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Washington Focus: A letter to the National Archives from former President George W. Bush dated November 2010 establishing nine categories of his presidential records that are cleared for release was recently disclosed after being obtained by Josh Gerstein of POLITICO under the FOIA. Gerstein noted that the letter was in marked contrast to Bush's policies when he was President, including substantially cutting back on access under the Presidential Records Act. Towson University political science professor Martha Kumar believes Bush has little to lose from opening his files. Kumar told Gerstein that "he left the presidency very comfortable with his record. I think that'll carry through into release of information from it. I think he believes his actions were justified and that the records will demonstrate that."

D.C. Circuit Decision Preserves Practical Obscurity in Internet Age

In a clash of perspectives over the existence of any expectation of privacy in hard-to-access records, the D.C. Circuit has drawn a firm line protecting the identities of individuals who have been charged with a crime but were not convicted. Assessing the privacy implications of six federal prosecutions based on cell phone tracking data obtained without a warrant in which the defendant was acquitted or the charges were dropped, Circuit Court Judge David Tatel, writing for the majority, noted that "given the fundamental interest individuals who have been charged with but never convicted of a crime have in preventing the repeated disclosure of the fact of their prosecution, we have little hesitation in concluding that the release of the remaining information the ACLU seeks 'could reasonably be expected to constitute an unwarranted invasion of personal privacy [under Exemption 7(C)]. Indeed, the government, having brought the full force of its prosecutorial power to bear against individuals it ultimately failed to prove actually committed crimes, has a special responsibility—a responsibility it is fulfilling here—to protect such individuals from further public scrutiny."

ACCESS REPORTS

This is the second time the case has been before the D.C. Circuit. The ACLU originally requested docket information on criminal prosecutions based on warrantless cell phone tracking. District Court Judge James Robertson found that the public interest in disclosure outweighed the privacy interest for individuals who were convicted, but that for those not convicted, their privacy interests outweighed any public interest in disclosure. Both sides appealed and the D.C. Circuit ruled that, while a privacy interest existed for the individuals prosecuted, it was minimal. The court then ruled that the Department of Justice was required to disclose the list of individuals who were convicted and left the fate of those who were not convicted unanswered. Justice released the docket information for 214 prosecutions that resulted in convictions. Because the ACLU did not challenge the government's right to withhold information from sealed cases, the remaining 15 cases were reduced to six. District Court Judge Amy Berman Jackson ruled in favor of DOJ and the ACLU appealed.

Tatel began his analysis by trimming back both parties' contentions. He pointed out that "we disagree with the Department that those who have been acquitted or had their cases dismissed and whose involvement in alleged criminal activity has already been publicly revealed are in the same situation as those who were never charged in the first place." He noted that "we likewise disagree with the ACLU that the privacy interests of defendants who were indicted but not convicted are essentially indistinguishable from those of defendants who were convicted." He added that "to be sure, many of the factors we considered important in concluding that convicted defendants have a relatively weak privacy interest are equally applicable to those individuals whose interests we now consider here," particularly the fact that their prosecution was a matter of public record. Tatel, however, observed that "but the fact that information about these individuals' cases is a matter of public record simply makes their privacy interests 'fade,' not disappear altogether." He explained that "if individuals not convicted have a substantially greater privacy interest than convicted individuals to start with, then even after both interests are discounted due to prior public revelation, the former interest will remain substantially greater than the latter."

Acknowledging that the public might assume individuals are guilty if they were charged even if they were not convicted, Tatel noted that "although the fact that such defendants were accused of criminal conduct may remain a matter of public record, they are entitled to move on with their lives without having the public reminded of their alleged but never proven transgressions." He pointed out that "while this attention would have been warranted at the time of indictment, now that these defendants have been acquitted or had the relevant charges dismissed they have a significant and justified interest in avoiding additional and unnecessary publicity."

The government argued that the public interest in disclosure had been diminished by the information provided in the previously disclosed docket information pertaining to the 214 convictions and urged the court to assess the incremental value of the remaining information in balancing privacy against the public interest. On the other hand, the ACLU suggested that the issue of warrantless cell phone tracking was still an important public interest weighing in favor of disclosure. Sidestepping that issue, Tatel indicated that "even assuming, as the ACLU contends, that the public interest in the disclosure here equals that in *ACLU I*, that public interest pales in comparison to the substantial interests in privacy that are now at stake."

