Howell, however, pointed out that "the plaintiff concedes that the State Department's *Vaughn* index adequately establishes that 'the [withheld] material pertains to foreign relations.' Furthermore, the Court finds the agency's explanation of non-segregability logical and reasonable because the 'pieces of information' denominated by the plaintiff appear unlikely to exist within the withheld document such that they could be discretely separated from the classified portions of the document. For example, the plaintiff has presented no reason to believe that the 'fact of the discussion' in [the] document is a piece of information that was specifically noted in the document, such that it could be segregated and released without releasing any classified information. On the contrary, the Court concludes that such general facts regarding the overall context of the documents are unlikely to be reasonably segregable."

Muttitt fared considerably better when it came to State's Exemption 5 claims. Howell agreed with Muttitt that the agency had failed to provide sufficient information to claim the deliberative process privilege. She noted that the agency's perfunctory claims "do no fill the gaps in the factual context necessary to invoke the deliberative process privilege. In particular, three pieces of factual context normally crucial to determining whether the privilege applies—the nature of the deliberative process involved, the role the document played in that process, and the nature of the decisionmaking authority vested in the document's author—are noticeably absent from the State Department's descriptions of these ten documents in its *Vaughn* index." She added that "the State Department does not specify what role *any* of the ten challenged documents played in the often-unspecified deliberative process at issue." She also questioned whether some documents qualified as inter- or intra-agency records. She observed that "although unclear from the State Department's declaration, it is reasonable to assume that, since the hydrocarbon law is a piece of *Iraqi* legislation, the document identifies changes made by the Iraqi government, not changes made by the U.S. State Department." (*Greg Muttitt v. Department of State*, Civil Action No. 10-202 (BAH), U.S. District Court for the District of Columbia, Mar. 4)

Views from the States…

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

Florida

A court of appeals has affirmed the trial court's ruling that an email submitted anonymously by a student enrolled in Darnell Rhea's class complaining about Rhea's teaching methods is a student record protected under FERPA. Rhea argued the email was about him and not about the student. While the court acknowledged a line of cases distinguishing between student- and teacher-related records, it concluded the distinction did not apply in this case. The appellate court noted that "the unredacted e-mail [Rhea] seeks to obtain identifies the student and the student's enrollment in his class. Further, the e-mail describes that student's personal impressions of the classroom educational atmosphere in the context of Rhea's teaching and methodology. The student's knowledge of, and connection to, the information conveyed in the e-mail is not merely peripheral or tangential. As a member of the class, the student claimed to have experienced the

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treatment described in the e-mail, and the e-mail is in the student's own words. Although Rhea may be the primary subject of the e-mail, the e-mail also directly relates to its student author." The court further observed that "if a record contains information directly related to a student, then it is irrelevant under the plain language in FERPA that the record may also contain information directly related to a teacher or another person. While FERPA makes clear that certain employee records are not included within the definition of 'education record' to be removed from the ambit of the 'education record' definition, those employee records must relate *exclusively* to the employee in his or her capacity as an employee." (*Darnell Rhea v. District Board of Trustees of Santa Fe College*, No. 1D11-3049, Florida District Court of Appeal, First District, Mar. 13)

Iowa

A trial court has enjoined Iowa State University from disclosing records concerning testing conducted by Prof. James Dickson, a food microbiologist, as a private consultant to Beef Products, Inc. The records were originally requested by a Seattle law firm, but others, including the *New York Times*, subsequently requested the same records. The court concluded that the test results, emails exchanged between Dickson and BPI, and invoices for Dickson's services, qualified as public records because they either were created by or in the custody of the university. But the court decided all the records except for dollar amounts in the invoices constituted confidential business information. The court noted that "the documents. . .if examined by knowledgeable people employed by BPI's competitors, could result in disclosure of confidential information about BPI's existing food-processing methods and its development of new methods. . .Some of the invoices from the laboratory, likewise, contain information that, although cryptic to the casual observer, could be used by competitors to steal BPI's trade secrets." The court found no public interest in disclosure, pointing out that "this case does not involve ISU's making governmental decisions on behalf of the public. Rather, it involves the university's providing laboratory testing services for a fee to a private entity. . .Little public money is used to support the research laboratories at ISU." The court added that "rejecting the request for an injunction in this case could lead to a significant reduction in the use of ISU's laboratory services by the private sector and thereby jeopardize the financial viability of the laboratories." (*Beef Products, Inc. v. Iowa State University of Science and Technology*, No. E1CV045745, Iowa District Court for Story County, Mar. 13)

