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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: Patrice McDermott, executive director of OpenTheGovernment.org, has responded to an editorial in the Washington Post supporting passage of the Cyber Information Sharing Act, recently passed by the Senate Intelligence Committee, by urging the Senate to instead look more closely at the legislation and improve it before considering a final bill. McDermott pointed out that "the bill authorizes the government to use cybersecurity data it obtains from private companies to prevent or prosecute leaks under the Espionage Act and defines 'cybersecurity threat' broadly enough to include sources' conversations with reporters." She added that "CISA also creates, for the first time in decades, a new exemption from the Freedom of Information Act, which could prevent the public from learning both about private companies' failure to protect their privacy and how the government uses the information it receives." . . .Rep. Bennie Thompson (D-MS) has introduced the Clearance and Over-Classification Reform and Reduction Act" (H.R. 5240), cosponsored in the Senate by Sen. Ron Wyden (D-OR). In announcing the legislation, Thompson noted his concern over new programs to monitor the activities of government employees with security clearances and pointed out that "the federal government is on an unsustainable course where too much information is classified—creating barriers to information sharing and driving up Federal spending to safeguard this material and process and oversee 5.1 million people with security clearances."

Court Finds No Need To Clarify Scope of Request

While disposing of most issues left outstanding in a series of lawsuits brought by University of Virginia graduate student Katelyn Sack, Judge Emmet Sullivan has inadvertently exposed the difficulty in making FOIA amendments designed to be favorable to requesters work in practice. By limiting the agency's obligation to clarify a request it finds to be overly burdensome, a feature of the 1996 EFOIA Amendments, Sullivan has allowed agencies to essentially dismiss requests simply because their interpretation made the request too open-ended.

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Sack made a series of requests to government agencies for records pertaining to their use of polygraphs. One request to the CIA asked for "documents pertaining in whole or in part (all years, all classifications) to a list of closed Inspector General investigations and reports." The agency sent a generic response declining to respond to her request, telling her that "because of the breadth of your request, and the way in which our records systems are configured, the Agency cannot conduct a reasonable search for information responsive to your request." The response encouraged her to narrow the scope of the request by, for example, limiting the time frame, but offered no specifics about why the agency concluded her request was too broad. Although Sack failed to appeal the agency's decision, she still challenged the agency's action by arguing that its decision constituted a failure to search.

Examining the parties' arguments, Sullivan first pointed out that the CIA's position was that "the language 'pertaining in whole or in part' was undefined and caused the request to cover any document that is arguably relevant to any list of closed Inspector General investigations and reports, even if the document did not reference such a list." By contrast, Sack claimed her request was considerably more narrow and that she asked only for a list of closed Inspector General investigations and reports and that information would likely be located in only a few offices.

Sullivan agreed with the agency, noting that "although plaintiff's request clearly encompasses all lists of closed Inspector General investigations and reports and any documents specifically referencing those lists, it would also cover documents that otherwise relate to those lists." He explained that "the problem for an agency responding to such a request is that the lack of clarity leaves the agency to guess at the plaintiff's intent. . .Indeed, any document related to a closed investigation may arguably pertain, at least 'in part,' to a subsequently generated list of investigations. Given this breadth, the CIA could not assume that responsive documents would be located only in [a few places]. That would be a starting point, but the CIA would also have needed to devise a method to search for records that do not mention a list of closed Inspector General investigations and reports, but still somehow pertain to such a list. This borders on the 'all-encompassing fishing expedition' on which a FOIA requester cannot embark." He added that "this problem is especially acute because the CIA's record-keeping systems do not permit it to 'identify records that do not necessarily reference a document, but which may bear some relation to it'" and observed that "here, 'the breadth of plaintiff's request is not compatible with the CIA's document retrieval system, and plaintiff must deal with that system as it is.'"

Sullivan acknowledged that Sack had ultimately clarified her request but that she did so too late. "Faced with the task of guessing at plaintiff's intent regarding what might 'pertain' to any list of closed Inspector General reports and investigations, the CIA followed a reasonable path: it sought additional guidance from the requester and, when none was provided, closed the file."

