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Washington Focus: As part of its second round of commitments to the international Open Government Partnership announced Dec. 3, the Obama administration agreed to 23 new or expanded open government steps, including further development of an online FOIA portal to channel requests, establishing common and consistent FOIA regulations, and creating a FOIA advisory committee through the National Archives. The CIA and NARA will test new technology designed for searching and automatically analyzing documents for disclosure in a pilot program focusing on the Reagan administration's classified email system. Sean Moulton, director of open government policy at the Center for Effective Government, welcomed the new commitments. "We are impressed by the scope and detail of the plan, as well as the administration's commitment to continue to engage and refine those commitments for which detailed goals are not yet available." Ginger McCall, federal policy manager at the Sunlight Foundation, also approved of the thrust of the commitments, but noted that, to succeed, a FOIA advisory committee will need "to include people who are knowledgeable about FOIA and passionate and willing to take agencies to task. If it's stacked with people who are very friendly with agencies and more concerned about maintaining their relationship with agencies, then that would not be good."

Presidential Directive Not Protected by Privilege

Ruling on an issue of first impression, Judge Ellen Segal Huvelle has found that the Presidential Policy Directive on Global Development, communicating policy on national security and foreign relations, is not protected by the presidential communications privilege and must be disclosed by the State Department in response to a request from the Center for Effective Government. Huvelle pointed out that the directive, known as PPD-6, "is a widely-publicized, non-classified Presidential Policy Directive on issues of foreign aid and development that has been distributed broadly within the Executive Branch and used by recipient agencies to guide decision-making. Even though issued as a directive,

the PPD-6 carries the force of law as policy guidance to be implemented by recipient agencies, and it is the functional equivalent of an Executive Order." The State Department claimed the entire directive was protected by Exemption 5 (privileges), specifically the presidential communications privilege. Relying on the handful of cases analyzing the presidential communications privilege, particularly *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), Huvelle noted that "the scope of the privilege is to be 'construed as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected.' As such, it 'only applies to communications that. . .advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters' and does not generally 'extend to staff outside the White House in executive branch agencies.'"

The government admitted the directive had been widely disseminated within the executive branch, but took the position that the privilege applied "because, regardless of how widely the document has been distributed within the Executive Branch, it *originated with the President*, and. . .the privilege protects the President's final decisions." However, Huvelle pointed out that "the D.C. Circuit has never actually applied the presidential communications privilege to a 'final' presidential directive or decision. Instead, the privilege's application to 'final' decisions, as in any other circumstance, is no broader than necessary to ensure that the confidentiality of the presidential decision-making process, and its concomitant decision-making benefits, are 'adequately protected.'" She observed that "when a court decides whether the privilege extends to a document or class of documents, it must ask whether application of the privilege is necessary to protect the confidentiality of communications as between the President and his advisers."

Huvelle pointed out that "in ruling in dictum that the privilege can apply to 'final' documents, the [D.C. Circuit in *In re Sealed Case*] rested on the fact that the privilege also protects the President's ability to 'operate effectively.' However, this broad purpose is not implicated in this case." Indeed, Huvelle explained, this case did not involve a quintessential and nondelegable Presidential power. Nor was the PPD-6 "relevatory of the President's deliberations" since "the PPD-6 was distributed far beyond the President's close advisors and its substance was widely discussed by the President in the media." She observed that *In re Sealed Case* did not support the conclusion that "the D.C. Circuit specifically considered, no less endorsed, the extension of the presidential communications privilege to presidential communications distributed and implemented widely throughout the Executive Branch."

Moreover, Huvelle indicated that "there is *no* evidence that the PPD-6 was intended to be, or has been treated as, a confidential presidential communication." Aside from the fact the directive was not classified, Huvelle pointed out that "the fact sheet released for PPD-6 described in detail the goals and initiatives set forth therein, copying verbatim many portions of the PPD-6. . .Although the government is correct that the disclosure of portions of a document subject to the presidential communications privilege does not waive the privilege as to the entire document, the widely publicized nature of the PPD-6 is important in considering the confidentiality interests implicated by the directive's disclosure under FOIA."

