Volume 40, Number 17
August 27, 2014

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Court Rejects DoD Certification for Continued Withholding 1

Views from the States 3

The Federal Courts 4

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.
Copyright by Access Reports, Inc
1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

No portion of this publication may be reproduced without permission.
ISSN 0364-7625.

Washington Focus: Sen. Dianne Feinstein (D-CA), chair of the Senate Intelligence Committee, has sent a letter to Attorney General Eric Holder asking that the Justice Department hold off on any release of documents pertaining to the Senate Intelligence Committee's report on the CIA Detention and Interrogation Program until parts of the report are declassified and released by the Committee. Responding to three pending cases involving the report, two from journalist Jason Leopold and one from the ACLU, Feinstein noted that "not only would it be inappropriate for the Department to release documents related to the Committee's Study prior to the Committee's own release, but the result of the ongoing negotiations will likely positively affect the redactions in the documents being sought through the FOIA process. . ." She added that "I have no objection to the release of these three documents, but given that the declassification process for the Executive Summary and Findings and Conclusions may still be ongoing on August 29, 2014, when the next filings are due in the FOIA litigation, I ask that you request an additional one-month delay from the United States District Court for the District of Columbia, where the FOIA litigation is pending."

Court Rejects DOD Certification For Continued Withholding

In a good illustration of how some FOIA cases never seem to end, Judge Alvin Hellerstein has ruled that a 2012 certification by former Defense Secretary Leon Panetta that photos showing apparent abuse of detainees in Iraq and Afghanistan by U.S. military personnel should remain protected under the terms of the 2009 Protected National Security Documents Act, an Exemption 3 statute passed by Congress to prohibit the disclosure of such documents as a result of the Second Circuit's decision in *ACLU v. Dept of Defense*, 543 F.3d 59 (2d Cir. 2008), rejecting the agency's claim that the photos were protected under Exemption 7(F) (harm to physical safety) because their disclosure could endanger U.S. personnel in the Middle East, is insufficient under the terms of the statute.

Hellerstein ruled in 2006 that neither Exemption 7(F) nor Exemption 6 (invasion of privacy) applied to the records. By the time the case was heard by the Second Circuit, the agency had abandoned its Exemption 6 claim and relied solely on Exemption 7(F). The Second Circuit rejected the agency's 7(F) claim as too broad and the government sought review by the Supreme Court. But after the Court accepted review, Congress stepped in to specifically exempt the photos, but required the Secretary of Defense to provide a certification every three years as to whether such photos should remain protected. President Barack Obama accepted the congressional solution and the Supreme Court dismissed the case as moot. Iraqi Prime Minister Nouri al-Maliki had asked President Obama not to release the photos and then Secretary of Defense Robert Gates certified in November 2009 based on recommendations from the military that disclosure of the photos would endanger U.S. citizens deployed outside the United States. Convinced by the circumstances at the time, Hellerstein accepted Gates' certification and ruled that the photos could continue to be withheld.

Gates' successor, Leon Panetta, certified in 2012 that the photos required continued protection. The ACLU challenged the sufficiency of Panetta's certification. The government argued that under the PNSDA all that was required to continue protecting the photos was the Secretary's certification and that the court should not conduct any further review. Hellerstein, however, found Panetta's certification inadequate, noting that "the 2012 Certification is practically identical to the certification given by Secretary Gates three years earlier. The certifications are expressed in conclusory fashion, and relate to all the photographs at issue—likely hundreds or thousands. The certifications track the language of the statute, without providing any specific explanation for why the Secretary certified the photographs, except to state that based on the recommendations of certain senior military officials, the Secretary determined that the photos met the criteria of the statute."

The government argued Hellerstein was bound by the law of the case doctrine, which provides that when a court has ruled on an issue previously it should continue to adhere to that decision in subsequent stages of the case. But Hellerstein noted that "given the passage of time, I have no basis for concluding either that the disclosure of photographs depicting abuse or mistreatment of prisoners would affect United States military operations at this time, or that it would not."

