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In this Issue

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Washington Focus: The Center on Privacy and Technology at Georgetown University Law Center is presenting a one-day symposium Oct. 30 celebrating the 40th anniversary of the Privacy Act and the 1974 FOIA amendments. A panel will discuss the origins of the Privacy Act and the 1974 FOIA amendments, followed by a panel discussion of the state of the Privacy Act today. Senior D.C. Circuit Court Judge Laurence Silberman, who was a pointman for the Justice Department during the passage of the legislation, will be the luncheon speaker. In the afternoon, a panel will discuss the current state of FOIA followed by a panel discussion of what lies ahead for both statutes. The free symposium is at Georgetown University Law Center, 600 New Jersey Ave. NW, Washington, D.C. and runs from 9 am to 5:30 pm.

Court Finds Database Redaction Too Burdensome

A ruling by Judge Rudolph Contreras finding that personally identifying information contained in several FTC complaint databases is protected by Exemption 6 (invasion of privacy), while almost certainly correct based on case law interpretation, still raises interesting questions about the social role government information could or should play in expanding public knowledge. But because nearly any personally identifying information is now routinely withheld under the privacy exemptions, the public value of such information is never seriously considered. And the Supreme Court's unfortunate conclusion in *Reporters Committee* that the only public interest in disclosure is whether information sheds light on government activities or operations makes it that much harder to consider any other social value that might come from disclosure of even the most mundane personal information.

The case before Contreras concerned a request from a coalition of public interest groups working primarily with low-income and immigrant populations for information contained in the FTC's Consumer Sentinel database, an online repository containing millions of consumer complaints about alleged illegal business activity. The databases consist of consumer

complaints received by the FTC through its telephone complaint line or complaints received through the agency's website. The public interest groups apparently were interested in using the data as the basis for their own online review system that would allow consumers to see if businesses had been subject to complaints and post their own reviews of their interactions with businesses. The FTC, however, drew the line at providing any non-business-related personally identifying information and told Contreras that, unfortunately, data fields containing consumer descriptions of their complaints frequently contained personally identifying information making it essentially impossible to disclose those fields without complaint-by-complaint review, which was clearly too burdensome. Not only did the description field frequently contain personal information, complainants often provided personal information about themselves or the business in other data fields as well, making it nearly impossible to write a code that would locate and redact such information. As part of its response to the coalition's request for the data elements the agency thought could be released, the agency provided a cost estimate from its contractor of $8,581.95 "to develop the custom scripts, extract from reporting [database] format, validate and complete the FOIA request." The contractor's estimate was based on 65 hours at $132 an hour. The agency told the requesters that it would administratively close the requests if the coalition did not agree to pay within 10 days. The coalition told the agency not to commence its search and production of the data until resolution of the status of the contested data fields. Ultimately, the coalition filed suit challenging the agency's privacy claims as well as the contractor's cost estimate.

To get a handle on how often personal information was included in the wrong data field, the FTC searched for Gmail addresses on the theory that they were primarily used by individuals rather than as business email addresses. Of the 350,000 complaints yielded by the search, the agency reviewed 600 complaints and found 82 percent of them contained further personally identifying information. Contreras noted that "the Court is satisfied that—based on the evidence provided by the FTC, the lack of allegations of bad faith, and the lack of contradictory evidence provided by Plaintiff—the agency has demonstrated a real, and not merely speculative, possibility of personal identifying information in the form of names, addresses, telephone numbers, and email addresses existing in the Company Information Fields."

Contreras agreed with the agency that both consumer complainants and individuals identified in their business capacity had legitimate privacy interests. Recognizing the coalition's intent to provide the information to downstream consumers, he pointed out that "this proposed benefit demonstrates the very privacy interest at stake if personally identifying information about an accused individual wrongdoer is released—namely that people will use this information to identify the individual and then make judgments and alter their behavior in regard to the accused based on unverified complaints held by a federal agency. This benefit, moreover, clearly is not the type recognized under FOIA Exemption 6."

The coalition argued that by submitting complaints online individuals had a diminished expectation of privacy, particularly because the FTC's privacy policy indicated information could be disclosed under FOIA. But Contreras pointed out that "as the FTC explains, however, consumers are not required to click on, read, or agree to the privacy policy in order to file a complaint. In addition, individuals accused of misconduct in a complaint never see the privacy policy in the first place. Yet, even if all parties involved actually read and consented to the policy, the policy itself represents only a warning, not a waiver of FOIA privacy rights."

Rejecting the coalition's claimed benefits from disclosure, Contreras observed that "those benefits do not outweigh the substantial privacy interest of protecting victims and individuals accused of wrongdoing from abuse, harassment, and embarrassment given the very real risk of their being identified and the tenuous connection between their personal information and Plaintiffs' stated policy goals." However, Contreras found the agency had not shown why five-digit zip codes should be withheld. He noted that "because the agency provides no evidence suggesting that disclosure of the five-digit zip code actually or potentially affects the

likelihood that the complainant will be identified, the Court cannot conclude that such information implicates a substantial privacy interest."