However, in an unusual concurrence, Tatel revealed that he believed the incremental value test was a useful tool in assessing the balance between the public interest and privacy rights. He pointed out that "if the Department's disclosure of 214 prosecutions has failed to reveal the nature and extent of the government's practice of obtaining cell phone tracking data without a warrant, the probability that disclosure of these six remaining cases would yield significant benefits is relatively low." He rejected the ACLU's contention that the incremental value standard would allow agencies to hide embarrassing material with the claim that the public interest was satisfied by the large volume of the disclosure. He observed that "although I have no doubt

that this court would look with great suspicion on any attempt to manipulate FOIA in this fashion, this case involves no such mischief. It is well-established that federal agencies may disclose particular records or portions of records responsive to a request without disclosing *all* responsive records so long as they have some legitimate FOIA-based reason for doing so." Addressing the situation in this case, he noted that "having released all of the information our prior decision required, the Department now resists disclosure of a particular type of information that implicates stronger privacy interests. That being so, I see no reason to now disregard this prior disclosure."

In a scathing dissent, Circuit Judge Janice Rogers Brown dismissed the majority's decision as a dead letter in the Internet age. She blasted Tatel, noting that "the court hypothesizes the plight of individuals who, though never convicted, are viewed with suspicion when others learn of their mere involvement in particularly ignoble cases. But even if true, persons who are publicly indicted and tried can have no reasonable expectation that the occurrence of these events will not be publicly disclosed. Risk of disclosure inheres in the very nature of these *public* proceedings." She pointed out that "the touchstone of informational privacy—the right to be let alone—has long rested on the degree to which an allegedly private fact has been disseminated, and the extent to which the passage of time has rendered it private. Nevertheless, technological advances seem to presage the death knell for this previously workable standard. In today's echo chamber of big data, metadata, and the Internet, the once wholly forgotten memory of some unsavory, minimally broadcast misdeed is resurrected for global consumption. Against this backdrop, it seems fanciful to believe that individuals who were publicly indicted but never convicted (though in some cases publicly tried), retain an objective, substantial privacy interest in controlling information about these public facts." She added that "thanks to the Internet (for better or worse), information that was once scattered, localized, and forgotten with the passage of time is now effectively permanent and searchable. . .Once a secret is disclosed online, neither the courts nor society may unring the lingering echo of the bell. In this respect, *Reporters Committee* is an anachronism." (*American Civil Liberties Union v. United States Department of Justice*, No. 13-5064, U.S. Court of Appeals for the District of Columbia Circuit, May 9)

Views from the States…

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

New York

The Court of Appeals has ruled that a 1983 exemption passed by the legislature to prevent the disclosure of names and addresses of retired New York City police officers for solicitation purposes does not apply to a request for the names only of retired teachers. The Empire Center for New York State Policy, a think tank, requested the names of retired teachers from the New York State Teachers' Retirement System and the Teachers' Retirement System of the City of New York. Both agencies refused to disclose the names based on the Court's ruling in *New York Veteran Police Association v. New York City Police Dept*, where the Court ruled that a recent amendment prohibited the disclosure of names and home addresses of retirees. But the Court noted that "the lower courts in this case, however, read our statement in *Veteran Police* that the provisions of [the exemption] 'foreclose relief to the petitioner' as meaning that it foreclosed even partial relief—though partial relief was never in issue in *Veteran Police*. Thus, the courts below concluded that *Veteran Police* held that the statute exempted the names of retirees from disclosure. In this they erred. Our decisions are not to be read as deciding questions that were not before us and that we did not consider." The

ACCESS REPORTS

retirement systems also argued that disclosure would be an invasion of privacy because people could use the names to find home addresses. Rejecting the claim, the Court pointed out that "this petitioner is not, as the petitioner in the *Veteran Police* case was, interested in sending membership solicitations to retirees. When a FOIL request that seems to have such a purpose is made, it will be time to consider the effect of the privacy exemption." (*In the Matter of Empire Center for New York State Policy v. New York State Teachers' Retirement System and Teachers' Retirement System of the City of New York*, No. 77 and No. 78, New York Court of Appeals, May 6)

