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Washington Focus: In an editorial in Roll Call, Anne Weismann, chief counsel for CREW, provides the open government community's perspective for supporting changes in Exemption 5 as part of FOIA amendments currently being considered by Congress. Noting that CREW's work focuses on issues of government accountability, Weismann characterizes the government's explanation of the harm to the integrity of agency decision-making as "expressed largely in recycled platitudes and generalities," and points out that "if Congress passes the FOIA Improvement Act of 2014, FOIA requesters, for the first time, will have an opportunity to argue whatever the harm to an agency's internal deliberations, that harm is outweighed by the public interest in being able to evaluate the rationale for controversial programs and policies and their impact on the rights and privileges we enjoy as American citizens." . . .The Department of Health and Human Services has denied an allegation by the Associated Press that FOIA decisions at the agency are made by political appointees. In an interview with Washington Post media blogger Erik Wemple, Kevin Griffis, an HHS spokesman, said the AP's claim that political appointees handled FOIA requests was "categorically false." But Wemple pointed out that AP had dealt with Dori Salcido, the agency's chief FOIA officer and a political appointee, on appeals. AP told Wemple it had received at least one letter from HHS indicating that Salcido would adjudicate its administrative appeal. However, an official at HHS told Wemple that "a career staffer at the HHS public affairs office now signs off on FOIA appeals decisions. Salcido isn't involved in day-to-day FOIA processing."

Court Questions Predecisional Status Of Agency's Deliberative Process Claim

Although he found that the agency's Exemption 5 (privileges) claim for withholding records pertaining to Maria Andrea Mezerhane de Schnapp's asylum application might be appropriate, Judge John Bates has ordered U.S. Citizenship and Immigration Services to provide supplemental submissions to rebut credible evidence from Mezerhane de Schnapp that because the agency had granted her application

several years earlier the records constituted a final decision and were not protected by the deliberative process privilege.

Mezerhane filed for asylum in August 2010. While USCIS insisted her application was not granted until November 2013 when the agency mailed a letter notifying her of its decision, Bates noted that Mezerhane had supplied considerable evidence casting doubt on this claim. Mezerhane's husband, Roberto Schnapp, had visited a USCIS filed office to inquire about his long-pending application for an "Advance Parole Travel Document," which is needed to travel abroad during a pending asylum application. Schnapp was a derivative beneficiary of Mezerhane's application and his asylum status was directly tied to hers. USCIS officials told Schnapp that he did not need the Advance Parole Travel Document because he had already been granted asylum under his wife's application. The USCIS officials showed Schnapp his case file and told him he needed a "Refugee Travel Document," a document available only to individuals who have already been granted asylum. Bates noted that the relevant USCIS records supported Schnapp's story. In October 2013, a staff member at the USCIS Ombudsman's office contacted the Merzerhane's attorney to inform her that the family no longer needed to apply for an Advance Parole Travel Document because they "already held asylum status." As confirmation, this USCIS official apparently located Mezerhane's case in the USCIS Refugee Asylum and Parole System database, which indicated Mezerhane's application for asylum had been granted in September 2010. Finally, after returning from a brief trip to the Bahamas in January 2014, a Customs and Border Protection officer pulled up the family's file and commented that the records showed they were "asylees since 2010."

Faced with this contradiction, the agency argued the Mezerhane's evidence was hearsay. Bates observed that "this argument is meritless: the key out-of-court statements are from USCIS and [Department of Homeland Security] employees acting squarely within the scope of their employment, speaking on issues they are authorized to speak about. These statements are the admissions of a party-opponent—not hearsay." The agency also claimed it regulations provided that a determination was not final until a letter was sent to the applicant notifying her of its decision. Bates, however, noted that "the regulation says no such thing—it simply requires that '[t]he decision of an asylum officer to grant or to deny asylum. . .shall be communicated in writing to the applicant.' The regulation says nothing of timing or finality. And, in fact, Mezerhane's theory is that USCIS *violated* this regulation (at least its spirit, if not its letter), by waiting over three years to mail her a notice letter confirming that her asylum application had been granted."

