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Washington Focus: The recently appointed FOIA Advisory Committee held its first meeting June 24. The committee consists of 10 non-government members and 10 government members and was created by the second Open Government National Action Plan. Jay Bosanko, chief operating officer for the National Archives and former head of ISOO, noted at the meeting that "FOIA administration and its process is not something that is or should be entirely government run; it is a partnership between the government and requesters." The committee set up three subcommittees, each chaired by a government and non-government member. The subcommittees will focus on fees and fee waivers; oversight, including a litigation review at DOJ; and proactive disclosure.

FOIA Amendments Introduced in Senate

Sen. Patrick Leahy (D-VT) and Sen. John Cornyn (R-TX) introduced the "FOIA Improvement Act of 2014" (S. 2520) June 24, a mix of clarifying amendments similar enough to H.R. 1211, which passed the House Feb. 25, to offer a real chance that FOIA amendments might be a realistic possibility before the end of the Obama administration in 2016.

The centerpiece of the Senate bill is its attempt to restrict the use of Exemption 5 by requiring a public-interest balancing test for invocation of both the deliberative process privilege and the attorney work-product privilege. The balancing test for the deliberative process privilege would require that "the agency interest in protecting the records or information is not outweighed by the public interest in disclosure," while the test under the attorney work-product privilege would be "the agency interest in protecting the records or information is not outweighed by a compelling public interest." Regardless, Exemption 5 would not apply to records more than 25 years old.

While Exemption 5 is singled out specifically, all exemptions would be subject to the presumption of openness contained in the Holder memo. This would mean an agency should withhold information only when it could articulate a foreseeable harm from disclosure or disclosure was actually

prohibited by law. Agencies would be required to consider partial disclosures if full disclosure was not possible and would need to take reasonable steps to segregate and release all non-exempt information. Borrowing directly from the Holder memo, the Senate bill provides that agencies cannot "withhold information requested under this section merely because the agency can demonstrate, as a technical matter, that the records fall within the scope of an exemption" or "because information may be embarrassing to the agency or because of speculative or abstract concerns."

The Senate bill deletes the requirement that certain records and reports be made available for public inspection to mandate instead that such records be made available in electronic format to ease public access. Further, the definition of "frequently requested" records is tweaked slightly to include any document that has been released under FOIA and requested at least three times.

To underscore that Congress meant to prohibit agencies from collecting fees when they missed any applicable time limit, the bill limits the ability of agencies to avoid the prohibition on fees by claiming the request fell within the definition of "unusual circumstances." While agencies may still stave off the prohibition initially, invocation of "unusual circumstances" will only buy agencies an extra 10 days in which to comply. If the agency still can't comply after 10 days, it becomes subject to the prohibition on the collection of fees. Perhaps because "exceptional circumstances" are both more unique and complex, the impact of the existence of "exceptional circumstances" is left to a court determination.

The Senate bill provides added independence to the Office of Government Information Services by giving OGIS the ability to report directly to Congress and the President and to issue advisory opinions at its discretion after the completion of mediation. Agencies are also required to notify requesters of their right to seek dispute resolution from OGIS or from the agency's public liaison.

The role of the Government Accountability Office, first introduced in the 2007 OPEN Government Act to audit agency compliance with FOIA, is extended to cataloging Exemption 3 statutes and assessing how those exemptions are used by agencies. Another provision creates a Chief FOIA Officer Council, modeled after the Chief Information Officers Council. The Chief FOIA Officer Council will be tasked with developing recommendations for increasing agency FOIA compliance and efficiency, disseminating information about agency best practices, and coordinating initiatives to increase transparency and open government.

As in recent FOIA amendments, more reporting requirements are added to the annual agency FOIA reports. The bill requires agencies to report the number of times records have been exempted from disclosure as part of an ongoing criminal investigation under the exclusions contained in section (c), the number of times agencies engaged in dispute resolution with OGIS or the FOIA public liaison, and the number of records the agency proactively disclosed under section (a)(2).

