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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: Open government advocates are still hopeful that FOIA amendments can be passed by Congress before the end of the legislative session. The House already passed a bill (H.R. 1211) at the end of February. A Senate bill (S. 2520), sponsored by Sen. Patrick Leahy (D-VT) and Sen. John Cornyn (R-TX), has been introduced and while the bills are not identical, they are reasonably compatible and probably could be reconciled by both Houses. Senate and House staffs are currently trying to iron out differences and the hope is that a bill that can pass both Houses can make it out of Congress before it adjourns for the upcoming election season. At least one former Obama administration official, former head of OIRA Cass Sunstein, has gone on record as opposing any changes to limit the use of the deliberative process privilege.

Court Finds Privacy Glomar Goes Too Far

Judge James Boasberg has put another chink in the government's policy of invoking a *Glomar* response neither confirming nor denying the existence of records based on the privacy exemptions. Ruling that the Justice Department's Office of Professional Responsibility must disclose the existence of records pertaining to an acknowledged investigation of Assistant U.S. Attorney Clay Wheeler for his conduct during the prosecution and conviction of Gregory Bartko for fraud and other securities violations, Boasberg found Wheeler no longer had a reasonable expectation that such information would remain confidential.

Bartko made a request to the FBI for records concerning himself and his co-conspirators. His request to OPR asked for a copy of the agency's operating regulations and all records pertaining to former AUSA Wheeler. The FBI provided more than 800 pages pertaining to Bartko and a deceased co-conspirator, but refused to search for records pertaining to the other three co-conspirators because they had not waived their privacy interests. OPR disclosed its operating regulations and released five documents pertaining to Bartko's complaint against Wheeler. As to any records concerning Wheeler, the agency issued a *Glomar* response.

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Boasberg explained that *Glomar* responses could be appropriate under the privacy exemptions but they had to be tied to an actual privacy interest in non-disclosure. In this case, he pointed out that "OPR has identified one potential privacy interest at issue here: Wheeler's interest in not having it known that he has been the subject of an OPR investigation. . .As the potential subject of an investigation, then, Wheeler would ordinarily have a privacy interest in protecting information about that investigation." Bartko, however, argued that the mere existence of an investigation of Wheeler would not invade his privacy because the government had acknowledged that it was investigating Bartko's complaint against Wheeler. OPR asserted that the investigation had not been officially acknowledged.

Boasberg agreed that "an individual's privacy interest in not extinguished merely because the media reports or the public speculates that the individual may have been the subject of an investigation." He indicated that "public acknowledgement is enough to vitiate the relevant privacy interest—and to require that the agency at the very least confirm the existence of an investigation—only if the contested information was made public through an 'official and documented disclosure.'" Boasberg found that an investigation of Wheeler had been acknowledged publicly both by Thomas Walker, the U.S. Attorney for the Eastern District of North Carolina, and the Fourth Circuit. Boasberg pointed out that "although it was Walker, a U.S. attorney—rather than OPR, the defendant in this case—who confirmed that Wheeler was under investigation, the prosecutor's decision to acknowledge the investigation is 'enough to trigger the public domain exception,' as both Walker and OPR work for DOJ."

OPR also argued that Walker's acknowledgement was contained in a news article rather than an official press release. But Boasberg observed that "the forum in which an official acknowledges the existence of an investigation, however, is not dispositive. While the Court may not infer official disclosure merely from 'widespread public discussion' of a matter, a statement to the media *made by a person authorized to speak for the agency* certainly suffices." He pointed out that "Bartko, therefore, has carried his burden of showing that the Government has acknowledged an investigation into Wheeler's conduct, and the Government may not submit a *Glomar* response predicated on Wheeler's interest in keeping such an investigation quiet. Although Wheeler may, of course, have a privacy interest in protecting the *content* of documents related to the investigation, as the subject of a confirmed investigation he does not have a privacy interest in concealing this status or the *existence* of related documents."