Assessing the relative merits of Mezerhane's contrary evidence, Bates pointed out that "there is evidence to support both parties' positions: statements from USCIS employees corroborate Mezerhane's assertion that the decision was made as early as September 2010, yet USCIS documents from early 2013 are written as if a final decision had not yet been made. Documents generated after a final decision are generally not 'pre-decisional' for purposes of the deliberative-process privilege, so this issue could very well be outcome-determinative (for these five pages of documents)." He observed that "to be sure, Mezerhane's evidence is not immune to skepticism; it is primarily based on unverifiable accounts of the plaintiff, her husband, and her attorney's recollections of conversations with (sometimes unnamed) government officials. For that reason, one might conclude that Mezerhane's evidence is not reliable, not credible, or both. Relying on this evidence is also in some tension with case law that instructs a district judge to treat the plaintiff's own self-serving affidavits with some skepticism—even at the summary judgment stage." However, he noted that "USCIS does not deny that the conversations took place as remembered by the various affiants, and all of USCIS's legal arguments for ignoring this evidence have been rejected. And Mr. Schnapp's account is consistent with tangible, documentary evidence in the record." Bates concluded that "the bottom line is this: on the present record, one can come to more than one conclusion about when USCIS made a decision on Merzerhane's asylum application and, in turn, whether these documents are predecisional and protected by the deliberative-process privilege."

Regardless of his questions concerning the agency's Exemption 5 claims, Bates, after examining the documents *in camera*, found that most of them were properly withheld under **Exemption 7(E) (investigative methods and techniques)** and **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. He agreed that data from the agency's Enforcement Communications System (TECS II) database was created for law enforcement purposes and that its disclosure "could create the 'chance' of a 'risk' of circumvention of the law, because it would enlighten asylum applicants with criminal backgrounds about what sort of law enforcement information (from which databases) is consulted by USCIS during adjudication of a pending asylum application—and, of course, by logical inference, what sort of information is *not* consulted." Mezerhane argued that she was a devoted mother with a spotless record. But Bates observed that "what matters is the risk of improper disclosure of law enforcement techniques and procedures, regardless of who wants the information." Turning to the privacy exemptions, Bates indicated that Mezerhane's allegations of agency misconduct in delaying her application had to be considered to determine if there was a legitimate public interest in disclosure of personal information. But after his *in camera* review, he pointed out that "quite simply, the withheld information neither confirms nor refutes Mezerhane's allegations of misconduct. . .Disclosure of the names of [the] individuals would not get Mezerhane any answers about possible agency misconduct, and would infringe upon the privacy interests of third parties not before the Court." (*Maria Andrea Mezerhane de Schnapp v. United States Citizenship and Immigration Services*, Civil Action No. 13-1461 (JDB), U.S. District Court for the District of Columbia, Sept. 9)

Views from the States…

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

Florida

A court of appeals has ruled that the Jacksonville Electric Authority improperly delayed responding to public records requests from Promenade D'Iberville, a company with which JEA was involved in contentious litigation in Mississippi, and instead sought an injunction from a Mississippi state court prohibiting Promenade from using the Public Records Act as an alternative to discovery. Although JEA had responded to previous Promenade requests, after awhile it decided to seek a protective order instead. Promenade responded by filing suit in Florida under the Public Records Act. JEA convinced the Florida court to postpone any action until the Mississippi court ruled on its request for a protective order. After the Mississippi court rejected JEA's request for a protective order, JEA released the requested records to Promenade within days. The Florida court then ruled JEA had not willfully violated the Public Records Act and Promenade appealed. The appeals court reversed, noting that "JEA violated the Act by delaying Promenade's access to non-exempt public records for legally insufficient reasons. JEA imposed what amounted to a requester-specific barrier to records requests made by Promenade because it was an adversary in out-of-state litigation." The court pointed out that "Florida law doesn't allow public records custodians to play favorites on the basis of who is requesting records. . .JEA had a duty to produce the non-exempt public records requested by Promenade regardless of its identity. And its decision to seek a ruling from a Mississippi court with respect to Promenade's request did not justify its decision to delay its disclosure of the requested records." JEA argued that it had cured its violation by immediately disclosing the records after the trial court hearing. But the appeals court indicated that "the case law is clear that unjustifiable delay to the point of forcing a requester to file an enforcement action is *by itself* tantamount to an unlawful refusal to provide public records in violation of the Act." (*Promenade D'Iberville, LLC v. Rachelle M. Sundy*, No. 1D13-5583, Florida District Court of Appeal, First District, Aug. 28)