The government contended that "*de novo* review requires the Court merely to ascertain whether the Secretary of Defense issued a certification," while the ACLU argued that Hellerstein should conduct *de novo* review of whether the Secretary of Defense had properly concluded that disclosure would continue to endanger U.S. personnel. Finding that neither the statutory language nor its legislative history resolved how extensive judicial review should be, Hellerstein turned to judicial canons of interpretation, noting that similar statutes were presumed to have similar interpretations. Because FOIA provided for extensive *de novo* judicial review, Hellerstein concluded Congress intended the same interpretation for the PNSDA. Noting that "in light of the specific policies underlying FOIA and the general presumption of judicial review," Hellerstein pointed out that "there is no evidence that Congress intended to depart from those principles when it enacted the PNSDA."

The government argued that the Secretary of Defense's certification could cover the photos collectively while the ACLU claimed the certification had to consider the harm from disclosing each photo individually. Hellerstein agreed with the ACLU, noting that "the statute provides that the Secretary of Defense shall issue a certification 'for any photograph' if the 'disclosure of that photograph' would meet certain criteria. This plain language refers to the photographs individually—'*that* photograph'—and therefore requires that the Secretary of Defense consider each photograph individually, not collectively." Noting that "reading the PNSDA as requiring the individual review of photographs, rather than collective review, will further [the] goal of broad disclosure," Hellerstein explained that "during the course of this litigation, I have reviewed some of these photographs and I know that many of these photographs are relatively innocuous while others need more serious consideration. Even if some of the photographs could prompt a backlash that

would harm Americans, it may be the case that the innocuous documents could be disclosed without endangering the citizens, armed forces or employees of the United States. Considering the photographs individually, rather than collectively, may allow for more photographs to be released, furthering FOIA's 'policy of full disclosure.'"

Hellerstein indicated that "nothing in the statute prevents the Secretary of Defense from issuing one certification to cover more than one photograph. What is important is that the government, to invoke the PNSDA, must prove that the Secretary of Defense considered each photograph individually." Applying that standard, Hellerstein pointed out that Panetta's certification "suggests that the Secretary of Defense has reviewed the photographs as a 'collection,' not individually. Thus, standing alone, the 2012 Recertification is insufficient to meet the government's burden of showing that the photographs were individually considered by the Secretary of Defense. The condition provided by the PNSDA for withholding disclosure is that each individual photograph, if disclosed, alone or with others" would endanger U.S. citizens or personnel deployed outside the United States. Finding the 2012 certification insufficient, Hellerstein nonetheless concluded that "it would, however, be prudent to allow the government the opportunity to create a record in this Court justifying its invocation of the PNSDA." (*American Civil Liberties Union v. Department of Defense*, Civil Action No. 04-4151 (AKH), U.S. District Court for the Southern District of New York, Aug. 27)

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 nothing short of a constitutional amendment would be sufficient to permit the City of San Francisco from deciding in its Sunshine Ordinance that the attorney-client privilege will not be used under certain specified circumstances to exempt information requested from city agencies. The case involved a request from Allen Grossman under the California Public Records At and the San Francisco Sunshine Ordinance to the San Francisco Ethics Commission for records concerning development of some of its policies. The commission provided more than 120 documents, but withheld 24 written communications between the commission and the San Francisco City Attorney's Office under the attorney-client privilege. Grossman filed suit and the trial court ruled the attorney-client privilege did not apply to requests under the Sunshine Ordinance. The city then appealed and the appellate court reversed. The Sunshine Ordinance specifies privileges will not apply to "advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco Governmental Ethics Code, or this Ordinance." The appeals court noted that the City Charter "by establishing the office and responsibilities of the city attorney, establishes an attorney-client relationship between the city attorney on the one hand, and City and its officers and agencies (including the Ethics Commission) on the other. . .[S]tate law establishes that the privilege's protection of the confidentially of written attorney-client communications is fundamental to the attorney-client relationship, in the public sector as well as in the private sector, and is vital to the effective administration of justice. We therefore conclude the charter incorporates the state law attorney-client privilege for written communications between the city attorney and his or her clients." Grossman argued the charter was in conflict with the ordinance. But the court pointed out that "when a city enacts an ordinance or takes other action, it cannot contravene its charter." The court added that "the charter unambiguously creates an attorney-client

