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Washington Focus: The Senate Judiciary Committee has released an amended version of its "FOIA Improvement Act of 2014," dropping the public interest balancing test for Exemption 5, but retaining a provision that would prohibit the use of at least the deliberative process privilege for records more than 25 years old. Jason Leopold, writing for VICE News, noted that according to Sen. Patrick Leahy (D-VT), agencies in 2012 used Exemption 5 more than 79,000 times. According to an Associated Press survey, agencies used the exemption 81,752 times in 2013. Although the public interest test was dropped, open government advocates are still pleased by the Senate bill, which is expected to pass the full Senate next week. Amy Bennett, assistant director of Openthegovernment.org, told Leopold that "we think this is a really strong FOIA reform bill that would help the public actually use the FOIA to better understand what the government is doing and why." Nate Jones, FOIA coordinator for the National Security Archive, told Leopold that the bill "if passed, will lead to release of more information more quickly. The 25-year cut-off stays, which is a big win."

D.C. Circuit Reaffirms Breadth of Exemption 8

Because the use of Exemption 8 (examination reports) is largely confined to agencies with jurisdiction over financial institutions, it is rarely litigated. It is even rarer at the appellate level and, thus, a recent decision by the D.C. Circuit involving Exemption 8 is cause for note by itself. But to make it that much more unique, the case deals with a 2010 congressional attempt to repeal an Exemption 3 provision for the SEC included in the Dodd-Frank financial reform legislation by clarifying that those entities regulated by the SEC qualified as financial institutions and that most of the information protected by the Exemption 3 provision could be withheld under Exemption 8 instead. Although admitting to some bewilderment over this legislative legerdemain, the D.C. Circuit agreed with the SEC that the change had its desired effect. However, that legal effect resulted in a pointed concurrence by Circuit Court Judge Janice Rogers Brown suggesting that Exemption 8's historically broad coverage had

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become outdated and that Congress should revisit the exemption with an eye to making both financial agencies and financial institutions more publicly accountable.

The case involved a request from the Public Investors Arbitration Bar Association for records of SEC audits, inspections, or reviews of the auditing procedures of the Financial Industry Regulatory Authority, a private organization that oversees securities arbitrations, whose practices are subject to SEC oversight. The agency found 65 boxes of records, but refused to disclose them, citing Exemption 8. At the district court, PIABA argued that Exemption 8 applied only to financial examinations and that the agency was required to show that all its records were actually related to an examination. The district court rejected both arguments and PIABA appealed to the D.C. Circuit.

Calling the language of Exemption 8 "a mouthful," Circuit Court Judge David Tatel indicated that "we must first address whether the contested records implicate a relevant Commission 'examination,' and, if they do, we then ask whether they relate to a particular 'report.'" PIABA argued that Congress had intended to protect only financial information and not reviews of an administrative function performed by a self-regulatory organization. Reaching back to *Consumers Union v. Heimann*, 589 F.2d 531 (D.C.Cir. 1978), the seminal D.C. Circuit opinion on the coverage of Exemption 8, Tatel noted that "this court has explained time and again that Exemption 8's scope is 'particularly broad.'" He then pointed out that "the statute's plain meaning is all but conclusive. Guided by the dictionary, we think it is quite clear that 'examination' reports encompass any report stemming from the Commission 'inspecting closely' or 'inquiring carefully' into something." He then explained that Exemption 8 protected reports "that are both (1) prepared by an 'agency responsible for the regulation. . .of financial institutions' and (2) compiled in the course of that agency's regulation of a financial institution." Tatel rejected interpreting Exemption 8's reference to "financial institutions" as limiting only the type of agency, observing that "such an interpretation would mean that an agency that regulates financial institutions—say, the Securities and Exchange Commission—could withhold any examination report it prepared, even if the report detailed the operations of an institution that is not even vaguely financial.. This can hardly be what Congress intended when it sought to protect the 'well-being of. . .banks.'"