While Huvelle agreed with the government that limiting PPD-6's distribution to those with a need-to-know implicated confidentiality concerns, Huvelle criticized the government for failing to define the scope of need-to-know in this case. She pointed out that "as in the attorney-client privilege context, the scope of the 'need to know' is relevant to the presidential communications privilege, where, for the privilege to apply, the *reason* a given recipient 'needs to know' must implicate the purposes that animate the privilege: the promotion of candor and effective presidential decision-making." She explained that "just like agency advisory documents that never reach the Office of the President, documents distributed from the Office of the President for non-advisory purposes do not implicate the goals of candor, opinion-gathering, and effective decision-making that confidentiality under the privilege is meant to protect." She added that "simply put, the purposes

of the privilege are not furthered by protecting from public disclosure presidential directives distributed beyond the President's closest advisors for non-advisory purposes."

Even worse for the government's position, Huvelle pointed out that there was substantial evidence that the directive had been disseminated for non-advisory purposes. She indicated that the government's response to this evidence was to insist that "the only relevant question is 'whether the document at issue *originated* with (or at the request of) the President or one of his close advisors' and if the answer is yes, the fact that the 'original recipients of the document subsequently *distributed* it beyond the President's inner circle' is irrelevant." Huvelle flatly rejected that assertion. Instead, she pointed out that "no court has suggested that the mere fact that a President's direct involvement in a communication, either as an author or recipient, renders it automatically protected. Instead, the privilege has always been limited to certain *types* of communications directly involving the President. . ." Huvelle was disturbed by what she called the "unbounded nature of the government's position." She indicated that "the purpose underlying the distribution of a presidential communication beyond the President's closest advisers is paramount. If distribution is limited to advisory purposes, the privilege may apply; if distribution is far broader, the purposes animating the privilege will not justify its application." Huvelle concluded that if she accepted the government's position, "there would be no effective limitation on a President's ability to engage in 'secret law' and, at least for presidential directives, FOIA would become 'more. . .a withholding statute than a disclosure statute.'" (*Center for Effective Government v. U.S. Department of State*, Civil Action No. 13-0414 (ESH), U.S. District Court for the District of Columbia, Dec. 17, 2013)

Views from the States…

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

California

The Supreme Court has ruled that there is a common law right of access to non-identifying data from the State Bar's admissions database on bar applicants even though there is no statute requiring the State Bar to release such information. Richard Sander, a professor at UCLA law school, proposed to collaborate with the State Bar in researching racial disparities in bar passage rates and law school grades. The State Bar rejected his proposal and Sander then filed a request for the State Bar's admissions database under the California Public Records Act. After the State Bar rejected the request, Sander filed suit. The trial court found that neither the CPRA nor the common law right of access to judicial records applied. The Court of Appeal reversed, finding instead that the common law right of access to judicial records applied more broadly and that disclosure should be considered based on whether the public interest outweighed any privacy interest. The case then went to the Supreme Court, which essentially agreed with the Court of Appeal. The Supreme Court found there was no statutory prohibition, since the State Bar did not interpret its regulation restricting disclosure of personal information to encompass non-identifying data. The court then pointed out that "we see no conflict between the CPRA's exemption of judicial branch records and the recognition that a common law right of access continues to exist in records of those public entities not governed by the CPRA, in which there is a legitimate public interest, if the interest is not outweighed by other interests." Turning to the balance between the public interest in disclosure and the privacy interests, the court noted that "the public's interest in the information in the database would contribute to the public's understanding of the State Bar's admissions activities, and is sufficient to warrant further consideration of whether any countervailing consideration weighs

against public access." As to the privacy interest, the court observed that "the State Bar's argument that disclosure of the requested data would violate applicants' privacy even if it cannot be connected to them as individuals is not supported by authority." Since the only question that had been litigated concerned whether or not the database could be disclosed, the Supreme Court returned the case to the trial court for a resolution on the issue of how difficult it would be for the State Bar to disclose the data in a non-identifying format. (*Richard Sander v. State Bar of California*, No. S194951, California Supreme Court, Dec. 19, 2013)