Turning to the question of whether the agency could be forced to redact the information so that non-exempt information could be disclosed, Contreras noted that "if Plaintiffs sought a smaller, more manageable universe of records and not the twenty million complaints in the Consumer Sentinel database, the solution might be simple: the Court could order the FTC to expend a reasonable amount of resources to identify and redact the exempt personal information from each complaint. The facts and equities of this case, however, compel the Court to conclude that the FTC properly withheld the entire universe of information given the burden of removing the subset of exempt information. . .[H]ere, because the agency aims to protect the private information of citizens by withholding the data fields at issue, and because the manual review needed for redacting such information is unreasonably burdensome, the Court concludes that the FTC properly withheld the data fields under Exemptions 6 and 7(C)." Finally, Contreras rejected the coalition's challenge to the cost estimate, finding the plaintiffs had failed to provide any evidence suggesting that the estimate was inaccurate. (*Ayuda, Inc., et al. v. Federal Trade Commission*, Civil Action No. 13-1266 (RC), U.S. District Court for the District of Columbia, Sept. 30)

Editor's Note: While this case is almost certainly correct based on the case law, the striking inability of non-government groups to make use of government collected information for socially useful purposes severely undercuts the concept of access to government information. Although agencies may withhold such information under FOIA, FOIA does not require agencies to withhold information, it provides a basis for protecting various types of information if the agency chooses to do so. By so frequently choosing to withhold information solely because the statute allows them to do so, agencies have largely removed themselves from any consideration of the social use of government information and instead wrapped themselves in the mantle of non-discretionary application of exemptions.

Views from the States…

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

Louisiana

A court of appeals has ruled that group emails discussing political activity sent by William Shane, a Jefferson Parish businessman, that went to Lucien Gunter, a fellow businessman who at the time was serving as a member of the Jefferson Parish Economic Development Commission, an independent political subdivision, do not constitute public records even though they became part of an audit of JEDCO that found the emails were an improper use of the Commission's computers. *Times-Picayune* reporter Drew Broach learned about the emails and made a public records request to Jefferson Parish. Shane filed suit to block disclosure, arguing the emails were not public records and qualified as constitutionally-protected political advocacy. The trial court found that while the emails were private, they became public once they were used as part of the audit. The appeals court, however, reversed. The appeals court noted initially that "we agree with the [trial] court's finding that the e-mails were purely private communications between private citizens concerning private political activity, and that the e-mails had nothing to do with the conduct of JEDCO business." But the court pointed out that JEDCO was the legal custodian of the records and the only entity authorized to disclose them. The court observed that "the internal auditor's review, use, or physical

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possession of the e-mails in his investigation did not transform the Parish into a custodian of the records." While the trial court had recognized that private citizens identified in the emails may had had a constitutional right of privacy in not being identified, the appeals court took that a step further, noting that "the right to privacy, which is express in the Louisiana Constitution, extends equally to the contents of private e-mail messages as it does to the names of other correspondents." (*William Henry Shane v. Parish of Jefferson*, No. 13-CA-590, Louisiana Court of Appeal, Fifth Circuit, Sept. 24)

Tennessee

A court of appeals has ruled that an exemption in the Public Records Act protecting the identities of individuals involved in executions does not create a privilege from discovery and that the State must disclose the identities of individuals to a group of death row prisoners challenging the constitutionality of Tennessee's lethal injection procedure. The trial court had found the names of the individuals were relevant and admissible in litigation and had ordered the State to disclose the names pursuant to a protective order. The State appealed, claiming the exemption for confidentiality of the names in the Public Records Act created a prohibition against public disclosure. The appeals court noted that "it seems likely that, had [the exemption in the Public Records Act] been intended to apply to discovery as well as public records requests, the Legislature would have said so expressly. In other contexts, the Legislature has specifically excluded information from discovery as well as disclosure." The court pointed out that "with regard to discovery, a court engages in a balancing of the parties' interests only after a threshold determination that a privilege applies. . . Because we have concluded that [the PRA exemption] does not create a privilege, it is not necessary for us to engage in a balancing of the interests of confidentiality and disclosure." (*Stephen Michael West, et al. v. Derrick D. Schofield*, No. M2014-00320-COA-R9-CV, Tennessee Court of Appeals, Sept. 29)

Washington

A court of appeals has ruled that the Washington State Patrol did not violate the Public Records Act when it failed to provide John Andrews with notification of further extensions of time in responding to his request for records indicating that attorney-client conversations were being recorded in a WSP breath alcohol concentration room. While the agency took one 20-day extension, responding to Andrews' request was complicated by the need to preserve the integrity of any overheard attorney-client material. Further, the agency was dealing with an influx of more than 1,000 requests. The agency ultimately provided Andrews with the records he sought, but he filed suit claiming the agency should be subject to penalties for failing to respond on time. The court disagreed, noting that "the PRA contains no provision requiring an agency to strictly comply with its estimated production dates." The court pointed out that "although [the statute] requires that agencies provide 'the fullest assistance to inquirers and the most timely possible action on requests for information,' the statute does not envision a mechanically strict finding of a PRA violation whenever timelines are missed. Rather, the purpose of the PRA is for agencies to respond with reasonable thoroughness and diligence to public records requests. The WSP's thoroughness of response is not an issue in this case. The uncontested facts in this case establish the WSP acted diligently." (*John Andrews v. Washington State Patrol*, No. 32288-2-III, Washington Court of Appeals, Division 3, Sept. 16)

A court of appeals has ruled that the Department of Corrections properly withheld almost all records related to an incident in which several prisoners told prison officials that Libby Haines-Marchel, wife of prisoner Brock Marchel, was planning to pass drugs to her husband when she visited. As a result, Brock Marchel was isolated in a dry cell for several days. No drugs were found. In response to his grievance, the prison provided Marchel with a form that contained a Confidential Informant Report on one side and a Guide to the Evaluation and Reliability of Informant Information on the other side. The report showed that three inmates, whose names were redacted, had provided information. Much of the criteria for evaluating their