Addressing the FBI's policy of refusing to search for records on individuals without a privacy waiver, Boasberg noted that "Bartko suggests that such a categorical denial is impermissible. He is correct." Boasberg explained that "to uphold the FBI's categorical denial—indeed, its refusal to conduct a search at all—the Court must find that the co-conspirators' privacy interests in the documents 'characteristically' outweigh the public's interest in those documents." He added that "the nature of the information that would arise from such a search, however, does not admit of such categorical conclusions. Perhaps, for example, the FBI might unearth documents that merely summarize the individuals' trial testimony or synthesize other innocuous and public facts about them. Such records would be unlikely to implicate a privacy interest that could outweigh the public's interest in disclosure. But because the Bureau did not conduct a search at all, neither it nor the Court has anything on which to come to a contrary conclusion. Under the circumstances, the Court will order that the FBI search for records concerning the three co-conspirators and either release them or provide an appropriate *Vaughn* index."

Boasberg found that the FBI's claims under Exemption 7(A) (interference with ongoing investigation or proceeding), Exemption 7(D) (confidential sources) and Exemption 7(E) (investigative methods and techniques) were insufficiently supported. On the Exemption 7(E) claim, he noted that while the agency explained that it analyzed data taken from digital media seized pursuant to search warrants or subpoenas, "conspicuously absent from this dive into modern investigative technology, however, is any mention of how

disclosure of the bare *data* contained in [the] reports might reveal any technique, procedure, or technological methods the FBI uses."

As proof that the government will apparently argue anything at least once, Boasberg called the FBI's argument that CDs and thumb drives were not agency records but instead were physical items "transparently implausible." He noted that "the Bureau's rationale seems to be that the electronic media in question are not 'records' for FOIA purposes because they are physical items that were presented to prosecutors as evidence. Why this reasoning would exclude CDs that hold documents in digital form but not, say, the printer paper that will eventually hold this Opinion is beyond the Court." He observed that "in any case, no sophistry is necessary here, as Congress, with commendable technological foresight, amended FOIA in 1996 to cover records 'maintained by an agency in any format, including an electronic format.' With that amendment in mind, the Court will order that the FBI either produce the records contained on the CDs and flash drive in question or justify their withholding with reference to one or more FOIA exemptions." (*Gregory Bartko v. United States Department of Justice*, Civil Action No. 13-1135 (JEB), U.S. District Court for the District of Columbia, Aug. 5)

Court Rules Coal Lease Pricing Protected by Exemption 5

After a thorough review of the case law and legislative history, a federal court in New York has ruled that the way in which the Bureau of Land Management arrives at its estimates of fair market value for coal leases in the Powder River Basin in Wyoming is protected by Exemption 5 (privileges), but because there is no real competition for the coal leases, information provided by the coal mine operators is not protected by Exemption 4 (confidential business information). And if that is not enough, the court also ruled that Exemption 9 (data on wells) does not cover drill holes.

The Natural Resources Defense Council requested the BLM appraisals for coal leases in the Powder River Basin, which because of its lower production costs and lower sulfur content makes up about 40 percent of the coal mined in the United States. The land is owned by the federal government and under the Mineral Leasing Act the government is required to lease the land at fair market value. In response to the NRDC's request, BLM redacted most of the appraisal reports, claiming they were protected by both Exemption 4 and Exemption 5, and that drill holes were also protected under Exemption 9.

The NRDC argued that the information was not protected by Exemption 4 because there was no real competition for coal leases. Indeed, of 28 coal lease sales conducted during the past 20 years, BLM had received only one bid for 23 sales and two bids for the other five sales. Because of the huge investment in infrastructure and heavy equipment to operate such mines, new leases were typically awarded to companies already operating adjacent or nearby mines. Mine operators actually nominated tracts for potential leases based on both coal content and proximity to an existing mine. However, since there was no actual marketplace competition, BLM argued that its determination of fair market value under the Mineral Leasing Act was the crucial factor in deciding the price and terms for a lease.

