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Washington Focus: A new report from the Administrative Conference of the United States urges government agencies to cooperate more fully with OGIS in resolving disputes with requesters. The report, entitled "Reducing FOIA Litigation Through Targeted ADR Strategies," recommended that "all agencies, acting in a spirit of cooperation, should affirmatively seek to prevent or resolve FOIA disputes to the greatest extent possible" and suggested that OGIS consider using its power to issue advisory opinions. . .The Student Press Law Center has sent a letter to Sen. Ed Markey (D-MA) and Sen. Orrin Hatch (R-UT) criticizing the Senators' recent bill to amend the Family Educational Rights and Privacy Act to extend the statute's privacy protections. Urging instead that the Senators review the law's misuse by educational institutions, SPLC noted that "FERPA has become an impenetrable cloak concealing information about school safety and effectiveness, even where no conceivable student privacy interest could be at stake."

Requests on Surveillance Technology Highlight Interplay of Federal and State Laws

An investigation by the Associated Press has revealed that the Obama administration has been intervening in routine state open records and criminal cases to protect details about surveillance technology being used by local law enforcement agencies to vacuum up cell phone data. Not only does the investigation offer a fascinating glimpse into new technology that may purposefully skirt constitutional and statutory protections against warrantless surveillance, it also brings up an important but largely ignored area of information policy—whether disclosure rights under state laws fall by the wayside when the federal government asserts a broad interest in non-disclosure.

The AP investigation revealed more details about the use of surveillance equipment known as Stingray, which tricks cell phones into identifying some of their owners' account information, like a unique subscriber number. As a result, police are able to obtain cell phone information without having to go through the service provider. With such information police can locate the cell phone without a call or text message.

Such technology seems to facilitate warrantless surveillance and civil liberties advocates have been strongly critical of the technology. Nathan Freed Wessler, a staff attorney at the ACLU, told the AP that "these extreme secrecy efforts are in relation to a very controversial local government surveillance practice using highly invasive technology. If public participation means anything, people should have the facts about what the government is doing to them."

The AP found that the Obama administration has urged state and local agencies to withhold as much information as possible about the surveillance equipment, including how the technology is used and how to turn it on. The FBI has willingly provided affidavits and consultations to local law enforcement agencies faced with questions about disclosure of information concerning the technology.

One key federal tie is that the Harris Corporation, a manufacturer of the equipment, agreed to secrecy restrictions built into their 2011 authorization agreement with the Federal Communication Commission. Manufacturers need FCC approval to sell the wireless equipment because it can interfere with radio frequencies. Although Harris would not tell AP anything on the record, its public filings indicate that government sales of products such as the Stingray account for nearly one-third of its $5 billion in revenue.

AP was denied information about the program by agencies in San Diego, Chicago, and Oakland County, Michigan, particularly information about the equipment purchased, the cost of the equipment, and from whom the equipment had been purchased. In San Diego, police released a heavily redacted purchasing document, while in Oakland County the police claimed that exemptions for law enforcement and attorney-client privilege protected the information.

A public records suit challenging exemption claims made by the Tucson police is underway in Arizona. The police filings include an affidavit from FBI special agent Bradley Morrison indicating disclosure would "result in the FBI's inability to protect the public from terrorism and other criminal activity because through the public disclosures, this technology has been rendered essentially useless for future investigations." Morrison referred to provisions in federal statutes protecting information sharing and arms control. AP was told by a source familiar with the Tucson litigation that federal attorneys told the Tucson Police not to hand over a PowerPoint presentation made by local officers about how to operate the Stingray equipment. But rather than try to remove the case to federal court, the federal government sent the FBI affidavit to the Tucson Police for use in the state case.

In a criminal case in Tallahassee, court records indicate that prosecutors told the court they had consulted with the FBI to keep portion of the court transcript closed. However, the transcript was released earlier this month. Meanwhile, in Sarasota, the U.S. Marshals Service confiscated local records on the use of the surveillance equipment to keep the records from the ACLU after that organization made a request under Florida's public records act for the records. While the ACLU has asked a judge to intervene, the Marshals Service contends that it had deputized a local law enforcement officer as a federal agent who removed the records to federal custody and control.