relationship between the city attorney and the commission, and the state law attorney-client privilege is a fundamental aspect of that relationship." Grossman contended the ordinance waived confidentiality for such records. However, the court observed that "because the charter incorporates the privilege, an ordinance (whether enacted by City's board of supervisors or by the voters) cannot eliminate it, either by designating as not confidential a class of materials that otherwise would be protected by the privilege, or by waiving the privilege as to that category of documents; only a charter amendment can achieve that result." (*John St. Croix, Executive Director, San Francisco Ethics Commission v. Superior Court of the City and County of San Francisco; Allen Grossman, Real Party in Interest*, No. A140308, California Court of Appeal, First District, Division 1, July 28)

The Federal Courts…

Judge Christopher Cooper has ruled that the FBI failed to show that it had conducted an **adequate search** for records concerning government use of polygraphs for employment purposes and that the Bureau of Alcohol, Tobacco and Firearms improperly claimed **Exemption 2 (internal practices and procedures)** and **Exemption 5 (deliberative process privilege)** to withhold communications with OPM concerning the re-approval of its polygraph regulations. As a result of his ruling on Exemption 2 and Exemption 5, Cooper also questioned the validity of the agency's remaining **Exemption 7(E) (investigative methods and techniques)** claim. University of Virginia Ph.D. student Kathryn Sack made a series of requests to agencies focused on polygraph bias. While Cooper accepted the overall thrust of many of the FBI's searches, he found the agency had failed to show the extent to which it had searched for records concerning the Defense Academy for Credibility Assessment, a Defense Department component responsible for training of polygraph examiners and a location to which Sack was referred at least five times during the processing of her requests. Because of the apparent importance of DACA, Sack contended the agency must have more records concerning DACA. Cooper noted that the agency's affidavit "does not indicate whether the agency searched specifically for records regarding DACA. Nor does it reveal whether employees searched all hardcopy records or only a selection, or what terms they used to search electronic records." He added that "the government's description of its search indicates it may have misconstrued Sack's request. While she asked for records pertaining to DACA broadly, the FBI appears only to have searched for records pertaining to polygraph bias, which would have excluded records regarding DACA that were unrelated to bias research." ATF had withheld portions of ATF Order 2123.1on its pre-employment polygraph special agent screening program and a portion of an email to OPM citing a portion of the order and providing a clarifying interpretation of that provision. Sack acknowledged that the order pertained to personnel matters, but argued that it pertained to a non-trivial matter and was of genuine public interest. ATF contended that the records were not of any public interest. Cooper, however, pointed out that "how government agencies use polygraphs to screen employees is not a trivial matter like the 'use of parking facilities or regulations of lunch hours…,' which the Supreme Court has cited as examples of documents than can be withheld under Exemption 2. The public may well want to know, as Sack does, how agencies employ somewhat-controversial polygraph techniques to screen job applicants." ATF also claimed Exemption 5 applied to the email to OPM. Cooper disagreed, noting that "it is well established that an agency's regulations and settled regulatory interpretations are not covered by the deliberative process privilege. At face value, then, the redacted portion of the email cannot be withheld under Exemption 5 because it provides ATF's interpretation of its regulation, and nothing indicates that this interpretation was in any way novel." ATF contended that the email referred to future regulation. But Cooper indicated that "the D.C. Circuit held, however, that a document explaining *existing* policy 'cannot be considered deliberative' simply because it was created to help make decisions about future policies." Finding the agency's explanation of its 7(E) claims met "the highly deferential standard the Court must apply under 7(E)," in light of his ruling rejecting the agency's Exemption 2 and Exemption 5 claims for the email, Cooper

decided to send the Exemption 7(E) claim back to the agency to determine if the information could be segregated. (*Kathryn Sack v. Department of Justice*, Civil Action No. 12-01755 (CRC), U.S. District Court for the District of Columbia, Aug. 21)