reliability were also disclosed. Haines-Marchel then made a Public Records Act request for records related to the incident. The agency disclosed 43 heavily redacted pages, including redaction of almost the entire contents of the Confidential Informant Report and the Evaluation Guide that had been previously disclosed to Marchel, citing the exemption for intelligence compiled by penology agencies. The trial court ruled in favor of the agency and Haines-Marcel appealed. The appeals court agreed that all the redactions, except for Marchel's name, number, and alleged infraction, were appropriate. Upholding redaction of preprinted materials that reflected on how informant tips were evaluated, the court pointed out that "out of all possible indicia of reliability which investigators might use to evaluate an informant's tip, the knowledge of what information in the tip will be considered and how investigators will weigh that information could easily be valuable in crafting a false accusation." The court dismissed the relevance of the agency's prior disclosure to Marchel, observing that "the fact that an agency releases documents, whether through a records request or some other process, does not by itself establish the absence of an exemption." Nevertheless, because the court had ordered Marchel's name, number and infraction allegation disclosed, it found Haines-Marchel was a prevailing party and entitled to penalty fees to be determined by the trial court. (*Libby Haines-Marchel v. Department of Corrections*, No. 43700-7-II, Washington Court of Appeals, Division 2, Sept. 16)

Wisconsin

A court of appeals has ruled that Lakeland-Union High School properly withheld a report discussing employer references pertaining to Rich Fortier, who was hired as the high school basketball coach, under an exemption protecting employee records used for staff management purposes. After choosing Fortier and Levi Massey as the two finalists for the job as basketball coach, Lakeland-Union formed a five-member citizen committee to interview both men. The committee recommended hiring Massey after receiving a two-page report from the principal containing negative comments from Fortier's previous employers. At a school board meeting to consider the recommendation, one board member questioned why the committee had received negative comments about Fortier, but not Massey. The board ultimately voted to hire Fortier. Gregg Walker, a reporter for the *Lakeland Times*, requested the principal's report with the negative comments about Fortier. The school board denied the request, citing the staff management exemption. The newspaper argued that because the principal's comments might not be accurate the exemption did not apply. The trial court, after reviewing the report *in camera*, ruled in favor of the school board, but found that there was still a factual dispute over the accuracy of the comments. The appeals court found that issue irrelevant and affirmed the decision in favor of the school board. The appeals court noted that "even demonstrably false statements 'relate' to their subject. . .[I]t would be absurd to hold that a record 'relates to' an employee only if it contains verifiably accurate information about that employee." The newspaper insisted that discovery was needed to confirm the report's veracity. But the court pointed out that "a party making an open records request cannot use the discovery process to circumvent the statutory exemptions to disclosure when the complaint's allegations establish the record was properly and justifiably withheld." (*Lakeland Times v. Lakeland Union High School*, No. 20141P95, Wisconsin Court of Appeals, Sept. 16)

A court of appeals has ruled that the Wisconsin Counties Association is not subject to the public records law because it is not an "authority" under that statute. The Wisconsin Professional Police Association filed several records requests with the Counties Association, an unincorporated association, which rejected them based on its claim that it was not subject to the public records law. The Police Association sued, arguing the Counties Association was a quasi-governmental corporation. However, the trial court sided with the Counties Association. Affirming the trial court's decision, the appeals court noted that "to hold that the term 'governmental or quasi-governmental corporation' includes an entity that is not a corporation would effectively rewrite the statute to eliminate the legislature's use of the word 'corporation.' That is the job of the legislature, not the courts." (*Wisconsin Professional Police Association, Inc. v. Wisconsin Counties*

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Association, No. 2014AP249, Wisconsin Court of Appeals, Sept. 18)

The Federal Courts…

Judge Amy Berman Jackson has ruled that the Inspector General for Tax Administration cannot invoke a *Glomar* response for records it contends are protected by **Exemption 3 (other statutes)**. Cause of Action requested records from the IRS for any investigation into the unauthorized disclosure of tax return information under 26 U.S.C. § 6103 to anyone in the Executive Office of the President. The IRS referred the request to TIGTA as well. TIGTA issued a *Glomar* response neither confirming nor denying the existence of records because such confirmation would violate the prohibitions on disclosure of tax return information. Rejecting the claim, Jackson noted that "the mere existence of records of investigations into unlawful disclosure of tax return information is not, itself, return information compiled by the IRS 'in connection with its determination of a taxpayer's liability' for a violation of Title 26." She pointed out that "at this stage of the case, the only question is whether defendant must acknowledge if some records exist related to an unknown number of investigations into a particular set of unauthorized disclosures of tax return information: those made to unnamed individuals in the Executive Office of the President. This information is not 'unique to a particular taxpayer' and it is not 'return information,' as broadly defined as that term may be." She observed that "the fact that TIGTA has publicly announced that it has investigated unlawful disclosures of, or access to, that body of information protected by statute as 'return information' strongly suggests that the fact of an investigation is not, itself, 'return information.'" TIGTA also argued its *Glomar* response was appropriate under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. But Jackson pointed out that Cause of Action had not identified any individuals who had been investigated with the exception of former Chairman of the Council of Economic Advisors Austan Goolsbee. Jackson acknowledged that Goolsbee, who had been alleged to have disclosed tax return information during a press conference, would have a privacy interest in non-disclosure, but explained that that TIGTA had publicly acknowledged the existence of the investigation through letters to U.S. Senators indicating it was reviewing Goolsbee's comments and a later email from a TIGTA agent to the Chief Counsel of Koch Industries stating the final report of Goolsbee was been completed and would be available under FOIA. Jackson sent the case back to TIGTA to "determine whether the *contents*—as distinguished from the *existence*—of the officially acknowledged records may be protected from disclosure." (*Cause of Action v. Treasury Inspector General for Tax Administration*, Civil Action No. 13-1225 (ABJ), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in California was ruled that EOUSA and the Criminal Division of the Justice Department properly withheld the bulk of several memos providing guidance on how government attorneys should approach the issue of court authorization to use location tracking technology in light of the Supreme Court's recent ruling in *United States v. Jones* under **Exemption 5 (privileges)**. The memos were part of a response to a multi-part request from the ACLU of Northern California. The ACLU argued the memos constituted the working law of the agency on the subject of court authorization of the use of location tracking technology and were not protected by Exemption 5. But Magistrate Judge Maria-Elena James disagreed, noting that the memos instead "involve legal issues that will ultimately be decided by the Court, not the DOJ. . .DOJ's interpretation of recent case law affects only the strategies government lawyers will use to obtain permission from the court to use location tracking techniques by law enforcement officers in criminal prosecutions." She added that "they are not directives, not interpretations of any of the DOJ's regulations, and not part of a body of law promulgated by the DOJ. Rather, they present arguments and litigating positions that federal prosecutors may pursue on a case-by-case basis." James found that portions of the Criminal Division's