Pennsylvania

A court of appeals has ruled that while the federal Emergency Planning and Community Right to Know Act provides public access to records of specific facilities that house hazardous chemicals, it does not serve to supersede the provisions of the state Right to Know Law by making such records presumptively public. Reporter William Heltzel requested the database of hazardous chemical facilities from the Department of Labor and Industry. When the agency refused to disclose the database, Heltzel appealed to the Office of Open Records, which agreed with Heltzel that EPCRA's requirement that the records be publicly available superseded the state RTKL and, thus, neither the public safety nor the physical security exemptions applied. The agency appealed and the appellate court reversed. The appeals court agreed with OOR that it had jurisdiction to interpret federal statutes as they applied to RTKL issues, noting that "quite simply, without construing federal statutes that pertain to the public or nonpublic nature of records, OOR cannot perform a core adjudicatory function." But the court explained that "other statutes that provide other avenues and set other parameters for access to records, like EPCRA, operate independently of the RTKL. . .[T]heir procedural hurdles, and exceptions, remain intact and enforceable. Requester cannot cherry-pick the convenient provisions of EPCRA, which indicates public availability, while neglecting the federal statute's applicable request and review criteria." Sending the case back to OOR to consider the agency's RTKL exemption claims, the court added that "EPCRA provides the records will be made *available* under certain conditions, which is different than clearly establishing the public nature of records." (*Department of Labor and Industry v. William Heltzel*, No. 1653 C.D. 2013, Pennsylvania, Commonwealth Court, May 5)

Tennessee

A court of appeals has ruled the Tennessee Secondary School Athletic Association functions as the equivalent of a government agency and that records of its investigation of Montgomery Bell Academy, a private school in Nashville, for financial aid misconduct are not protected by any exemption and must be disclosed to the *City Paper*. The newspaper requested records concerning the investigation of MBA, but the TSSAA declined to disclose the records, arguing that it was not subject to the Tennessee Public Records Act. The TSSAA establishes bylaws or rules for interscholastic sports competition and enforces those rules. Although only two percent of its funding comes from public school membership dues, most of its $5 million budget derives from contracts for post-season championships and gate receipts. The trial court found the TSSAA was the functional equivalent of a government agency. The appeals court agreed that "revenues from the various championship tournaments, which generate millions, constitute indirect government funding." The court then pointed out that "the [TSSAA's] Board of Control and Legislative Council [made up primarily of public school administrators] have substantial control over the TSSAA; these governing bodies influence and enforce the bylaws of the TSSAA, essentially controlling the TSSAA's purpose—to regulate interscholastic sport competition." The court recognized that a 1996 amendment suggested that public school involvement with TSSAA was voluntary, but pointed out that "it did not affect the fact that the vast majority of the decision-makers continued to be public officials and representatives of public entities." Finding that TSSAA qualified as the functional equivalent of a government agency, the court agreed with TSSAA's claim that it should have the benefit of any applicable exemptions under the Public Records Act. However, the court

rejected all of TSSAA's claims and found the records of the MBA investigation were required to be disclosed. (*City Press Communications, LLC v. Tennessee Secondary School Athletic Association*, No. M2013-01429-COA-R3-CV, Tennessee Court of Appeals, Apr. 30)

Washington

A court of appeals has ruled that the San Juan County Council did not violate the Open Public Meetings Act when three of its six members met as part of the San Juan County Critical Area Ordinance/Shoreline Master Program Implementation Committee (CAO Team). The Citizens Alliance for Property Rights Legal Fund appealed the trial court's conclusion that the CAO Team was not subject to the OPMA because it did not constitute a quorum of the full council. The appeals court explained that "clearly, the Council is the 'governing body' of a 'public agency.' However, under Washington case law, a gathering that includes less than a majority of the governing body does not violate OPMA." CAPR argued that an email exchange involving four members of the council violated the OPMA. But the court pointed out that "however, 'the mere use or passive receipt of e-mail does not automatically constitute a "meeting."' Viewed in the light most favorable to CAPR, the record shows that at most three councilmembers participated in the active discussion of issues by phone or email. The fourth councilmember received a copy of the email, but there is no evidence that she responded or actively participated in the discussion." Relying on a Wisconsin decision, CAPR contended that because the three council members on the CAO Team could prevent the council from taking action their meetings fell within the OPMA. The court disagreed, noting that to accept the Wisconsin decision "would carve out a significant exception to well-established Washington precedent holding that OPMA does not apply where a majority of the governing body is not present." CAPR also argued that the OPMA allowed subcommittees to take action on behalf of the larger body. But the appeals court agreed with the trial court's conclusion and noted that "the CAO Team could not have 'acted on behalf of' the Council because there is no evidence it had policy or rule making authority." (*Citizens Alliance for Property Rights Legal Fund v. San Juan County*, No. 70606-3-I, Washington Court of Appeals, Division I, Apr. 28)