Addressing a topic that has recently emerged as a top priority for the FOIA community, the Senate bill requires agencies to review and issue regulations on "the procedures for disclosure of records under section 552 of Title 5, including procedures for dispute resolution and engaging with the Office of Government Information Services."

The bill also fosters proactive disclosure by amending Title 44 on record management requirements by requiring agency heads to "include in an agency's records management system procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and making such records publicly available in electronic format."

Although the Senate bill has just been introduced, the fact that it has strong bipartisan sponsorship indicates that it stands a realistic chance of moving forward. How quickly Leahy and Cornyn will push to move the bill in the Senate Judiciary Committee has not yet been decided, but with congressional elections only five months away it seems unlikely the legislation will move quickly. And it is even less clear how a Republican take-over of the Senate in November might effect the commitment to amending FOIA. However, the Republican-controlled House has passed FOIA amendments that cover most of the same issues so resolving differences between the two bodies may not be so difficult regardless of which party controls the Senate in the next Congress. Although history shows that FOIA amendments occur about every ten years, a slightly quickened pace for the next set of amendments may well be in the offing.

Views from the States…

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

Connecticut

A trial court has agreed with the FOI Commission's ruling that records of the resolution of a grievance filed by Michael Aronow concerning the workplace conduct of Dr. Jay R. Lieberman, chair of the orthopedic department at the University of Connecticut Health Center, do not constitute "records of the performance and evaluation" of a state university faculty member. Aronow's compliant accused Lieberman of "incivility, vindictiveness, attempted intimidation, disrespectfulness and harassment" aimed at Aronow, other health center faculty, orthopedic residents, and medical students. The Health Center Appeals Committee heard the grievance and issued a four-page report that was reviewed by the president emeritus of the University, who wrote a one-page letter. Aronow requested the records and the university denied the request. Aronow complained to the FOI Commission, which found the records were not an evaluation of Lieberman's teaching. The court agreed, noting that "characterization of the reports as involving teacher performance versus teacher discipline or misconduct is extremely difficult. For one thing, the challenged actions do not involve teaching in a traditional classroom setting. Rather, the plaintiff is a teacher in the sense that he practices medicine in a teaching hospital in the presence of medical students, residents, fellows. Furthermore, many of the interactions discussed in the reports involve persons who are clearly not students, such as other faculty members or members of his staff." The court added that 'the predominant complaint and investigation focuses on what might be described as the plaintiff's management style. Aronow's grievance alleges that the plaintiff's actions violated the university's code of conduct, but the bulk of the reports discuss the more generic topic of the plaintiff's relations with his colleagues. To a certain degree, the reports evaluate both performance and misconduct." The court concluded that "it is clear that the purpose of the reports is to respond to a grievance about workplace misconduct and not primarily to create a record of performance and evaluation of an individual faculty member. This original purpose would not change even if the reports ultimately discussed the plaintiff's performance as a faculty member and even if they found no misconduct." (*Jay R. Lieberman, M.D. v. Michael Aronow, et al.*, No. HHB CV13-6022070S, Connecticut Superior Court, June 24)

Florida

A court of appeals has ruled that the City of Greenacres may not condition access to records on an email requester's provision of specific identifying information. The city received three email requests that only included the email address. The city sent an email to the email address indicating that the requester needed to

fill out a form on the city's website so that the city could track the request for fee purposes. After the city failed to provide the requested records, the requester filed suit. Finding the requester had provided enough information in his/her request to qualify for standing, the court noted that "if a public agency believes it is necessary to provide written documentation of a public records request, it may require the *custodian* to complete an appropriate form or document. However, the *person requesting the information cannot be required to provide such documentation* in order to inspect or receive copies of public records." The court indicated that "the city could have sent an estimate of costs through e-mail to the requester just as it could through regular mail, had the request been made via paper by an anonymous requester. Requiring appellant to provide further identifying information prior to disclosure could have a chilling effect on access to public records and is not required by the Public Records Act." (*Joel Edward Chandler v. City of Greenacres*, No. 4D13-377, Florida District Court of Appeal, Fourth District, June 11)