Ginger McCall, director of EPIC's open government project, told the AP that "it's troubling to think the FBI can just trump the state's open record law." Dan Metcalfe, former co-director of the Office of Information and Privacy at the Justice Department and now head of the Collaboration on Government Secrecy project at American University law school, told AP that "the federal government appears to be attempting to assert a federal interest in the information being sought, but it's going about it the wrong way."

How best to assert a federal interest in records that either originate from the federal government or are a product of federal contracts is a question that hasn't been addressed very often at the state level. The

Supremacy Clause of the U.S. Constitution says that "The Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." This generally means that federal law takes precedence over state law when they conflict with each other in some way. In the area of public records laws, many states have dealt with potential conflicts by including provisions similar to that of Exemption 3 in the federal FOIA providing that any state or federal law or *regulation* that prohibits or restricts the disclosure of information can provide the legal basis for non-disclosure under the state's public records law.

But whether the federal government has an ownership interest in records is crucial in determining whether those records are required to be withheld at the state level. There have been a handful of cases in the past year involving the interplay between federally-generated records and state disclosure requirements. Perhaps the best example for purpose of illustration is a recent Connecticut Supreme Court case, *Commissioner of Public Health v. Freedom of Information Commission*. In that case, the state requesters were looking for information about medical care in Connecticut contained in the National Practitioner Databank. Under the federal statute creating the database, disclosure of information originating from the database was restricted to those authorized to use the database. However, the Connecticut Supreme Court ruled that, although data originating from the database was not disclosable under the Connecticut Freedom of Information Act, records that had originated in Connecticut and had become part of the database were still subject to disclosure since they were state records.

In the case of the surveillance technology, the federal government seems to be employing a variety of approaches that include intervening in state cases, but also asserting a federal ownership right in the records that allowing their disclosability to be determined under the federal FOIA and to be removed altogether from the effects of state law. Whether this kind of approach will be successful depends in part on how hard state courts push back against federal interest claims and the extent to which the federal government concludes any substantial bad publicity outweighs the value of strong-arming the states.

Views from the States…

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

Hawaii

The Office of Information Practices has ruled that the Department of Planning and Permitting of the City and County of Honolulu properly withheld a memorandum concerning an alleged unauthorized use of Waikele Caves by the U.S. Navy under the attorney-client privilege. Following a complaint, the Department sought an opinion from the Corporation Counsel concerning the alleged unauthorized use. The Navy was issued a notice of violation, which was subsequently withdrawn based on an overarching federal interest. Carroll Cox then requested the opinion and the Corporation Counsel withheld it, claiming it was protected by attorney-client privilege. Cox argued that similar land use opinions were routinely made public. He then filed a complaint with OIP. After reviewing the memorandum *in camera*, OIP noted that "the Memorandum confirms that a legal analysis was provided by the Corporation Counsel to DPP, as its government client, for the purpose of determining DPP's powers, duties, privileges, immunities and liabilities in preparation for the

ACCESS REPORTS

prosecution or defense of an action in which DPP may be a party." OIP rejected Cox's claim that the agency waived its privilege by providing the record to OIP for *in camera* inspection. OIP pointed out that "because DPP was required to comply with OIP's legal authority to conduct an *in camera* review of the Memorandum so that OIP could determine the applicability of any exceptions to disclosure in the [Uniform Information Practices Act], DPP did not voluntarily waive its attorney-client privilege by disclosing the Memorandum for *in camera* review. Moreover, the required disclosure was itself a qualified privileged communication between DPP and OIP and would not be subject to waiver." (OIP Opinion Letter No. F14-01, Office of Information Practices, Office of the Lieutenant Governor, State of Hawaii, June 5)