While outcomes like this happen all the time, they underscore how discouraging and unenlightening such responses can be to requesters. A built-in disadvantage to FOIA requesters is that most requesters are interested in records pertaining to a subject, but don't know much about how the agency's records are compiled or maintained. To try to capture the greatest amount of responsive information, requesters frequently include expansive descriptions to prevent the agency from unduly narrowing its interpretation of the request. It certainly isn't surprising that many such requests seem overly broad, but Section (6)(B)(ii) instructs agencies to give requesters an opportunity to limit the scope of the request and to make available its FOIA Public Liaison [added by the 2007 OPEN Government Act amendments] to "assist in the resolution of any disputes between the requester and the agency." Certainly the underlying intent for such a provision is to force the agency and the requester to clarify requests and, if possible, to narrow them. But by rejecting requests with nothing more than a generic explanation, the agency probably skirts the requirements of the provision without providing much clarification. In this case, if the CIA indeed was worried about the

potentially untethered nature of Sack's request, the best outcome for both parties would have been for the CIA to explain its concerns and offer some alternative rather than rejecting the request without further consideration. In a footnote, Sullivan indicated that during the litigation, the CIA did search for a list and did not find one.

The rest of Sack's case involved whether the CIA, the DIA, and the FBI had properly withheld records pertaining to their polygraph programs under Exemption 1 (national security), Exemption 3 (other statutes) and Exemption 7(E) (investigative methods and techniques). Sullivan found that Section 102A(i)(1) of the National Security Act protected many of the records claimed by both the CIA and the DIA. But he became the third district court judge in the D.C. Circuit to find that Section 6 of the CIA Act, protecting information about the functions of CIA personnel, covered only personnel and not the functions of the agency itself. Sullivan upheld the use of Exemption 7(E) to protect DIA polygraph training materials. Sack argued that some of the materials pertained to practices already adopted by the agency, but Sullivan indicated that "even if some of the findings have been used to improve polygraph practices, 'harm would be caused to the overall process were it to be disclosed precisely which. . .vulnerabilities have been suitably addressed and which remain a critical task.' These statements are sufficient to meet the agency's burden of showing that release of the information could lead to circumvention of current law-enforcement techniques." (*Katelyn Sack v. Central Intelligence Agency*, Civil Action No. 12-244 (EGS), U.S. District Court for the District of Columbia, July 10)

Views from the States...

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

Colorado

The Supreme Court has ruled that the Colorado Open Records Act mandates an award to a plaintiff who gains access to records initially denied by a public body. Ruling in a case brought by the Colorado Republican Party against a number of state representatives for access to answers provided in a 2005 survey on various issues, the Supreme Court agreed with the appeals court that the statute required an award where the Colorado Republican Party had gained access to more than half of the responses originally withheld. While the trial court granted access to 925 of 1,584 survey responses, it exercised its discretion in finding that the Colorado Republican Party was not the prevailing party when the litigation was viewed as a whole. The Colorado Republican Party then appealed and the appeals court reversed, finding the statutory provision, which had been amended to make a fee award mandatory rather than discretionary, required an award when a party gained access to documents originally withheld. The Supreme Court agreed, noting that the fees provision "when properly construed, mandates an award of costs and reasonable attorney fees in favor of any person who applies for and receives an order from the district court requiring a custodian to permit inspection of a public record." (*Debbie Benefield, et. al v. Colorado Republican Party*, No. 11SC935, Colorado Supreme Court, June 30)

Connecticut

The Supreme Court has affirmed a court of appeals ruling finding that a 1994 amendment to the exemption for law enforcement investigatory records when prosecution is pending, addressing a 1993 Supreme Court decision, *Gifford v. FOI Commission*, 631 A.2d 252 (1993), resulted in a compromise requiring law enforcement agencies to provide at least one more data element than appeared on a police blotter, but did not,

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as the FOI Commission contended, make related investigatory records subject to broader disclosure under another provision of the FOIA. The *Gifford* court had concluded that the exemption required law enforcement agencies to provide police blotter information—name and address of person arrested, the date, time and place of the arrest, and the offense for which the person was arrested—and nothing else during the pendency of a prosecution. But after the 1994 amendment requiring law enforcement agencies to include the arrest report, incident record, news release, or other similar report of the arrest, the FOI Commission interpreted the amendment to limit the exemption's temporal restrictions to those specified data elements and not to other investigatory records. However, the Department of Public Safety appealed an adverse ruling by the FOI Commission, leading the trial court and the appellate court to reject the FOI Commission's interpretation. When the case arrived at the Supreme Court, that court agreed as well. In contrast to the appeals court, the Supreme Court found that the statutory provision was ambiguous and that both interpretations were plausible. But after examining the legislative history of the 1994 amendment, the Court observed that the Senate amendment reflecting the FOI Commission's position had resulted in a compromise in the House, supporting the department's position. The Supreme Court noted that the 1994 amendment "responded to *Gifford* by increasing law enforcement agencies' disclosure obligations under [the exemption], but did not disturb the holding in *Gifford* that [the exemption] exclusively governs law enforcement agencies' disclosure obligations under the act during pending criminal prosecutions, to the exclusion of the act's broader disclosure obligations set forth [elsewhere in the statute]. . .On the basis of the ample extra-textual evidence of the meaning of the otherwise ambiguous [exemption], we further conclude that the commission's construction of the statute to the contrary is not reasonable and, therefore, is not entitled to judicial deference." (*Commissioner of Public Safety v. Freedom of Information Commission*, No. 19047, Connecticut Supreme Court, July 15)