Minnesota

A court of appeals has ruled that the Minnesota Joint Underwriting Association, created in 1986 to provide insurance coverage to any person or entity unable to obtain insurance through ordinary methods, is not a state agency and is not subject to the Government Data Practices Act. The Minneapolis *Star-Tribune* requested information from the association. The MJUA responded that it was not a state agency and was not subject to the GDPA. The trial court found the MJUA was a state agency and the association appealed. After finding that it was unclear from the statute itself whether the association qualified as a state agency, the appeals court looked to the earlier creation of the Comprehensive Health Association, an entity quite similar to the MJUA. The court noted that the legislature indicated the CHA was subject to the Open Meetings Law, a distinction that would have been unnecessary if the CHA was considered a state agency. The court also pointed out that the legislature later amended the GDPA to include the CHA, clearly suggesting that it was not included previously. The court observed that "because the statute that created the CHA and the statute that created the MJUA may be construed together to determine their meaning, we conclude that when the legislature created the MJUA, it did not intend to make the MJUA a state agency, just as it did not intend the CHA to be a state agency." (*Minnesota Joint Underwriting Association v. Star Tribune Media Company*, No. A13-2112, Minnesota Court of Appeals, June 9)

Pennsylvania

A court of appeals has ruled that the Office of Open Records has the authority to determine if a claim of attorney-client or attorney work-product privilege is valid and to conduct an *in camera* review if necessary to make that determination. Beverly Schenck requested the solicitor's invoices from Center Township. The township claimed that the invoices were privileged because they related to litigation services. Schenck appealed to the Office of Open Records, which found the township had failed to justify its privilege claim. But the township responded by alleging OOR did not have jurisdiction to determine if the privilege applied. OOR then ordered the township to provide the records for *in camera* review and the township again refused to comply, claiming OOR did not have the authority to order *in camera* review. The township based its claim that OOR did not have jurisdiction to rule on the application of attorney privileges on a Pennsylvania Supreme Court decision, *City of Pittsburgh v. Silver*, 50 A.3d 296 (2012), in which the court found that litigation-related settlement documents were protected by a judicial rule granting the Supreme Court sole authority to govern the conduct of attorneys. But the appeals court explained that *Silver* was limited to its facts and did not apply broadly. Instead, the court noted that "when the Legislature enacted the Right to Know Law, it incorporated provisions that explicitly conferred subject matter jurisdiction with the OOR to decide requests under the RTKL that were denied by an agency. Per well-settled case law, the OOR maintains this subject matter jurisdiction to adjudicate RTKL disputes even where, as in *Silver*, the OOR ultimately lacks the power or authority, for whatever reason, to order the disclosure of the documents." Approving the use of *in camera*

review, the court pointed out that "the OOR has the implied authority to order the production of documents for *in camera* review." (*Office of Open Records v. Center Township*, No. 522 M.D. 2013, Pennsylvania Commonwealth Court, June 24)

On remand from the Pennsylvania Supreme Court, a court of appeals has dismissed various claims by the Pennsylvania Senate that records pertaining to representation of various Senate members in an investigation are protected by the attorney work-product privilege, grand jury secrecy, and the criminal investigation exemption. The appeals court had originally ruled that the Senate had waived its arguments because it did not make them until the appellate level. The Supreme Court disagreed and remanded the case back to the appeals court to consider the applicability of the exemption claims. The court rejected the Senate's argument that once a privilege applied, any records related to the privilege were exempt. Instead, the appellate court noted that "although the general descriptions such as drafting a memo, making a telephone call, performing research, observing a trial, reflect work performed, without further detail they do not reveal an attorney's 'mental impressions, theories, notes, strategies, research and the like.' Disclosure of the general tasks performed in connection with the fee charged reveals nothing about litigation strategy." The court likewise rejected the Senate's grand jury secrecy claim, pointing out that "although the billing records reference fees charged for legal services provided in connection with a grand jury investigation, the records do not relate to the grand jury investigation." Dismissing the criminal investigation exemption claim, the court observed that "again, the records reveal nothing other than the fact of counsel's engagement and that it pertained to a grand jury investigation." (*Marc Levy v. Senate of Pennsylvania*, No. 2222 C.D. 2010, Pennsylvania Commonwealth Court, June 16)