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Illinois

A trial court has ruled that the City of Peoria failed to show that a special report describing the work of the staff of the Target Offender Unit is protected by the exemption for disciplinary records even if the report led to disciplinary action. Reporter Matt Buedel requested the report, the City denied access, and Budel filed suit. After reviewing the report *in camera*, the trial court ruled in favor of the newspaper and the City asked to be permitted to file an affidavit. The court agreed to allow the City to file the affidavit, but after reviewing it concluded it fell far short of justifying the claimed exemption. The court observed that "if an affidavit as cursory and conclusory as the [City's] Affidavit sufficed to meet a public body's burden of invoking a FOIA exemption a public body could too easily create an affidavit containing mere legal conclusions paraphrasing an exemption's statutory text and so absolve itself of its FOIA obligations. Such a low standard of proof cannot satisfy [FOIA's] requirement of clear and convincing evidence." Although the newspaper had requested attorney's fees, the court stayed release of the report to give the City an opportunity to appeal and indicated it would consider the attorney's fee request at a later date. (*Peoria Journal Star and Matt Buedel v. City of Peoria*, No. 14-MR-288, Illinois Circuit Court, Tenth Judicial Circuit, Peoria County, Sept. 23)

New York

In a case of first impression, a trial court has ruled that the New York City Police Department may invoke a *Glomar* response neither confirming nor denying the existence of records pertaining to a possible investigation of the Mosque of Islamic Brotherhood. Believing the Islamic group was being investigated by the police, Imam Talib Abdur-Rashid requested records concerning the investigation. The police responded by indicating that to confirm or deny the existence of such an investigation would interfere with a law enforcement investigation, reveal investigative methods and techniques, and could endanger the safety of a person. Recognizing that the *Glomar* response was a legitimate response only under the federal FOIA, Judge Alexander Hunter looked to federal case law to determine whether such a response was appropriate under New York's FOIL. Hunter found the police "meet their burden to issue a Glomar response, set by the federal courts, by describing generic risks posed by disclosure, including undermining counter-terrorism operations, compromising the intelligence capabilities of the NYPD, and disclosing sources of the information of the NYPD." Acknowledging that the federal FOIA was not intended to apply to state agencies, Hunter nevertheless observed that "this court looks to the holdings of other jurisdictions for guidance since the current issues have never been squarely decided and, thus, there is no precedent to fo1low. Respondents have sufficiently demonstrated that applying the Glomar doctrine to petitioner's FOIL request is in keeping with the spirit of similar appellate court cases. Indeed, an examination of prior court rulings with parallels to the instant petition, combined with well-reasoned legal arguments put forth by respondents, lead this court to conclude that respondents' decision not to reveal whether documents responsive to petitioner's FOIL request exist should not be disturbed as it has a rational basis in the law." (*Talib W. Abdur-Rashid v. New York City Police Department*, No. 101559/2013, New York Supreme Court, New York County, Sept. 11)

Washington

A court of appeals has ruled that a public official's personal cell phone records are public records if they relate to government business and are used or retained by a government agency. As part of a whistleblower action, Glenda Nissen, a detective with the Pierce County Sheriff's Department, obtained records showing that Pierce County Prosecutor Mark Lindquist rarely used his business cell phone. Nissen then made a Public Records Act request for business-related calls and texts made on his personal cell phone. Nissen submitted a second request for all of Lindquist's personal cell phone records. The trial court ruled personal cell phone records were not public records and Nissen appealed. The appellate court pointed out that "the unique nature of Lindquist's employment as Pierce County Prosecutor requires him to be available to

fulfill 'public duties 24 hours a day 7 days a week.' But Nissen's broad interpretation of what constitutes a 'public record' could conceivably subject *all* records of a public prosecutor's personal phone calls to a PRA request, whether made on a government-owned device or on a personal device, thereby eradicating protections for purely personal information." The court agreed that some of the calls were likely to be business-related and indicated the trial court would need to make that determination. The court likewise remanded a determination on the agency's use of the records to the trial court as to "whether Lindquist (or a prosecutor's office employee) actually reviewed, referred to, or otherwise 'used' these call logs for government purposes." (*Glenda Nissen v. Pierce County*, No. 44852-1-II, Washington Court of Appeals, Division 2, Sept. 9)