Michigan

A court of appeals has ruled that Delta College District improperly responded to multiple requests from Ann Aklam concerning the compensation and benefits for Delta College President Jean Goodnow. Finding the District had not supported its claim of attorney-client privilege, the court noted that the District's failure to explain the scope of the redactions until the litigation was improper. The court noted that "there is no language in [the Michigan FOIA} remotely suggesting that compliance may be achieved at a later date or that compliance is excusable if the public body eventually provides the required description. Compliance certainly cannot be found when the public body communicates the description of the separated or deleted records after the requesting party is forced to initial litigation to obtain FOIA compliance." The court rejected the trial court's conclusion that the attorney-client privilege applied. The court pointed out that "a trial court must construe a claimed exemption narrowly and is not permitted to render conclusory or generic determinations in deciding whether a claimed exemption is justified." The court found that disclosure of information about Goodnow's retirement contributions was not an invasion of personal privacy. The court indicated that "disclosure of the 403(b) information at issue would facilitate the ability of citizens to be informed regarding President Goodnow's compliance with her contractual obligations. . .When balanced against President Goodnow's privacy interests, relative to the extent of her 403(b) contributions, public disclosure governs; therefore, any invasion of privacy is not clearly unwarranted." (*Ann Anklam v. Delta College District*, No. 317962, Michigan Court of Appeals, June 26)

Missouri

A trial court has ruled that the Department of Corrections waived any exemptions not claimed in its denial letter to the ACLU representing Allaeddin Qandah, a prisoner who claimed his Quran was damaged during a cell search. ACLU attorney Michael Hill requested records about Qandah's information resolution request concerning any property damage. The Department denied the request, citing Federal Regulation 28 C.F.R.

§ 40.10, implementing 42 U.S.C. 1997e providing that "records regarding the participation of an individual in a grievance proceeding shall be considered confidential." After the ACLU brought suit, the Department also claimed exemptions for institutional security and personnel records. The court found the Department had waived the subsequent exemption claims. The court noted that "the legislature has mandated that if a custodian denies access to public records, the custodian must, upon request, specify the legal basis for the denial. Permitting Defendant to assert additional reasons for denial after litigation commences, as it attempts here, renders superfluous the statutory requirement of notice of the reasons for denial. It would also discourage citizens from retaining attorneys (or litigating pro se) to challenge the exemptions claimed by a government entity that withholds documents, if, after a lawsuit is filed, the government could cite additional exemptions. This is also contrary to public policy." The court then decided that 28 C.F.R. § 40.10 did not provide a basis for withholding "because the federal authority for 28 C.F.R. § 40.10, 42 U.S.C. § 1997e (1980), has been repealed, and, therefore it is not a valid authority on which DOC can rely to close the requested records." (*American Civil Liberties Union Fund v. Missouri Department of Corrections*, No. 12AC-CC00692, Missouri Circuit Court, Cole County, Missouri, June 23)

New Jersey

The Supreme Court has adopted the interpretation of the common interest doctrine from *LaPorta v. Gloucester County Board of Chosen Freeholders*, 774 A.2d 545 (N.J. 2001), a 2001 appellate decision, in finding that the Borough of Longport and an attorney representing two former Longport board members shared a common interest when they exchanged documents pertaining to strategies for defending suits against citizen activist Martin O'Boyle. The attorney for the former board members contacted Longport's municipal attorney to discuss possible cooperation in defending litigation brought by O'Boyle and subsequently shared some documents. The municipal attorney reviewed the documents and returned them to the private attorney. Longport ultimately decided not to participate in a joint defense. O'Boyle requested the records under the Open Public Records Act and the common law right of access. The Borough indicated that records pertaining to the discussion of a joint defense were subject to the common interest doctrine and were protected under the attorney-client privilege and the attorney work-product privilege. The trial court agreed with the Borough, as did the appeals court. The Supreme Court confirmed the appellate court's decision, adopting the broad interpretation of the common interest doctrine articulated earlier in *LaPorta*. The court explained that "the common interest exception to waiver of confidential attorney-client communications or work product due to disclosure to third parties applies to communications between attorneys for different parties if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest, and the disclosure is made in a manner to preserve the confidentiality of the disclosed material to prevent disclosure to adverse parties." The court added that "the common interest need not be identical; a common purpose will suffice." Rejecting O'Boyle's argument that the common interest doctrine did not apply after the Borough decided not to pursue a common defense, the court observed that "it is of no consequence that the private attorney and the municipal attorney did not jointly defend the pending litigation. The focus must be whether the private attorney and the municipal attorney shared a common purpose at the time the private attorney shared his work product with the municipal attorney." (*Martin E. O'Boyle v. Borough of Longport*, No. A-16-12, New Jersey Supreme Court, July 21)