USABook, a legal resource book and reference guide for federal prosecutors, did not qualify as work product. She noted that 'the general description of the materials as guidance, coupled with the templates for use in obtaining location tracking information or devices, strongly suggest that these documents function like an agency manual, providing instructions to prosecutors on how to obtain location tracking information." James rejected the government's argument that information about a more precise use of publicly known investigative techniques could be protected under **Exemption 7(E) (investigative methods and techniques)**. She indicated that "to the extent that potential law violators can evade detection by the government's location tracking technologies, that risk already exists." Rejecting the government's claims, she observed that "the declarations here set forth only conclusory statements that the public is not aware of the specifics of how or when the techniques are used, but do not state that the techniques are not generally known to the public." (*American Civil Liberties Union of Northern California v. Department of Justice*, Civil Action No. 12-04008-MEJ, U.S. District Court for the Northern District of California, Sept. 30)

The First Circuit has ruled that the CIA properly withheld its analysis of what eyewitnesses saw during the crash of TWA 800 off Long Island in 1996 and related radar tracking analysis from Thomas Stalcup under **Exemption 5 (deliberative process privilege)**. The appellate court also upheld the FBI's decision protecting the names of individuals interviewed during the investigation under **Exemption 7(C) (invasion of privacy concerning law enforcement files)**. Stalcup focused on his theory that the entire investigation was a cover-up and that any exemption claims should be waived as a result. Stalcup argued that while the CIA determined the cause of the crash in 1997, it did not create the two disputed documents until 1998, suggesting they were post-hoc rationalizations for the original conclusion. But the First Circuit noted that "the roadblock in Stalcup's path is that the CIA's task did not end in 1997 when it reached its initial conclusion. Instead, as would any reasonable government entity presented with new data, it undertook to determine whether its prior assessment was accurate or whether it needed to change its position." Stalcup claimed that eyewitness accounts of accidents were typically public, that the NTSB had the authority to force recalcitrant eyewitnesses to testify if necessary, and that at least one witness claimed he was intimidated from speaking out. The court observed that "even crediting the testimony regarding intimidation, that provides no basis to conclude that the government also 'intimidated' 243 other eyewitnesses or, more benignly, that those witnesses had a desire to discuss the case. Although this single witness may wish to speak about the crash, as far as we know, the remainder may prefer to remain private." The court pointed out that "given the presence of a privacy interest, and the complete absence of any public benefit, the balance between the two unquestionably banks against release." (*Thomas Stalcup v. Central Intelligence Agency*, No. 13-2329, U.S. Court of Appeals for the First Circuit, Oct. 6)

Judge Paul Friedman has ruled that although the Department of Veterans Affairs ultimately conducted an **adequate search** for records pertaining to guidance for the treatment of PTSD, its conduct during the litigation brought by CREW was egregious enough for Friedman to consider sanctioning the agency's behavior by making it pay CREW's **attorney's fees** for the additional time and effort CREW was required to expend due to the agency's tactics. After a May 2008 email written by Dr. Norma Perez, a psychologist and coordinator of the post-traumatic stress disorder clinical team at the VA medical center in Temple, Texas, was leaked and widely interpreted as suggesting the VA should refrain from giving PTSD diagnoses to cut costs, CREW requested records concerning the agency's guidance on PTSD diagnoses. The agency rejected the request as too broad and burdensome. After CREW filed suit, the VA told the court that it was unable to search its email files created before December 2008. CREW interpreted this admission as indicating the agency had improperly destroyed records after its request was made. The VA then found and released a copy of Perez's email. CREW sought to depose VA FOIA Officer John Livornese concerning the possible

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destruction of records. Friedman granted limited discovery and CREW deposed Livornese. The VA then filed a renewed motion for summary judgment and for the first time revealed the existence of another declaration by an IT specialist and put into question the accuracy of Livornese's declaration. Friedman permitted CREW to depose the IT specialist and re-depose Livornese. The agency once again filed for summary judgment and Friedman concluded that the agency had finally provided a sufficient explanation of its search. Noting that the agency had now conducted an extensive search, Friedman pointed out that "the VA has sufficiently demonstrated that monthly backup tapes were not created between August 2007 and October 2008 due to an unrelated litigation hold and that pre-December 2008 daily backup tapes were rendered 'unreadable' in October 2008 due to a software reset when the hold ended. Searching additional backup tapes is particularly unnecessary here because the VA included its earliest available backup tape, from December 2008, in its search, already surpassing the requirements imposed by some other courts." But Friedman scolded the agency for its litigation tactics, noting that he was "deeply troubled by the VA's litigation conduct in the case: inaccurate declarations were left uncorrected for months despite the fact that already-executed declarations to the contrary existed but were withheld, apparently as a litigation tactic. Nothing stated in defendant's motion for reconsideration or other filings has done anything to mitigate that concern." He ordered the agency to show why it should not be sanctioned by having to pay CREW for the additional time and effort it spent because of the agency's tactics. (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Veterans Affairs*, Civil Action No. 08-1481 (PLF), U.S. District Court for the District of Columbia, Sept. 24)