The Federal Courts…

A federal court in California has ruled that while the FBI has justified its withholding under **Exemption 1 (national security)** of records pertaining to various Occupy movements in California, it still has not sufficiently supported many of its **Exemption 7 (law enforcement records)** claims and must provide the disputed records for *in camera* review as well as providing a more detailed public affidavit. Judge Susan Illston explained that after reviewing the agency's *in camera* declaration she was satisfied that a two-page document had been properly classified. But she disagreed with the agency's contention that "*ex parte, in camera* review of the declarations is appropriate. The declaration does not appear to reveal the very information the government claims is exempt from disclosure" and the agency must either file a public affidavit or provide another *ex parte in camera* declaration that "reveals the very information this is exempt from disclosure." The FBI claimed the records qualified as law enforcement records because they dealt with possible terrorist activities. Illston found the agency still had not adequately provided a rational nexus tying the records to a terrorist investigation and pointed out that "the Court rejects the argument presented by the FBI at the hearing that it has established a sufficient nexus simply because the documents are contained in a counter terrorism database regardless of whether the documents are actually related to any unlawful activity. . . [E]ven if the documents are contained in a counter terrorism database, the FBI must still provide the Court with a sufficient description of the alleged criminal activity to establish the applicability of Exemption 7." While she agreed that the names of third parties in the records were protected under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, she faulted the agency for failing to show that non-exempt information could not be reasonably segregated and released. She observed that "a blanket statement that the documents are not segregable or that all reasonably segregable information has been released is insufficient to satisfy the government's burden." She accepted the FBI's **Exemption 7(D) (confidential sources)** claims as they pertained to explicit assurances of confidentiality, but noted that its showing of implicit assurances fell short. She pointed out that "the FBI does not explain what it means by the term 'organized violent groups.' The declaration states that the individuals came in contact with criminal elements, but the FBI does not explain what types of criminals they are, whether they are violent, or whether they would retaliate against an individual for disclosing information to law enforcement." The FBI claimed **Exemption 7(E) (investigative methods and techniques)** protected database collection, but Illston agreed with the plaintiffs that they had provided evidence showing the techniques were publicly known. She observed that "the FBI contends that it is not seeking to protect the publicly available criteria for classifying suspicious activity that is referenced in plaintiffs' motion; it is only withholding information that is not publicly known about the system of data collection. However, this specificity is not contained in the FBI's declaration. The declaration simply provides a blanket statement that the characteristics and data collected are not known and the way the FBI apples this information is not known. These statements are contradicted by plaintiffs' evidence." (*American Civil Liberties Union of Northern California and San Francisco Bay*

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Guardian v. Federal Bureau of Investigation, Civil Action No. 12-03728 SI, U.S. District Court for the Northern District of California, Sept. 16)

Judge Rudolph Contreras has ruled that a variety of Department of Justice components conducted an **adequate search** for records about Sean Fowlkes' criminal conviction and that most of their exemption claims are appropriate. However, he becomes one of the first judges to find that a recognized **Exemption 3** statute—a provision of the Consolidated Appropriations Act of 2012 prohibiting BATF from using funds to process requests for gun trace data—no longer qualifies under Exemption 3 because it does not cite the exemption as required by the OPEN FOIA Act of 2009. Contreras noted that "the statute on which the ATF relies, the Consolidated Appropriations Act of 2012, was enacted after the OPEN FOIA Act of 2009. To satisfy Exemption 3 then, the Consolidated Appropriations Act of 2012 expressly must reference Exemption 3. Here, the ATF's declarant does not state that the Consolidated Appropriations Act of 2012 specifically refers to 5 U.S.C. § 552(b)(3) and, therefore, the ATF does not demonstrate that Exemption 3 applies." Accepting most of EOUSA's grand jury secrecy claims, Contreras faulted the agency for withholding the name of a judge. He noted that "the EOUSA has not adequately explained how disclosure of the name of the judge either would reveal the scope and direction of the grand jury or subject him or her to reprisal or possible harm." Upholding the DEA's use of **Exemption 7(E) (investigative methods and techniques)** for internal code numbers, he rejected the ATF's claim under the exemption as too vague. He pointed out that "the declarant's explanation merely mirrors the language of the exemption. Missing is any description of the operation or any statement from which the Court could conclude that disclosure of the information might reveal a law enforcement technique or procedure." (*Sean Darnell Fowlkes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, Civil Action No. 13-0122 (RC), U.S. District Court for the District of Columbia, Sept. 15)