Pennsylvania

The Office of Open Records has ruled that the Department of Environmental Protection failed to show that data collected as part of the department's study of radiation levels involved in oil and gas development, known as the TENORM study, are protected by the exemptions pertaining to non-criminal investigations, personal security, or the deliberative process privilege. Corinne Bell, requested records about the ongoing

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study on behalf of the Delaware Riverkeeper Network. The department denied the request in part under the exemptions non-criminal investigations, personal security, and the deliberative process privilege. Bell appealed to the Office of Open Records. After reviewing the parties' submissions, Appeals Officer Jill Wolfe concluded that none of the exemptions applied. She first noted the department had authority to conduct studies or investigations, but that the requested records were clearly part of a study. She explained that "the Department's synonymous use of study and investigation in its submission does not change the fact that the Department was conducting a scientific analysis in a context that would not lead to the possibility of the imposition of sanctions under its regulatory authority, but rather to report its findings of radioactive material in Pennsylvania." The department contended that because the data was about radioactive exposure levels, disclosure would pose a personal security risk. But Wolfe pointed out that "the Department's argument attempts to equate the risk of radioactive material itself to the *release of information* about radioactive material. The risks associated with exposure to radioactive material are not the same as any risk associated with releasing information about radioactive material." Wolfe rejected the department's deliberative process privilege claim, noting that "under the Department's logic, these tests, that consist of data collected by the Department, are exempt from disclosure merely because the Department has not undergone 'internal deliberations to verify the quality and assess the data's significance as to potential radiation exposure.' However, the responsive records identified in the exemption log are not deliberative, rather [they] are factual in character consisting of sample data collected and sample location." (Docket No. AP 2014-0880, Pennsylvania Office of Open Records, July 11)

South Carolina

The Supreme Court has ruled that autopsy reports qualify as medical records and are exempt under the Freedom of Information Act. The court noted that "although the objective of an autopsy is to determine the cause of death. . .the actual examination is comprehensive. Thus, the medical information gained from the autopsy and indicated in the report is not confined to how the decedent died. Instead, an autopsy, which is performed by a medical doctor, is a thorough and invasive inquiry into the body of the decedent which reveals extensive medical information, such as the presence of any diseases or medications and any evidence of treatments received, regardless of whether that information pertained to the cause of death." The court observed that a statutory provision concerning the release of autopsy records to a coroner in another state did not constitute a waiver for purposes of FOIA disclosure. "The reference to the FOIA as a law of *exclusion* indicates the General Assembly assumed the FOIA barred dissemination of these types of reports." The plaintiffs argued that an earlier case in which the Supreme Court found that a death certificate was not a medical record suggested that an autopsy report also did not qualify as a medical record. However, the court pointed out that "a death certificate includes no more than the cause of death, if known. In contrast an autopsy is a comprehensive medical examination of a body designed to reveal not only the cause of death, but also the decedent's general medical condition." (*Joe Perry and Osteen Publishing Co., Inc. v. Harvin Bullock, Sumter County Coroner*, No. 27419, South Carolina Supreme Court, July 16)

Wyoming

The Supreme Court has recognized a common law deliberative process privilege in Wyoming. The case involved a request from Robert Aland for records from the Office of the Governor and the Game & Fish Department related to a letter sent by Gov. Mathew Mead to Secretary of the Interior Ken Salazar concerning the status of the grizzly bear under the federal Endangered Species Act. The State sent Aland some responsive records, but withheld others under the deliberative process privilege. The court first addressed whether to recognize a common law deliberative process privilege. After reviewing the legal basis for the privilege, the court noted that "we find the policy purposes behind the common law deliberative process privilege to be persuasive, and consistent with Wyoming policies and precedent; we therefore hold that a common law