Judge Tanya Chutkan has ruled that the Justice Department has not shown that a categorical use of **Exemption 7(C) (invasion of privacy concerning law enforcement records)** is appropriate for records concerning an Inspector General's investigation of Juan Carlos Ocasio's complaint against a former INS employee for impersonating a federal officer after he no longer worked for the agency and lying about his military record in violation of the Stolen Valor Act. While Ocasio's complaint was investigated, the agency decided to take no action. Ocasio requested the records pertaining to the OIG investigation and was originally told that the records had been destroyed pursuant to the agency's records retention policy. After Ocasio filed suit, the agency conducted another search and discovered the records did still exist and retrieved 296 pages. However, because the records contained information about a law enforcement investigation pertaining to third parties, the agency decided the records were categorically exempt. Ocasio challenged the **adequacy of the agency's search**. Stating the obvious, Chutkan agreed the first search was inadequate, but indicated that because the agency had since located the responsive records there was little she could do. She noted that "no purpose would be served by this Court speculating on the adequacy of DOJ's prior searches which indicated the records were destroyed—the records have been found, and DOJ searched the appropriate channels to find them." Turning to Exemption 7(C), Chutkan found there were clearly protectable privacy interests in the records, but observed that because the complaint had been referred to two different AUSAs in California for possible prosecution, Ocasio had made a case for a public interest in disclosure. She pointed out that "contrary to DOJ's assertion, the investigation file might reveal something about the agency's own conduct. While Ocasio may not have alleged enough to require disclosure, there is at least some public interest counterweight to balance against the privacy interests." She then rejected the agency's categorical exemption claim, noting that "DOJ asserts that all the documents are categorically exempt because they are law enforcement records related to a third party. However, the D.C. Circuit held in *CREW* [*v. Dept of Justice*, 746 F.3d 1082 (D.C. Cir. 2014], that Exemption 7(C) does not apply to an entire records merely because it contains some identifying information, meaning DOJ cannot withhold the entire file on this reasoning alone." Ordering the agency to redact information protected under Exemption 7(C) or provide a better explanation of why the exemption applied to the entire file, Chutkan observed that "it is simply impossible for the Court to determine on the basis of the DOJ declarations whether there is any reasonably segregable portion of the record that could be disclosed. The difficulty is compounded by the fact that the DOJ did not provide a *Vaughn* index with its motion for summary judgment as is customary. Absent a *Vaughn* index, the Court cannot ascertain the nature

of the documents and what portions may properly be withheld." (*Juan Carlos Ocasio v. U.S. Department of Justice*, Civil Action No. 13-921 (TSC), U.S. District Court for the District of Columbia, Oct. 3)

A federal court in New York has ruled that the FBI properly withheld the five pages the agency located in response to Michael Kuzma's request for records concerning the Occupy Buffalo movement under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, **Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods and techniques)**. The agency conducted a keyword search of its Central Records System for records and located five pages, which it withheld entirely. Kuzma argued the agency had not conducted an appropriate key word search, but the court noted that "the *Vaughn* index makes clear that the FBI performed such a search, and in fact, it was this search that yielded the five responsive documents." The court rejected Kuzma's contention that the agency was covering up its role in conducting surveillance of the Buffalo group. The court indicated, however, that "plaintiff makes no effort to explain how or why the disclosure of individuals' personal information would shed any light on the FBI's surveillance of Occupy Buffalo. Indeed, the FBI did not even have an investigative file concerning the Occupy Buffalo Movement; its role was limited to assisting local law enforcement with their investigative efforts." The court found that certain individuals had spoken with the agency with an implied assurance of confidentiality. The court pointed out that "the confidential source in this case is precisely the type of individual who reasonably would fear retaliation in the event of disclosure. This is particularly true given the highly publicized and politicized nature of the Occupy Movement." Kuzma contended that the FBI was required to show that the investigative methods and techniques it was withholding were not known to the public. The court, however, observed that under Second Circuit case law it was the plaintiff's burden to show that such methods or techniques were publicly known and that Kuzma had provided no evidence to carry his burden of proof. (*Michael Kuzma v. United States Department of Justice*, Civil Action No. 12-807S, U.S. District Court for the Western District of New York, Sept. 29)

A federal court in Michigan has ruled that the Department of Veterans Affairs has not yet shown that datasets from patient files maintained by the Veterans Health Administration is protected by **Exemption 6 (invasion of privacy)** because of the possibility that patients could be re-identified. The records were requested by researcher Onur Baser covering certain specific time periods. The agency concluded that the risk of re-identification by analysis using other commercially available data was unacceptable under the HIPAA Safe Harbor guidance. But Baser provided affidavits from two experts who concluded the risk of re-identification was not significant and argued that there was a clear public interest in using the data for research purposes. The court indicated that "in light of the fact that the VA has now re-reviewed its position and has undergone another analysis regarding re-identification risks and has now agreed to produce certain data to Plaintiff, the VA's position on re-identification is now in question. Plaintiff has presented sufficient evidence to rebut the VA's position as to re-identification." (*Onur Baser v. Department Veterans Affairs*, Civil Action No. 13-12591, U.S. District Court for the Eastern District of Michigan, Sept. 30)

A federal court in New York has ruled that the State Department conducted an **adequate search** for records concerning immigration attorney John Assadi and his law firm and properly withheld records under **Exemption 3 (other statutes)** and **Exemption 5 (privileges)**. Assadi requested the agency search the National Visa Center, the Fraud Prevention Unit, and U.S. embassies and consular offices in Turkey, Abu Dhabi, and France. He explained that his belief that such records existed was based on a 2010 unclassified memo from the U.S. Embassy in Turkey and subsequent anomalous treatment of visa applicants he represented. The agency ultimately conducted three searches. The agency withheld a number of records,

