Volume 40, Number 22
November 5, 2014

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: William Cohan, a columnist for the New York Times who writes on business and has had his own run-ins with the SEC concerning the agency's FOIA performance, lambasted the agency in a Nov. 4 column concerning efforts by Robert Jackson, a law professor at Columbia University, to force the agency to disclose data collected by the agency on various aspects of how investment professionals conduct their business. The agency initially told Jackson that it had no responsive records, but after he pointed out that two economics professors had used such data provided by the agency to write a 2012 article published in the Journal of Financial Economics, the agency changed its position, admitting the existence of records but insisting that processing Jackson's request would be unduly burdensome. In a letter to SEC FOIA Officer Barry Walters, Jackson complained that "the reason your colleagues have delayed this request has nothing to do with its merits. . .Rather than seek ways to satisfy the request, your colleagues have lurched from one basis for denial to another, finally settling on the absurd notion that obtaining data that the SEC already has would take significant staff time."

Requester Coalitions Push for FOIA Improvements

A coalition of public interest organizations has sent a letter to the White House expressing their concerns about the scope of legislative clarifications they believe the Obama administration should support. Another letter from a similar coalition to OGIS Director Miriam Nisbet collects evidence that a number of agencies have been contacting requesters with outstanding requests inquiring about whether they are still interested in the requests and indicating that the requests will be administratively closed if the agency does not hear back from the requester by a date certain confirming his or her continued interest. The letter asks OGIS to conduct an investigation of the practice, which, the coalition asserts, is not permitted by FOIA. Both letters are illustrations of the continued commitment of the FOIA community to improving the way the statute works for requesters and attempts to bring pressure for change other than through litigation.

ACCESS REPORTS

A series of FOIA amendments—including codifying the foreseeable harm standard to apply to all exemptions—passed the House earlier this year. Amendments introduced in the Senate targeting changes supported by the requesters' community were designed to improve on the House bill while remaining similar enough to the House bill to pass that chamber as well. The coalition letter to President Obama underscores the importance the requester community attaches to those improvements. Chief among those goals is the need to codify both the presumption of disclosure and the foreseeable harm standard already contained in the 2009 Holder memorandum. The letter notes that "as with the presumption of openness, different administrations have either implemented or rescinded the requirement that material only be withheld where disclosure would cause foreseeable harm to government interests. The FOIA is a statutory mandate that can be fulfilled only by codifying these essential elements."

A key element of FOIA reform for the requester community is to rein in the use of Exemption 5, particularly invocation of the deliberative process privilege protecting the candor and integrity of internal government discussions. In the past, courts applied a partial narrowing restriction by requiring agencies to tie deliberative documents to actual discrete agency decisions, but only a handful of courts continue to apply that standard and now any discussions that can be cast as predecisional and deliberative can be protected because their disclosure potentially harms the integrity of the process of agency deliberations. The foreseeable harm test requiring agencies to identify an actual harm from disclosure of specific documents first appeared in the Reno memo during the Clinton administration, was dropped in the Ashcroft memo during the Bush administration, and reappeared in the Holder memo issued by the Obama administration. If the foreseeable harm test is to have any value, it must mean that agencies are required to articulate a reason why *specific* documents must remain protected because their disclosure will likely cause *real* harm to the ability of the agency to come to a decision. But the privilege continues to be used by agencies routinely to withhold information based on its potential to undercut nothing more specific than the integrity of the process.

The requester community attacks the privilege in several ways. First it supports incorporating a public interest test applicable to challenges to the use of Exemption 5. The letter points out that "adding a balancing test will mirror how the deliberative process privilege is treated for discovery purposes, where courts weigh the government's interest in secrecy against the stated need for disclosure by the party seeking discovery. Unless the FOIA incorporates a similar balancing test, the public will continue to be denied access to information of critical public importance, even where secrecy serves at best only a very limited governmental interest." The second limitation would be to place a 25-year limit on the use of Exemption 5. The letter notes that "the FOIA should not be used to bar the public's access to our nation's history where the passage of time has significantly eroded, if not eliminated altogether, any valid governmental interest served by secrecy." The letter adds that "a 25-year period far exceeds the 12 years of non-disclosure afforded the records of former presidents under the Presidential Records Act."