deliberative process privilege exists in Wyoming." The court pointed out that for purposes of applying the deliberative process privilege in the context of the Wyoming Public Records Act, a public body must show that the records was (1) an inter- or intra-agency communication that was (2) pre-decisional and deliberative and (3) disclosure would be contrary to the public interest. The court observed that "this public interest prong of the test [will usually be] satisfied by weighing the public interest in allowing the free exchange of opinions within the executive branch against the public interest in being informed of the actions of public officials carrying out the business of the public." Applying the three factors of the deliberative process privilege to the withheld documents, the court found some documents qualified for the privilege while others did not. In rejecting the privilege for a draft created by an advisor to Gov. Mead because it contained the same information as the final letter, the court noted that "all of the details contained in [the document] became incorporated in the final letter sent [to the Secretary of the Interior]. As a result, the deliberative nature of the document no longer exists." (*Robert H. Aland v. Matthew H. Mead, et. al*, No. S-13-0119, Wyoming Supreme Court, June 26)

The Federal Courts…

The Second Circuit has ruled that special access requests submitted to the National Archives by representatives of former President George W. Bush and former Vice President Dick Cheney are protected by **Exemption 6 (invasion of privacy)** and need not be disclosed to journalist John Cook. During the time the records of former Presidents are being prepared for public disclosure under the Presidential Records Act, former Presidents and Vice Presidents may make special access requests, often to help research their memoirs. Cook requested the special access requests made on behalf of Bush and Cheney. NARA located nearly 1,000 requests but declined to disclose them, citing Exemption 6. Cook sued and the district court agreed with the government. Cook then appealed. The Second Circuit found the records qualified as "similar files" under Exemption 6 and noted that "because they reveal what archived materials were sought from NARA, who sought those materials, and the general research topics and fields of interest of particular requestors, the records Cook seeks contain information about specific persons that can be identified as applying to those persons and are therefore 'similar files.'" Turning to the privacy interest in the content of the special access requests, the court pointed out that "information about what archived materials the former officials requested from NARA would reveal personal details—what they were thinking, considering, and planning as they transitioned back to private life after their years of service to the country. The implicated privacy interests are compelling. The former officials have a significant interest in developing their ideas privately, free from unwanted public scrutiny." The court added that "we must keep the historical context in mind: before the passage of the PRA, the President's records were his property after he left office, and he was free to consult his papers at will, completely privately. The PRA gives no indication that Congress intended to alter the President's unfettered access to his papers by, for example, making his requests to access them subject to public disclosure." By contrast, the court was unpersuaded by Cook's public interest claims. The court observed that "while information as to how NARA responds to special access requests submitted by the former officials may shed some light on the internal functioning of the agency, knowledge of what *specific* information was sought and by whom sheds little light on how NARA is carrying out its obligations." The court likewise rejected the contention that disclosure of the special access requests would shed light on how the former officials were shaping their memoirs. The court pointed out that "it is not NARA's duty to police how the former officials use the presidential records they receive. In light of this, disclosure of the former officials' requests for records would do little to advance the public understanding of how NARA is carrying out *its* duties." (*John Cook v. National Archives & Records Administration*, No. 13-1228, U.S. Court of Appeals for the Second Circuit, July 8)

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Judge John Bates has lifted a **stay of proceedings** in a FOIA suit brought by Judicial Watch for records concerning the Fast and Furious Operation that were subpoenaed by a House Committee but withheld under a claim of executive privilege and ordered the Department of Justice to provide a *Vaughn* index explaining its basis for withholding all the requested records under **Exemption 5 (privileges)**. After the Obama administration invoked executive privilege for the subpoenaed records, the House Committee on Oversight & Government Reform filed suit against Attorney General Eric Holder challenging the privilege claim. Judicial Watch then requested the privileged records under FOIA. Its request was denied under Exemption 5 and it filed suit after the House Committee litigation had already been filed. To allow Judge Amy Berman Jackson to resolve the executive privilege issues in the House Committee litigation, Bates stayed proceedings in the Judicial Watch case. But after attempts to settle the House Committee litigation stalled, Bates decided the Judicial Watch litigation could proceed as a normal FOIA suit. DOJ argued that its Exemption 5 claim encompassed at least two constitutionally-based privileges—a constitutionally based deliberative process privilege and a congressional response work-product privilege. Bates pointed out, however, that "but because DOJ could refuse to release [documents claimed under a constitutional privilege] to Judicial Watch in this case simply because it is exempt under garden-variety deliberative process privilege, the Court need not reach the constitutional privilege question for the document." He noted that "perhaps these [non-constitutionally-based] claims will permit DOJ to properly withhold all documents in this case. If so, that would end this case without any inquiry into executive privilege." He explained that requiring the agency to provide a *Vaughn* index would help identify documents being withheld solely under a constitutionally-based privilege and those not subject to such a claim. He observed that "much is left to do here before this Court would reach any issues being addressed in [the House Committee suit] or in the negotiations between the political branches. In this circuit, when an agency is withholding documents under exemption claims, courts require that the agency provide a *Vaughn* index so that the FOIA requester—at a distinct informational disadvantage—may test the agency's claims." He noted that "doing so here will not prematurely expose or resolve the executive privilege issues ahead of Judge Jackson and the political branches; it will merely permit the parties and this Court to cull from the dispute any documents as to which a valid, non-executive-privilege reason for withholding exists, thereby narrowing or perhaps even resolving the case." Ordering DOJ to provide a *Vaughn* index, he pointed out that the "index should satisfy the law of this circuit, permitting Judicial Watch to test DOJ's exemption claims without exposing the withheld information." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 12-1510 (JDB), U.S. District Court for the District of Columbia, July 18)