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primarily under Exemption 3. Assadi argued that the agency's failure to search its Office of Legal Adviser and Office of Legal Affairs in the Office of Visa Services suggested the search was inadequate. But the court pointed out that "it was reasonable for DOS to interpret Assadi's request as seeking records pertaining to the February 2010 memorandum and the processing of visa applications involving Assadi and his firm. DOS later asked for clarification from Assadi about the request's scope, and when Assadi said that his request included litigation files in cases brought by Assadi & Milstein LLP, DOS undertook supplemental searches of its legal offices." State withheld records under §1202((f) of the Immigration and Nationality Act, which provides confidentiality for records pertaining to the issuance or refusal of visas. Assadi did not contest that §1202(f) qualified as an Exemption 3 statute, but argued that it only applied to past and present visa applications, not future applications. However, based on a State Department affidavit, the court agreed that the withheld records pertained to visa applications already in existence. (*John Assadi v. United States Department of State*, Civil Action No. 12-1111, U.S. District Court for the Southern District of New York, Sept. 22)

In a companion case, a federal magistrate judge in New York has ruled that USCIS also conducted an **adequate search** for records requested by John Assadi pertaining to visa applications for his clients. In both cases, Assadi requested the court view the records *in camera*. His request was rejected by both courts. In the USCIS case, Assadi argued that *in camera* review was appropriate because there were only a small number of records. But the magistrate judge noted that "this is not the only factor the court should consider. Assadi argues that CIS's affidavits are conclusory because, by the time of its motion, CIS had provided no affidavits and only a conclusory Vaughn index. . .[But] CIS has since provided a supplemental *Vaughn* index that is sufficiently detailed. Considering that courts may remedy a conclusory *Vaughn* index by ordering a supplemental *Vaughn* index, the Court finds that this factor does not point towards *in camera* review." The court then found the agency had properly withheld records under **Exemption 5 (deliberative process privilege)** and had adequately explained why no factual information could be **segregated** and released. The agency had also withheld information pertaining to background checks under **Exemption 7(E) (investigative methods and techniques)**. The magistrate judge noted that "because the withheld records consist of background check information and are being used for the purpose of gathering information on applicants, the records qualify as 'records or information compiled for law enforcement purposes. The withheld records qualify as 'techniques and procedures' because they include instructions for agency staff on how to interact with applicants and gather information for law enforcement purposes." (*John Assadi v. United States Citizenship and Immigration Services*, Civil Action No. 12-1374 (RLE), U.S. District Court for the Southern District of New York, Sept. 26)

Illuminating some of the difficulties of prison litigation, Judge Rudolph Contreras has ruled in two companion opinions that DEA must take steps to process a request by Jeremy Pinson for records on another prisoner, but has rejected Pinson's allegation that he submitted a request to the Justice Department's Civil Right Division. Pinson made two requests to the DEA—one for records on himself, and the other for records on Ismael Guzman, a fellow prisoner who signed a certification permitting Pinson to have access to his records. In response to the request for Pinson's records, the agency indicated it had searched its investigative database and found no record. In response to the request for Guzman's records, the agency told Pinson that it would need better proof of the authenticity of Guzman's waiver and also that the request was too broad. After Pinson failed to respond to the agency's requests for clarification, the DEA closed the request for Guzman's records. Pinson claimed the Bureau of Prisons had intercepted and confiscated his mail and that, as a result, he had not received the DEA letters for clarification. The agency argued Pinson had **failed to exhaust his administrative remedies**, but Contreras noted that "Mr. Pinson alleges that under these circumstances, he could not have exhausted his administrative appeals process before he filed his lawsuit, and thus the exhaustion requirement ought to be waived. The DOJ does not contest these factual allegations in its opposition or offer evidence to show that Mr. Pinson did receive the DEA's response letters." The agency also

argued that the request for Guzman's records was too broad because it would require the agency to search through all its databases. But Contreras pointed out that he was "unconvinced that there is a rational reason to treat the language used in [the request for Guzman's records] differently from the language used by Mr. Pinson in requesting information on himself. . .where the DOJ was able to construe the records sought as being limited to investigative records. The addition of the words 'including [various types of records]' does not unreasonably broaden the search give that the DOJ has the same information for the third party as it did for Mr. Pinson. The DOJ could have run a reasonable search in response to [the FOIA request for Guzman's records] by interpreting the scope to be limited to criminal investigative records." While Contreras sympathized with the DEA's doubts about the authenticity of Guzman's signed waiver, he ordered DOJ to contact Guzman to determine the validity of his certification. In the companion opinion, the Civil Rights Division contended that it had not received Pinson's request, although Pinson said he had given the request to a BOP staffer to mail. Contreras found that was insufficient, observing that "Mr. Pinson only attests that he attempted to mail a FOIA request to the CRD. Such evidence is insufficient to create a genuine dispute of material fact because it does not actually contradict the agency's declaration stating that it did not receive the request." (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, Sept. 30 and Sept. 24)