The Office of Information Practices has ruled that the Board of Land and Natural Resources did not violate the Sunshine Law when it failed to include a summary of written testimony in its meeting minutes. The Board held a meeting to discuss requirements that operators of power-driven boats take boating safety courses. The Board's minutes indicated it had received written testimony on the issue and described oral testimony presented by several individuals. Glenn Shiroma received copies of the written testimony but filed a complaint with OIP regarding the Board's failure to summarize the written testimony in its minutes. Ruling that there had been no violation, OIP noted that "nothing in the Sunshine Law expressly requires a board's minutes to describe views expressed solely in written testimony submitted to the board. Rather, another section of the Sunshine Law clearly refers to only 'oral testimony or presentations' that must be described in a board's minutes." OIP pointed out that "the rationale for requiring a description of only oral testimony in a board's minutes is plain. Unlike written testimony, the minutes may be the sole record of oral testimony presented to a board. In contrast, written testimony submitted to and maintained by a board would be a 'government record' that is accessible to requesters under the State's Uniform Information Practices Act. Instead of a summary or general description, every written testimony 'speaks for itself' and provides a complete and accurate record of its contents." (OIP Opinion Letter No. F14-02, Office of Information Practices, Office of the Lieutenant Governor, State of Hawaii, June 13)

Washington

The Supreme Court has ruled that the Seattle Police Department violated the Public Records Act when it refused to provide a list of all retained in-car videos taken by the police as well as videos that were actually retained. Radio reporter Tracy Vedder made several requests to the police for records of the in-car videos. After consulting with the company that manufactured the video system, the police told Vedder it was unable to produce the videos because it could not query the database for the elements Vedder requested. The police denied Vedder's request for a list of the retained videos for much the same reason. However, the police were able to provide a subsequent requester with the system's activities log in Microsoft SQL. When Vedder learned of that list, the police provided it to her as well. The police argued the PRA did not require it to create a record in response to Vedder's request. Noting that the distinction between compiling information and creating a record was murky, the Supreme Court majority pointed out that a "'public record' is broadly defined and includes 'existing data compilations from which information may be obtained' 'regardless of physical form or characteristics.' This broad definition includes electronic information in a database. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a record." Observing that the police's response to the other requester showed the police could have responded in part to Vedder's request, the majority indicated that "the uncontroverted evidence presented showed that a partially responsive response could have been produced at the time of the original denial. Failure to do so violated the PRA." The police also argued Vedder had been seeking metadata, which needed to be identified in the request. But the majority explained that "Vedder was not seeking to peer beneath some text in an electronic database. She was not requesting metadata in any meaningful sense." As to Vedder's request for the videos themselves, the police argued they were prohibited from disclosing them under the state's privacy act. But the majority disagreed, noting that

"the statute as a whole provides a limited exception to the rules against recording and the rules requiring disclosure to protect the integrity of law enforcement investigations and court proceedings" by providing a limited exception to disclosure until court proceedings are finished. The court indicated that the provision of the privacy act "is a limited exception to immediate disclosure under the PRA, but it is one that applies only where there is actual, pending litigation." (*Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, No. 87271-6, Washington Supreme Court, June 12)

West Virginia

The Supreme Court has ruled that Computer-Assisted Mass Appraisal filed for all real property in West Virginia is in the custody and control of the Tax Commissioner and must be disclosed with redactions in response to a request by Roger Hurlbert and Sage Information Services. Hurlbert requested the records from the Tax Commissioner, who denied his request for the CAMA files because the county assessors rather than the Tax Commissioner were the custodians of the records. The trial court agreed, noting that the CAMA data was exempt as tax return information and security system information. Hurlbert then appealed. The Supreme Court reversed, finding that "the CAMA files are contained in the computer system maintained and administered by the Tax Commissioner; there is no question that the electronic files constitute 'records in his or her office.'. . .The CAMA data is collected to enable the Tax Commissioner to fulfill his obligations pursuant to [statute]. . .The respondents' hair-splitting about the vagaries of the administration of the [Integrated Assessment System] and the division of administrative duties regarding the collection of this data misses the point entirely." Noting that information clearly exempted, such as information about burglar alarms and security systems was properly protected, the court observed that "the circuit court erred in ruling that the CAMA data was subject to a *wholesale* exemption from disclosure because it includes some of these more narrowly-defined exemptions." The court explained that "we find that the CAMA data, as a whole, does not constitute *per se* 'personal information.' . . .[W]e find that those categories which have been identified concerning the construction and general characteristics of the property do not fairly constitute 'personal' information. Rather, much of the information is that which could be readily observed by the general public. Other, less 'public' characteristics of the property, i.e. interior aspects of the home, could be easily ascertained from an MLS real property listing or other public dissemination of the home's features, which is common today." The court added that "the respondents have identified no 'injury' or 'embarrassment' that is occasioned by the disclosure of information about the number of bedrooms or construction materials of an individual's home. To the contrary, it seems plain that this type of information could prove valuable to taxpayers to ensure fair and equal assessment of like properties." Sending the case back to the trial court for production of a *Vaughn* index, the court noted that "on remand, the [trial] court is directed to require submission of a *Vaughn* index containing the specific exemptions claimed by respondents as to the specific fields of data in the CAMA files, whereupon the [trial] court is to evaluate the *specific* categories of information sought in accordance with the exemptions delineated in [the statute]." (*Roger Hurlbert and Sage Information Services v. Mark Matkovich and Sallie Robinson*, No. 13-0217, West Virginia Supreme Court of Appeals, June 5)