A court of appeals has ruled that fund performance information for venture capital funds in which the Regents of the University of California have invested are not constructively in the possession of the Regents and do not have to be provided to Reuters. After 2003 litigation in which the Regents were forced to disclose such fund operating data, venture capital firms prohibited the Regents from investing in new funds because of the risk that fund performance data would be disclosed. In 2005, the legislature passed an exemption to the California Public Records Act protecting such fund information, but providing a series of exceptions to non-disclosure. After the Regents denied its request for fund performance data, Reuters filed suit. The trial court found that the records related to the Regents' public business, and, even though the Regents did not have possession of the information, ruled that they were required to make reasonable attempts to retrieve the information from the fund operators. During the litigation, the Regents had provided some fund data, which was placed under seal. However, at the conclusion of the suit, the trial court ruled that, except for data it had found was exempt, the Regents would be required to provide redacted public versions of the data that had been sealed. The Regents then appealed. The court of appeals reversed. The court agreed with the Regents' contention that "whether the information falls within the meaning of 'public records' is not determined by whether it has or might have *constructive* possession of them." The court pointed out that "no words in [the CPRA] suggest that the public entity has an obligation to obtain documents even though it has not prepared, owned, used, or retained them." Reuters argued that the exceptions to non-disclosure contained in the 2005 amendment concerning access to fund information required the Regents to disclose the data. The court of appeals disagreed, noting that "properly understood, the specific information about alternative investments while no longer exempt from disclosure based upon a claim of trade secrets, must be 'prepared, owned, used or retained' by the public agency in order to be considered public records." Rejecting Reuters' constructive possession argument, the court observed that "we do not believe that refusing to add constructive possession into the definition of public records will frustrate the Act's purpose of enhancing governmental accountability through a general policy of access to information. If the Regents determine that it *needs* particular information to perform its fiduciary obligation of prudently investing and monitoring its investments, nothing in this record suggests it will avoid receiving that information or violate its fiduciary duty in order to shield itself from its obligations to disclose under the CPRA." The appeals court then rejected the trial court's order requiring the Regents to disclose redacted versions of records previously sealed, indicating that the trial court's use of the documents did not raise the doctrine of judicial estoppel, and instead ordered the trial court to return the records to the Regents. (*Regents of the University of California v. Superior Court of Alameda County; Reuters America LLC, Real Party in Interest*. No. A138136, California Court of Appeal, First District, Division 2, Dec. 19, 2013)

Illinois

A court of appeals has ruled that the Public Access Counselor did not issue a binding opinion when it agreed with Oak Park-River Forest High School District that redactions the school district made to payment records for its private law firm were privileged. Warren Garlick requested the records from the school district and then asked the PAC to review the school district's decision. Garlick then filed suit against the school district and the Public Access Counselor. The trial court found that the PAC had issued a binding opinion reviewable only under the Administrative Review Law. The appeals court, however, disagreed. The court noted that "the FOIA expressly grants the Attorney General discretion to decide to resolve an issue without

issuing a binding opinion. . .The Attorney General must participate in the review, as a defendant, if he or she issued a binding opinion, but the Attorney General need not participate in the review when he or she has not issued a binding opinion." The court indicated that "when the PAC issues a letter that it does not characterize as a binding opinion concerning the dispute brought to the PAC, the parties cannot seek review under the Administrative Review Law. Instead, if the parties seek to litigate the issue further, they must either obtain a binding opinion from the Attorney General or proceed [to court]." Finding that in Garlick's case the PAC had not issued a binding opinion, the appeals court dismissed the PAC as a defendant and allowed Garlick to re-file his complaint against the school district. The appeals court agreed with the school district's recommendation that "the PAC could expressly identify all of its binding opinions as binding opinions subject to review only under the Administrative Review Law, and all of its nonbinding opinions as nonbinding and not subject to review." (*Warren R. Garlick v. Office of the Public Access Counselor*, No. 1-12-2444, Illinois Appellate Court, First District, Third Division, Dec. 31, 2013)