Congress stepped in in 2010 "responding to concerns that a separate Dodd-Frank provision muddied the Exemption 8 waters." At that time, Congress amended the SEC Act to confirm that "for the purposes of [FOIA], the Commission is an agency responsible for the regulation or supervision of financial institutions" and that "for the purposes of [FOIA]. . .any entity for which the Commission is responsible for regulating, supervising, or examining under [the Exchange Act] is a financial institution." Tatel pointed out, however, that a literal reading of the amendment's effect on Exemption 8 made no sense. To clarify the amendment's intent, he observed that "Congress conditioned the exemption's reach on whether the institution being examined is a 'financial institution'—though, still, not on whether the particular *records* would divulge financial data. This means that, in essence, one should read 'examination, operating or condition reports' to mean 'examination, operating, or condition reports *related to financial institutions*.' After all, with the first half of the amendment, Congress clarified that the Commission is an agency responsible for the regulation of financial institutions. Why would it have added a subsection to specify which organizations are financial institutions if nothing depended on it?"

Tatel used a hypothetical to illustrate the result of the amendments. In the hypothetical, Congress gave the SEC jurisdiction over the National Football League and the Commission launched an investigation of the League's response to brain concussions. Tatel observed that "the Commission is indisputably an agency responsible for regulating financial institutions, and, by the terms of the 2010 amendment, the NFL would qualify as a financial institution. As a result of those amendments, then, any report arising out of the Commission's examination of the NFL would be exempt from disclosure whether or not it risks outing someone's financial details." In sum, Tatel explained, "we hold that documents the Commission collects

while examining financial institutions—that is, while examining any organization the agency regulates—are exempt from disclosure. This is true no matter the records' substance so long as they relate to a resulting report." Although PIABA argued the SEC was responding only to consumer complaints rather conducting an examination of FINRA, Tatel was satisfied that "even if a particular withheld document relates *only* to an inspection of a customer complaint, Exemption 8 applies with full force."

Brown concurred in the result, but castigated what she characterized as its unfortunate consequences. She noted that "to the extent our case law fosters today's result, it bears questioning the wisdom of the course our precedents plot. The financial world has changed since the genesis of our Exemption 8 case law. So has the world in which our financial system operates. Financial institutions and their regulators now frequently operate under a haze of public distrust fueled by repeated regulatory failures and massive, opaque, and unaccountable bailouts. The public now has good reason to doubt the rigor of our financial systems' reliability and oversight." She recommended that "Congress should revisit this ill-conceived amendment and make sure an apparent miscue does not morph into a serious misadventure." (*Public Investors Arbitration Bar Association v. Securities and Exchange Commission*, No. 13-5137, U.S. Court of Appeals for the District of Columbia Circuit, Nov. 14)

Views from the States…

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

Hawaii

The Office of Information Practices has ruled that the Office of Hawaiian Affairs violated the Sunshine Law when it conducted informal serial email communications with board members to obtain their signatures on a letter rescinding a letter sent by the board's director to the U.S. Department of Justice requesting a legal opinion as to the continued existence of the Hawaiian Kingdom. OIP also ruled the board violated the Sunshine Law when it failed to permit public testimony on the board's subsequent consideration of the director's employment. Because the board voted to go into executive session to consider the issue, it did not provide an opportunity for public testimony. Shortly after board director Dr. Kamana'opono Crabbe informed the board chair that the letter to DOJ had been sent, the chair contacted board members, some of whom were in Hawaii while others were in Washington, D.C., explaining that the letter had been sent without her approval. This led to a series of email communications to obtain the board members' agreement to sign a rescission letter, which was sent to Secretary of State John Kerry that same day. Responding to complaints filed with OIP, OHA defended its actions by claiming that since the Crabbe letter was unauthorized its rescission was no more than an expression of OHA policy and not a board decision. But OIP pointed out that "the key question is not whether the Crabbe Letter was authorized or whether the OHA Board's Chair could have responded to it unilaterally; instead, the key question is whether the Trustees' alleged serial discussion and agreement as to how to respond to the Crabbe Letter involved an issue that was OHA board business." OIP answered that question in the affirmative, noting that "the mere fact that the Trustees discussed and immediately acted on the question of how to respond to the Crabbe Letter is sufficient to indicate that the Trustees believed the OHA Board had supervision, control, jurisdiction, or advisory power over that question, and that it was currently pending before the OHA Board." OIP observed that under the circumstances the Board could have treated the need to respond as an emergency meeting, but it did not do so. Turning to the email discussions, OIP indicated that while staff members were not subject to the Sunshine Law to same