Judge Barbara Rothstein has ruled that U.S. Citizenship and Immigration Services conducted an **adequate search** for records concerning Mohamed Atta, one of the 911 hijackers, and that it properly withheld most of them under **Exemption 7(A) (ongoing investigation or proceeding)**. In response to Judicial Watch's request for visa records on Atta, USCIS denied the request entirely. After consultation with the FBI, the agency released nine heavily redacted records, claiming Exemption 7(A). Rothstein found the agency's affidavit provided sufficient detail concerning its search. The affidavit indicated that "USCIS employees determined that the relevant records would be located within the program offices for Fraud Detection and National Security, Service Center Operations, and the Field Office Directorate." Those offices were searched electronically and the agency's affidavit provided "the specific search terms used by USCIS employees to conduct the search, including, 'the records' subject's name, date of birth, place of birth, and the subject's application receipt number.'" Judicial Watch questioned the search because several records disclosed by the 911 Commission had not been located. But noting that the records used by the 911 Commission were created before the Department of Homeland Security was established, she pointed out that "it cannot be assumed that the records were in the custody and control of USCIS at the time of the FOIA request." Judicial

Watch also challenged the invocation of Exemption 7(A) because it was based on a claim that there was an ongoing investigation of the 911 attacks, rather than of Atta himself, who died 12 years ago. Rothstein, however, observed that "the fact that Atta is dead, as Judicial Watch repeatedly points out, does not render the exemption irrelevant, because the investigation into the 9-11 attacks is still ongoing." (*Judicial Watch, Inc. v. United States Department of Homeland Security*, Civil Action No. 12-2014 (BJR), U.S. District Court for the District of Columbia, July 24)

Judge Richard Leon has once again ruled that journalist Jefferson Morley is not entitled to **attorney's fees** for his 11-year battle to force the CIA to provide more information on CIA employee George Joannides. Even though the D.C. Circuit had remanded the case twice for reconsideration of the public interest in disclosure of records related to the Kennedy assassination, Leon once again concluded that no public interest was served by the disclosure of some 300 previously undisclosed records pertaining to Joannides. When Morley first requested records from the CIA on what he alleged to be Joannides' role in the Kennedy assassination, the agency referred him to the National Archives, explaining that records on Joannides were part of the publicly available Kennedy Assassination Collection. Morley sued instead. The agency provided 113 records already available at NARA and 524 more records related to Joannides. Morley requested attorney's fees, which Leon denied after finding the records had not increased public understanding of the Kennedy assassination. The case went to the D.C. Circuit for a second time. The D.C. Circuit told Leon to apply the public interest test from another recent Kennedy assassination case, *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008), in which the D.C. Circuit had noted that "records 'about individuals allegedly involved in President Kennedy's assassination serve a public benefit.'" Undeterred, Leon rejected Morley's attorney's fees request once again, noting that "the *Davy* court did not make a broad statement that *all* records 'about individuals allegedly involved in President Kennedy's assassination' benefit the public. . .The *Davy* Court's description of the documents at issue does not create a category of records that automatically satisfy the [public interest] factor based on a plaintiff's claims of a relationship to the assassination." Morley argued that newly disclosed records concerning Joannides' travel to New Orleans during the time Lee Harvey Oswald was there and Joannides' receipt of a Career Intelligence Medal for exceptional service when he retired provided further context for linking Joannides to the Kennedy assassination. Leon observed that a footnote in *Davy* explained that "plaintiffs who obtain information that, while arguably not of immediate public interest, nevertheless enables further research ultimately of great value and interest, such as here the public understanding of a Presidential assassination," should not be foreclosed from fees. But he pointed out that "I do not interpret the *Davy* Court's footnote as holding that *every* new piece of information released pursuant to a FOIA request benefits the public because it may, someday, in some way, contribute to research on a matter of public import. The public benefit test requires more than speculation of an unknown potential future benefit." (*Jefferson Morley v. Central Intelligence Agency*, Civil Action No. 03-2545 (RJL), U.S. District Court for the District of Columbia, July 23)