Because the Mineral Leasing Act allowed the agency to disclose exploration data after the award of a lease, the NRDC argued the records were not protected by Exemption 4. But Judge Paul Engelmayer disagreed. He noted that "the Mineral Leasing Act and its implementing regulations do not require the Government to release exploration data." He added further that "the Government has submitted a sworn declaration stating, as a factual matter, that none of the redacted information was based on drilling conducted by a mining company under an exploration license." The NRDC also questioned whether the information had

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actually been "obtained from a person" as required under Exemption 4. While acknowledging that the agency's initial *Vaughn* index was sparse, Engelmayer found that a subsequent affidavit from the Minerals Appraiser for BLM's Wyoming office clarified the matter. Engelmayer observed that "BLM invoked Exemption 4 to withhold mining company data underlying its analysis, but it did not invoke Exemption 4 to withhold BLM's analysis itself. For that, BLM invoked Exemption 5."

But Engelmayer was not persuaded that the agency had shown the existence of any competitive harm from disclosure. He pointed out that "this lack of competition, is, in fact, the fulcrum of the Government's invocation of Exemption 5, in which it seeks to withhold its methodology for determining fair market value, on the ground that the Government's internal calculation of fair market value, rather than a competing bid, is in fact the benchmark that a bidding mining company must exceed." Calling affidavits from mining companies on the issue of competitive harm "speculative," Engelmayer observed that "the Government does not anywhere explain concretely how access to the mining companies' bidding information would be useful to a competitor in setting prices or to customers in negotiating. The information concerning operating costs or coal pricing largely comes from mines that were leased years ago. It is unclear why competitors or customers would rely on such old data, which at most provides thin circumstantial evidence as to how, today and in the near future, the company at issue might seek or be willing to price its coal." Engelmayer also rejected the agency's claim that disclosure would impair its ability to get similar information in the future. He noted that "BLM's notion that the mining companies, like the proverbial little boy who takes his ball and goes home when he does not get his way, will cease to bid from Powder River Basin leases, is unsubstantiated and unlikely."

Although Engelmayer found Exemption 4 did not protect the information to the extent sought by the agency, he agreed that the confidential commercial information privilege contained in Federal Rule of Civil Procedure 26(c)(7) (now codified at 26(c)(1)(G)) applied and that the information was protected under Exemption 5. The NRDC argued that while the Supreme Court in *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979), had ruled that Rule 26(c)(7) qualified under Exemption 5, it had also ruled that the privilege was temporal in nature and ended when the need for confidentiality expired. Thus, the NRDC contended that under *Merrill* the privilege for the awarded appraisal data was no longer applicable.

Engelmayer, however, noted that the NRDC was over-interpreting the *Merrill* decision by insisting that the privilege had an expiration date. Instead, he pointed out that to the extent BLM could show that the confidentiality of its appraisal data was still necessary the agency could still invoke the privilege. Engelmayer explained that the Supreme Court's reference to the temporal nature of the privilege "was instead keyed to the familiar, paradigmatic, multi-bidder competitive bidding context that the Supreme Court was addressing, in which the post-bidding release of historical bid information should pose no threat to the Government's interests." Instead, he explained that in awarding coal leases "more that 80% of the time there is only one bidder, the mining company with adjacent land, for whom economies of scale and convenience give it a virtually prohibitive inside track on the nearby lease. In that situation, the Government's private assessment of fair market value, informed by its own metrics, work-product, experience, and data, is the only relevant competition. In this context, the Government's rationale for protecting this information would *not* necessarily expire as soon as the contract is awarded. Far from it." He observed that "FOIA does not require BLM to release its pricing model or its fair market value estimates derived from the same model where doing so would enable the coal company neighboring the next tract up for lease to peg its bid strategically to the government's floor. FOIA does not require that the Government be thus deprived of its ability to secure a good deal fro the taxpayer."