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extent as members were, the facts here supported the conclusion that "the staffers were not independent actors, but merely go-betweens tasked with passing on the information in the e-mail to each Trustee and sending back each Trustee's response." Rejecting the board's claim that the Sunshine Law's requirement to permit public oral testimony for any item on a public body's agenda did not apply to closed session items, OIP clarified that "the requirement to accept testimony applies to **every** agenda item at **every** meeting, including items to be discussed in executive session at a meeting where only executive session items are on the agenda." (OIP Opinion Letter No. F15-02, Office of Information Practices, Office of the Lieutenant Governor, State of Hawaii, Nov. 7)

Illinois

A court of appeals has ruled that the Better Government Association is prohibited by the regulations implementing the state's Law Enforcement Agencies Data System from accessing information about queries to the LEADS database by Du Page County Sheriff John Zaruba's teenage son Patrick. BGA submitted a FOIA request to the Sheriff's Office for records of queries sent by Patrick Zaruba to the LEADS database maintained by the Illinois State Police. The Sheriff denied the request, indicating any records, if they existed, would be in the custody of the State Police. When BGA filed suit, the State Police explained that they could only identify the terminal from which an inquiry came and not the individual making the request. Further, all such records were considered LEADS data the disclosure of which was restricted to authorized users. BGA argued that Patrick Zaruba's queries were not LEADS data, which the regulations defined as information from the LEADS database. The trial court sided with the sheriff and BGA appealed. The appeals court affirmed, noting that "the regulations, viewed in their entirety, reflect the Department's intent to create a law enforcement resource that is not open to public inspection. We cannot agree with BGA that, by defining 'LEADS data' as [data from the LEADS computer], the Department intended to allow the public to know which suspects have been investigated by particular law enforcement officers. Such a construction of 'LEADS data' is neither necessary nor reasonable in the context of regulations designed to prohibit rather than promote public access to the LEADS system. It is readily apparent that public access to the inquiry identifier information was not intended and that the regulations do not treat such information differently from other information stored in or accessible through the system." BGA also argued that because the regulations penalized improper use of the LEADS system it made no sense to prevent the public from learning about such abuses. The court, however, observed that such abuses were meant to be checked by internal policies like audits. (*Better Government Association v. John E. Zaruba, Sheriff of Du Page County*, No. 2-14-0071, Illinois Appellate Court, Second District, Nov. 6)

South Carolina

A court of appeals has ruled that the Town of Mount Pleasant did not violate the meetings notice provisions of the FOIA, but that it took action based on discussions during an executive session that went beyond the council's description of the items to be discussed during executive session. The Town of Mount Pleasant became interested in purchasing a piece of property owned by a local attorney. The purchase and potential litigation arising from purchase negotiations were discussed at several town council meetings. Stephen Brock, a member of the town council's planning commission, eventually sued the Town for various violations of the open meetings provisions of the FOIA. The trial court ruled in his favor on some of his claims and awarded him $42,000 in attorney's fees. However, Brock appealed the trial court's ruling that the Town had not violated the notice provisions because they failed to identify the actions the council planned to take. The appeals court noted that "Town Council could not have known what action it would take—to include on an agenda—prior to discussing the relative legal issues and personnel matters during executive session. From the posted and amended agendas, the public and press had notice Town Council desired to confer with its attorney in closed session regarding certain matters and may take some action upon

reconvening to open session." The court observed that "to require Town Council to notify the public of the exact actions it plans to take after an executive session seems inapposite to provisions allowing for closed sessions." However, the court agreed that the town council had overstepped its authority to act after a closed session as a result of one meeting. The court pointed out that "announcing it would discuss 'legal matters' or obtain 'legal advice' on a particular issue was an insufficient announcement when Town Council obtained individual attorneys for 'all lawsuits now and in the future' as a result of the executive sessions discussion." (*Stephen George Brock v. Town of Mount Pleasant*, No. 527, South Carolina Court of Appeals, Nov. 5)