The coalition also questions agencies' disregard of a provision added by the 2007 OPEN Government Act amendments severely limiting agencies' ability to charge fees if they failed to meet any statutory deadlines. The letter notes that "the Department of Justice has advised agencies that they may continue to charge fees past the deadlines if they have made a reduction in their backlogs, even if that reduction is by only one request. Such a position directly conflicts with the clear legislative language and intent." The coalition also recommends expanding the role of OGIS, including clarifying its authority to issue advisory opinions.

The letter to OGIS concerning administrative closings of requests is a particularly sore point in the FOIA community. While requesters don't object in principle to agencies contacting requesters whose requests have lain dormant for long periods to confirm whether or not they are still interested in the records, they vociferously object to the agencies threatening to close a request if they don't hear back from the requester within a set time period. Attaching a collection of examples of such a practice across a number of agencies,

the coalition asks OGIS to "investigate this practice and its impact on FOIA requesters as a barrier to pursuing government records." The letter adds that "based on this investigation, the undersigned organizations request that OGIS develop guidance advising agencies how to deal with the issue of older requests in a manner that complies with the FOIA, yet recognizes the agency interest in conserving scant FOIA resources. We further request that OGIS publish a report on its findings in this matter."

This kind of practice is particularly repugnant to the FOIA community because it has no statutory basis. Agencies cannot unilaterally decide to close a perfected request because the requester does not respond to their inquiry. On the other hand, agency resources are already overtaxed and to the extent the agency can identify requests in which requesters have lost interest that frees up agency resources to work on other requests. But while such requests can be closed if the requester consents, lack of response can never be used to justify closing a request. However, to the extent such a policy is a legitimate attempt by an agency to winnow its backlog, the inability of the agency to establish contact with a requester may be a real indication that a requester has changed jobs or moved or is no longer interested in a request. Ironically, one of the examples provided with the coalition's letter to OGIS tends to highlight that problem. The letter is from OIP to the First Amendment Fellow at the New York Times, asking whether the current Fellow is still interested in requests filed in 2009 and 2010 by his predecessors for records concerning Sonia Sotomayor and Merrick Garland when both were potential candidates for appointment to the Supreme Court. The subject matter and the context of the requests lend themselves to the possibility that the requesters are no longer interested in pursuing them.

Unfortunately, another incentive for agencies to close requests is to meet targets set for backlog reduction and to improve their statistics in annual reports. While these statistics may burnish an agency's image, they should not play a role in administratively closing legitimate requests. And, unfortunately for agencies, requests remain legitimate until the requester withdraws a request or the agency completes its processing of the request.

Views from the States…

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

Connecticut

A trial court has ruled that the Greenwich Board of Estimate and Taxation improperly closed a meeting concerning the need for environmental remediation of property adjacent to Greenwich High School for a proposed expansion of the school's auditorium and related music facilities. Based on a series of emails from William and Steven Effros, brothers who owned adjacent property, to various local, state, and federal agencies questioning the nature, cost and legality of the proposed remediation work, the board claimed it needed to go into executive session to discuss a pending claim. The Greenwich *Time* filed a complaint about the closed meeting with the FOI Commission, which found the board had failed to show a pending claim. The trial court agreed, noting that the Effros' emails "at most state an intention to file a complaint with state and federal agencies. [They do] not state an intention on the agencies' part or on the part of the Effros brothers to file an action against the plaintiffs." To show that a meeting was closed to discuss a pending claim, a public body needed to show that it took action to preserve a legal right. But the court observed that "in this case, however, there is no evidence that the board discussed taking any affirmative action to enforce a legal right. Instead, as