Wisconsin

A court of appeals has ruled that the Milwaukee Board of School Directors properly rejected Korry Ardell's request for records concerning a public school employee because there was a domestic abuse injunction prohibiting Ardell from having any contact with the employee, an injunction that he had already violated twice. When Ardell made the request, the MBSD initially decided to disclose most of the information requested. But after speaking with the employee, the Board changed its mind and denied the request because disclosure would constitute an invasion of privacy. Ardell filed suit and the trial court agreed with the MBSD that it had properly balanced the interests and found that for public policy reasons non-disclosure outweighed any public interest in disclosure. The appeals court noted that "here, the MBSD does not argue that a statutory or common law exemption applies to bar disclosure, but rather that public policy does so. . .We conclude that public policy, that is, ensuring the safety and welfare of the MBSD employee, does overcome the presumption of access in this instance." Balancing the competing interests, the court pointed out that "when Ardell's acts of violence and harassment of the MBSD employee, as well as his disregard for the domestic abuse injunction, are juxtaposed against the purpose of the open records law—that is, to provide an opportunity for public oversight of the workings of government—it is clear that nondisclosure was prudent in this case. It is plain from Ardell's history with the MBSD employee that his purpose in requesting the employment records was not a legitimate one; rather, his intent was to continue to harass and intimidate the MBSD employee. In committing acts of violence against the MBSD employee and ignoring the domestic abuse injunction, he forfeited his right to the documents he requests." The court observed that "we conclude that Ardell's identity is relevant to our decision in this case." The court added that "in this case, Ardell has not aligned himself with

ACCESS REPORTS

the general class of persons who request disclosure of public records in order to ensure transparent government. Rather, Ardell's violent history with the MBSD employee, including his two convictions for violations of the domestic abuse injunction, align him more closely with the class of persons statutorily denied access to public records for safety reasons, that is, committed and incarcerated persons. Ardell has forfeited his right to disclosure of the MBSD employee's employment records by demonstrating an intent to hurt the employee, and it would be contrary to common sense and public policy to permit him to use the open records law to continue his course of intimidation and harassment." (*State of Wisconsin ex rel. Korry L. Ardell v. Milwaukee Board of School Directors*, No. 2013AP1650, Wisconsin Court of Appeals, May 6)

The Federal Courts…

Judge James Boasberg, after rejecting the FBI's third affidavit justifying the confidentiality of two witnesses who helped the agency identify vandals at a 2008 demonstration at the Four Seasons Hotel in protest of the International Monetary Fund's annual meeting, has ordered the agency to disclose the information to photojournalist Laura Sennett. Sennett was present at the demonstration taking photos. After the demonstration devolved into petty vandalism, the FBI seized 7,000 pictures from Sennett's computer. Sennett then requested her records from the FBI, which released over 1,000 pages and withheld 600 more. Sennett sued and Boasberg ruled in favor of the agency on all claims except for its invocation of **Exemption 7(D) (confidential sources)**. Although Boasberg gave the FBI a third chance to justify its Exemption 7(D) claim, he found its argument unpersuasive. The FBI claimed one source had attended meetings to plan the IMF protests and that the source's testimony was "singular in nature." But Boasberg noted that "presumably, these statements are meant to suggest that the source would fear retaliation if the information provided were made public, as he or she could be identified from that information. But the Court cannot simply assume that this is so." He noted that "the redacted description of the confidential information, which the Court has reviewed *in camera*, is fairly generic—in fact, it is hardly more specific than the [agency declaration] summary. The FBI's account of this source's relationship to the crimes at issue, therefore, cannot support an inference of confidentiality." Boasberg also rejected the agency's claim that disclosure would harm its ability to continue a confidential relationship with the source. He pointed out that "the agency's desire to obtain information from the informants in the future says nothing about whether the informants expect or intend to provide it." Ordering the agency to disclose the four disputed documents, Boasberg observed that "the Court is attentive to the FBI's views in relation to informants, as the policy at the heart of Exemption 7(D) is one of source protection and empowerment of law-enforcement agencies. That solicitude, however, can only carry the Court so far. The Bureau has had two chances to explain itself, or at least to say that it could not explain without providing too much detail and risking the disclosure of the very information it seeks to withhold. It did neither." (*Laura Sennett v. Department of Justice*, Civil Action No. 12-495 (JEB), U.S. District Court for the District of Columbia, Apr. 30)