Because of the scarcity of any Exemption 9 cases, any case that interprets Exemption 9 is unique for no other reason. Indicating that Exemption 9 protected data about wells, Engelmayer noted that "wells are not

used to extract solid matter such as coal; they are used to extract liquids or gases." He pointed out that "simply put, there is no basis on which to conclude that the word 'wells' can also refer to drilling holes used to extract coal. Significantly, the Government concedes that Exemption 9 was enacted to protect oil companies, not coal companies." (*Natural Resources Defense Council v. United States Department of Interior*, Civil Action No. 13-942 (PAE), U.S. District Court for the Southern District of New York, Aug. 6)

Views from the States…

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

California

A court of appeals has ruled that the Los Angeles School District need not provide identifying information for the Academic Growth Over Time scores of individual teachers because the public interest in non-disclosure outweighs the public interest in disclosure. Using data originally disclosed by the school district for prior years, the *Los Angeles Times* was able to provide a comprehensive statistical analysis on the success of using the academic growth scores, which included identifying the AGT score for individual teachers, which supposedly provided an indicator of the success or failure of individual teachers in improving the academic performance of their students. The *Times* requested the data for more recent years and the school district declined to provide identifying teacher information or information about teacher location tied to AGT scores, claiming the information was protected by both the privacy exemption and the "catch-all" exemption that balanced the public interest in non-disclosure against the public interest in disclosure. While the school superintendent provided an affidavit asserting that disclosure of teacher names would cause parents to try to get their children in classes with high-scoring teachers and would create invidious comparisons between teachers, impacting teacher morale, the trial court found the teacher scores were not protected by the privacy exemption and ordered the school district to disclose them. The appeals court, however, analyzed the "catch-all" exemption instead, finding that the public interest in non-disclosure clearly outweighed the public interest in disclosure. Finding that the trial court had failed to consider the superintendent's affidavit because it was too speculative, the appeals court noted that the affidavit "clearly demonstrates a legitimate concern for what may occur if the names of teachers are released along with their AGT scores." Applying "common sense and human experience," the appeals court observed that "one would certainly expect that if told the AGT scores of each teacher in their child's grade, many parents would attempt to have their child assigned to the teacher with the higher score and/or away from the teacher with the lower score." The *Times* argued that the names would allow parents to better understand their child's performance. But pointing out that "it does not necessarily follow that the interest is a *public* one," the appeals court indicated that "the interest in having one's child get the best teacher is, at bottom, a private one." The court explained that "the Times has failed to demonstrate that if a *public* interest in the teachers' names tied to their AGT score exists, it is anything more than minimal or hypothetical." Balancing the school district's concerns against what it considered the *Times*' speculative public interest in disclosure, the appeals court found the interests favoring non-disclosure outweighed those favoring disclosure. Noting that the disclosability of location codes showing where teachers taught had not been addressed at the trial court level, the appeals court remanded that issue back to the trial court, observing that there could be a public interest in disclosing that information. (*Los Angeles Unified School District v. Superior Court of Los Angeles County; Los Angeles Times Communications LLC, Real Party in Interest*, No. B251693, California Court of Appeal, Second District, Division 8, July 23)

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Idaho

The court of appeals has ruled that the trial court erred in concluding that records of an ongoing investigation were categorically exempt and that as a result the plaintiffs were not the prevailing party and were not eligible for attorney's fees. Gretchen Hymas and Travis Forbush, the parents of McQuen Forbush who died of carbon monoxide poisoning while staying at a third party's apartment, requested records from the Meridian Police Department concerning the incident. The police denied the request, claiming the records were exempt under the ongoing law enforcement investigation exemption. The requesters filed suit and the police provided the information identified by the parents. Two months later, the police concluded the investigation by declaring McQuen's death an accident, and disclosed a redacted version of the investigatory report. The parties agreed the disclosure mooted their request, but the plaintiffs argued they were still entitled to attorney's fees. The trial court found that since the records were categorically exempt because they were investigatory records the parents were not a prevailing party and were not entitled to fees. The appeals court noted that "an agency must show proof beyond the mere threshold fact that the investigation is active and ongoing before the exemption for investigatory records applies." The court observed that "a public agency has a clear duty to examine the documents subject to a public records request and separate the exempt and nonexempt material and make the nonexempt material available for examination. . .Law enforcement agencies must still show a reasonable probability that disclosure of each requested document in investigatory records may result in one of the enumerated harms and they must disclose all documents in investigatory records for which this showing cannot be made." The appeals court sent the case back to the trial court to review the appropriateness of the agency's exemption claims and determine if the parents were entitled to attorney's fees. (*Gretchen Hymas, Breanna Halowell and Travis Forbush v. Meridian Police Department*, No. 41156, Idaho Court of Appeals, July 25)