Michigan

A court of appeals has ruled that the trial court failed to follow the supreme court's guidelines for determining what constituted a reasonable award of attorney's fees and has sent the case back for further consideration. Although Nancy Prins had requested fees of 104.73 hours at $385 per hour, the trial court, without any analysis, concluded that a rate of $175 an hour for 70 hours was reasonable and awarded Prins a total of $12,250. Noting that in a non-FOIA fees case, the supreme court had identified eight factors for courts to consider, the appeals court pointed out that "a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services. . .This number should be multiplied by the reasonable number of hours expended in the case." The appeals court observed that in this case "essentially there is no attorney-fee analysis at all—let alone an analysis pursuant to [the supreme court's guidelines]—for this Court to conduct a meaningful review of the [trial] court's attorney-fee determination. [The supreme court] explicitly required trial courts to briefly address each of [its] factors when reaching its decision to aid appellate review; the [trial] court did not do so in this case." (*Nancy Ann Prins v. Michigan State Police*, No. 309803, Michigan Court of Appeals, Mar. 5)

Ohio

The supreme court has ruled that Scioto County may charge $2,000 for access to electronic data files used to create tax maps and aerial photographs because the data is inextricably intertwined with proprietary

software used by the county to create and print the maps and photographs. Real estate appraiser Robert Gambill requested the data files at cost from Scioto County engineer Craig Opperman. Opperman initially contended the files were not public records, but the supreme court disagreed. The court pointed out that "the requested electronic database is a record for purposes of the Public Records Act. It is an electronic record created by the engineer's office by compiling data from various sources, including deeds recorded in the auditor's office, and it serves to document the activities of the engineer's office." But the court agreed that the proprietary software used to create maps allowed the county to recoup the actual costs of separating the data from the software. The court observed that separate legislation allowed the DMV to provide access to data at actual cost, which was defined to include "actual cost paid to private contractors for copying services." Extending this definition of actual costs, the court indicated the definition "applies in general to requests for copies of public records, as long as the decision to employ the services of the private contractor is reasonable." One justice dissented, noting that "a person seeking public records should expect to pay the price for copying the records, but not the price for a public entity's mistake in purchasing inefficient software." The dissent added that "the holding in this case encourages public entities desiring secrecy to hide public records within a software lockbox and requires individual citizens to provide the golden key to unlock it." (*State ex rel. Robert Gambill v. Craig Opperman*, No. 2012-1296, Ohio Supreme Court, Mar. 7)

Tennessee

A court of appeals has ruled that Corrections Corporation of America is the functional equivalent of a governmental agency when running state prisons and that CCA must disclose settlement agreements and settlement reports to Alex Friedmann, editor of Prison Legal News. Although both the trial court and the appeals court had already ruled that CCA was covered by the Public Records Act, CCA continued to argue that its decisions pertaining to inmate suits did not fall under the functional equivalent rubric. The appeals court noted that "CCA is a private entity acting as the functional equivalent of a government agency in its operation of the correctional facilities on behalf of the local governments. Thus, the settlement agreements and reports were made 'in connection with the transaction of official business by [CCA acting as a] governmental agency,' therefore they are public records as defined by [the Public Records Act]." The court added that "any documents created in litigation arising from the imprisonment of citizens of this state, which is a governmental function, would clearly be made 'in connection with the transaction of official business,' which would be the operation of a correctional facility." The court concluded that the settlement agreements and settlement reports that essentially kept track of settlement agreements were not protected by attorney work product even though CCA maintained them in a database used in part to anticipate the likelihood of future litigation. The court pointed out that "although other aspects of CCA's database and records that are not at issue here may qualify as attorney work product, the settlement reports Friedmann seeks pursuant to the Public Records Act do not." (*Alex Friedmann v. Corrections Corporation of America*, No. M2012-00212-COA-R3-CV, Tennessee Court of Appeals, Feb. 28)