Judge Ellen Segal Huvelle has ruled that the DEA must conduct a **search** for records on a confidential informant whose status as an informant had been publicly confirmed and cannot justify its failure to search by suggesting that any records would be exempt. Huvelle had previously rejected the agency's *Glomar* response neither confirming nor denying the existence of records pertaining to Carlos Javier Aguilar-Alvarez, who testified as a confidential informant at the drug trial of Rene Oswald Cobar. While the agency provided a further affidavit indicating that records were *reasonably likely* to be found in two databases, Huvelle pointed out that "the affidavit does not clearly establish that DEA actually searched the aforementioned databases for responsive records. Instead, it appears that the DEA may be asserting exemptions under FOIA based solely on the scope and content of plaintiff's request. An agency cannot avoid its duty to perform a FOIA search by

describing a proposed search and predicting—whether accurately or not—that all responsive documents would be exempt from disclosure. Because the DEA does not deny that it has records that are likely to be responsive to plaintiff's request, 'it was obligated to search those records.'" She added that "if the DEA has not yet searched for records responsive to plaintiff's request, it must do so. And once the DEA has performed its search (or if it already has), it must produce all responsive records to the Court for *in camera* review." The DEA explained that it did not conduct a search for Aguilar-Alvarez's criminal history records because the agency did not maintain such records. But Huvelle noted that "if DEA has acquired and possessed 'Criminal History records' in Aguilar-Alvarez's Confidential Source file at the time it received plaintiff's request, that information would be a DEA record subject to FOIA disclosure unless an exemption applied." She observed that "perhaps because DEA never performed a search, the declarant does not explain whether the Confidential Source file for Aguilar-Alvarez contains any criminal history records. To the extent it does, those records are DEA records subject to FOIA and their existence cannot be 'neither confirmed nor denied' by the DEA as non-agency records." (*Rene Oswald Cobar v. U.S. Department of Justice*, Civil Action No. 12-1222 (ESH), U.S. District Court for the District of Columbia, May 2)

Judge Reggie Walton has ruled that records pertaining to third-party contractor independence requirements of the Office of the Comptroller of the Currency are protected by **Exemption 8 (bank examination records)**. The Comptroller issued a Consent Order requiring several banks to retain an independent consultant acceptable to the Comptroller to conduct an independent review of specific foreclosure practices. Aurora Bank hired Allonhill, LLC to review its foreclosure practices, but the Comptroller terminated its contract because of an alleged conflict of interests between its previous work and the Comptroller's independence requirements. The law firm of Williams & Connolly, representing Allonhill, requested general information about third-party contractor independence requirements. The agency disclosed 13 pages, eight of which were already publicly available, and withheld the rest under Exemption 8. Williams & Connolly filed suit and in lieu of a *Vaughn* index, the agency provided two declarations with appendices summarizing the agency's search and explaining the nature of the withheld records and the basis for withholding them. Williams & Connolly argued that the records did not fall under Exemption 8 because they pertained to third-party contractors rather than banks. Walton noted that "under the plain language of Exemption 8, and contrary to the plaintiff's position, the documents withheld by the Comptroller fall within the purview of Exemption 8—regardless of whether the documents were generated as part of a third-party driven independent foreclosure review—so long as they were prepared in furtherance of the Comptroller's 'responsib[ility] for the regulation or supervision of financial institutions,' reducing the pertinent question in this case to whether the Comptroller regulates or supervises financial institutions. And because the Comptroller is explicitly charged with regulating financial institutions, based on the plain language of the statute, Exemption 8 applies to the requested documents." Williams & Connolly contended that Exemption 8 applied to regulation of financial institutions and not unrelated third parties. But Walton observed that a recent district court decision, *Public Investors Arbitration Bar Association v. SEC*, 930 F. Supp.2d 55 (D.D.C. 2013), had found that SEC records concerning the selection of third-party arbitrators were protected by Exemption 8 if they pertained to the agency's regulation of financial institutions. Walton pointed out that "the Court is persuaded by the defendant's position that withholding the requested documents furthers one of the exemption's underlying purposes—it encourages banks to be candid and transparent with the Comptroller regarding the independent third-party contractors each bank was required to hire pursuant to the Consent Order issued by the Comptroller to review the bank's foreclosure practices." Williams & Connolly also challenged the agency's decision not to provide a *Vaughn* index. However, Walton noted that "in cases where a sworn declaration is sufficient to identify the applicability of an exemption, such as Exemption 8, that protects an entire category of withheld information, there is no need for additional clarification." He added that "because Exemption 8 categorically applies to the requested records in this case, it would be futile to

order the Comptroller to do more than what it has already done." (*Williams & Connolly, LLP v. Office of the Comptroller of the Currency*, Civil Action No. 13-0396, U.S. District Court for the District of Columbia, Apr. 30)