Kentucky

The Supreme Court has ruled that while Leonard Lawson, owner of an asphalt company who was indicted by a federal grand jury in 2008 on charges of attempting to obtain confidential cost estimates for Kentucky highway construction contracts, may bring suit to block disclosure of his 1983 proffer made to the Attorney General to settle contract fraud charges, because the public interest in disclosure of the proffer outweighs his minimal privacy interests, the proffer should be disclosed to the Louisville *Courier-Journal*, the Lexington *Herald-Leader*, and the Associated Press. Lawson sued to block disclosure of the proffer, arguing that disclosure would invade his privacy and was also prohibited by an exemption for criminal investigatory files compiled by county or Commonwealth attorneys. The court found Lawson did not have standing to argue the investigatory files exemption, pointing out that it applied only to county and Commonwealth attorneys and that "disclosure of an otherwise exempt record is not precluded, however, if the intended beneficiaries of the exemption waive their right to non-disclosure." Agreeing, however, that Lawson did have standing to challenge the disclosure of the proffer on the grounds that it would be an invasion of his personal privacy, the court rejected Lawson's claim, observing that "the public has a legitimate interest in finding out in some detail how the Attorney General responded [to Lawson's misconduct]. . .Given the proffer's significant connection to 'what the government is up to,' and given Lawson's attenuated privacy interest, there is no real doubt that the balance tips in favor of disclosure." The court rejected Lawson's contention that there was no public interest in 30-year-old records. The court noted that "it is no less true that the public's interest in knowing what the government is up to includes a strong historical interest in knowing what the government *was* up to. The passage of time, therefore, while a factor relevant to the balancing of interests required by the privacy exemption, will seldom be dispositive in and of itself." One justice strongly disagreed, noting that "I find the public value of Lawson's proffer to be miniscule because it will do nothing to tell the public whether state agencies are executing their statutory functions today, thirty years later." (*Leonard Lawson v. Office of the Attorney General*, No. 2012-SC-000201-DG, Kentucky Supreme Court, Dec. 19, 2013)

The Supreme Court has ruled that the City of Hopkinsville properly redacted personally-identifying information from arrest records and police incident reports disclosed to the *Kentucky New Era*. The newspaper requested police records concerning stalking, harassment, and terroristic threatening from January to August 2009. Although it disclosed the records, the City redacted all personal information as well as any records concerning juveniles. The newspaper appealed to the Attorney General's Office, which found that the City was required to make a more particularized showing that the privacy exemption applied. The trial court upheld the City's decision, although it indicated the privacy exemption did not permit wholesale redaction of demographic data. Both sides appealed and the appeals court ruled in favor of the City, including its redaction of information pertaining to juveniles. The Supreme Court agreed that the privacy interests in the

case were strong. The court noted that "a person's involvement in any capacity in a criminal investigation poses risks, if disclosed, of embarrassment and stigma, and can easily pose much graver risks as well." The newspaper argued that the records were so heavily redacted that it was impossible to use them to monitor police action. But the court pointed out that "we certainly agree that the public is entitled to assure itself that the Hopkinsville Police Department is providing equal protection to all parts of the community. We do not agree, however, that that interest can only be vindicated by sacrificing the privacy interests of all those with whom the police come in contact." Instead, the court suggested the newspaper could use the police report information that was disclosed to contact individuals by locating them through other public sources, an argument that seems to undercut the conclusion that disclosure of such contact information would constitute an invasion of privacy. But the court adamantly noted that "the public interest in monitoring the police department clearly does not extend to providing phone numbers, addresses and driver's license numbers." The court rejected the newspaper's contention that the City's redaction of personally-identifying information constituted an impermissible blanket policy. Defining it instead as a categorical policy, the court noted that "with respect to discrete types of information routinely included in an agency's records and routinely implicating similar grounds for exemption, the agency need not undertake an ad hoc analysis of the exemption's application to such information in each instance, but may apply a categorical rule." (*Kentucky New Era, Inc. v. City of Hopkinsville*, No. 2012-SC-000290-DG, Kentucky Supreme Court, Dec. 19, 2013)

A trial court has castigated the Cabinet for Health and Family Services for what the court found to be the agency's unwavering resistance to disclosing records concerning child fatalities and near-fatalities to the Louisville *Courier-Journal* and the Lexington *Herald-Leader*. The court noted that, although it had ruled the records must be disclosed more than two years previously, the Cabinet instead applied an internal protocol to review of the records that resulted in redaction or withholding of entire files on unsubstantiated privacy grounds. Saying that "the Cabinet's continued assertion of confidentiality for dozens of documents that are already in the public domain, including the identity of perpetrators of child abuse who have been convicted of criminal charges, makes a mockery of the statutory command that 'free and open examination of public records is in the public interest.'. . .The Cabinet's conduct demonstrates that it will not comply with the plain requirements of the Open Records Act, except in response to significant judicial sanctions." After indicating that both plaintiffs were entitled to attorney's fees, Franklin County Circuit Court Judge Phillip Shepherd proceeded to sanction the Cabinet $10 a day for a total of 540 days, a total amounting to $756,000. Shepherd noted that "the Cabinet's unjustified legal tactics (including adoption of emergency regulations, and continued use of its protocol for wholesale redactions after the Court had specifically rejected it), constitute a willful obstruction of its duty of compliance with the Act. In context of the large volume of public documents at issue in this case, and the overall budget of the Cabinet, the Court finds that this is an appropriate penalty. . ." (*Courier-Journal, Inc. and Lexington H-L Services, Inc. v. Cabinet for Health and Family Services*, No. 11-CI-141, Franklin Circuit Court, Division 1, Dec. 23, 2013)