The Federal Courts…

In two cases concerning Homeland Security records on the use of Advanced Image Technology scanners as the primary method for scanning passengers, Judge Royce Lamberth, while upholding most of the agency's claims, has ruled that the agency improperly tried to withhold certain records from EPIC under **Exemption 4 (confidential business information)** and **Exemption 5 (deliberative process privilege)**. The agency argued that its own test results of a body scanning machine were protected under Exemption 4 because the "ultimate source" of the information was the company's machine. Rejecting the agency's claim, Lamberth noted that

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"even assuming that information gathered from an on-site visit to a plant qualifies as 'obtained from a person', information gathered from the test of equipment already in the government's possession does not. The information was generated by the government's own testing, not by a private party, and therefore is not entitled to exemption 4 protection." Lamberth also found that a subsequent report that relied on the government's earlier test results was also not protected under Exemption 4. He indicated that "information based on that earlier report would also not be 'obtained from a person.'" He added that "the government bears the burden to justify withholding any records. [Its] descriptions [of the records] fail to demonstrate that any particular piece of the withheld information was *not* based on the [earlier] report, so the Court finds that these withholdings were invalid under exemption 4." EPIC argued that some records were not covered by the deliberative process privilege because they were purely factual. But Lamberth pointed out that "all of these materials, factual or not, were properly withheld under exemption 5 because they are all part of DHS's deliberative process regarding the future of the AIT program." In the other opinion, Lamberth affirmed this holding, noting that "it follows that whether or not some of the material withheld was 'purely factual' is of no moment because this factual material was critical to the agency's deliberative process in determining whether to implement [its Automated Target Recognition program]." Rejecting the claim that some drafts were not deliberative because they were not part of a final decision, Lamberth explained that "to protect a 'draft' document, an agency need not necessarily identify a corresponding final document but must provide adequate description of the document to demonstrate that it was genuinely part of the agency's deliberative process." Lamberth found a PowerPoint presentation prepared for Congress was not protected by Exemption 5. He noted that "the document was assembled and presented to assist the Appropriations Committee in its own funding determinations." He rejected the agency's argument that PowerPoint presentation consisted of "preliminary agency opinions" and observed that "[this] argument does not undermine the main conclusion: this document was prepared to assist with Congressional deliberations rather than agency deliberations." The agency also withheld records under **Exemption 3 (other statutes)** because it concluded they constituted sensitive security information. After finding that 49 U.S.C. § 114(r) qualified as an Exemption 3 statute, Lamberth indicated that "judicial review of [the agency's] determination that certain material is nondisclosable sensitive security information is available exclusively in federal circuit courts." He added that "because the Court lacks jurisdiction to review the merits of the specific withholdings made pursuant to that provision, the legal conclusion that § 114(r) qualifies for exemption 3 withholding takes this Court as far as it can go here." (*Electronic Privacy Information Center v. Transportation Security Administration*, Civil Action No. 11-290 (RCL) and *Electronic Privacy Information Center v. United States Department of Homeland Security*, Civil Action No. 10-1992 (RCL), U.S. District Court for the District of Columbia, Mar. 7)