Judge Richard Leon has ruled that a court order requiring the Justice Department and the House Committee on Oversight and Government Reform to keep their settlement discussions private acts as a prohibition against disclosure of such records to Judicial Watch. After the House Committee filed suit against Attorney General Eric Holder to enforce its subpoena for records concerning DOJ's Fast and Furious operation, the parties began settlement discussions under the direction of Judge Amy Berman Jackson. Jackson subsequently referred the settlement discussions to Senior Judge Barbara Rothstein. Judicial Watch then requested records pertaining to the settlement discussions and DOJ's Civil Division told Judicial Watch that responsive records were protected by **Exemption 5 (privileges)** and Jackson's court order. Judicial Watch sued and Leon sided with DOJ. He noted initially that D.C. Local Ruled 84.9 "prohibits the mediator, all counsel and parties and any other persons attending the mediation from disclosing any written or oral communications made in connection with or during any mediation session." Judicial Watch argued that the documents were created before Jackson ordered mediation, but Leon observed that "unfortunately for the plaintiff, its narrow interpretation of Local Rule 84.9 is inconsistent with the broad protections this District Court provides for confidential settlement discussions between parties." He pointed out that "to say the least, it strains credulity for plaintiff to argue that these communications were not 'made in connection' with mediation, given that the parties were strongly encouraged to engage in settlement discussions, and were reminded that court-ordered mediation might be ordered at any time. As is the case with formal court-ordered mediation, disclosure of sensitive—yet informal—settlement communications between parties would have a chilling effect on settlement negotiations and would be inconsistent with the core purpose of Local Rule 84.9—to promote resolution of civil disputes short of litigation." He indicated that "here, we have an *explicit* statement from Judge Jackson instructing the parties to keep the substance of their settlement discussions private, extrinsic evidence that the parties believed there was a court-imposed restriction prohibiting the disclosure of the substance of their settlement negotiations, and a court rule prohibiting the disclosure of 'any written or oral communications made in connection with or during any mediation session. Based on the above, there can be no doubt that there was a valid court-imposed restriction prohibiting disclosure of confidential settlement communications between the parties. The defendant had no discretion to produce the responsive documents, and therefore, the withholding of those documents was clearly proper." (*Judicial Watch, Inc. v. United States Department of Justice*, Civil Action No. 13-01344 (RJL), U.S. District Court for the District of Columbia, Aug. 21)

A federal magistrate judge in Oregon has ruled that the U.S. Army Corps of Engineers failed to show that many of the documents it claimed were protected under the deliberative process privilege, the attorney-client privilege, or the attorney work –product privilege actually qualified under **Exemption 5 (privileges)**. The case involved a request from Columbia Riverkeeper for records concerning the Corps' decision to prepare an Environmental Assessment rather than an Environmental Impact Statement for the Morrow Pacific Project, a proposal to load coal from railcars to river barges at Port Morrow, transport the coal down the Columbia River to the Pacific Ocean, and offload the coal to ocean-going vessels for shipment to Asian destinations. The Corps provided some records but withheld 88 documents as privileged. CRK challenged 55 documents totaling 341 pages. After reviewing the documents *in camera*, the magistrate judge noted that his review "does not suggest that any of the draft communications plans were predecisional in any meaningful sense, but rather establishes that these documents were prepared for the purpose of facilitating the dissemination and publicization of what, at the time of their drafting, appeared to be the overwhelmingly likely conclusion of the

Corps' Morrow Pacific Project EA." As to the agency's claim of attorney-client privilege, the magistrate judge observed that it found "no suggestion that any of the documents were communicated in connection with any express or clearly implied request for legal advice or with the provision thereof." Rejecting the agency's attorney work-product claim, the magistrate judge pointed out that "because the documents were not created in preparation for trial or litigation (notwithstanding the Corps' awareness that litigation may have been a likely prospect), and because they would have been created in substantially the same form absent any likelihood of litigation, the Corps may not properly withhold any of the draft memoranda from production on the basis of the work-product doctrine." CRK did not challenge the agency's claim that the deliberative process privilege applied to two draft documents, but contended the agency had failed to show that none of the information could be **segregated** and released. The magistrate judge agreed, noting that "each draft version of the memorandum contains numerous 'mundane' sentences not subject to the deliberative process privilege." (*Columbia Riverkeeper v. U.S. Army Corps of Engineers*, Civil Action No. 13-1494-PK, U.S. District Court for the District of Columbia, Aug. 14)