South Carolina

The South Carolina Supreme Court has reversed 2-1 decision of the appeals court finding that the Saluda County Council violated the notice requirements for regularly scheduled meetings when it amended its agenda during a public meeting to include another topic. The trial court sided with the county, but a split court of appeals concluded that allowing a public body to change its agenda during a meeting violated the requirement that public notice of meeting be posted at least 24 hours before the meeting. Agreeing with the dissenting judge on the court of appeals, the Supreme Court noted that "nowhere in FOIA is there a statement that an agenda is required for regularly scheduled meetings. Since what the General Assembly says in the text of the statute itself is the best evidence of legislative intent, we believe the legislative intent evidenced in the use of the phrase 'if any' is that the issuance of an agenda for regularly scheduled meetings lies within the discretion of County Council." The court added that "nor is there any restriction contained in FOIA on the amendment of an agenda. We agree with the dissent that it appears the majority of the Court of Appeals engrafted this prohibition onto FOIA based on its subjective view of the 'spirit' and 'purpose' of FOIA. Although we understand the concerns articulated by the majority, the purpose of the notice provision [in the statute] is to prevent government business from taking place in secret. The public was not prevented from finding out the actions of County Council where the proposed amendment to the agenda and the resolution were both raised and voted upon in public and were recorded in the minutes of the meeting of County Council." (*Dennis N. Lambries v. Saluda County Council*, No. 2012-212790, South Carolina Supreme Court, June 18)

The Federal Courts…

A federal court in California has ruled that Section 6104 of the Internal Revenue Code, which provides an exception to Section 6103's rule of non-disclosure of tax returns by making Form 990 filings by tax-exempt

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organizations public, does not qualify as a separate disclosure scheme that supersedes the requirements of FOIA. Public.Resource.Org requested electronic copies of nine tax-exempt organizations from the IRS. The agency directed PRO to Form 4506-A, developed by the IRS exclusively for requesting copies of tax-exempt organizations' Form 990 filings. The agency subsequently told PRO that Form 990 filings were not subject to FOIA and were available only through the procedure laid out under Section 6104. The IRS relied on *Tax Analysts v. IRS*, a 2000 decision by a district court judge in the District of Columbia that found that Section 6110, rather than FOIA, controlled disclosure of IRS written determinations. But the court here noted that Section 6110 established judicial review of such decisions and that "by contrast, section 6104 provides that Forms 990 should generally be made available for disclosure with certain precise exceptions. This is manifestly different from a statute that proposes to alter the procedural elements of FOIA and the means of judicial review. The content of section 6104 is more consistent with the IRS's depiction of the statute as a carefully delineated exception to the general nondisclosure rule from Section 6103." The court explained that "a statute cannot be 'comprehensive enough' to supersede FOIA simply by specifying categories of records exempt from disclosure, since this is a means of identifying statutory exemptions *pursuant* to FOIA. If this sufficed, most statutory exemptions would supersede FOIA." The court rejected the IRS's contention that since Section 6104 preceded the passage of FOIA, Congress must have intended it to control. Instead, the court noted that "FOIA is broad precisely because Congress sought a comprehensive solution to what was viewed as a wide-ranging problem. The pre-FOIA disclosure statutes will necessarily be narrower by comparison. FOIA's breadth cannot be both its purpose and its undoing." The IRS argued that Section 6104 was tied in with Section 6103 as part of its non-disclosure scheme. But the court pointed out that "if a tension exists between the pro-disclosure purposes of FOIA and the confidentiality interests of section 6103, FOIA itself provides the mechanism for reconciling the two. Therefore, in linking together sections 6103 and 6104, as 'a comprehensive nondisclosure paradigm,' the IRS articulates an argument not for preempting FOIA, but for a statutory exemption pursuant to FOIA." (*Public.Resource.Org v. United States Internal Revenue Service*, Civil Action No. 13-02789-WHO, U.S. District Court for the Northern District of California, June 20)