Ohio

A court of appeals has ruled that records indicating homes in which children were found to have elevated blood levels may be withheld under the exemption for protected health information only to the extent that disclosure could lead to identification of a child's health condition. As a result, the court ordered the Board of Health of Cuyahoga County to redact records it had initially withheld entirely from the Lipson O'Shea Legal Group. The court noted that "a blanket exemption, which is what the BOH seeks, is not appropriate, nor does it uphold the intent of the Public Records Act. Instead, the BOH must consider each document to determine if the record contains 'protected health information,' and redact the document accordingly." The court added that "if the document contains only non-identifying information (of the affected child, family member, or parent/guardian) either on its face or after redaction, it does not, by definition contain 'protected health information' and is subject to disclosure." The court indicated there was a public interest in monitoring the

Board of Health's performance under a $3.4 million federal grant. "Release of the requested information could help to hold the BOH accountable for its duty and promise to reduce lead-related hazards in Ohio's largest county and reveal its successes or failures in doing so, also without requiring the release of prohibited information." (*Board of Health of Cuyahoga County v. Lipson O'Shea Legal Group*, No. 99832, Ohio Court of Appeals, Eighth District, Cuyahoga County, Dec. 26, 2013)

Washington

The Supreme Court has ruled that the effective law enforcement exemption, which covers investigatory law enforcement records, cannot be applied categorically to records the Seattle Police Department withheld from Evan Sargent, whose altercation with a Seattle police officer led to an investigation of both Sargent, who was not prosecuted, and the police officer, who was subject to an internal affairs investigation. Sargent claimed he was making a delivery at night when he was accosted by the police officer and charged with battery. The police officer claimed Sargent tried to strike him with a baseball bat. The King County Prosecuting Attorney's Office declined to press charges, but referred the case back to the police for further investigation. Sargent made Public Records Act requests for records concerning the incident. The police denied the requests based on the effective law enforcement exemption. The police subsequently completed their investigation of Sargent, the Seattle City Attorney declined to press charges, and the case was closed. Sargent then renewed his PRA requests, but the police continued to withhold records under the effective law enforcement exemption. Sargent filed suit and the trial court sided with him, finding the police had acted in bad faith in treating the effective law enforcement exemption as categorical. However, the court of appeals reversed, finding the categorical application of the effective law enforcement exemption was appropriate until any potential court proceedings were completed. At the Supreme Court, the court pointed out that the categorical application of the effective law enforcement exemption was based on a court-created exception stemming from *Newman v. King County*, 947 P.2d 712 (1997), where the court decided the government could assert a categorical exemption when an investigation was ongoing and no suspects had been identified. However, the court noted that "expanding the court-made rule to cases that have been referred for charges but rejected by the prosecutor is a sweeping change that is not justified by the express language of the exemption, nor by the public policy favoring disclosure and accountability of government agencies to the public they serve." The court found the categorical application of the effective law enforcement exemption also did not apply to the internal investigation of the police officer. The court observed that "we simply decline to extend the *categorical* application of the exemption derived in *Newman* in the context of a criminal investigation to this type of internal investigation material. Instead, when an agency withholds internal investigation information citing the effective law enforcement exemption, the burden will rest with the agency to prove that specific portions of the internal file are essential to effective law enforcement." (*Evan Sargent v. Seattle Police Department*, No. 87417-4, Washington Supreme Court, Dec. 19, 2013)

The Federal Courts…

Judge Robert Wilkins has ruled that the Defense Intelligence Agency conducted an **adequate search** for records concerning polygraph examinations and properly withheld records under **Exemption 7(E) (investigative methods and techniques)** in response to multiple requests from Kathryn Sack, a graduate student at the University of Virginia researching her dissertation on polygraph bias. Also, in rejecting Sack's challenge to the National Security Agency's refusal to place her in the **educational fee category**, Wilkins becomes one of the first judges to ever analysis in detail the requirements to qualify for the category. Sack sent requests to a number of federal agencies concerning polygraph exams, including DIA and NSA. Sack