The court of appeals has ruled that the City of Sun Valley properly responded to James Donoval's request for records concerning the use of credit cards by city officials and that because Donoval's appeal of the trial court's adverse ruling was not frivolous, the city is not entitled to attorney's fees. The city responded to Donoval's request by providing responsive records. In a further response, it told Donoval that it did not have the original credit card records because they had been sent to the Idaho Attorney General and the city only had copies. Donoval subsequently viewed the originals when they were returned to Sun Valley. He then filed suit, claiming that various "yellow sheets" were missing or were forgeries. The trial court dismissed his suit after finding the city had properly responded to his request, which was the only remedy to which he was entitled. Donoval then appealed. The appeals court pointed out that under the public records act a public body was not required to provide supporting evidence unless the court found initially that it had improperly withheld records. The court noted that "because Donoval's action ended upon the first inquiry when the district court determined that it did not appear that records were being improperly withheld—a condition precedent to the show-cause process—[the show-cause section] did not become applicable to his request." The court observed that "the district court properly determined, based on the pleadings, exhibits, and oral argument at hearing, that Donoval had not shown that it appeared that certain public records were being withheld." Rejecting Sun Valley's request for attorney's fees because Donoval's action was frivolous, the court noted that "Donoval provided evidence that these missing records may have at one time existed and that Sun Valley may have had a duty to maintain the records. Accordingly, there was a dispute as to whether Sun Valley was denying Donoval's request by withholding records or whether the records were no longer in the possession of Sun Valley." (*James R. Donoval v. City of Sun Valley*, No. 40853, Idaho Court of Appeals, July 22)

Kentucky

The Attorney General has ruled that the University of Kentucky properly found that there was a reasonable likelihood of identifying patients if it disclosed mortality rates for pediatric heart surgery where the number of

patients involved was less than five. Citing the privacy regulations from HIPAA, the University pointed out National Center for Health Statistics guidance supported the assumption of a reasonable likelihood of identification where the number of patients was less than five. However, the AG found that the University had failed to provide CNN sufficient justification for claiming that some data was nonexistent. The AG noted that "while it cannot produce a nonexistent record, and is not legally obligated to create one, UK is obligated to provide CNN with sufficient information about the nature of the record or records to which access was denied based on it or their nonexistence to permit CNN 'to dispute the claim and the court to assess it.'' (Order 14-ORD-158, Office of the Attorney General, Commonwealth of Kentucky, Aug. 6)

Minnesota

The Supreme Court has ruled that the Department of Administration erred when it dismissed Todd Schwanke's appeal under the Data Practices Act of an adverse performance evaluation from the Steele County Sheriff's Office because Schwanke, according to the Department, was challenging subjective judgments and had improperly raised new issues on appeal. Finding the Department's position too narrow, the Court pointed out that "the Department's position treats all subjective opinions and judgments the same way, even if those opinions and judgment rest on statements of fact that are. . .'capable of being proved false.'" Noting that the Sheriff's subjective evaluation rested on various factual assumptions, the Court observed that some of Schwanke's challenges to his performance evaluation contest the accuracy or completeness of falsifiable statements. Those challenges, which contest the 'accuracy or completeness of public or private data' are within the purview of the [Data Practices Act]." The Court added that "because Schwanke's appeal contests statements that *could* be proven false, we disagree with the Department's position that Schwanke's appeal categorically falls outside the scope of [the Data Practices Act]." The court also found the Department did not have the authority to dismiss an appeal unless it had been resolved either formally or informally. (*Todd Schwanke v. Minnesota Department of Administration*, No. A12-2062, Minnesota Supreme Court, Aug. 6)