Judge Colleen Kollar-Kotelly has ruled that EOUSA has not provided sufficient justification for invoking a *Glomar* response neither confirming nor denying the existence of tape recordings and wiretaps that reference Aida Prendushi requested by Adarus Mazio Black under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. In response to Black's request, EOUSA claimed all records were categorically exempt and that it would not search for the records without a Privacy Act waiver. Black filed suit, arguing the records had been publicly disclosed during the death penalty certification portion of his trial and that EOUSA had not considered whether any third parties were deceased. Kollar-Kotelly largely agreed with Black's arguments. She noted that "Defendants have not responded to Plaintiff's public domain argument. . .Plaintiff focuses on an audio/video tape recording from October 12, 2004, which he claims was entered into the public record and was responsive to his FOIA request. Defendants have failed to offer any response to this argument precluding the Court from fully evaluating Plaintiff's argument." Turning to whether any third parties were deceased, Kollar-Kotelly pointed out that "Defendants do not provide any information as to whether the third parties in Plaintiff's FOIA request are alive or dead and do not explain any efforts Defendants have undertaken to ascertain that information. Without this information, the Court is precluded from evaluating Defendants' balancing of privacy interests versus public interest and, thus, Defendant's invocation of Exemption 7(C). If Ms. Prendushi is alive, then she has a privacy interest protected by Exemption 7(C) and there is no need for the Court to consider the other third parties named in Plaintiff's FOIA request since all of the documents and recordings sought by Plaintiff necessarily reference Ms. Prendushi. If Ms. Prendushi is not alive, then her privacy interest is likely extinguished and the life status and privacy interests of the other third parties referenced in Plaintiff's FOIA request must be weighed by the Court." Kollar-Kotelly ordered the agency to supplement its filings to better

justify its position. (*Adarus Mazio Black v. U.S. Department of Justice*, Civil Action No. 13-1195 (CKK), U.S. District Court for the District of Columbia, June 24)

EOUSA's routine claim that all its personally identifying records are categorically exempt under Exemption 6 or Exemption 7(C) has been successfully attacked recently by sophisticated litigators like CREW in cases involving public officials where the public interest favored CREW's position, but for a judge now to find EOUSA has not even made its case in litigation brought by a prisoner suggests that the viability of its *Glomar* strategy is becoming increasingly tenuous.

Judge Christopher Cooper has ruled that the CIA properly withheld documents concerning its polygraph testing under **Exemption 1 (national security**), **Exemption 3 (other statutes)**, and **Exemption 5 (deliberative process privileges)**, although it has not yet shown whether it applied Section 6 of the Central Intelligence Act too broadly. In response to a series of requests from Kathryn Sack, a Ph.D. student at the University of Virginia, for records concerning its use of polygraphs, Sack ultimately focused on exemption claims for a handful of documents. Sack argued the agency had not shown why polygraph tests qualified as intelligence sources and methods protected under Exemption 1. But Cooper pointed out that "polygraphing job applicants can credibly be said to protect against individuals illegally using or revealing classified information obtained after misrepresenting their reasons for applying to the Agency, which falls within the CIA's 'broad power to protect the secrecy and integrity of the intelligence process.' . .Moreover, the CIA uses polygraphs when interviewing witnesses directly in the intelligence gathering process. Requiring the Agency to reveal its polygraph techniques thus would compromise its ability to use polygraphs in this capacity as well." Cooper found the agency had properly claimed that records were protected under Section 102(A)(i)(1) of the National Security Act, but found that since the Central Intelligence Act prohibition applied only to agency personnel and not the agency itself the agency was required to provide more specifics about its claims under that statute. Sack contended that records concerning a Blue Ribbon Panel on polygraphs did not qualify under the deliberative process privilege because they were created after the report. However, Cooper noted that the agency's affidavit explained that "the withheld documents are drafts, not the final version, and were part of the Agency's ongoing process of evaluating recommendations made by the Blue Ribbon Panel and assessing programmatic changes.' Drafts such as these reflecting internal evaluations of expert recommendations fall within the deliberative process privilege covered by Exemption 5." Sack questioned the agency's **segregability** analysis because it said no information could be segregated even for documents that had been redacted. But Cooper pointed out that "while the internal inconsistency of the CIA's statement that it could not segregate non-exempt material in documents where it did just that may reflect carelessness in the preparation of its *Vaughn* index, the statement alone is insufficient, under the circumstances of this case, to overcome the presumption of good faith accorded to the Agency." (*Kathryn Sack v. Central Intelligence Agency*, Civil Action No. 12-00537 (CRC), U.S. District Court for the District of Columbia, June 17)