The Federal Courts...

Judge James Boasberg has ruled that the Justice Department has finally satisfied its disclosure obligations in a case brought by CREW for records concerning the investigation of former Rep. Jerry Lewis and the agency's decision not to prosecute him. The agency initially claimed that any information was protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and refused to

ACCESS REPORTS

either confirm or deny the existence of records. After Boasberg rejected the agency's use of a *Glomar* response, the agency was ordered to produce a representative sampling of documents for purposes of assessing the application of exemptions. In a previous opinion, Boasberg had found the agency's claims were still insufficiently supported, but this time around the remaining claims focused on documents the agency claimed were protected by **Exemption 5 (privileges)** and documents pertaining to Lewis that were withheld under **Exemption 6 (invasion of privacy)** and Exemption 7(C). CREW focused its challenges to privilege claims to records that were referred to by the agency as "administrative documents." But Boasberg noted that "those records, however, are also the type of material that could compromise Government attorneys' preparation for litigation. Releasing 'emails concerning the scheduling of phone calls and meetings,' for example, could allow the public to infer when and how attorneys reacted to events during the investigation. . .Internal emails 'concerning media reports or articles, inquiries or third-party commentary,' likewise could reveal the timing of and strategy behind case-related decisions, not to mention that they could provide a direct window onto how those attorneys perceived the public's reaction to the potential case, which could be a factor in pre-litigation strategy. In short, an attorney's mental impressions and strategies can be revealed even by documents that may, at first glance, be characterized as 'administrative' rather than 'substantive.'" He added that "CREW cites a litany of other documents whose contents are supposedly merely administrative, but a glance at the records themselves belies that notion." He observed that "where a FOIA request 'focuses specifically on documents and communications related to a particular course of litigation,' it is reasonable for the Court to infer that the work-product privilege will likely apply." Turning to the privacy exemptions, he pointed out that "while Defendant seeks to withhold information in more than three thousand documents under the personal-privacy exemptions, all but a few of those records are immune from disclosure under the attorney-work-product privilege. The remaining records, moreover, do not contain information regarding Rep. Lewis—they instead address other officials and third parties—and, as a result, CREW has conceded the propriety of those withholdings." Boasberg found there was no **segregable** material, noting that "factual material is itself privileged when it appears within documents that are attorney work product, so if a document is protected as work product, then a segregability analysis is not required. As a result, the entire contents of the large majority of the documents at issue in this case—that is, the facts, law, opinions, and analysis that make up EOUSA's work product—are completely exempt from disclosure under FOIA." CREW argued that because two documents had been found to be improperly withheld in the sample of 168 documents the agency should be required to re-review all withheld documents for similar errors. But Boasberg observed that "the D.C. Circuit has held repeatedly that even if an agency's withholdings 'do not survive inspection,' other documents must be released only if the 'error rate' is 'unacceptably high.' Two mistakes out of 168 documents, however—an error rate of just over one percent—does not come close to the kind of error rate that has prompted courts to require further disclosure." (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, Civil Action No. 11-1021 (JEB), U.S. District Court for the District of Columbia, June 11)