Judge Colleen Kollar-Kotelly has ruled that Adarus Black has failed to show that records pertaining to various third parties involved in his drug conviction were made public during his trial and has accepted EOUSA's previous invocation of a categorical exemption withholding the records. In June, Kollar-Kotelly indicated that EOUSA had not shown that its privacy *Glomar* response was appropriate because Black alleged the records were in the public domain. But supplementary affidavits from EOUSA convinced her that Black had not shown that the wiretap records he sought had been played at his trial. She indicated that "plaintiff is seeking disclosure of the actual content of the recordings and none of the documents he attaches show that the actual content of the recordings was ever entered into the public record." She added that "although these documents show that the existence of the requested tapes has been referenced in the public domain, they in no way indicate that any portion of the tapes themselves has been entered into the public record." Black tried to suggest that misconduct by the Michigan U.S. Attorney's Office in 2003 and 2004 provided grounds to find that misconduct took place in his 2007-2009 trial as well. But Kollar-Kotelly noted that "simply citing [the previous misconduct findings] does not establish a pattern of misconduct within the Michigan USAO that would be revealed by these recordings and in which the public would have a significant interest." Black argued EOUSA was required to produce a *Vaughn* index, but Kollar-Kotelly pointed out that "all of the records Plaintiff requested only contained information implicating third parties in law enforcement investigations and were thus exempt from disclosure under Exemption 7(C)." She observed that "since Defendants provided a declaration explaining in detail why the records Plaintiff requested are categorically exempt from disclosure pursuant to Exemption 7(C), the Court is satisfied that Defendants met their burden under FOIA." (*Adarus Mazio Black v. U.S. Department of Justice*, Civil Action No. 13-1195 (CKK), U.S. District Court for the District of Columbia, Sept. 23)

A federal judge in Colorado has ruled that the email address for a client of a company that serves as an intermediary in leasing land for oil and gas exploration is protected by **Exemption 4 (confidential business information)**. MAO submitted an affidavit explaining why disclosure of the client's email would cause it competitive harm. The company noted that "MAO's business relationship with its client and all other oil and gas companies depends upon the confidentiality afforded to each company's identity and business prospects by MAO." The plaintiffs, San Juan Citizens Alliance, argued that disclosure would not cause competitive harm in the field of oil and gas leasing. But the court pointed out that "the primary harm it asserts is loss of

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the particular client at issue here, and possibly, other clients who learn of the breach of client confidentiality. . . [A]lthough [MAO] has not shown that it is certain to suffer economic harm if the information is released, it has shown a significant potential for economic harm [and] the showing is sufficient for the purposes of Exemption 4." (*San Juan Citizens Alliance v. United States Department of the Interior*, Civil Action No. 13-02446-REB-KMT, U.S. District Court for the District of Colorado, Sept. 30)

Judge John Bates has ruled that the Justice Department must produce a *Vaughn* index explaining its privilege claims for records pertaining to the Bureau of Alcohol, Tobacco and Firearms' Operation Fast and Furious that were withheld from a House committee under a claim of executive privilege. While the House Committee on Oversight and Government Reform sued the Justice Department to enforce its subpoena for the records, Judicial Watch made a FOIA request to DOJ for the records. In the subpoena case, Judge Amy Berman Jackson gave DOJ until November 3 to produce a list of its privilege claims. But Bates noted that in the Judicial Watch litigation he had given the agency from July 18 until October 3 to produce a *Vaughn* index. Dismissed DOJ's claims, Bates, instead of giving the agency until November 3, Jackson's deadline, pointed out that "Judge Jackson thought it prudent to allow the Department to complete its *Vaughn* index *first*, and *then* give the Department extra time to complete the more detailed list—and produce the documents—required by the *House Committee* order. This rationale counsels against dramatically shifting the goalposts in this case." Bates expressed little sympathy with DOJ's argument that it would need to assign more reviewers to the case and they would have to gotten up to speed. He observed that "this might be true. But the Department has known about its *Vaughn* index obligations since July 18. . .At best, it means the Department has been slow to react to this Court's previous Order. At worst, it means the Department has ignored that Order until now." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 12-1510 (JDB), U.S. District Court for the District of Columbia, Sept. 23)

A federal court in Louisiana has ruled that immigration attorney Michael Gahagan did not substantially prevail in his suit against USCIS and is not entitled to **attorney's fees**. Gahagan requested records for his client, Narinder Singh. The agency told Gahagan that the agency would process his request on a "first-in, first-out basis" and that his request was number 5,020 out of 12,386 pending at the agency. The agency also informed him that if he requested a specific document the agency would be able to process his request more quickly. Gahagan filed suit one month after he filed his request and the agency responded one month later. The agency released more than 300 pages, claiming some exemptions that were subsequently upheld by the court. Gahagan then filed for attorney's fees, arguing that his suit forced the agency to make a change in its position by processing the request more quickly. The court, however, disagreed. Rejecting Gahagan's fee request, the court noted that "while the court has sympathy for Plaintiff's predicament, and does not condone USCIS's delay in responding to FOIA requests, mere evidence of USCIS's administrative burdens is not sufficient for Plaintiff to prove that the filing of his lawsuit necessitated and caused the ultimate disclosure of his client's records. In light of Plaintiff's failure to satisfy the catalyst theory as well as the fact that a court order was issued against Plaintiff, Plaintiff has failed to show that he 'substantially prevailed' in his lawsuit, and thus is not entitled to attorney's fees." (*Michael Gahagan v. U.S. Citizenship and Immigration Services*, Civil Action No. 14-1268, U.S. District Court for the Eastern District of Louisiana, Oct. 1)

A federal court in New York has ruled that the EPA conducted an **adequate search** for air quality monitoring reports requested by Paul Mancuso after he was convicted of illegal remove of asbestos. Mancuso requested handwriting exemplars as well as air monitoring reports for properties in Herkimer and Poland, New York. Although the agency inadvertently overlooked Mancuso's handwriting exemplar initially, once it realized its mistake it located the exemplar and disclosed it to Mancuso. The agency provided its entire file on