Judge Rosemary Collyer has ruled that EOUSA properly denied Vincent Marino a **fee waiver** because he had failed to show how disclosure of records concerning an alleged conspiracy between the FBI and organized crime to convict him would contribute to a greater understanding of government operations and how he intended to disseminate the information while in prison. EOUSA provided Marino with a fee estimate of $5,796. He then asked for a fee waiver, arguing that disclosure would shed light on DOJ corruption. But Collyer agreed with EOUSA that the agency had properly considered the factors for granting a fee waiver and concluded that Marino did not satisfy them. Noting that Marino argued that the issue of improper use of

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organized crime informants by the FBI had been revealed in the media and congressional hearings, she pointed out that "any such records, however, would not contain new information." She also rejected Marino's claim that he would disseminate information on various websites pertaining to PROJECTMARINO. Collyer observed that "Mr. Marino has not explained how he would post the records that he seeks to these various websites while incarcerated. He has provided no information whatsoever regarding his access to these specific websites or even to the Internet generally. Mr. Marino, in short, simply has not demonstrated his ability to 'effectively convey' the requested information to the public." (*Vincent Michael Marino v. Department of Justice*, Civil Action No. 12-865 (RMC), U.S. District Court for the District of Columbia, June 19)

The Eleventh Circuit has affirmed the district court's ruling exempting names and video images identifying TSA employees involved in an airport incident in which Jonathan Corbett was denied access to his flight because he refused to go through either a TSA body scanner or submit to a pat-down. Corbett sued TSA after the agency denied identifying information concerning the incident under **Exemption 6 (invasion of privacy)**. Upholding the agency's denial, the appeals court noted that "the TSA's documents and videos describe in full detail every aspect of the events at issue and the TSA's response to those events. Disclosure of the names of the individuals in those documents, or faces of the individuals, would not add to a reader's or viewer's understanding of those documents and images." The court observed that "the individuals, names or depicted have privacy interests in avoiding disclosure of their personal identifying information. And Corbett has not shown the public has a compelling interest in disclosure of these personal identities. Corbett has not offered a reasonable, much less a compelling, explanation for a public interest, or even his own personal need, for the names and faces in the records here." (*Jonathan Corbett v. Transportation Security Administration*, No. 13-14053, U.S. Court of Appeals for the Eleventh Circuit, June 4)

Judge Reggie Walton has ruled that the FBI and the EOUSA properly withheld most of the records requested by convicted murderer John Petrucelli. Although Petrucelli was tried and convicted in New York, he challenged EOUSA's decision to limit its **search** for records in New York rather than search Washington, D.C. as well. Walton pointed out that "plaintiff acknowledges that he was prosecuted in the Southern District of New York, and puts forth no valid reason to suspect that records related to his criminal case likely would be located in any other federal district. . .Nor does the plaintiff proffer any authority for the proposition that a federal agency is obliged to consult with or retrieve documents from a state law enforcement agency." Petrucelli questioned EOUSA's **Exemption 5 (deliberative process privilege)** claims, arguing instead that any such records would be law enforcement records. Walton indicated that "the plaintiff fails to demonstrate that the records or portions of records withheld under Exemption 5 are law enforcement records to which FOIA Exemption 7 applies, or that these DOJ components are obligated to account for privileged material by any means other than through their supporting declarations." Walton agreed with the agencies that identifying information about law enforcement officers and third parties was protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. He pointed out that "the FBI Special Agents and other law enforcement personnel mentioned in the relevant records have legitimate privacy interests sufficient to outweigh any public interest in disclosure of their names or identifying information about them." Although he approved of most of the agencies' claims under **Exemption 7(D) (confidential sources)**, Walton found EOUSA had failed to show that sources it claimed as confidential had been explicitly granted confidentiality while the FBI had not justified its claims pertaining to implicit confidentiality. Walton also found that neither agency had justified application of **Exemption 7(E) (investigative methods and techniques)**. (*John A. Petrucelli v. Department of Justice*, Civil Action No. 11-1780 (RBW), U.S. District Court for the District of Columbia, June 27)