ACCESS REPORTS

the commission found, the board discussed several remediation options. Such a discussion hardly equates to 'pending litigation.'"The court accepted the commission's finding that the board had not discussed strategy concerning a pending claim. Instead, the court pointed out that "if there was any discussion about strategy, it was strategy about how best to resolve the contamination, rather than strategy about any possible claims or litigation." (*Board of Estimate and Taxation for the Town of Greenwich v. Freedom of Information Commission*, No. HHB CV14-6024209S, Connecticut Superior Court, Judicial District of New Britain, Oct. 30)

Maine

The Supreme Judicial Court has ruled that the Humane Society Waterville Area is not a public agency subject to the Freedom of Access Act. Gina Turcotte requested records about a certain cat. The HSWA declined to provide any records, arguing that it was not a public agency. Turcotte filed suit, claiming HSWA was primarily funded by its contracts with neighboring towns. The court, however, noted that "that an entity provides services under a contract with a public agency is insufficient, on its own, to establish that it performs a governmental function." The court pointed out that "although HSWA is funded in part by its contracts with area cities and towns, it receives the bulk of its funding from private donations." The court added that "HSWA is subject to certain licensing requirements and is bound to abide by the terms of its contract with the city. Such limited interaction does not amount to significant government control over HSWA." The court concluded that "although HSWA performs a function that both benefits the public and assists municipalities in fulfilling their statutory obligation to arrange for shelter services to be provided for the area, it is not a public agency subject to the requirements of FOOA." (*Gina Turcotte v. Humane Society Waterville Area*, No. Ken-14-52, Maine Supreme Judicial Court, Nov. 4)

New Mexico

A court of appeals has ruled that the Albuquerque Police Department did not violate the Inspection of Public Records Act when it failed to respond to reporter Kim Holland's oral request for lapel videos. Instead, the police did not release the lapel videos until a month later at a press conference. Noting that a provision of the IPRA recognizes that both written and oral requests can be submitted but that oral requests are not subject to the same administrative time frame, the court agreed that Holland's oral request to APD public information officer Marie Martinez was not transformed into a written request when Martinez emailed APD records custodian Reynaldo Chavez asking him to treat the email as a request from Holland for the lapel videos. The court noted that "that Ms. Martinez then emailed the request to Mr. Chavez did not convert Ms. Holland's oral request into a written request made by Ms. Holland. . .We see no reason to hold that an APD information officer's documenting an oral request, which would appear to be a good practice, should constitute transformation of an oral request into a written request for the purposes of the IPRA." The court also rejected Holland's argument that Martinez was acting as her agent. The court observed that "Ms. Martinez's request to Mr. Chavez that Ms. Holland's request be treated as an IPRA request on Ms. Holland's behalf constituted nothing more than documenting Ms. Holland's verbal request and bringing it to the attention of the proper IPRA person in the APD." The court added that "we agree with Respondents' concern that to accept Petitioners' agency theory would mean that every oral request documented by the APD would automatically, upon documentation, constitute a written request emanating from the requester." (*Kim Holland and KRQE News 13 v. City of Albuquerque*, No. 33,171, New Mexico Court of Appeals, Oct. 29)

Pennsylvania

A court of appeals has ruled that the Department of Education properly showed that records concerning the Sandusky scandal at Penn State University created by the outside counsel hired to investigate