Judge John Bates has ruled that the Secret Service must disclose non-exempt parts of several contracts concerning the monitoring of social media. Although EPIC admitted that substantial portions of the contracts were protected by **Exemption 7(E) (investigative methods and techniques)**, it argued the agency must disclose any non-exempt information. The agency argued that withholding the entire contracts was appropriate because "the nonexempt information in the documents has minimal or no value, either separately or taken together." But Bates noted that "the standard contract language and other basic information in [the disputed documents] do not equate to the kind of 'disjointed words, phrases, or even sentences' referred to by the court in *Mead Data v. Dept of Air Force*, 566 F. 2d 242 (D.C. Cir. 1977). The nonexempt (and concededly segregable) information here has meaning, and the agency may not withhold information simply because its 'value to the requestor' may be low. . .Moreover, there is no plausible argument here that segregating and producing these portions of four contract documents would require DHS 'to commit significant time and resources.'" Applying the same rationale to some emails the agency was withholding entirely, Bates added that "an agency may not withhold segregable, nonexempt portions of a document just because those portions may be less than helpful to the person or entity requesting the document." Bates agreed with the agency that a decision on **attorney's fees** was premature, but indicated that "although the Court is not deciding the issue at

this time, it notes, in the hope of guiding the parties' discussions, that EPIC will be entitled to some amount of fees and costs, given the agency's release of responsive documents, the *Vaughn* index revisions, and the Court's resolution of the instant motions." (*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, Mar. 4)

Judge James Boasberg has ruled that the records of the Financial Crisis Inquiry Commission, created by Congress to examine the causes of the financial crisis, did not become **agency records** when they were transferred to the National Archives for preservation and processing. Cause of Action, although acknowledging that congressional records were not subject to FOIA, contended that the FCIC records became agency records when they were transferred to the National Archives. Boasberg first noted that "there is no dispute that NARA *obtained* the materials, which were directly transferred to it from the FCIC. The question is whether NARA was in *control* of them." He pointed out that for an agency to have sufficient control over records there must be an intent by the creator of the records to relinquish control, the agency must have the ability to use and dispose of the records, the records must be read or relied upon by agency personnel, and there must be a sufficient degree of integration into the agency's files. Boasberg explained that the Commission's "specific, contemporaneous instructions regarding access to the FCIC records long after their transfer to NARA means that the first factor clearly tips in favor of a finding that the records retain their legislative character." He added that "NARA does not have wide discretion in its use and disposal of the FCIC records because of the specific limiting instructions placed on the records at the time they were transferred." He indicated NARA did not rely on the records 'since NARA is merely a repository and its personnel do not act in reliance on these types of documents." He admitted that the records had been integrated into NARA's system "since the essential reasons for depositing records at NARA are categorization and safekeeping. To the extent that the records were integrated into NARA's system, however, that system only serves the purpose of categorizing and preserving documents, rather than agency decisionmaking and this fact carries little weight." (*Cause of Action v. National Archives and Records Administration*, Civil Action No. 12-1342 (JEB), U.S. District Court for the District of Columbia, Mar. 1)

Judge Emmet Sullivan has ruled that both EOUSA and the Bureau of Prisons failed to conduct an **adequate search** for records on prisoner Jason Dent and that the FBI did not justify its **Exemption 5 (privileges)** and **Exemption 7(D) (confidential sources)** claims. Dent requested records about himself from the three Justice Department components. EOUSA told him the search time was estimated at 51 hours and would cost about $1,500. As a result, Dent narrowed the request, but because no arrangement was made to pay search fees, EOUSA took no further action. The FBI located 810 potentially responsive pages and ultimately disclosed about 300 pages with redactions. BOP told Dent it would not process his request unless he provided a more specific description of the records he sought. Dent then filed suit. The EOUSA argued Dent had **failed to exhaust his administrative remedies** by not committing to pay the fees. Sullivan agreed that EOUSA could hold Dent's response in abeyance until he made arrangements to pay fees, but noted that "nothing in the record of this case indicates that plaintiff paid search fees in advance, yet the EOUSA appears to have processed the request. Under these circumstances, the EOUSA's exhaustion argument is of no moment. Its supporting declaration is silent as to its search for records responsive to plaintiff's FOIA request, and the Court is unable to determine whether EOUSA has fulfilled its obligations under the FOIA." Turning to the FBI's exemption claims, Sullivan noted that the agency had withheld an unsigned draft complaint and a draft federal grand jury indictment. He indicated that "the declarant ably provides a description of the documents withheld but makes no effort to establish that the information withheld is either inter- or intra-agency, or that the information is predecisional and deliberative." While Sullivan agreed that the agency had shown that Exemption 7(D) applied to records based on an explicit or implicit grant of confidentiality, he