A federal magistrate judge in New York has ruled that Customs and Border Protection properly claimed **Exemption 7(E) (investigative methods and techniques)** to withhold portions of records concerning why *New York Times* reporters Mac William Bishop and Christopher Chivers were questioned by CBP staff at Kennedy International Airport when they boarded a flight to Turkey and when they subsequently returned from Turkey. After the reporters filed FOIA/Privacy Act requests for records concerning their questioning, the Department of Homeland Security told them it could find no records. Magistrate Judge Gabriel Gorenstein noted that "as a result of plaintiffs' persistence, which continued even after they filed their complaint in this case, DHS identified numerous responsive documents," although many of them were withheld or redacted under **Exemption 7(E) (investigative methods and techniques)**. Bishop and Chivers challenged the redactions made to "passenger activity" and "hit data" from the agency's databases, arguing that the data was so abbreviated that it would not "seem to provide any information about a government technique or procedure of use to a criminal or terrorist" since it would not "display the calculus used to reach that result or method through which that information was obtained." But Gorenstein disagreed. He noted that "requiring the production of this information, which was returned from a query of law enforcement databases, would plainly 'disclose. . .procedures for law enforcement investigations' within the meaning of Exemption 7(E) to anyone who could make sense of the letters or numbers." He pointed out that "if numerous records of this sort were made available to the public through FOIA, it is 'logical or plausible' that a motivated individual could decipher the true import of the coded information by analyzing the field data." Bishop and Chivers questioned the agency's Exemption 7(E) claim as it pertained to secondary inspection reports, arguing that the agency had failed to show that the techniques were unknown to the public. But Gorenstein observed that "we cannot find that the techniques or procedures at issue are generally known to the public. Certainly, as plaintiffs point out, the public is aware of the fact that CBP engages in the practice of collecting information about travelers and that it uses such information to target some of them for questioning. However, nothing submitted by plaintiffs suggests that the public has knowledge of the particular techniques or procedures reflected in the redacted

fields—in other words, which databases CBP considers in its targeting process and how such information can lead to the triggering of additional security screening." (*Mac William Bishop and Christopher Chivers v. United States Department of Homeland Security*, Civil Action No. 13-8620 (GWG), U.S. District Court for the Southern District of New York, Sept. 16)

A federal magistrate judge in Illinois has ruled that the Fish and Wildlife Service conducted an **adequate search** for records concerning the delisting of the grizzly bear from the endangered species list and that the agency properly invoked **Exemption 5 (privileges)** to withhold several documents. Robert Aland requested records related to a letter sent by Wyoming Gov. Matthew Mead to Interior Secretary Kenneth Salazar requesting an expedited effort to delist the grizzly bear, Salazar's response, and any records referencing a 2011 Ninth Circuit opinion that had invalidated the government's prior efforts to delist the grizzly. Aland challenged the agency's use of various terms to search for records as overbroad, resulting in many non-responsive documents. But Magistrate Judge Susan Cox noted that the terms used are "those terms directly taken from his FOIA request. . .[P]laintiff does not explain how defendants could have more narrowly focused on what plaintiff was seeking." Aland contended that his suit prodded the agency to disclose the records after the litigation commenced. But Cox accepted the agency's explanation that it had made the documents available to Aland on a temporary website in 2012 and it was not until he filed suit that the agency discovered he had not received them. Aland claimed more documents must exist, but Cox pointed out that "we have no way to assess this claim. Plaintiff fails to offer support that more documents exist, or provide the Court with an analysis of why the records he did receive are irrelevant, or show an obvious hole in the defendants' production." The agency had withheld emails under the deliberative process privilege. Aland claimed the emails were not predecisional because they related to the already published Ninth Circuit decision. But after examining the emails *in camera*, Cox agreed that they were protected and noted that "these emails do not relate to any decision discussed in those letters. . .These emails appear to be addressing a different issue entirely, albeit related to grizzly bear de-listing. These emails can also be considered predecisional, as it appears that the agency has yet to decide what it will be doing in respect to sheep grazing in the bears' habitat and, ultimately, what it will do prior to again attempting to de-list the grizzly bear." Aland argued that the attorney-client privilege did not apply to several documents because they were disseminated to non-lawyers. Cox noted that "in each of these communications the individuals were either government lawyers or agency employees. . .That more than one agency employee was involved does not waive the privilege." (*Robert H. Aland v. U.S. Department of the Interior*, Civil Action No. 13-3547, U.S. District Court for the Northern District of Illinois, Sept. 19)