Resolving the remaining redactions in several opinions by the Foreign Intelligence Surveillance Court pertaining to whether the government was improperly interpreting its authority under Section 702 of the Foreign Intelligence Surveillance Act, Judge Amy Berman Jackson, after reviewing the remaining document *in camera*, has ruled that the Justice Department's redactions under **Exemption 1 (national security)** fell within the categories for withholding contained in the Executive Order and were not made to conceal possible embarrassment to the government. In responding to a request from EFF, the Justice Department found five responsive documents and withheld most of the records under Exemption 1 and **Exemption 3 (other statutes)**. EFF then filed suit. During the litigation, Edward Snowden disclosed documents that included some of the information withheld by DOJ. As a result, the agency reprocessed the documents and disclosed

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some more information. Jackson agreed that an *in camera* review would be beneficial and provided a series of questions to DOJ concerning its justifications for withholding certain data after examining the documents, particularly why the agency continued to redact docket numbers. EFF contended the agency had failed to show that the remaining redactions fell within the protected categories contained in the E.O. and that information was not still being withheld to avoid embarrassment. Jackson found all the remaining redactions appropriate. She noted that "based on its review of those documents, the Court finds that none of the remaining redactions appear to be for an improper purpose, such as to shield embarrassing information from the public. The overwhelming majority of the redactions are simply docket information identifying prior applications and opinions by either number or date. None of these redactions, nor any of the other redactions, operate to withhold material that would show any violation of law, inefficiency, or administrative error. Indeed, material in the opinion that is critical of the government's conduct has been declassified and made public." (*Electronic Frontier Foundation v. Department of Justice*, Civil Action No. 12-01441 (ABJ), U.S. District Court for the District of Columbia, July 18)

Judge Ellen Segal Huvelle has ruled that Sai is not entitled to a **preliminary injunction** requiring TSA to disclose records pertaining to his ADA and Rehabilitation Act complaints. Sai filed two FOIA requests to the agency pertaining to incidents he alleged occurred at the airports in Boston and San Francisco. After the agency failed to respond, Sai filed suit asking for a preliminary injunction requiring the agency to disclose the requested records. The agency argued Sai was requesting relief beyond the scope of his FOIA complaint, but Huvelle noted that "plaintiff does specifically identity his November 2013 FOIA/PA request in the complaint and further alleges TSA's non-compliance with statutory deadlines as to that request. Moreover, plaintiff seeks in his complaint broad relief—including production of requested documents—as to 'all' his FOIA/PA requests. Construed liberally—as the court must—plaintiff's complaint seeks a court order requiring TSA to produce documents requested in his November 2013 FOIA/PA request." However, finding that she had jurisdiction over the claim, Huvelle concluded Sai was not entitled to relief, noting that "he has failed to demonstrate any—let alone 'very serious'—irreparable harm that would befall him absent the extraordinary relief of a preliminary injunction." She observed that "to be sure, a movant's general interest in timely processing of FOIA requests may be sufficient to establish irreparable harm if the information sought is 'time-sensitive.' In this regard, plaintiff implores the Court to consider the 'larger context of news and public interest reporting on a nationwide, multi-year pattern and practice of TSA violations of individuals' rights at checkpoints.' While this argument gets closer to those FOIA cases in which courts have found irreparable harm, the Court concludes that plaintiff has not provided any evidence to demonstrate the time-sensitivity of and public concern over the 'specific subject' of the TSA's responses to plaintiff's Rehabilitation Act grievances." She pointed out that "plaintiff 'has failed to demonstrate *any* time sensitive need for [the requested] information that will be irreparably lost if disclosure does not occur immediately' and this case is allowed to proceed down the typical path of FOIA litigation." (*Sai v. Transportation Security Administration*, Civil Action No. 14-0403 (ESH), U.S. District Court for the District of Columbia, July 7)

A federal court in Michigan has adopted a magistrate judge's recommendation finding that the Bureau of Alcohol, Tobacco and Firearms properly withheld gun trace information from prisoner Linzey Smith under **Exemption 3 (other statutes)**. Smith was involved in an altercation in 2004 where he was alleged to be in possession of a firearm. Since he had previously been convicted of a felony, Smith was charged with being a felon in possession of a firearm in the Eastern District of Washington. Although he claimed the firearm belonged to the person with whom he had the altercation, Smith was convicted and incarcerated in a federal correctional institution in Michigan. He subsequently made a FOIA request to BATF for the gun trace information for the gun he was found guilty of unlawfully possessing. The agency told Smith that under the Consolidated Appropriations Act of 2010, no funds could be used to process a request for gun trace data.