A federal court in California has ruled that the Justice Department has not shown why the DEA's informant file on Gordon Todd Skinner is categorically exempt and that because the agency's *Vaughn* index is "supremely unhelpful," the court can neither accept the agency's exemption claims nor order disclosure of such publicly disclosed information as Skinner's name and informant number. The case involves the continuing saga of William Pickard, who was sentenced to life imprisonment in 2003 for charges related to LSD. Pickard requested Skinner's file, claiming his status as a DEA informant had been confirmed at Pickard's trial. The agency issued a *Glomar* response neither confirming nor denying the existence of records. The *Glomar* response was initially rejected by the district court, but accepted when the agency provided further justification. However, the Ninth Circuit reversed, finding Skinner's identity as an informant had been publicly confirmed. The case then went back to DEA for processing and it provided a *Vaughn* index explaining why 325 pages were categorically exempt. The court explained that categorical exemptions were appropriate for categories of records that were invariably exempt. But the court pointed out that "a holding that 'all records related to Skinner' are categorically exempt fails to provide a workable rule for future cases because it only pertains to this case." Turning to the agency's *Vaughn* index, the court noted that "if Plaintiff or the Court wishes to do anything with such representations [that all the records are exempt] other than unquestioningly accept them, there is no way to do so." The court added that "the government must go back and produce an adequate Vaughn Index. It may also provide the requisite detail in a declaration explaining what information is in the documents, whether that information has already been released publicly, and what exemptions apply that would overcome the presumption in favor of disclosure." Pickard argued that Skinner's name and informant number could be disclosed because that information had been publicly confirmed. However, because the agency's *Vaughn* index was so confusing, the court indicated it was reluctant to even disclose that information without further information from the agency. Noting that Skinner had apparently been attacked by prison inmates when his informant status became known, the court observed that "it is possible that releasing a wave of new materials about Skinner's work as an informant could again endanger him. The Court will not order the release of materials when it does not know what they are, or what the consequences would be of their release." (*William Leonard Pickard v. Department of Justice*, Civil Action No. 06-00185 CRB, U.S. District Court for the Northern District of California, May 7)

A federal court in California has ruled that the FBI properly relied on a classified *in camera* affidavit to justify its use of **Exemption 7(E) (investigative methods and techniques)** to withhold records pertaining to the agency's visit to Hesham Abu Zubaidah, the brother of a Guantanamo Bay detainee, in an attempt to try to persuade him to rescind the Privacy Act waiver he had provided to Truthout. Truthout requested records about Zubaidah, who lived in California, and provided his Privacy Act waiver. The same day it acknowledged receipt of the Truthout request, the FBI visited Zubaidah to persuade him to rescind his Privacy Act waiver. After Truthout learned of the interview of Zubaidah, it requested records concerning any other instances in which the agency tried to persuade individuals to rescind Privacy Act waivers. The FBI responded by indicating that the existence of such a policy was protected by Exemption 7(E). Truthout argued that the Ninth Circuit's decision in *Lion Raisins v. Dept of Agriculture*, 354 F.3d 1072 (9th Cir. 2004), required agencies to justify their decisions to the greatest extent on the public record. While the court agreed, it noted that "the DOJ has not run afoul of *Lion Raisins* here. Having reviewed the unredacted [FBI] declaration, the court is satisfied that the government 'has submitted as much detail in the form of public affidavits and testimony as possible' in the form of the redacted [FBI] declaration." The court added that although the FBI had failed to provide a *Vaughn* index, doing so would have revealed the information it sought to protect. The

court pointed out that "the withheld documents meet the criteria outlined in FOIA Exemption 7(E)" and noted that "I am bound by the FOIA statute in reaching this conclusion." The court observed that "nonetheless, the court must state that [the FBI's] unredacted declaration is the quintessence of bureaucratic obfuscation," quoting George Orwell's reference to bureaucratic language as "hackneyed." (*Truthout v. Department of Justice*, Civil Action No. S-12-2601 LKK, U.S. District Court for the Eastern District of California, May 6)