Texas

A court of appeals has ruled that once the City of El Paso complied with an Attorney General's opinion requiring it to disclose emails discussing public business even if they were maintained on individual city council members' private computers the trial court's jurisdiction to hear the case ended and sovereign immunity prevented Stephanie Allala, who had intervened in the suit against the Attorney General brought by the City, from continuing to assert that the City had not completely complied with her request. Responding to Allala's request for emails, including those on private computers, the City filed a suit for declaratory judgment against the Attorney General. However, during the pendency of the litigation, amendments to the Public Information Act codifying the AG's position became effective. As a result, the City decided to drop its suit against the Attorney General and comply with Allala's request. It sent official letters to council members to provide any responsive emails on their private computers. Unsatisfied with the City's efforts, Allala asked the trial court to retain jurisdiction and allow her to conduct limited discovery. The City then challenged the court's continued jurisdiction, arguing that it had fully complied with the AG's order. The trial court denied the City's motion and the City appealed. The appeals court noted that "here, the City's jurisdictional evidence conclusively established that it was willing to supply the requested information and, to the extent that it located it or received it from the individuals named in the request, it actually has done so." Allala argued that at least one former council member had refused to provide his private emails. But the court pointed out that "the fact that a former city councilman has public information on his private email account that he has not provided to the City, despite multiple official requests from the City that he do, does not reflect that the City is unwilling to disclose that information as it is required to do under the [Public Information Act]." (*City of El Paso v. Greg Abbott*, No. 03-13-00820-CV, Texas Court of Appeals, Austin, Aug. 1)

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Washington

A court of appeals has ruled that the controversy exemption in the Public Records Act—protecting records related to a controversy involving an agency when the records would not be routinely discoverable—does not apply when the trial court determines records are unavailable because the discovery request is too broad. The case involved an employment discrimination action brought by Margarita Mendoza de Sugiyama against the Department of Transportation. In that litigation, she made a discovery request covering emails of 12 individuals over a five-year period. After DOT told the court that the request potentially covered 174,000 emails, the court agreed the agency did not have to respond to the request because it was unduly burdensome. Mendoza de Sugiyama then requested the same information under the PRA. DOT filed a separate suit asking the judge to find that the other court's protective order denying discovery acted as a prohibition against disclosure to Mendoza de Sugiyama under the PRA. The trial court, however, found the public interest in disclosure embodied in the PRA trumped the ban on discovery. The appeals court agreed. Noting that the controversy exemption protected records privileged from discovery, it pointed out that "this case does not involve any privilege. Instead, the issue is whether a protective order resulting from an unduly burdensome discovery request in a separate employment action between the same parties makes the same requested records unavailable within the purview of [the PRA]." The court observed that "we construe the controversy exemption of the PRA to exempt documents and records like those under the nearly absolute protection of the work product doctrine and those privileged by the existence of an attorney-client relationship." The court added that "here, the [trial court] did not determine that the e-mails Mendoza de Sugiyama sought were undiscoverable and thus unavailable under the civil rules, only that her particular request created undue burden." (*Washington State Department of Transportation v. Margarita Mendoza de Sugiyama*, No. 43859-3-II, Washington Court of Appeals, Division 2, July 29)

The Federal Courts…

A federal court in California has ruled that the Department of Justice properly withheld a handful of Foreign Intelligence Surveillance Court opinions and orders dealing with both its interpretation of Section 215 of the Patriot Act and the identities of phone carriers participating in the Call Records Collection Program under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. But the court found the agency had failed to show that an Office of Legal Counsel memo to the Commerce Department pertaining to the interaction between disclosure in the Patriot Act and prohibitions in the Census Act was protected under **Exemption 5 (deliberative process privilege)**. Dealing first with the FISC orders, Judge Yvonne Gonzalez Rogers noted that "disclosure of the documents would reveal intelligence activities or methods described in the FISC orders [and] could allow targets of national security investigations to divine what information was collected when, as well as gaps in surveillance, thus providing a roadmap for evading surveillance." EFF argued that because the identities of the phone carriers had been revealed by two different government officials any exemption had been waived. But Rogers found that Raj De, General Counsel of the NSA, had not waived protection by referring to three different carriers during a public panel discussion. Rogers pointed out that "the public availability of 'similar' or 'overlapping' information is not sufficient to negate the government's classification. . ." She observed that "the inherent risks to national security and government investigations of identifying the specific telecommunications carriers is not mitigated by the government's declassification of general information about the call record collection program." But she found that any privilege for the OLC Census Memorandum had been waived by DOJ's adoption of the memo before the FISA Court as its legal interpretation. She pointed out that "DOJ offered the Census Memorandum as a statement of the law to bolster its legal arguments concerning matters unrelated to the subject of the Census