PSU's potential liability are protected by both the attorney-client privilege and the attorney work-product privilege and that counsel did not waive the privilege when it updated the NCAA and the Big Ten on the progress of the investigation. Ryan Bagwell requested a series of communications between attorneys and the PSU Board of Trustees, of which the Secretary of Education was an *ex officio* member. The court had previously determined that the Board's records were subject to the Right-to-Know-Law through the Department of Education. However, the court had not yet ruled on whether the records were exempt. Noting that Bagwell had conceded that the withheld communications were privileged, the court was still left to decide whether the privileges had been waived. Bagwell argued that disclosure of information pertaining to the subject matter of the investigation constituted a broad waiver of the privileges. The court, however, disagreed, noting that Pennsylvania courts had not adopted a subject-matter waiver, and pointing out that "subject-matter waiver, to the extent it is recognized, applies where the parties seeking disclosure are adversaries in litigation. Here, however, PSU is not using its selective disclosures as weapons to the detriment of Requester. Unlike a party seeking waiver of the privilege in a discovery dispute or otherwise in litigation, Requester claims no punitive effect from PSU's selective disclosure. Therefore, the 'fairness' reasons for imposing a broad subject-matter waiver do not exist here." The court added that "there is no evidence that [outside counsel] waived the privilege as to the content of the records sought." Bagwell argued the burden of proving that a privilege had not been waived should be upon the agency since the requester did not have the ability to gather the evidence necessary to defeat such a claim. Rejecting Bagwell's contention, the court indicated that "to carve out such an exception in privilege jurisprudence for RTKL disputes would needlessly complicate RTKL adjudications and would undermine the applicability of established case law that assists agencies and [the Office of Open Records] in determining how to assess privilege." (*Ryan Bagwell v. Pennsylvania Department of Education*, No. 79 C.D. 2014, Pennsylvania Commonwealth Court, Oct. 31)

A court of appeals has ruled that the Office of Open Records properly concluded that records of discussions by the Department of Community and Economic Development pertaining to the federal Department of Housing and Urban Development's conclusion that a local project was not eligible for federal funding and the state agency needed to repay the funds were protected by the deliberative process privilege. Mark Heintzelman argued that the crime-fraud exception waiving privilege when discussions focus on criminal acts applied. While the court found the record supporting the deliberative process claims was conclusory, it nevertheless noted that "Requester does not dispute that the redactions meet the three elements required to establish the predecisional deliberative exception." The court found the crime-fraud exception did not apply because there was no evidence suggesting the state agency's actions were criminal. The court pointed out that "a violation of federal regulations, and investigation into same, does not equate to commission of a crime or fraud, which requires knowledge or intent." Heintzelman also argued OOR erred by denying his request for a hearing of his complaint. However, the court observed that "a requester has no 'right' to a hearing before an appeals officer. Rather, this Court emphasizes that an appeals officer's decision to not hold a hearing is 'discretionary and not appealable.'" (*Mark Heintzelman v. Pennsylvania Department of Community and Economic Development*, No. 512 C.D. 2014, Pennsylvania Commonwealth Court, Oct. 30)

A court of appeals has ruled that the Department of Environmental Protection properly withheld records concerning an evaluation of the status of Perkiomen Creek under the deliberative process privilege, but has remanded the case to the Office of Open Records to conduct an *in camera* review to determine if there are any factual portions of the withheld records that can be disclosed. Kellie McGowan argued the Department had failed to identify the date on which the documents were created and to show that they had not been disclosed to third parties. The court disagreed, noting that "these omissions do not render the affidavit fatally defective. Indeed, the date of the documents' production has little, if anything, to do with the internal nature of the documents, and there is no concrete evidence to suggest that the documents have been disclosed outside the Department." The court pointed out that "there is nothing in [the deliberative process exemption] that

ACCESS REPORTS

requires a predecisional deliberation by an agency to be one that results in an official adjudication or decision, such as the Department's final report on the re-designation of Perkiomen Creek for public comment." Sending the case back to the OOR for *in camera* review, the court observed that "in the event the OOR determines that severable, factual material exists within the [documents] which would not be tantamount to publicizing the Department's evaluation and analysis, the OOR shall direct the Department to redact the remaining deliberative portions of those documents because the Department has already established their exemption from disclosure." (*Kellie McGowan v. Pennsylvania Department of Environmental Protection*, No. 161 C.D. 2014, Pennsylvania Commonwealth Court, Oct. 28)