Judge Amy Berman Jackson has ruled that the Assessment to Refer created by an asylum officer at U.S. Citizenship and Immigration Services recommending that Anteneh Abtew's asylum application be denied is protected by **Exemption 5 (deliberative process privilege)**. Abtew traveled to the United States on a tourist visa from Ethiopia and applied for asylum after his visa expired. After an interview, an asylum officer prepared an Assessment to Refer denying Abtew's asylum application. The asylum officer's supervisor initialed the Assessment. After being placed in Abtew's file, the file was transferred to a Homeland Security attorney who would represent the United States at Abtew's immigration proceeding. USCIS then generated a Referral Notice that was provided to Abtew providing the reasons for denying his application. The Referral Notice also explained that his case would be referred to an immigration judge for further proceedings and that the agency's decision was not binding on the immigration judge, who would hear the case *de novo*. Abtew then requested his file and the agency released 97 pages and withheld 23 pages, including both the asylum

officer's notes and the Assessment, which were withheld under Exemption 5. After Abtew filed suit, the agency disclosed the notes, but continued to withhold the Assessment. Abtew argued the Assessment constituted the agency's decision. But Jackson pointed out that "the Assessment does not actually 'dispose' of plaintiff's asylum petition. It is the Decision Letter—in this case, the Referral Notice—that officially disposes of the asylum petition on behalf of USCIS." Further, Jackson noted that "the Assessment does not mark the end of plaintiff's asylum petition or subject him to a final determination of his status that can be challenged on appeal. Instead, it requires the case to go forward to the immigration court for removal proceedings and a *de novo* determination of plaintiff's asylum petition by that judge." Abtew contended the reasoning of the Assessment was incorporated in the agency's Referral Notice. But Jackson observed that "the Referral Notice provided its own explanation for the denial of plaintiff's asylum request. As a result, the Assessment did not lose its protected status when USCIS issued the Referral Notice." Abtew argued that if the DHS attorney introduced the Assessment at his immigration proceeding the privilege would be waived. But Jackson noted that "the document has not been used in immigration court as of the date of this opinion, and the claim that it will be used in the future is speculative. A DHS lawyer is not required to introduce an Assessment at the removal proceeding." Abtew continued to insist that the likelihood that the agency would disclose the Assessment at his immigration proceeding constituted a waiver. However, Jackson pointed out that "it is axiomatic that a party does not waive a privilege by intending to take an action in the future; the privilege is waived only when that action is actually taken. As a result, plaintiff cannot rely on the principle that voluntary disclosures may waive privileges because defendant has not made any voluntary disclosure or taken any action that would waive the deliberative process privilege at this time. . ." Abtew suggested that the agency was estopped from claiming the Assessment was privileged because it was likely to disclose it. Again, Jackson observed that "the fact that DHS may choose to waive a privilege—or even regularly chooses to waive that privilege—is not inconsistent with maintaining the position that the material is privileged in the first place." However, Jackson's *in camera* review of the Assessment persuaded her that "the first six paragraphs simply recite and summarize the facts that plaintiff presented to the AO during his asylum application interview. Those paragraphs do not include any analysis of impressions, and they do not reflect the AO's deliberative process: although the document does not purport to be a verbatim rendition of the interview, and there may have been some streamlining involved, the summary does not involve the sort of culling of facts from a large universe that could be characterized as deliberative." (*Anteneh Abtew v. United States Department of Homeland Security*, Civil Action No. 13-1566 (ABJ), U.S. District Court for the District of Columbia, June 13)

The D.C. Circuit has restricted the exclusion prohibiting intelligence agencies from responding to FOIA requests from foreign government entities to representatives of foreign governments who have authority to file such requests on behalf of their governments. One of the more pointless restrictions emanating from 9/11, Congress in 2002 amended FOIA at 5 U.S.C. § 552(a)(3)(E) to preclude intelligence agencies from "making any record available. . .to—(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or (ii) a representative of a government entity described in clause (i)." In response to requests from the All Party Parliamentary Group on Extraordinary Rendition, several of its members, and its U.S. attorney, agencies who were members of the intelligence community invoked the Foreign Government Entity Exception, claiming the requesters were all members of the United Kingdom's Parliament or their representatives and thus were barred from making such a request. The district court agreed and the All Party Parliamentary Group appealed. Writing for the court, Circuit Court Judge David Tatel pointed out that no classified information was likely to be disclosed regardless of the outcome and noted that "since the exception does not apply to FOIA requests filed by any person, foreign or domestic, other than foreign government entities and their representatives, a requester concerned about the exception can steer clear of it simply by waiting for a likeminded requester to seek the same information."