Memorandum itself. Thus, DOJ cited the Census Memorandum in the context of carrying out its duties, and in connection with matters completely unrelated to the OLC's provision of advice to the Department of Commerce." She rejected the agency's claim that the recent D.C. Circuit decision, *EFF v. Dept of Justice*, 739 F.3d 1 (D.C. Cir. 2014), holding that an OLC opinion was not the working law of the FBI because OLC was not authorized to speak for the FBI, was not applicable. She observed that "regardless of whether OLC attorneys have policymaking authority within the Department of Commerce (the agency to whom the advice was given) or DOJ (the agency that used the advice), it was the DOJ that cited the documents as a statement of applicable law and policy in an unrelated proceeding." (*Electronic Frontier Foundation v. Department of Justice*, Civil Action No. 11-05221-YGR, U.S. District Court for the Northern District of California, Aug. 11)

Judge Gladys Kessler has awarded CREW nearly $75,000 in **attorney's fees** for its suit against the Justice Department for records pertaining to its decision not to prosecute Rep. Don Young for alleged bribery. In response to CREW's request for records pertaining to the Young investigation, DOJ refused to either confirm or deny the existence of records. Kessler ruled that because Young had already made public the existence of the investigation and because there was a significant public interest in the issue, DOJ was required to process the records and then make exemption claims. DOJ did so and released a number of records to CREW. CREW then requested attorney's fees. Kessler found CREW's dissemination of the records was in the public interest, noting that "the disclosures DOJ made, and the media interest which ensued, were directly traceable to the litigation Plaintiff brought in this case." Since DOJ did not even question whether CREW had a commercial or personal interest in the records, Kessler moved on to the reasonableness of DOJ's withholding. DOJ argued that such a *Glomar* response was supported by case law, but Kessler pointed out that "despite the fact that there was relevant case law regarding the importance of protecting the privacy rights of individuals, DOJ knew at the time of Plaintiff's request that the Congressman had already given up that privacy right by discussing the subject on the floor of the House of Representatives and issuing his own press release that he was not going to be prosecuted. Based on the specific facts of this case, the Court concludes that the decisions made by the Government to withhold the requested documents were not reasonable." DOJ challenged CREW's use of the Legal Services Index component of the Consumer Price Index as a measure of hourly rates rather than depending on the lower U.S. Attorney's Office matrix. But Kessler noted that "this Court has concluded over a period of at least 14 years that the methodology which is based on the Legal Services Index of the [Consumer Price Index] is far more accurate and pinpointed than the USAO methodology. . .The Court continues to believe that the LSI Methodology is a more accurate and reliable indicator of the prevailing market rates in this area, and, therefore, applies that methodology to the present case." Referring to many of the government's arguments aimed at reducing the fee award as "nitpicking," Kessler granted almost everything CREW had requested, although she agreed to reduce a portion of the award by 10 percent for overbilling. She rejected the government's contention that CREW's award should be reduced 20 percent because the agency's withholding decision was reasonable. Instead, she observed that "given the fact that the Court has already ruled that the Government's withholding decision in the context of this particular factual situation was not reasonable, no across-the-board reduction of 20 percent in Plaintiff's fee request is justified." (*Citizens for Responsibility and Ethics in Washington v. Department of Justice*, No. 11-754 (GK), U.S. District Court for the District of Columbia, Aug. 4)

A federal court in Washington has ruled that the EPA properly responded to four requests from the Community Association for Restoration of the Environment for records pertaining to settlement agreements with several dairy farms in the Yakima Valley concerning the impact of nitrates on the water supply. Because several of CARE's requests were sent by email late on a Friday, the parties disputed the date on which the requests were received since the EPA did not consider them received until the following Monday. The EPA