The Federal Courts…

A federal court in Illinois has ruled that the Department of Homeland Security conducted an **adequate search** for records concerning the investigation of a complaint filed by Adijat Edwards, a Nigerian citizen who claimed ICE agents stole $1,200 in cash and several pieces of jewelry while she was in detention before being deported, although the agency has failed to show why it was unable to segregate two video files. Jacqueline Stevens, a professor of political science at Northwestern, requested records of the OIG's investigation of Edwards' complaint and included a privacy waiver from Edwards. OIG conducted multiple searches and referred documents to both ICE and USCIS. OIG disclosed 139 unredacted pages and 335 redacted pages. It withheld two video DVDs after concluding that the images Stevens sought were not on either DVD. Stevens challenged the search because the agency had been forced to conduct multiple searches before finding all the responsive documents. The court noted that it "views DHS's remedial searches as a good-faith effort to work with Stevens and to provide all non-exempt documents responsive to her request. It is inevitable that a search may fail to find every responsive document, but FOIA does not require such a high standard—'a search need not be perfect, only adequate.'" Stevens argued the agency would not have conducted an adequate search if it had not been for her persistent prodding. But the court pointed out that "the case law demonstrates that it is the agency's actions to rectify the failings of its initial search that demonstrate an adequate search has been performed." After finding the records had been created for a law enforcement purpose, the court indicated that redactions of personally-identifying information of third parties were justified under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Assessing whether Stevens had shown a public interest in disclosure that would outweigh the privacy interest, the court noted that "while Stevens may wish to possess this information as part of her research. . .the Court cannot discern the significant public interest that would be advanced by revealing this private information. . ." ICE told the court that it did not have the technological expertise and resources to redact video files. The court agreed that the videos were exempt but indicated that it was "troubled by ICE's inability to segregate video footage, especially given the large number of requests for video records that ICE's FOIA Office receives. . .A large federal government agency such as ICE should have sufficient technological expertise and equipment to segregate data from its video files." But the court reached a different conclusion when OIG told the court that it had access to video-editing software but did not have the expertise in its office. The court ordered the OIG FOIA office to consult with DHS staff that did have such expertise and either segregate the video or provide an affidavit explaining why the video could not be segregated. (*Jacqueline Stevens v. United States Department of Homeland Security*, Civil Action No. 13-03382, U.S. District Court for the Northern District of Illinois, Nov. 4)

Judge Rudolph Contreras has ruled that Florent Bayala **failed to exhaust his administrative remedies** when he filed suit against the Department of Homeland Security after the agency partially denied his request for records concerning his asylum application rather than first filing an administrative appeal. Bayala argued that the agency's cover letter explaining its reasons for denying records was so vague and cryptic that

appealing administratively would have been futile. Contreras noted that "Bayala assumes that the 'purposes of exhaustion' would be served only if he could make 'targeted' arguments in an administrative appeal," but pointed out that "he fails to cite any authority for this proposition or to explain why an appeal from DHS's letter, as written would necessarily preclude DHS" from exercising its discretion and expertise or making a factual record supporting its decision. Bayala claimed the agency had failed to provide reasons for its determination. Contreras, however, observed that "the cover letter's 'reasons' were sufficient to require Bayala to file an administrative appeal. The letter explained that DHS decided to withhold certain documents in full because they 'contain no reasonably segregable portions of non-exempt information.' DHS also enumerated FOIA exemptions that it concluded were 'applicable' to withheld information. . .Lastly, DHS explained its reasons for referring certain documents to the Department of State and to ICE—to enable those agencies to provide a 'direct response' to Bayala." In a footnote he added that "to the extent Bayala contends that FOIA requires of an initial agency response something more than 'reasons' but less than a *Vaughn* index, this Court discerns no such principle in the statute or case law." Addressing an issue that is currently unsettled after the D.C. Circuit's decision in *CREW v. FEC*—whether a plaintiff is still required to file an administrative appeal if the agency responds after the time limit expires but before the plaintiff files suit—Contreras came down on the side of the status quo, indicating in a footnote that "to be sure, DHS's letter issued after the twenty day response period. . .But this delay did not amount to constructive exhaustion because Bayala waited until *after* DHS's late response to file his lawsuit." (*Florent Bayala v. United States Department of Homeland Security*, Civil Action No. 14-00007 (RC), U.S. District Court for the District of Columbia, Nov. 4)