Judge Richard Leon has ruled that EOUSA properly withheld an ethics opinion concerning Assistant U.S. Attorney Harold Schimkat under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Martin Garvey and four others were indicted in the Southern District of Florida. Garvey and another co-defendant were tried together and were acquitted of all charges. However, a third co-defendant was tried separately and convicted. Garvey later learned that Schimkat, the prosecuting attorney, had a possible conflict of interest because his wife worked for the same law firm as the attorney representing a major government witness in both trials, the fourth co-defendant. In response to a motion to vacate the convicted co-defendant's sentence, Schimkat told the court that there was no conflict of interest and that as a precaution he had requested an ethics opinion from EOUSA that found no conflict of interest. Garvey then asked EOUSA for Schimkat's formal ethics opinion request and the agency's formal ethics opinion. The agency denied the request entirely, claiming the records were exempt under the privacy exemptions as well as **Exemption 5 (privileges)**. Garvey argued the agency had waived any reliance on the exemptions by relying on the report in its response to the co-defendant's motion for a new trial. Leon pointed out the government did not address the issue of waiver. But he noted that "although the defendant ultimately bears the burden of establishing the applicability of the exemptions it claims, the Department of Justice is not requesting summary judgment in its favor. Only Mr. Garvey is. In so moving for summary judgment, Mr. Garvey is asking this Court to find on the basis of the record before it, that the defendant improperly applied all three FOIA exemptions it relied upon when withholding the records at issue. Unfortunately for Mr. Garvey, the record does not support such a conclusion." Leon found the privacy exemptions protected both documents. He observed that "the individuals [mentioned in the documents] have more than a *de minimis* privacy interest in records requesting an ethics opinion and the ethics opinion itself when those records contain personal factual information." After finding the records were protected under Exemption 6, he found they were also covered by Exemption 7(C). He pointed out that "the records in question were compiled for law enforcement purposes. They were created by government prosecutors or other employees of prosecuting offices during the course of, and for the purpose of, a criminal proceeding." He added that "Mr. Garvey failed to establish the government improperly invoked the narrower Exemption 6, and he fares no better here. The third parties at issue have a privacy interest in their personal information remaining private. And again, Mr. Garvey has not specified the public interest justification for the disclosure he requests." Leon concluded that "Mr. Garvey has failed to establish that the defendant's reliance on the personal privacy exemptions—Exemptions 6 and 7(C)—were improper. Thus, he is not entitled to summary judgment on his request that the Department of Justice produce the potentially responsive documents. I need not, and do not, consider the question of whether Exemption 5 applies." (*Martin H. Garvey v. U.S. Department of Justice*, Civil Action No. 14-201 (RJL), U.S. District Court for the District of Columbia, Aug. 21)