After the denial of Smith's request was upheld by OIP, Smith filed suit. The magistrate judge agreed the provision of the Appropriations Act qualified as an Exemption 3 statute. The magistrate judge noted that "it does not limit the prohibition on disclosure to only certain records in the Firearms Trace System, but instead prohibits the disclosure of 'part or all' of the database's contents." The magistrate judge also found the provision specified certain criteria for withholding and pointed out that "the Act's prohibition on disclosure continues beyond fiscal year 2008 and it also extends to all other laws." Smith argued that an exception to non-disclosure that allowed use of gun trace information in a criminal investigation applied to his circumstances. But the magistrate judge indicated that "although the exception allows for appropriated funds to be spent disclosing trace records in connection to a criminal investigation or prosecution, the disclosure of the records is limited to various law enforcement or government entities. Notwithstanding the underlying criminal investigation or prosecution, Smith does not qualify for the Act's exception because he is not a law enforcement officer or government agent." (*Linzey Smith v. Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives*, Civil Action No. 13-13079, U.S. District Court for the Eastern District of Michigan, July 18)

Judge Richard Leon has ruled that the FDA violated the **Federal Advisory Committee Act** and the Administrative Procedure Act when it allowed three pharmacologists with conflicts of interest to serve on the Tobacco Products Scientific Advisory Committee, created under the Family Smoking Prevention and Tobacco Control Act of 2009 that made the FDA responsible for regulation tobacco products. The TPSAC was required to consider the impact of menthol products and dissolvable tobacco products on the public health and submit a report on menthol within one year of its establishment. While Congress specifically prohibited the appointment of individuals with financial ties to the tobacco industry, it also applied general rules of ethics concerning conflicts of interest to all members. After the TPSAC met, discussed the designated topics, and issued a menthol report, a coalition of tobacco industry companies sued the FDA, alleging that the three pharmacologists had disqualifying conflicts of interest and that the FDA's selection of the three constituted arbitrary and capricious behavior under the APA. The FDA argued that the three pharmacologists did not have conflicts of interest because there was no evidence that they stood to gain financially from their work on the TPSAC. The agency had concluded that even "an outright ban on menthol cigarettes cannot be determined to result in an increased demand for tobacco cessation products." Leon responded by noting that "this conclusion defies common sense. A ban or restriction on menthol cigarettes would have a 'direct and predictable effect' on the Challenged Members' financial interests because it would likely increase the sales of such smoking-cessation drugs by *some* amount, which would in turn lead the manufacturers of such drugs to demand further consulting services from the challenged members. . .Put simply, if a Challenged Member stands to profit from the sale of products that help people quit smoking, then he faces a conflict in his duty to render impartial advice regarding the regulation of menthol cigarettes, which comprise a substantial share of the cigarette marketplace." Leon pointed out that the fact that all three were involved as expert witnesses in multiple cases against the tobacco industry also posed a conflict of interest. He noted that "of course, the ethics laws cannot be applied so broadly as to disqualify from membership in an advisory committee every scientist who has *ever* testified as an expert witness. But where, as here, the two Challenged Members repeatedly testified against tobacco manufacturers, to similar opinions (which concerned menthol), and were committed to do so in the future, there is a conflict of interest because they have a financial incentive in protecting their opinions." Leon turned Congress' prohibition of participants from the tobacco industry into a broad statement of concern about conflicts of interest from any perspective. He observed that "if Congress deemed that past remunerations from tobacco companies constituted a conflict of interest, it stands to reason that past remuneration from direct *competitors* of those companies, such as manufacturers of smoking-cessation drugs, would also constitute a conflict of interest." Saying the Menthol Report was "at a minimum, suspect, and, at worst, untrustworthy," Leon concluded that "the only way the agency can correct its error of law in evaluating the credentials of future members of the TPSAC is for this Court to remand the case to the

agency for the appointment of a newly-constituted, interest free, TPSAC panel of authorities consistent with the applicable ethics laws." (*Lorillard, Inc., et al. v. United States Food and Drug Administration*, Civil Action No. 11-440 (RJL), U.S. District Court for the District of Columbia, July 21)

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