The Fifth Circuit has ruled James Negley failed to show that the FBI did not conduct an **adequate search** pertaining to his 2009 request for records on himself. Because Negley had asked the librarian at Chico State University for a copy of the Unabomber's manifesto the day it was published in the *Washington Post* in 1995, he became a person of interest in the search for the Unabomber. The FBI quickly eliminated him as a suspect, but Negley later filed a series of requests with the agency for records pertaining to its investigation of him. In 1999, he submitted a request to the agency's Sacramento field office and sued the agency over whether it had conducted an adequate search (*Negley I*). He submitted a subsequent request in 2002 to the San Francisco field office and again sued the agency over the adequacy of its search (*Negley II*). The adequacy of the agency's search was upheld by the D.C. Circuit in 2012. In 2009 while the *Negley II* litigation was ongoing, Negley filed another request for records about himself and again sued the agency, this time in the Western District of Texas. The agency argued at the trial court that Negley's suit was precluded by both *res judicata*—claim preclusion—and collateral estoppel—issue preclusion—because the D.C. Circuit district court had ruled that the agency's search in response to his 2002 request was adequate and, further, because the agency had conducted another search in response to his 2009 request during the *Negley II* litigation. The Fifth Circuit rejected the claim, noting that "even if the FBI had identified some unequivocal expression of confidence from the district court about the adequacy of the search in response to the 2009 request, the FBI has not shown how such a determination was at all necessary to the court's decision on the adequacy of the search initiated in response to the 2002 request." The court pointed out that claim preclusion also did not apply. "Here, the two actions are based on two different FOIA requests of different scope made years apart. Those requests might seek information related to a common nucleus of operative facts, but the suits are in response to distinct FOIA requests and the alleged failure of the FBI flowing from those requests." The court found the trial court had erred in relying on Negley's failure to show bad faith on the part of the agency as evidence that the search was adequate. The appellate court noted that "absent countervailing evidence by the plaintiff, the court will assume that the agency is telling the truth about its search, but that does not mean that the court must accept the agency's assertion that the search was adequate." Instead, Negley needed to provide evidence that put the adequacy of the agency's search in question. Negley relied on a murky notation in one document that could be interpreted as suggesting that many more responsive records existed as evidence that

ACCESS REPORTS

the agency had failed to follow up new leads. The court disagreed, observing that "allowing an indication that more records exist, without requiring an indication of the types of records or their location, would change the agency's obligation from showing a reasonable search to proving a negative, namely, that there existed no more responsive records." (*James Lutcher Negley v. Federal Bureau of Investigation*, No. 13-50912, U.S. Court of Appeals for the Fifth Circuit, Nov. 3)