Judge Barbara Rothstein has ruled that while the FBI conducted an **adequate search** for records concerning Gregory Scarpa, Jr, a high-ranking Mafia member who served as an FBI informant, it still has not yet shown that certain records withheld under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** qualify for protection. Rejecting Angela Clemente's renewed arguments concerning the adequacy of the agency's search, Rothstein pointed out that "Plaintiff's arguments regarding the adequacy of the FBI's search have been addressed on three separate occasions—Judge Friedman addressed the arguments twice, this district court once." She added that "Plaintiff raises the same arguments that this Court has thrice addressed and rejected; the Court declines to address those arguments yet again." Friedman had previously questioned whether the FBI had properly assessed whether the privacy expectations of some individuals had been diminished by their deaths. Clemente argued particularly that the fact that the name of former FBI Assistant Director John Mohr did not show up in the records cast doubt on all the agency's withholdings. But Rothstein noted the agency had finally provided supplemental declarations explaining that the names of neither Mohr nor Cartha DeLoach were redacted from the records. Rothstein indicated that "unless this Court disregards the FBI's sworn testimony, something this Court is not prepared to do, it must assume that Assistant Director Mohr's name is not included in the records. Accordingly, the Court finds that this particular criticism of the FBI's efforts to ascertain the life status of the individuals identified in the records is unfounded." Focusing on a handful of documents, Rothstein found that some of the agency's claims were still unsupported. As to one FBI employee's identity, she noted that "given the facts of this particular FOIA request—namely that Plaintiff implicates FBI agents in wrongdoing and that the document in question dates back to 1965—this Court finds that the public's interest in disclosure outweighs the FBI agent's privacy interest." Addressing Clemente's claim that redactions were too extensive in another document, Rothstein observed that "the following redacted section [relating a story] takes up nearly two-thirds of the page, suggesting that the redacted section contains more information than simply names and other identifying information. . .In addition, given that the events in the story took place sometime before at least January 1971, suggesting that the individuals involved in the story may be dead, the FBI is further instructed to confirm the life status of the individual(s) who are the subject of the story. . ." Clemente claimed that withholdings under **Exemption 7(E) (investigative methods and techniques)** were outdated. The agency claimed one technique was still effectively being used in current investigations. Accepting the claim, Rothstein pointed out that "although the FBI does not directly state that the techniques are not publicly known, the Court infers that they are not, otherwise the techniques could not be 'effectively used' by the FBI in 'current investigations' This is sufficient to satisfy the FBI's burden of proof under Exemption 7(E)." (*Angela Clemente v. Federal Bureau of Investigation*, Civil Action No. 08-1252 (BJR), U.S. District Court for the District of Columbia, Aug. 18)

Judge Colleen Kollar-Kotelly has ruled that the CIA has sufficiently justified its invocation of both the CIA Act and the National Security Act to withhold information from Stephen Whitaker under **Exemption 3 (other statutes)** concerning the death of his father in a plane crash in Spain and a subsequent request for how the agency processed his original request. Kollar-Kotelly had ruled in her first decision that the CIA Act protected the functions of CIA personnel but not the functions of the CIA itself. She had told the agency that if it wanted to continue to invoke the CIA Act it had to show how the withholdings related to agency personnel. This time the agency explained that disclosure of the information being withheld would lead to the identification of agency personnel. Kollar-Kotelly pointed out that "this Court has previously observed that 'the names of its employees, personal identifiers, official titles, file numbers, and internal organizational data' would all appear to be information relating to CIA personnel that would properly be withheld under the statute.'" As to its use of the National Security Act, Kollar-Kotelly had previously told the agency that FOIA processing material did not qualify as intelligence sources and methods. This time she was satisfied by the agency's explanation. She pointed out that "the CIA has stated that the document processing materials either

ACCESS REPORTS

themselves discuss intelligence sources and methods or contain information that would *reveal* intelligence sources and methods which the CIA has sought to protect through its *Glomar* response." Kollar-Kotelly also dismissed the State Department from Whitaker's suit after finding that it had released the only document it found as the result of a further search she had ordered the agency to conduct. (*Stephen Whitaker v. Central Intelligence Agency*, Civil Action No. 12-316 (CKK), U.S. District Court for the District of Columbia, Aug. 15)