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declined to find the exemption covered local grand jury testimony. He pointed out that "missing from the [agency's] declaration, however, is any indication that the information withheld pertains to the identity of or information provided by a confidential source." (*Jason Dent v. Executive Office for United States Attorneys*, Civil Action No. 12-0420 (EGS), U.S. District Court for the District of Columbia, Mar. 2)

A federal court in Illinois has ruled that the State Department has not yet shown that it conducted an **adequate search** for records concerning the investigation of former Foreign Service officer John Erwin. The court indicated that neither the agency nor Erwin had provided a list of facts that complied with local rules. Instead, the court relied on facts provided in a previous suit Erwin had filed against the government. Since Erwin had been investigated by the Bureau of Diplomatic Security, the agency told the court it had found some responsive records after searching four Diplomatic Security components. The court noted that "but the affidavit fails to describe with any level of specificity what searches were conducted within those components and which documents were found. [The agency's] averment that documents concerning Erwin 'were located in [one of the components]' does not say that *all* documents in the component concerning Erwin were located and, without some description of how the search was conducted, the affidavit 'lacks the detail necessary to afford [Erwin] an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment.'" Although the court declined to consider the agency's exemption claims until it supplemented its affidavit, the court questioned State's claim that the records concerning Erwin were created for law enforcement purposes under **Exemption 7 (law enforcement records)**. The court observed that "without further explanation, the court cannot conclude that the investigation was for law enforcement purposes." The court also questioned State's **segregability** claims. The court pointed out that "the Department does not explain with any degree of specificity, however, why it could not protect the privacy of third parties and the need to avoid disclosure of law enforcement techniques through redacting those lengthy documents as opposed to entirely withholding them." (*John Erwin v. United States Department of State*, Civil Action No. 11 C 6513, U.S. District Court for the Northern District of Illinois, Eastern Division, Mar. 6)

A federal magistrate judge in Mississippi has found that prisoner Peter Bernegger **failed to exhaust his administrative remedies** for his requests to the FBI. Bernegger requested records from the FBI's Jackson Field Office on October 19, 2010, but received no response from the agency until April 19, 2011. He claimed that the failure of the Jackson Field Office to respond within 20 days constituted constructive exhaustion of his administrative remedies. The agency told the court that Bernegger's request to the Jackson Field Office was forwarded to FBI Headquarters on November 2, 2010, where it was acknowledged and assigned a case number. Bernegger was told that his request did not contain enough information for the agency to conduct a search and requested further information, which Bernegger furnished on November 23, 2010. On January 4, 2011, the FBI informed Bernegger that it had found 980 pages and asked for his commitment to pay fees. Instead, on January 10, Bernegger filed suit against the agency, claiming it had failed to respond to his request within 20 days. In the meantime, Bernegger agreed to pay the fees requested by FBI Headquarters and the agency updated him on the progress of his request several times. Bernegger renewed his complaint against the Jackson Field Office, contending that both Headquarters and the Field Office were required to provide responsive records in their possession. On June 28, 2011, FBI Headquarters told Bernegger that 480 pages responsive to his request were disclosable. The letter told Bernegger that he could appeal the decision to OIP. On December 1, 2011, Bernegger sent a letter to FBI Headquarters acknowledging that he had received the documents on November 22, 2011 and appealing the agency's decision. Bernegger argued the Jackson Field Office was also required to respond. But the agency told the court that its long-time policy requiring requesters to submit requests for field office records to those specific field offices had been abandoned in 2009 as a result of the Holder memorandum and that since that time a request to any FBI office would result in a