Judge Rosemary Collyer has ruled that various components of the Justice Department properly withheld records about a confidential source in North Carolina under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Benjamin Cunningham requested the information about the informant because he wanted to sue him for damages caused when law enforcement officials searched his residence in New York. Approving of the use of 7(C) by the Marshals Service and EOUSA, Collyer noted that "the Marshals Service confirms that a confidential source directed investigators, who were looking for Mr. Cunningham's fugitive brother, to Mr. Cunningham's residence. The Marshals Service adds that this individual cooperated 'under circumstances where a promise of confidentiality may be inferred.' Further, both the Marshals Service and EOUSA aver that any existing records were 'compiled for law enforcement purposes—namely, to facilitate the investigation and criminal prosecution of [Mr. Cunningham's] brother." Collyer pointed out that "Mr. Cunningham readily admits that he seeks information concerning the confidential informant for personal reasons. . .[However], Mr. Cunningham's personal interest in records concerning the confidential information is not a cognizable public interest for purposes of the FOIA Exemption 7(C) analysis, and does not overcome the privacy interests of the individual who cooperated with law enforcement." She added that "the Court recognizes that Mr. Cunningham claims to have been victimized by the confidential informant. His relationship to the confidential informant, however, is immaterial to the question of whether the Court should sanction an invasion of privacy." (*Benjamin Cunningham v. U.S. Department of Justice*, No. 13-1115 (RMC), U.S. District Court for the District of Columbia, Apr. 16)

A federal court in Arizona has upheld a magistrate judge's recommendation pertaining to records of an investigation conducted by the Department of the Interior's Inspector General concerning the capture and death of jaguar Macho B in southern Arizona in 2009. The court agreed with the magistrate judge that the privacy interests of individuals identified in the records outweighed the limited public interest in further disclosure. The court noted that "the Court's *in camera* review indicates that conduct described in the documents may provide identifying information. Because the conduct described in the documents is limited to a few individuals, disclosure of such conduct may subject such persons to 'undeserved embarrassment and attention.'" (*Star Publishing Company v. United States Fish and Wildlife Service*, Civil Action No. 13-080-TUC-CKJ, U.S. District Court for the District of Arizona, Apr. 23)

A federal court in Maryland has ruled that NASA did not violate the **Privacy Act**'s requirement that information be collected from the individual to the greatest extent practicable when it interviewed contract employees who had made allegations of sexual misconduct against Stanford Hooker before interviewing Hooker himself. Hooker, an oceanographer who had worked for NASA for 19 years and directed the Calibration and Validation Office, Ocean Ecology Laboratory at Goddard Space Flight Center, was accused of making inappropriate sexual remarks to two contract employees during an Arctic expedition. NASA interviewed the employees and then interviewed Hooker. During the investigation, Hooker was relieved of many of his duties because NASA decided he should have no contact with the contract employees. Further older allegations were also made against Hooker and he was disciplined by NASA after being given the opportunity to contest the agency's proposed findings. The agency's action was upheld after two union

grievances. Hooker argued that NASA should have interviewed him before it spoke to the contract employees. But based on *Hogan v. England*, 159 F. App'x 534 (4th Cir. 2005), the court found the agency's behavior was appropriate because of the subjective nature of the allegations. The court pointed out that "the only evidence that Hooker made inappropriate comments to his coworkers was the testimony of his coworkers, Thus, NASA inevitably would have needed to interview both Hooker and his coworkers during its investigation and, consequently, NASA was free under the Privacy Act to interview Hooker's coworkers before interviewing Hooker." Hooker also argued that he was not given the opportunity to respond to the subsequent allegations before discipline was imposed. However, the court disagreed, noting that "NASA afforded Hooker the opportunity to provide his own account of all of the disputed events prior to imposing discipline." Hooker contended he could have mitigated the need for discipline if the agency had allowed him to explain at an earlier stage. But the court observed that "Hooker's Complaint does not identify a single piece of information he was unable to provide NASA in his response to the allegations of misconduct, nor does he explain why NASA's ultimate conclusions would have been any different if NASA had interviewed him about every allegation before visiting any adverse effects upon him." (*Stanford B. Hooker v. National Aeronautics and Space Administration (GSFC)*, Civil Action No. ELH-13-2552, U.S. District Court for the District of Maryland, Apr. 24)

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