Judge Richard Leon has ruled that various Justice Department components conducted an **adequate search** for records related to the seizure of property from Edgar Gamboa as a result of a money laundering and drug trafficking investigation. After the FBI and the DEA released redacted copies of about 300 pages, Gamboa challenged the agencies' searches because they had not found records concerning the seizure of his property. He argued that "because the government has an affirmative obligation to maintain records regarding seized property, defendants' inability to locate such records is evidence of wrongdoing." Leon disagreed, noting that "the only purported genuine issue of material fact asserted by plaintiff goes to the validity of the underlying seizure or forfeiture of assets, not the adequacy of the searches for records. Plaintiff's unsupported speculation as to the existence of records that defendants have not produced is not sufficient to withstand defendants' showing on summary judgment at least with respect to the EOUSA and the FBI." However, he explained that the DEA "does not describe a search at all, and, thus, neither plaintiff nor the Court can assess whether its search was reasonable under the circumstances." He found the agencies had shown that the records were created for law enforcement purposes, but that, in several instances, the FBI had failed to substantiate its **Exemption 7(D) (confidential sources)** claims. He found the FBI's claims that informants received an implicit assurance of confidentiality lacking, observing that "missing from the declaration is any explanation as to the connection between the source(s) and plaintiff or his criminal activities. Nor is there any description of the circumstances which purportedly gave rise to the implication that the source(s) provided information to the FBI only with the understanding that their identities and the information they provided would not be released to the public." He also rejected claims under **Exemption 7(F) (harm to individual)**, pointing out that the agencies failed "to adequately demonstrate a connection between the protected individuals and the purported reasonable expectation that their lives or physical safety will be endangered as a result of disclosure." (*Edgar Mosquera Gamboa v. Executive Office for United States Attorneys*, Civil Action No. 12-1220 (RCL), U.S. District Court for the District of Columbia, Aug. 25)

Judge Colleen Kollar-Kotelly has rejected Jeffrey North's second motion to reconsider her previous ruling finding that the DEA had conducted an **adequate search** for records pertaining to any offers the agency made to Gianpaolo Starita, who testified at North's criminal trial. North contended that Kollar-Kotelly had improperly relied upon searches conducted in 2008 and 2012 as the basis for it conclusion that there were no records related to Starita in the context of North's trial. Instead, North claimed the later searches were contradicted by a 2007 search in which the agency said there were investigative files on North. Kollar-Kotelly disagreed, noting that "the searches the DEA conducted in 2008 and 2012 confirm that the files searched in 2007 do not contain any documents responsive to Plaintiff's 2007 request nor do any other files where responsive documents could reasonably be found." She pointed out that "but the Court did not clearly err in relying on those searches. Although the 2008 and (allegedly) 2012 searches were conducted in response to Plaintiff's 2008 FOIA request, the 2008 request covered the universe of documents responsive to Plaintiff's 2007 FOIA request. Thus, in assessing whether the DEA searched all locations where responsive document would reasonably be found, the Court properly considered the later searches the DEA conducted." North also claimed the DEA had said it was unable to identify Starita by the information provided by North. But Kollar-Kotelly rejected that argument as well. She observed that "even though the DEA did not have enough information to positively identify the Gianpaolo Starita for whom the DEA located files as *the* Gianpaolo

Starita identified by Plaintiff, the DEA's search looked at the files associated with all Gianpaolo Staritas and found that none of them also referenced or otherwise corresponded with Plaintiff." (*Jeffrey North v. United States Department of Justice*, Civil Action No. 08-1439 (CKK), U.S. District Court for the District of Columbia, Aug. 19)

Access Reports is no longer available in hard-copy and is available only via email in Word or PDF versions. Subscribers who have been receiving *Access Reports* in hard-copy need to provide an email address for future deliveries and identify the format in which they want to continue to receive the newsletter. Email addresses and choice of format can be sent to hhammitt@accessreports.com or by calling (434) 384-5334.

ACCESS REPORTS

1624 Dogwood Lane, Lynchburg, VA 24503 (434) 384-5334 Fax (434) 384-8272

Please enter our order for Access Reports Newsletter. It will help us stay on top of developments in FOI and privacy.

- ❑ Access Reports Newsletter for $400
- ❑ Bill me
- ❑ Check Enclosed for $________________

Credit Card
Master Card / Visa / American Express
Card # _________-_________-_________-_________ Expiration Date (MM/YY):______/______
Card Holder:__________________________________ Phone # (______) _______-____________

Name:____ Phone#: (____) _____-______
Organization: ____ Fax#: (____) _____-______
Street Address: ____ email: _____________________
City: _______________________ State:____________________ Zip Code: ________________