A federal court in California has ruled that the Justice Department must produce a *Vaughn* index of records about DEA informants Steven Olaes and Shane Ahlo, who testified as government informants at Michael Schultz's drug trial. After Schultz's conviction, he requested records about himself, Olaes, and Ahlo. The agency issued a *Glomar* response neither confirming nor denying the existence of records on the third parties. But the court pointed out that under *Pickard v. Dept of Justice*, 653 F.3d 782 (9th Cir. 2011), a case whose facts were nearly identical to those in Schultz's case, the Ninth Circuit has ruled that once the government publicly identified informants it was required to respond to a request for information. The court observed that in *Benevides v. DEA*, 968 F.2d 1243 (D.C. Cir. 1992), the D.C. Circuit had specifically said that once an informant's identity was officially confirmed "the agency must acknowledge the existence of any records it holds." The court noted that "whatever case authority may exist to support a *Glomar* response under any exemption in any other context, *Benevides* and the cases interpreting it have uniformly held that a *Glomar* response is not available in the context of an informant whose identity has been officially confirmed." The government also argued that *Reporters Committee* allowed agencies to use categorical exemptions where the type of information was routinely protected by the privacy exemption. Rejecting the claim, the court pointed out that "Plaintiff's FOIA requests do not request information from a *discrete category* of information. While there might be one or more rap sheets include in the list of responsive documents, Plaintiff's FOIA request encompasses far more than rap sheets or any other single discrete category of document." The court also indicated that there could be a plausible public interest in examining the way the various agencies handled their *Brady* obligation to disclose exculpatory evidence. The court noted that "while the court agrees that the public has little or no interest in law enforcement files on Olaes and Ahlo as such, it would be of considerable interest to the public if the evidence requested points to a practice of failing to disclose facts pertaining to paid informants that would otherwise be required under *Brady*." (*Michael F. Schultz v. Federal Bureau of Investigation, et al.*, Civil Action No. 05-0180 AWI GSA, U.S. District Court for the Eastern District of California, Oct. 29)

A federal court in Washington has ruled that Tom and Cathleen Osterman do not have **standing** to challenge the Army Corps of Engineers' partial denial of a request filed by their attorney for records of their application for permission to build a private boat dock in U.S. waters adjacent to their residence. Dennis Reynolds represented the Ostermans in their permit application. He filed a FOIA request with the agency for the Ostermans' permit application, identifying the application by number. Reynolds did not, however, indicate that he was requesting the records on behalf of the Ostermans. He sent a separate email to the agency indicating that the Ostermans had requested that he review the file and asking when the file could be made available for review purposes. The email made no mention of his FOIA request. When the agency withheld certain records in response to Reynold's FOIA request, he filed an administrative appeal on behalf of the Ostermans. Before the agency responded to the appeal, the Ostermans filed suit. Judge Barbara Rothstein noted that "in the context of FOIA, standing is conferred on an individual whose FOIA request has been denied in whole or part. This means that the individual who made the FOIA request is the only individual who has standing to challenge an agency's response to that request." She observed that "here, it is undisputed that the FOIA request was not signed by the Ostermans; nor, does the FOIA request indicate that it was made on behalf of the Ostermans." The Ostermans argued the agency should have known that their attorney was requesting the records on their behalf. But Rothstein pointed out that "a *post hoc* declaration by an attorney of

an intent which is not manifested by the operative FOIA request is irrelevant. Such a self-serving declaration is inherently unreliable. Moreover, it is patently unworkable from a FOIA perspective to ask federal agencies to recognize someone as an actual FOIA requester based only on after-the-fact statements of intent, such as those made by Mr. Reynolds." Rothstein added that "it was not until after the Corps responded to the FOIA request and an administrative appeal was filed that Mr. Reynolds claimed he made the request on behalf of the Ostermans. This is not sufficient to confer standing on the Ostermans. Indeed, if it were, there would be nothing to prohibit a party from piggy-backing onto an existing request at any point in the administrative and/or judicial process. Such was not the intent of Congress." (*Tom and Cathleen Osterman v. U.S. Army Corps of Engineers*, Civil Action No. 13-1787-BJR, U.S. District Court for the Western District of Washington, Oct. 30)

Editor's Note: Dismissals because of improper plaintiffs or defendants stem largely from government attorneys' obsession with trying to get rid of cases by any means possible. In most such cases, a simple amendment to the complaint to include the proper party would preserve the case and allow the court to consider it on the merits.