ACCESS REPORTS

Tatel observed that "the intelligence agencies insist that these FOIA requesters are 'representatives' of a foreign government entity, [but] they never clearly explain how they would have us define 'representative.'" The plaintiffs insisted that "representative" was synonymous with "agent" and Tatel agreed. He explained that "we think it is reasonable to infer that Congress included the 'representative' provision in order to prevent foreign government entities from evading the Foreign Government Entity Exception by filing FOIA requests through agents, not to create a separate and independent class of disfavored FOIA requesters." The intelligence community argued one definition of "representative" was a member of a legislative body. But Tatel indicated that "even though members of Congress are known as 'representatives,' members of legislative bodies are 'representatives' because they act on behalf of their constituents, not because they are representatives of foreign government entities." Noting that the only reference to congressional intent was a paragraph in a House report, Tatel pointed out that "we hesitate to put much stock in the House Report. . .E]ven if the report accurately documents what the House committee—a subset of one house of Congress—thought about the Foreign Government Entity Exception, we have explained that our interpretation finds support in the text and structure of the statute." Rejecting the amorphous definition put forth by the intelligence agencies, Tatel observed that "reading the term 'representative' to mean something along the lines of 'official,' 'employee,' or 'affiliate,' as the intelligence agencies seem to suggest, would leave the precise contours of the 'representative' class quite vague." Tatel instead concluded that "FOIA requesters who have authority to file requests on behalf of foreign government entities are 'representatives' of such entities when they file requests of the sort they have authority to file. Since the intelligence agencies concede that under this theory these three FOIA requesters fall outside the Foreign Government Entity Exception, the exception poses no barrier to the FOIA requests at issue." (*All Party Parliamentary Group on Extraordinary Rendition, et al. v. United States Department of Defense, et al.*, No. 13-5176, U.S. Court of Appeals for the District of Columbia Circuit, June 17)

Judge Christopher Cooper has ruled that the State Department conducted an **adequate search** for records concerning contacts with *New York Times* reporter David Sanger pertaining to Sanger's stories about the government's attempts to disrupt Iran's nuclear program through the use of a computer "worm." After Sanger's article appeared in 2012, Freedom Watch made broad requests to the Department of Defense, CIA, NSA, and the State Department for records concerning information disclosed to Sanger, including any classified information. After the expiration of the 20-day time limit, Freedom Watch filed suit against the agencies. Judge Robert Wilkins ruled in favor of the agencies, but found that State had not shown that it conducted an adequate search for records of agency contacts with Sanger and ordered the agency to provide a better explanation. State identified its Central Foreign Policy Records, the Bureau of Public Affairs, and the Bureau of Near Eastern Affairs as the areas most likely to have responsive records. The Bureau of Public Affairs located three responsive records, releasing two in full and one with redactions of non-responsive information. The Bureau of Public Affairs subsequently determined that it had not searched its front office, which performs executive tasks to support the Bureau. The front office conducted a search and located 62 documents that revealed that Sanger had interviewed five agency employees. The records of those five employees were searched and 14 additional documents were located. Of the 79 documents located, State released 58 in full, 20 in part, and withheld one in full. Cooper noted that "searching by Sanger's name was a reasonable method of uncovering documents regarding what information employees may have given him; indeed, Freedom Watch does not quarrel with the search methods used. . .Notably, Freedom Watch does not object to the adequacy of the supplemental searches conducted after it filed its opposition." He pointed out that "unless Freedom Watch 'can identify any additional searches that must be conducted,' which it has declined to do, the State Department has met its burden by conducting searches that were reasonably calculated to find responsive records, regardless of whether the records were found initially or after subsequent searches." (*Freedom Watch, Inc. v. National Security Agency, et al.*, Civil Action No. 12-01088 (CRC), U.S. District Court for the District of Columbia, June 12)