Judge Royce Lamberth has ruled that Administrative Remedy Indexes and Reponses maintained by the Bureau of Prisons, which contain inmate complaints and the agency's responses, are publicly available with redactions of identifying inmate information and that the agency cannot refuse to process Myron Tereshchuk's request for all the indexes solely because the request is voluminous. Tereshchuk complained that the indexes were so heavily redacted that they were useless. But Lamberth noted that "the BOP provided the indexes as they are maintained by the agency, with only prisoners names and identifying numbers redacted, as required by BOP regulations as well as FOIA Exemption 6. Mr. Tereshchuk got all parts of the indexes to which he has a legal right, and he has no right to require defendant to create a new index." The agency argued that to provide all the indexes was too burdensome. Lamberth, however, pointed out that "Mr. Tereshchuk seeks all records already identified in the indexes provided to him. In fact, the BOP has estimated the exact number of pages of records it would have to produce. However, the BOP argues that the mere production of records that have technically been identified can be **unreasonably burdensome**." Lamberth observed that "this Court is skeptical that a FOIA request may be denied based on sheer volume of records requested." He added that "the

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BOP makes much of the fact that the request implicates 214,456 responses stored in hardcopy in various facilities that would have to be redacted before production. However, the BOP has not shown the extent to which this would burden the agency and whether such a burden is unusual. . .Although there are many responses, it appears that they are already compiled (albeit in different locations) and consist of approximately 24,840 pages. The severity of the burden is thus unclear." Lamberth rejected Tereshchuk's allegation that the indexes represented the working law of the agency and were required to be made available through the affirmative disclosure provisions of Section (a)(2). Lamberth noted that "records that have no precedential value and do not constitute the working law of the agency are not required to be made available under this part of the Act." He concluded that "ordinary prison-management records are not the sort of 'adjudication' anticipated by Section (a)(2)." (*Myron Tereshchuk v. Bureau of Prisons*, Civil Action No. 09-01911 (RCL), U.S. District Court for the District of Columbia, Sept. 16)

Judge Amy Berman Jackson has dismissed most of Jill Kelley's **Privacy Act** claims against the FBI and the Department of Defense, but has allowed her to continue with her claim that both agencies improperly disclosed protected information to the media. Kelley and her husband Scott had extensive social contacts with top military officials at Central Command in Tampa. She received a threatening email warning her to stay away from Gen. David Petraeus, then director of the CIA but previously head of Central Command, which she reported to the FBI. In an attempt to locate the anonymous email sender, the FBI asked the Kelleys for the login and password to their email accounts for the limited purpose of identifying the anonymous email sender. The sender of the anonymous email was identified as Paula Broadwell, who was writing a book about Petraeus and conducting an affair with him as well. However, as the investigation progressed, Kelly believed it focused more on her and after the FBI uncovered a cache of emails between Kelley and Gen. John Allen, then commander of Central Command, the Defense Department began an investigation of whether Allen's conduct was inappropriate. Allen was exonerated, but Kelley lost much of the access to MacDill Air Force Base, where Central Command was located, that she had previously enjoyed. After concluding that the agencies and the press had portrayed her in an unfair light, she and her husband filed suit alleging a number of Privacy Act claims and related invasion of privacy theories. Calling Kelley's complaint "a long, overwrought, and argumentative document," Jackson concluded that all Kelley's allegations should be dismissed except for the claim of improper disclosure to the media. Jackson found Kelley had alleged sufficient facts to support her claim that relevant records were kept in a system of records. She pointed out that "the pleading alleges that plaintiffs lodged a complaint with the FBI, that the FBI undertook a specific investigation at plaintiffs' behest, that there was an agent in charge of the matter, that DOD received records about the plaintiffs from the FBI, and that officials within DOD reviewed them. These circumstances support the notion that one or both agencies maintained a group of records assigned to plaintiffs in some identifiable way. This inference is reinforced by the specific accusation that a newspaper reporter claimed to plaintiffs that he was in possession of the emails that are or were likely contained in defendants' system of records." Allowing the claim of improper disclosure to the media to continue, Jackson pointed out that "providing information to the media is not among the list of permissible disclosures listed in the Privacy Act. While it may prove to be the case that the media sensationalized the facts and seasoned its coverage of these events with sexual innuendo on its own, plaintiffs do point to several press accounts that identify the sources as unnamed government or military officials." She added that "resolving any inferences arising out of these facts in favor of the plaintiffs, the Court finds that plaintiffs have alleged enough facts to support a plausible Privacy Act claim for disclosure to the media, and that the sufficiency of these allegations—several of which are based 'upon information and belief'—will be more appropriately tested after more facts have been uncovered." (*Gilberte Jill Kelley v. Federal Bureau of Investigation*, Civil Action No. 13-0825 (ABJ), U.S. District Court for the District of Columbia, Sept. 15)