Mancuso but could not locate any air monitoring reports and provided three affidavits from EPA officials responsible for clean-ups in New York State indicating that no monitoring reports ever existed. Mancuso argued they must have existed because the EPA would need them to assess clean-up costs. The court noted that "Plaintiff's argument that the requested air monitoring reports 'must exist,' and therefore Defendant's failure to provide them evinces bad faith, is unavailing. Defendant has provided Plaintiff with the entire case file, including the few air monitoring reports that were issued, and performed multiple rounds of searches to ensure compliance with Plaintiff's request. Plaintiff's assertion that the reports 'must exist' is wholly conclusory and unsupported by any facts in the record." (*Paul Mancuso v. United States Environmental Protection Agency*, Civil Action No. 12-1027 (LEK/TWD), U.S. District Court for the Northern District of New York, Sept. 22)

Judge Richard Leon has ruled that DEA, EOUSA and the Marshals Service conducted **adequate searches** for records pertaining to the chain of custody of drugs related to Brian Smith's drug conviction in Pennsylvania and that because the responsive records originated from DEA, it was proper for the agencies to refer the records to DEA, which responded to Smith's request by withholding the handful of records under **Exemption 5 (attorney work product)** and **Exemption 7(E) (investigative methods and techniques)**. By the time the records were referred to DEA, the agency concluded it had already processed the records in response to Smith's direct request to DEA. Approving EOUSA's referral to DEA, Leon pointed out that "the referral neither significantly impaired plaintiff's ability to obtain records nor significantly increased the length of time plaintiff awaited a response to his request." EOUSA withheld one page because it contained handwritten notations. Accepting the claim that the notations were protected by the attorney work product privilege, Leon explained that "the EOUSA's declarant demonstrates that all the handwritten case citations and numbers on the page were made by an attorney. Insofar as the record was located in a criminal case file associated with plaintiff, it is reasonable to conclude that the notes were made in anticipation of or in connection with the prosecution of plaintiff's criminal case." Leon approved DEA's withholding of a G-DEP identifier under Exemption 7(E). He noted that "a G-DEP code is assigned to a case when a case file is opened" and indicated that "if a G-DEP code were released, the declarant explains, violators could 'identify priority given to narcotic investigations, types of criminal activities involved, and violator ratings.'. . .In short, disclosure of a G-DEP code 'would. . .thwart the DEA's investigative and law enforcement efforts.'" (*Brian Eugene Smith v. Executive Office for United States Attorneys*, Civil Action No. 13-1088 (RJL), U.S. District Court for the District of Columbia, Sept. 24)

Ruling for the third time in a case involving records pertaining to allegations that a former AUSA was not authorized to practice law at the time she was working with the U.S. Attorney in Arkansas, Judge Amy Berman Jackson has found that EOUSA still had not adequately explained its **search** for responsive records, but that virtually all the agency's exemption claims were appropriate. Dismissing the description of the search by EOUSA's Personnel Staff, Jackson noted that the affidavit "does not explain why [the two systems searched] were the only ones likely to contain responsive records, nor does it describe the Personnel Staff filing system in general." Jackson found that "Legal Counsel Control Sheets" were protected by **Exemption 5 (privileges)**, but not **Exemption 6 (invasion of privacy)**. She pointed out that "Exemption 6 does not apply to these documents because they are not 'personnel,' 'medical' or 'similar' files. Rather, by defendant's own description, they are Legal Counsel Office communication devices." (*Lonnie J. Parker v. U.S. Department of Justice*, Civil Action No. 10-20168 (ABJ), U.S. District Court for the District of Columbia, Sept. 23)

A federal court in Indiana has ruled that the EEOC properly withheld its rationale for deciding not to pursue Joseph Kennedy's employment discrimination complaint under **Exemption 5 (privileges)**. Kennedy had filed a complaint with the EEOC against his employer, Stericycle. The agency informed Stericycle of Kennedy's complaint, but did not require the company to take any action. The agency ultimately found

Kennedy had filed his complaint too late. Kennedy then requested records concerning his complaint. The agency withheld information concerning the investigator's rationale for recommending that Kennedy's complaint be closed. Upholding the agency's decision, the court noted that "the Investigator's initial assessment of Mr. Kennedy's Charge of Discrimination and the EEOC codes that convey that assessment to the Investigator's supervisor are undisputedly related to the process by which the EEOC reached a final decision on how Mr. Kennedy's Charge of Discrimination should be resolved. This type of information is precisely the type of deliberative information that Exemption 5 covers. . ." (*Joseph Robert Kennedy v. United States Equal Employment Opportunity Commission*, Civil Action No. 14-00374-JMS-MJD, U.S. District Court for the Southern District of Indiana, Sept. 29)

A federal court in Georgia has ruled that the NSA has explained why any records on Michael Taylor would be exempt under the **Privacy Act**. Taylor had requested any records concerning himself and the agency responded that it could neither confirm nor deny the existence of records, citing both **Exemption 1 (national security)** and **Exemption 3 (other statutes)** as the basis for its *Glomar* response. The court had found that Exemption 3 protected the records from FOIA disclosure, but indicated the agency had not provided justification for withholding records under the Privacy Act. After the agency provided a supplemental affidavit, the court agreed the records were exempt under the Privacy Act as well. The court noted that Subsection (k)(1) provided an exemption for properly classified records. As a result, the court addressed whether Exemption 1 also covered the records. The court observed that acknowledgement of "the existence or non-existence of intelligence information on Plaintiff is proper because a positive or negative response to Plaintiff's request would reveal information that is currently and properly classified in accordance with [the Executive Order on Classification] and is thus exempt from disclosure under Section 442(b)(1) of FOIA. Therefore, the request is also exempt from disclosure under Section 552a(k)(1) of the Privacy Act." (*Michael Taylor v. National Security Agency*, Civil Action No. 313-045, U.S. District Court for the Southern District of Georgia, Sept 30)