Judge Beryl Howell has ruled that the Bureau of Prisons conducted an **adequate search** for records pertaining to prisoner Barry Schotz and properly withheld portions under **Exemption 7(C) (invasion of privacy concerning law enforcement files)** and **Exemption 7(F) (harm to individual)**. Ironically, she has also rejected the government's attempt to dismiss the case for lack of jurisdiction because Schotz sued BOP Director Charles Samuels rather than the agency itself. She noted that "while it is true that the FOIA authorizes a cause of action against federal agencies only, 'pleadings [in general] must be construed so as to do justice' and *pro se* filings in particular must be construed liberally." She observed that under Federal Rule of Civil Procedure 17(a)(3) "the court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to. . . be substituted into the action." She then explained that "the Court hereby substitutes the Department of Justice, of which BOP is a component, as the real party in interest and dismisses the complaint against BOP Director Samuels under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Consequently, the defendant's motion to dismiss under Rule 12(b)(1) is denied." Noting that Scholtz's request was far from clear, she approved of the agency's exemption claims and agreed that under BOP policy Scholtz was allowed only to review his pre-sentence report rather than to possess a copy. Although Scholtz asked the agency to search "outside sources," Howell agreed with the agency that all responsive records would be in his central file. Howell dismissed Scholtz's request for sanctions, rejecting his claim that the agency should have provided a *Vaughn* index at the administrative level. Instead, she pointed out that "this is incorrect. A *Vaughn* index, created by judicial fiat (not the FOIA), is a suggested mechanism to assure 'adequate adversary testing' of the government's claimed exemptions and to assist the court in assessing the government's position during litigation. During the administrative process, 'an agency is not required to produce a Vaughn index—which district courts typically rely on in adjudicating summary judgment motions in FOIA cases." (*Barry R. Schotz v. Charles E. Samuels, Jr.*, Civil Action No. 13-1811 (BAH), U.S. District Court for the District of Columbia, Oct. 30)

A federal magistrate judge in California has ordered Richard Snyder and the Defense Logistics Agency to submit to administrative dispute resolution to try to resolve a technical problem preventing the agency from completing a FTP transmission of a Commercial and Government Entity Code File pursuant to court orders in an earlier 1996 case, *TPS Inc. v. Defense Logistics Agency* and in a 2003 case, *Richard Snyder v. Defense Logistics Agency*. Snyder told the court that he was requesting enforcement of these earlier orders, but the

court explained that "to avoid any confusion, Plaintiff should understand that an order by a judge in a different case does not constitute an order in this case. As such, legal arguments made in other cases are not arguments made in this case until such time that the arguments based on the particular facts of this case are made. Each case is litigated on its own merits. Thus, Plaintiff's repeated argument that the issues in this case have already been decided in other cases from 1999 and 2003 is misguided." The court then indicated that "it does not appear that the Government has denied Plaintiff's requests outright" and added that "given the nature of this dispute, then, the Court finds that the parties should be able to negotiate an agreement to resolve the CAGE Code File transmission problem without further Court intervention." The court sent the parties to administrative dispute resolution, although it noted in a footnote that "the parties argued that this case was not suitable for ADR," but because the parties never filed a stipulation asking to be excused from ADR the court pointed out that "the parties were not, therefore, ever excused from compliance with the Court's ADR Program." (*Richard Snyder v. Department of Defense*, Civil Action No. 14-01746-KAW, U.S. District Court for the Northern District of California, Oct. 29)

A federal court in Connecticut has ruled that the law firm of Carmody & Torrance is neither eligible nor entitled to an award of **attorney's fees** for its suit against the Defense Contract Management Agency. The court noted that "Carmody has not shown that this is the kind of case in which it is appropriate for the court to exercise its discretion to award a fee. Indeed it made no argument at all on this front." The court observed that "nor, on the merits, is this case the kind in which a fee award is appropriate. . .Carmody appears to have sought the documents at issue with the only foreseeable benefits being commercial benefits to its client in ongoing litigation." (*Carmody & Torrance LLP v. Defense Contract Management Agency*, Civil Action No.. 11-1738 (JCH), U.S. District Court for the District of Connecticut, Nov. 4)