The Ninth Circuit has ruled that the Forest Service has so far failed to justify its exemption claims for records concerning an investigation of allegations of work place violence at the Trapper Creek Center Job Corps Program. Mark Kowack, who taught disadvantaged youth at the Center, filed a complaint. The Director of the Job Corps National Center launched an investigation. The investigator interviewed everyone who worked at the Center, including Kowack, but the Forest Service ultimately declined to take any action and closed the investigation. It notified Kowack of its decision but gave him no further explanation. Kowack then made a FOIA request for records about the investigation. The Forest Service located 173 responsive pages and withheld 80 pages under **Exemption 6 (invasion of privacy)**. On appeal, he received 188 pages, many of them heavily redacted. He filed suit and the district court ruled in favor of the agency. Chief Circuit Court Judge Alex Kozinski initially noted that because the names of all the employees involved were known, they no longer had a cognizable privacy interest in not being identified with an investigation. He pointed out that "the government justifies its redactions only by noting that the center is located in a small community and has a small staff: Because of the limited universe of possible suspects, the government argues, the public could easily identify who made which allegation, and which employee is being complained about. That's fine in theory, but the government hasn't told us anything about the type of incidents reported. It's entirely possible that the substance of the witness statements could be disclosed without revealing who made them. The government asks us to take its word for it. FOIA requires more." He observed that the agency had failed to rebut the possible public interest in disclosure, noting that "for all we know, the witness statements reveal that the Trapper Creek Center is run by dangerous bullies who shouldn't be allowed anywhere near disadvantaged youth. . .Without a more detailed description from the government, the only way we can determine the public interest is by looking at the documents ourselves." Kozinski questioned the agency's claim that **Exemption 5 (deliberative process privilege)** covered some of the records created by the investigator. He pointed out that the agency's affidavit "makes clear that at least some of the redacted information includes 'the factual reasons why the investigator concluded that the allegations of workplace violence and employees making threatening remarks to one another were unsubstantiated.' While facts aren't automatically subject to disclosure, 'factual material that does not reveal the deliberative process is not protected.'" He indicated that "without more information, we can't make the 'independent assessment' that FOIA demands." (*Mark Kowack v. United States Forest Service*, No. 12-35864, U.S. Court of Appeals for the Ninth Circuit, Sept. 9)

Judge Beryl Howell has ruled that the Defense Department properly withheld the one page it found concerning the costs for building and maintaining the Camp 7 detention facility at Guantanamo Bay. *Miami Herald* Reporter Carol Rosenberg had requested records on the costs of the detention facility and the Defense Department located one page and withheld it entirely under **Exemption 1 (national security)**, **Exemption 2 (internal practices and procedures)**, **Exemption 3 (other statutes)**, and **Exemption 6 (invasion of privacy)**. Howell found the one-page record had been properly withheld under Exemption 1. She explained that "the defendant's declarant makes clear that [information about the costs] would have been found by the Office of Detainee Policy." She noted that 'even if it is 'intuitively unlikely' that the defendant's search revealed only a single record, such intuition, absent some indication of bad faith or other dissembling, is insufficient to overcome the defendant's sworn affidavit, particularly when national security interest are implicated, as is the case here." Finding the record was properly classified based on the agency's affidavit, she also concluded that "there are no reasonably segregable portions of the record that can be released." (*Carol Rosenberg v. United States Department of Defense*, Civil Action No. 13-1554 (BAH), U.S. District Court for the District of Columbia, Sept. 11)