The Second Circuit has ruled that the district court properly refused to consider the Service Women's Action Network's narrowed request to the Defense Department concerning military sexual trauma because the record before the court was insufficient to allow the court to address the merits. The Network sent a broad request to DOD, which the agency rejected as unduly burdensome. After the Network filed suit, it offered a narrowed version of the request and complained that DOD had failed to consider it but rather had assumed it was also too broad and time-consuming. Ruling that the original request was too broad, the district court indicated the record was insufficient to consider the narrowed request. The Network then appealed. The Second Circuit noted that "we have repeatedly held that district courts need not consider claims raised for the first time in a briefing opposing summary judgment." The Network argued that FOIA's goals of efficient and full disclosure demanded that "FOIA litigants be permitted to pursue requests that have been narrowed during litigation." The court disagreed, pointed out that "it is doubtful whether permitting FOIA litigants to narrow their requests at will in the midst of ongoing litigation would not itself destroy the 'prompt' and 'efficient' disclosure of government records, as litigants continually test the permissible breadth of their requests." (*Service Women's Action Network v. Department of Defense*, No. 13-2007, U.S. Court of Appeals for the Second Circuit, June 20)

A federal court in Maryland has ruled that the Bureau of Alcohol, Tobacco and Firearms conducted an **adequate search** for personnel records requested by former employee Sim Moore. Moore requested his entire personnel file and when the agency failed to respond in a timely manner, he filed suit. After being told that his file was at the National Personnel Records Center, the agency finally produced his entire personnel file with redactions of third party personal information. Believing the agency's response was incomplete, Moore provided the agency with a list of six categories of records he believed should be in his personnel file pertaining to disciplinary actions, a signed settlement agreement, and medical records. But the Branch Chief of Payroll told the agency FOIA office that "the items listed by Mr. Moore are not the types of items that are filed in the [Official Personnel File]." The agency contended Moore was required to submit another FOIA request for the items in the list he provided to the agency, but Moore argued those documents were responsive to his original request. The court agreed with the agency, noting that "although Moore believes that additional documents are responsive to his request, agencies are not obligated to look beyond the 'four corners' of a FOIA request 'when formulating their searches, nor [are] they required to chase rabbit trails that may appear in documents uncovered during their search.' Moore's FOIA request, on its face, seeks only a copy of his 'complete' personnel file 'including' all the documents within it. ATF reasonably interpreted Moore's request to mean that he wanted a copy of his OPF, which it produced in full. If Moore wishes ATF to produce additional documents that were not in his OPF, he should submit a second FOIA request." (*Sim B. Moore, Jr. v. United States of America*, Civil Action No. WDQ-13-2353, U.S. District Court for the District of Maryland, Northern Division, June 6)

Judge Christopher Cooper has ruled that a coalition of environmental groups may amend their complaint against the SBA to include OMB as a defendant, but that their complaint against EPA is different enough that it does not qualify for consolidation. Environmental Integrity Project, Earthjustice, and the Sierra Club made a request to the SBA for communications between the agency and interest groups, and communications between the agency, OMB and EPA pertaining to an EPA rulemaking revising effluent limits for steam-powered electric plants. On the same day, the coalition made a request to OMB for similar records. Two months later, the coalition requested a variety of technical data from EPA. The coalition filed suit against the SBA and then sought to amend their complaint to add OMB and EPA as defendants. Agreeing to allow the joinder of OMB, Cooper noted that "plaintiffs' claims against OMB are factually related to their claims against SBA. The groups requested essentially identical categories of records from the two agencies on the same day regarding