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took extensions for all CARE's requests and in response to one request concerning the agency's attempt to settle with one dairy farmer, it invoked **Exemption 7(A) (interference with ongoing investigation or proceeding)** until the farmer told the EPA he had sold all his cows. The dairy farms had claimed much of their information was confidential and protected under **Exemption 4 (confidential business information)**. After completing its confidentiality determination the agency disclosed some of those records with heavy redactions. Because some of the records were involved in a reverse-FOIA suit in Minnesota, the agency withheld those as well. Finally, it withheld a large number of records responsive to one request under **Exemption 5 (deliberative process privilege)**. But the court's opinion focused only on the procedural issues, particularly whether EPA had a policy of responding to requests after the statutory time limits. The court first found that CARE had standing to pursue the pattern and practice claim. The court noted that "CARE's interest in the timely production of the documents is sufficient to meet the 'injury-in-fact' requirement for standing." Agreeing with the agency on the date on which the email requests were received, the court observed that "CARE can hardly expect a request received by the [online FOIA request] system 10 minutes from the end of the business day Pacific Time, and after close of business Eastern Time, to be received and logged in by the appropriate office the same day. Calculating receipt by the next business day is standard in automated systems." The court found the EPA, except in a single instance, had properly invoked various extensions and had either responded on time or had provided a satisfactory explanation of its decision. The court pointed out that "common sense dictates that a single violation cannot constitute a 'pattern' or a 'practice.'" The court also found CARE was not eligible for **attorney's fees**. CARE argued the agency had dropped its 7(A) claim as a result of the litigation but the agency contended the change was due to a change in circumstances. The court agreed with the agency, noting that "the information was released after the Haak Dairy told the EPA it sold its cows, the very reason the EPA cited for having released the information." (*Community Association for Restoration of the Environment v. United States Environmental Protection Agency*, Civil Action No. 13-3067-TOR, U.S. District Court the Eastern District of Washington, Aug. 6)

A federal court in Alabama has decided to conduct an ***in camera*** **review** of documents withheld by the FBI even though the judge admitted that he was inclined to accept the agency's exemption claims. Mark Landers, convicted of murdering his father in 1997, requested his file from the FBI. After considerable back and forth, the agency located a single two-page document, which it withheld under **Exemption 7(E) (investigative methods and techniques)**. Landers' attorney made a subsequent request for the same documents, but this time the FBI determined the two-page document originally withheld from Landers was a summary of other documents. This led to the discovery of 74 pages, of which the agency withheld 35 pages. Although the court found the agency's withholding of personal information under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** was likely appropriate, he decided to review the withheld records *in camera* before making a final decision. The court observed that it "is inclined to conclude that defendant has satisfied its burden of proving it properly withheld and/or redacted portions of the requested information pursuant to the cited exemptions. Even so, out of an abundance of caution, *and* in keeping with the 'strong public policy in favor of public access to information in the possession of federal agencies,' the court will conduct an *in camera* review of the contested documents to determine whether they fall under any of the applicable exemptions." (*Mark S. Landers v. United States Department of Justice*, Civil Action No. 12-S-4045-NE, U.S. District Court for the Northern District of Alabama, July 24)

Judge Reggie Walton has dismissed a request by True the Vote, a Texas non-profit allegedly associated with the Tea Party, for the appointment of a third-party forensic expert to investigate whether IRS emails that went missing after a House Committee began to investigate whether the agency had improperly impeded tax-exempt applications because of political reasons can be recovered. Walton noted that the

Treasury Inspector General for Tax Administration was already investigating the lost emails. True the Vote argued that the agency had violated the **Federal Records Act**, but Walton pointed out that "there is no proof that 'records,' as that term is defined by the Act, have been destroyed. More importantly, under the Federal Records Act, there is '*only one remedy* for the improper removal, defacing, altercation, or destruction of a "record" from a government agency,'" which is for the head of the agency to ask the Attorney General to make a determination. Walton observed that "even if there has been a Federal Records Act violation, the current action before this Court is not the appropriate vehicle to determine whether such a violation occurred. Without the authority to make that determination in the first instance, it would be inappropriate for the Court to predicate a finding of spoliation on a violation of the Federal Records Act." (*True the Vote, Inc. v. Internal Revenue Service*, Civil Action No. 13-734 (RBW), U.S. District Court for the District of Columbia, Aug. 7)

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