A federal court in New York has ruled that the Federal Reserve Bank of New York failed to conduct an **adequate search** for records of securities held by the bank on behalf of external parties that had matured

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but had not been paid because one of its affidavits is too conclusory. Bernard Gelb, a funds tracer, had previously requested similar information from the agency. The bank told Gelb that it had "discontinued the processing of outstanding and matured registered securities" for governmental and international agencies in 2008. However, the bank searched its Financial Services Group and its Markets Group for potentially responsive records and found two securities files, neither of which dealt with a matured but unpaid security. Gelb then filed suit, arguing that he believed the bank had relevant securities in 2010. The court noted that "based on the evidence before it, the Court is satisfied that [the agency's three] declarations are based on [the individuals'] personal involvement in the search. In their declarations, [two staffers] describe in detail where they searched, why they searched where they searched, where else they could have searched, and why their search revealed no responsive documents. But [the third individual's] declaration is conclusory and therefore deficient. . .He does not describe the system within which he was working, how he conducted the search, the scope of his search, an estimate of the amount of time his search took, or any other detail from which the Court might conclude that his search was, in fact, adequate." (*Bernard Gelb v. Federal Reserve Bank of New York*, Civil Action No. 12-04880 (ALC)(AJP), U.S. District Court for the Southern District of New York, Sept. 5)

Judge Rudolph Contreras has ruled that FBI Agent Michael Dick failed to show that the FBI acted willfully and intentionally in violation of the **Privacy Act** when it circulated a nationwide bulletin indicating that Dick had threatened an FBI employee and that he was on administrative leave pending further investigation. Fox News ran a piece on the bulletin, which the FBI subsequently corrected to indicate the bulletin involved a personnel matter and that Dick's whereabouts were no longer a concern because he had been located. The bulletin was precipitated by an incident that occurred during Dick's quarterly firearms qualification testing at the shooting range at Quantico. While attempting to shoot a semi-automatic pistol, Dick suffered a severe gash between his thumb and forefinger. He sought medical treatment at the Marines Corps Health Services Unit, but after being unable to fill out the required questionnaire because of his hand injury, he left and went to several urgent care facilities in Stafford County, where he ran into delays in treatment because of the inability to get permission from the Health Services Unit at Quantico. Treatment permission was finally granted and Dick drove home. However, when he attempted to have his prescription filled, he was unable to get authorization from the FBI for the medication. Frustrated, he called the FBI Health Services Unit and told an employee he "would personally come to the [FBI] to straighten out the approval process." The next day, the FBI issued the disputed bulletin. Dick subsequently lost his security clearance. He later filed suit against the agency alleging improper disclosure and failure to maintain accurate records. The agency claimed the disclosure was proper under the need-to-know exception. Rejecting that claim, Contreras noted that "the Court many reasonably infer from Agent Dick's allegations that the alert was blasted indiscriminately throughout the agency and not just specifically to those who may have needed to receive it in connection with their job responsibilities. Under such a situation, permitting agency-wide distribution under § 552a(b)(1) without any showing of why each employee needed to receive the information would allow the exception to swallow the rule." The FBI also argued the disclosure was permitted under the routine use exception, relying on an OPM notice allowing agencies to use employee records for personnel reasons. Contreras pointed out that "quite clearly, however, the information more plausibly was disclosed through the [bulletin] not for the purpose of determining Agent Dick's employment status or eligibility, but rather so that other law enforcement agencies might locate, and perhaps, apprehend, him." Although Contreras accepted Dick's claim that his suspension without pay constituted an adverse effect under the Privacy Act, he nevertheless found that Dick had failed to show that the bulletin had caused his suspension. He pointed out that "the plain language of the complaint. . .only suggests that it was Agent Dick's independent actions, not the [bulletin]—which merely describes his actions in far more limited terms—that prompted the FBI to [take an adverse action against him]." (*Michael G. Dick v. Eric H. Holder, Jr.*, Civil Action No. 13-1060((RC), U.S. District Court for the District of Columbia, Sept. 10)

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