complained that DIA limited its search of its National Center for Credibility Assessment to bias-related information. But Wilkins pointed out that Sack's request was explicitly limited to records in DIA's security office, which the agency decided was unlikely to have any responsive records. Instead, it concluded that while the NCCA might have responsive records, the NCCA did not maintain aggregate data and, thus, searching for terms like "bias" would be the best way to locate responsive records. Wilkins observed that "in carrying out that aspect of its search, it was equally reasonable for DIA to rely upon the bias- and EEO-related search terms used. As noted, DIA determined, in consultation with NCCA officials, that a search for 'aggregate data' would have been fruitless. In turn, the agency interpreted the scope of Sack's request in a manner consistent with the scope of Sack's accompanying FOIA requests to DIA, all of which sought bias- and EEO-related information related to polygraphs. Under the totality of the circumstances, this was an appropriate approach." Sack also complained DIA had found no records of correspondence with Sheila Reed, a leading polygraph researcher. But Wilkins indicated that "based on NCCA's mission of assisting federal agencies with education and tools for credibility assessment, it was appropriate for DIA to conclude that any responsive records were likely to be found within the NCCA, and to focus its search efforts accordingly. At bottom, Sack is effectively arguing that responsive documents might exist elsewhere within DIA, but she offers nothing beyond her own supposition in support of this theory. This approach simply comes up short." Wilkins found that quality assurance program reports prepared for OPM were properly protected by Exemption 7(E). He noted that "disclosure of the QAP Reports could reasonably be expected to circumvent the efficacy of background investigations undertaken by federal agencies. Indeed, these concerns are particularly heightened in this case, given that the QAP Reports in contention pertain to the polygraph screening programs of *federal law enforcement agencies*. . .The Court agrees that placing this information in the public domain at least creates a risk that bad actors could leverage those details to subvert the background screening process, thereby gaining access to sensitive (if not classified) information that could be exploited to harm national security and homeland security interests." NSA had denied Sack's request to be considered a representative of an educational institution, even after she submitted a letter from her faculty advisor confirming that her research was consistent with the research goals of the university. Wilkins pointed out that "all of Sack's submissions contained vague and conclusory wording that evaded the central question presented by the OMB fee guidelines: whether the request was for Sack's coursework, or whether it was for a project sponsored by the educational institution. Sack, as the requester, had the burden of proof on this issue, and her proof was simply insufficient. To hold otherwise would allow a student's FOIA request supporting her coursework to fall with the educational institution exemption, so long as the request does not mention her coursework and so long as the instructor asserts (without explanation) that the request is 'on behalf of the institution' and that the student's research is 'consistent' with the goals of the institution. This would be an end-run around the OMB fee guidelines." (*Kathryn Sack v. U.S. Department of Defense*, Civil Action No. 12-1754 (RLW), U.S. District Court for the District of Columbia, Dec. 9, 2013)

A federal court in Illinois has ruled that the State Department's supplemental affidavit adequately justifies its invocation of **Exemption 7(law enforcement records)** to protect portions of its security background check on John Erwin. While Erwin argued that his suitability for employment did not constitute a law enforcement investigation, the court noted that "the Department's background check of Erwin satisfies Exemption 7's 'law enforcement purposes' requirement." He indicated that such investigations were conducted under an executive order and pointed out that "suitability investigations by Diplomatic Security likewise are conducted pursuant to an Executive Order providing that eligibility for access to classified information will be granted only after an investigation confirms the employee's 'loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment.' Given Diplomatic Security's position as 'the law enforcement arm of the Department'. . .documents related to the Department's background check of Erwin satisfy Exemption 7's 'law enforcement purposes' requirement." Rejecting Erwin's **segregability** claim, the court observed that "for each of the eleven documents that continue to be withheld in full, the

updated *Vaughn* index describes the information withheld in detail and explains with sufficient particularity why the Department withheld the entire document. Given the presumption that the Department has satisfied its duty to disclose reasonably segregable information—a presumption Erwin fails to overcome—the court finds that the Department has met its obligation." (*John Erwin v. United States Department of State*, Civil Action No. 11-6513, U.S. District Court for the Northern District of Illinois, Eastern Division, Dec. 9, 2013)