search for all records regardless of where they were located. The magistrate judge noted that "plaintiff agrees that within 20 days of submitting his FOIA claim he received a response from FBI Headquarters acknowledging the receipt of his request, and stating that the agency would begin to search as soon as he provided the necessary supplemental information. Constructive exhaustion lasted only up to the point that Plaintiff received a response. He does not cite, not does the Court find, any support for treating the response from FBI Headquarters as no response at all." The magistrate judge pointed out that "plaintiff was clearly and repeatedly advised where, when and to whom his appeal must be sent if he was not satisfied with the production of documents. . .[But] the plaintiff in this case elected to send his appeal letter to another division of DOJ, at a different address and in another state." Bernegger argued that the agency's letter was vague because it said appeals "should be" addressed to OIP rather than that they must be sent there. But the magistrate judge observed that "this argument would mean that mailing to any DOJ or FBI office would constitute acceptable compliance. That is not the case. The regulation is not vague and Plaintiff did not properly comply." Bernegger also argued that his failure to appeal within the required 60 days was due to the fact that he had been moved to various locations in the interim. He asserted that he sent his appeal within 60 days of acknowledging receipt of the records. The magistrate judge disagreed and noted that "plaintiff failed to properly appeal the denial to the OIP as he was required to do. To now permit him to ignore the agency's directive 'would cut off the agency's power to correct or rethink initial misjudgments or errors. . .and frustrate the policies underlying the exhaustion requirement. Plaintiff's explanation for his failure to appeal according to procedure is not sufficient to defeat his duty to comply with the exhaustion requirement." (*Peter Bernegger v. FBI Field Office of Jackson, Mississippi*, Civil Action No. 3:12CV63 HTW-LRA, U.S. District Court for the Southern District of Mississippi, Feb. 21)

Judge Richard Roberts has sharply criticized the IRS for its failure to explain its **search** for records responsive to Douglas Hysell's multiple requests for records pertaining to himself. Roberts noted that "the IRS submits six declarations in support of its [summary judgment] motion, and the Court finds each to be replete with acronyms and sorely lacking in clarity as to the agency's interpretation of and responsiveness to the FOIA requests. Furthermore, the declarations fail to put forth a cogent explanation of the IRS's recordkeeping systems or practices, leaving the Court to divine the agency's rationale for searching particular systems of records, using particular command codes, or appearing to ignore certain of the items listed in plaintiff's FOIA request." Roberts indicated that "in this case, the IRS' supporting declarations do not establish compliance with the agency's obligations under the FOIA." He sent the case back to the agency to revise and resubmit its summary judgment motion. (*Douglas William Hysell v. Internal Revenue Service*, Civil Action No. 12-0426 (RWR), U.S. District Court for the District of Columbia, Mar. 4)

Judge Richard Roberts has ruled that the Executive Office for U.S. Attorneys properly withheld records from Antoine Plunkett, convicted in a murder-for-hire scheme, under a variety of exemptions, but that the agency has so far failed to show its Western District of Virginia office conducted an **adequate search**. Plunkett asked for records pertaining to his investigation and conviction. EOUSA located about 550 pages and withheld 305 pages in full. Roberts agreed with Plunkett that the agency had not adequately explained how it conducted the search of its Western District office. He noted that "there is no evidence describing the filing systems that were actually searched and the search terms that were utilized. Nor is there any evidence establishing that all files likely to contain responsive records were searched." However, he upheld all the agency's exemption claims. He rejected Plunkett's claim that a newspaper report showed that some information was in the public domain. Roberts indicated that Plunkett "has not shown that any statements [a witness] may have made to a newspaper report were officially acknowledged." He agreed that information furnished in a murder investigation could be considered to have been given with an implicit understanding that

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it was confidential. He observed that "surely, the same presumption [given in a drug trafficking case] would apply to a witness to a murder for hire conspiracy." (*Antoine Plunkett v. Department of Justice*, Civil Action No. 11-0341 (RWR), U.S. District Court for the District of Columbia, Feb.20)

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