the same underlying subject matter: inter- and intra-agency communications regarding the Steam Rule. Common questions of law also arise from these requests as SBA and OMB both invoke Exemption 5 to justify their withholdings, which the environmental groups expect to challenge. Although SBA maintains that resolution of its anticipated summary judgment motion would be delayed if OMB is required to search a considerably larger database of records, SBA points to no prejudice it might suffer by waiting a reasonable period of time to move for summary judgment." But he rejected the request to join EPA, pointing out that "the environmental groups' claims against EPA, however, are not sufficiently related to this case to warrant the joinder of EPA as a defendant. Merely because FOIA requests target the same general subject matter, such as the effluent rulemaking here, does not mean they are related for purposes of Rule 20 [of the Rules of Civil Procedure]. The requests to EPA were for specific and voluminous technical data the EPA used in its rulemaking, which is quite different from the inter- and intra-agency communications the environmental groups requests from SBA and OMB. The EPA requests also raise distinct legal issues because the EPA based its withholdings on a different FOIA exemption—Exemption [4]. And, as both parties acknowledged at the hearing before the Court, there will likely be substantial additional delay caused by EPA's continuing confidential business information determinations under Exemption [4] before the environmental groups' claims against it can be adjudicated." (*Environmental Integrity Project, et al. v. Small Business Administration*, Civil Action No. 13-01962 (CRC), U.S. District Court for the District of Columbia, June 16)

A federal court in Pennsylvania has ruled that Jacquelyn N'Jai's FOIA claim against the EPA is **moot** because the agency provided her with all the documents it had concerning the investigation of mold and other allergens at her Pittsburgh apartment. N'Jai had complained to her landlord for several years about the conditions in her apartment and not until she was prepared to move out did the landlord appear to attempt to fix the problem. She filed a complaint with the EPA, which began an investigation. However, dissatisfied with the agency's apparent unwillingness to keep her informed, she filed a suit against the EPA for various claims, including the agency's failure to respond to her FOIA request. Dismissing the FOIA claim, the court found the agency's explanation that because its investigator was unable to conduct or complete his investigation the agency had provided 33 pages of records sufficient to show that the agency had responded to N'Jai's request. N'Jai argued that since the agency had failed to respond within the statutory 20-day time limit it had violated the FOIA. But the court pointed out that "plaintiff does not dispute the adequacy of the EPA's search for responsive documents, nor does she point to any evidence suggesting that additional documents are within EPA's possession but have not been turned over. Although Plaintiff complains that the Agency's response took too long and that [an agency employee] impeded the process in bad faith, Plaintiff does not dispute that the EPA has satisfied, albeit belatedly, its obligations under FOIA." (*Jacquelyn B. N'Jai v. U.S. Environmental Protection Agency*, Civil Action No. 13-1212, U.S. District Court for the Western District of Pennsylvania, June 4)

A federal court in California has ruled that while Gary Atkins provided sufficient evidence to suggest that the Naval Medical Center in San Diego had inadequate safeguards for medical records he failed to show that lack of safeguards was willful or intentional under the **Privacy Act**. Atkins was diagnosed with a life-threatening disease. He worked at the Naval Medical Center from 2005-2011. In 2008 he began to suspect that other employees knew about his condition and heard that employees could access medical records without leaving a trail. He eventually took a job with the Veterans Administration, but subsequently sued the Navy for improper disclosure and failing to safeguard his records. The court found that testimony by Noel Molinos, an employee at the Medical Center, provided the legal basis for questioning the Medical Center's procedures for safeguarding records, but concluded that "even assuming Plaintiff's characterization of the email was accurate, Ms. Molinos, at most, acknowledged the lack of an appropriate safeguard to insure the confidentiality of records, not that [the Medical Center] intentionally or willfully failed to establish appropriate safeguards."

(*Gary Atkins v. Raymond E. Mabus*, Civil Action No. 12-1390-GPC (WVG), U.S. District Court for the Southern District of California, June 13)

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Editor's Note: *Access Reports* will take a break for the summer. The next issue, v. 40, n. 15, will be dated July 30, 2014.

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