A federal court in Oklahoma has ruled that a multi-part request submitted by 13 state attorney generals to the EPA for records pertaining to the agency's non-discretionary duties to take action under the Clean Air Act is too vague for the agency to process. The attorney generals filed suit after the agency denied them a fee waiver because the request did not adequately describe the records sought. The court noted that "discussions with any Interested Organization or Other Organizations concerning the scope and application of the EPA Administrator's non-discretionary duty to take 'certain actions' under the CAA" was too vague. "The term 'certain actions' is not defined or limited in any manner, and a professional EPA employee would be left to guess which of hundreds of actions that the Administrator has a non-discretionary duty to perform, plaintiffs are actually interested in. . ." Suggesting the plaintiffs resubmit more narrowed requests, the court observed that "if plaintiffs work with the EPA and the EPA works with plaintiffs, plaintiffs will be able to submit a FOIA request that reasonably describes the records requested and that will not be burdensome on the EPA." (*State of Oklahoma v. Environmental Protection Agency*, Civil Action No. CIV-13-726-M, U.S. District Court for the Western District of Oklahoma, Dec. 18, 2013)

A federal court in Maryland has allowed Orly Taitz to amend her complaint against the Social Security Administration to challenge the agency's **search** rather than whether or not it properly responded to Taitz's request for Social Security Number applications for Harrison Bounel, Tamerlan Tsarnaev, and Stanley Ann Dunham, President Obama's mother. Taitz indicated that because Bounel was born in 1890, his Social Security application fell within the 120-year rule requiring disclosure without proof of death. The agency responded by disclosing the applications for Tsarnaev and Dunham, but told Taitz it did not find an application for Bounel. The court explained that "in regard to the adequacy of the search, plaintiff's arguments that the SSA has failed to meet its obligations under FOIA may have merit." The court pointed out that the agency's affidavit indicated that "a search of the Numident for a record that matched the information provided by Plaintiff could not locate a record for Mr. Bounel." But the court observed that the agency "did not explain the manner in which the search was conducted, whether multiple searches were conducted using different combinations of the information provided by plaintiff (to ensure that a minor discrepancy in the information submitted by plaintiff did not sabotage the search), or any other details related to the thoroughness of the search." However, the court noted that "plaintiff's contention on this point, and the factual allegations underlying them, do not appear in the Amended Complaint. The Amended Complaint is premised only on the SSA's failure to respond to plaintiff's FOIA request. . .Plaintiff first raised the issue of inadequacy in her Opposition." The court told Taitz that "if plaintiff takes issue with the adequacy of the SSA's response, she must amend her complaint to add allegations that the SSA's response was deficient." (*Orly Taitz v. Carolyn Colvin, Commissioner, Social Security Administration*, Civil Action No. ELH-13-1878, U.S. District Court for the District of Maryland, Dec. 13, 2013)

A federal court in West Virginia has ruled that Jeff Corr is not entitled under the **Privacy Act** to access to an administrative inquiry file pertaining to his two supervisors at the Bureau of Debt because the file is not retrievable by his name or identifier. Corr complained of several incidents of alleged misconduct concerning his supervisors. As a result, the agency initiated an investigation and created an administrative inquiry file. Corr submitted a seven-page document to Human Resources, detailing the allegations and asking for money

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damages. After the agency completed its investigation, Corr requested a copy of the administrative inquiry file, indicating it was the result of a grievance he filed. The agency concluded the administrative inquiry file was not created as the result of a grievance and because it was not retrievable by Corr's name or identifier it was not about him for purposes of Privacy Act access. While the magistrate judge found that Corr had not filed a grievance in accordance with the agency's grievance procedures, she did rule that Corr was entitled to access the administrative inquiry file because it could be located through a Boolean word search including his name. District Court Judge Thomas Johnston agreed with the magistrate judge that Corr had not filed a proper grievance. He noted that "the [System of Records Notice] only provided a right of access to a grievance file when an aggrieved employee first properly complies with the procedural requirements of the Administrative Grievance Procedure. Plaintiff cannot claim the benefit of this system after failing to comply with the requirements that would have brought his complaints within the scope of the SORN in the first place." Johnston then pointed out that "the method of retrieval of a record, rather than its substantive content, implicates the coverage of the Privacy Act. . .The Administrative Inquiry file is not contained in a system of records retrievable by Plaintiff's name. . .The issue is retrievability; there is no evidence that Defendant retrieved the file by use of Plaintiff's name." (*Jeff Corr v. Bureau of the Public Debt*, Civil Action No. 6:11-cv-00865, U.S. District Court for the Southern District of West Virginia, Dec. 19, 2013)

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