Addressing the remaining issues stemming from a massive FOIA request submitted to the EPA by Utah's Attorney General for records pertaining to the agency's conclusion that greenhouse gases endangered public health, Judge Emmet Sullivan has ruled the agency properly withheld several documents under **Exemption 5 (attorney-client privilege)** and that it has now justified the **adequacy of its search** for records pertaining to a number of subparts of the request. Sullivan originally found the agency had failed to substantiate its attorney-client privilege claims because it had not shown that the confidentiality of the records had been maintained and that individuals who received the advice had been authorized to act on behalf of the agency. This time around, Sullivan indicated the agency had justified the privilege. He noted that "the senders and recipients were limited to EPA attorneys, scientists, analysts, support staff, or senior executives who were responsible for developing EPA's position on the underlying environmental issues." Utah's Attorney General argued the agency's interpretation of his request was too narrow leading to "the self-serving result that no search was even attempted" for some subparts. But Sullivan indicated that "the EPA's explanation, derived from multiple planning meetings by EPA and [Climate Control Division] staff to determine how to respond to Plaintiff's broad and complex request, demonstrates that EPA appropriately approached Plaintiff's requests, and that searches for documents that it never had or no longer possessed would be futile." The EPA explained that it had conducted specific searches for records pertaining to how it used certain data from non-agencies and that it had used the results of a recent similar request to respond to one subpart of the Utah request. Reviewing the agency's supplemental affidavit, Sullivan noted that "taken together, the [agency's affidavits] provide detailed descriptions of the EPA's search for documents responsive to [various] subparts, including the methodology used for determining how to respond to the FOIA request, the manner in which relevant individuals and offices were identified as possessing responsive documents and the reasons for such identification, the filing systems and files searched, and the search terms used." He observed that "moreover, plaintiff does not identify other files, search terms, documents, offices, or individuals which would likely possess responsive records to these subparts." (*Sean D. Reyes v. United States Environmental Protection Agency*, Civil Action No. 10-2030 (EGS/DAR), U.S. District Court for the District of Columbia, June 13)

Judge Beryl Howell has dismissed the remaining portion of Khalid Awan's FOIA suit against the Department of Justice after the agency satisfied her original concerns as to whether records that had been withheld because they were sealed by another court actually satisfied the criteria for claiming that such a record was protected by **Exemption 3 (other statutes)**. The agency had withheld a material witness affidavit under Rule 6(e) covering grand jury secrecy. But Howell had ruled that under *Morgan v. Dept of Justice*, 923 F.2d 195 (D.C. Cir. 1991), the agency was required to show that the sealing order was meant to prohibit disclosure. This time around the agency had provided an affidavit from the Southern District of New York that the sealing order for the material witness affidavit was intended to prohibit disclosure. She rejected Awan's argument that he should have access to the affidavit because he was a party to the criminal action. She noted that "this argument reflects a basic misunderstanding about the FOIA. Unlike a 'constitutionally compelled disclosure to a single party,' during discovery in criminal litigation, a disclosure of information under the FOIA is a release not only to the requester but to the public at large." (*Khalid Awan v. United States Department of Justice*, Civil Action No. 10-1100 (BAH), U.S. District Court for the District of Columbia, June 5)

A federal court in California has rejected Truthout's motion to reconsider the court's decision to grant the Justice Department summary judgment based on an *in camera* affidavit. Truthout argued the court had

improperly neglected to provide it with an opportunity to file an opposition to the agency's position. But the court noted that "Truthout is incorrect when it argues that the Federal Rules of Civil Procedure mandate the opportunity to oppose a summary judgment motion. As Rule 56(a) plainly states, 'The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" The court explained that it had concluded "after reviewing the unredacted [FBI] declaration, that FOIA Exemption 7(E) was indisputably satisfied. The court therefore deemed additional briefing regarding the summary judgment motion to be unnecessary. Its decision to forego further briefing was not an 'oversight or omission,' but a deliberate choice." The court observed that it sympathized "with any frustration that Truthout may feel at not being able to be heard regarding the propriety of summary judgment, particularly in the fact of secret evidence. Nevertheless, this is one of those (thankfully rare) cases when the evidence presented *in camera* was so conclusive as to the questions presented that further briefing and argument was clearly unnecessary." (*Truthout v. Department of Justice*, Civil Action No. X-12-2601 LKK/CKD, U.S. District Court for the Eastern District of California, June 4)

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