Washington

A court of appeals has ruled that the Washington State Auditor's Office conducted an adequate search for records concerning its investigation of a complaint filed by Mike Hobbs against the Department of Social and Health Services concerning that agency's use of SSI data for accounts for foster children. The Auditor's Office told Hobbs it would respond in installments. However, after the first installment was sent to Hobbs, he filed suit claiming violations of the Public Records Act primarily because of redactions made to the records. The Auditor told Hobbs that it would continue to process his request and resolve a number of technical issues that came up concerning the disclosability of the records. The agency completed its response several months later. Hobbs argued that the Auditor violated the PRA in its first installment and the agency should be liable for such violations going forward. But the court disagreed, noting that "before a requester initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." The court explained that "here, there is no dispute that the Auditor was continuing to provide Hobbs with responsive records until March 1, 2012, when the Auditor determined it had provided all responsive documents to Hobbs' public records request. . .The plain language of the statute does not support Hobbs' claim that a requester is permitted to initiate a lawsuit before an agency has taken some form of final action in denying the request by not providing responsive documents." The court pointed out that under the PRA an agency could provide an estimated time frame as to when it would complete the request. The court observed that "because the Auditor complied with the plain language of [the statute] we hold that the trial court did not err in finding that the Auditor complied with the prompt response requirement of the PRA." (*Mike Hobbs v. State of Washington*, No. 44284-1-II, Washington Court of Appeals, Division 2, Oct. 7)

The Federal Courts…

Judge Tanya Chutkan has ruled that EPIC is entitled to nearly $20,000 in **attorney's fees** for its suit against the FBI for access to records related to the agency's Next Generation Identification program. EPIC made two related requests to the FBI and the agency responded two days later that it had located 7,380 pages of potentially responsive records and asked EPIC to narrow the scope of its second request. EPIC did so, but after hearing nothing further from the agency, it filed suit six months later. A month later, the FBI released 592 pages responsive to EPIC's first FOIA request, including an unredacted copy of the contract for the NGI program after concluding the contract had been public at one point. Several weeks later, the parties, pursuant to Chutkan's order, filed a proposed briefing schedule stipulating that the FBI would produce all non-exempt records by August 30, 2013, with an interim release by July 31, 2013. Chutkan approved the order, the FBI provided the records, and EPIC then filed a motion for $22,124 in fees and costs. Finding EPIC had substantially prevailed because of her signed order, Chutkan pointed out that "compliance with this order constituted both some relief on the merits of EPIC's claims and a judicially sanctioned change in the parties'

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legal relationship. That the FBI consented to the terms mandated by the Court's Order is immaterial." The FBI argued EPIC had not substantially prevailed because the agency had already provided some records before the stipulation. Chutkan observed that "the law merely requires that the plaintiff 'substantially prevails' and achieves *some* of the benefits sought in bringing suit. Here, EPIC has done both." Turning to an assessment of whether EPIC was entitled to fees, Chutkan found the subject matter of the records was clearly in the public interest. She noted that "there can be little dispute that the general public has a genuine, tangible interest in a system designed to store and manipulate significant quantities of its own biometric data, particularly given the great number of people from whom such data will be gathered." Because the agency did not challenge whether EPIC had a commercial or personal interest in the records, Chutkan examined whether the agency's actions were reasonable. During the relevant time period, the FBI temporarily lost $700 million in funding due to the government shutdown and sequester and Chutkan agreed that the FBI's behavior was not unreasonable. But she pointed out that "the FBI has not advanced any colorable legal reason why, after indicating that it possessed responsive documents and asking for a revised request, it simply ceased all communication with EPIC in October 2012, until EPIC sought recourse in this Court in April 2013." The FBI argued that EPIC's fees should be reduced, particularly since the case was not terribly complex. While Chutkan trimmed EPIC's fee request, subtracting triple-billing for several teleconferences and reducing the hourly rate for an EPIC attorney who may not have been a member of the bar at the time of the litigation, she largely agreed with EPIC's claims. The FBI complained that EPIC should not be entitled to fees for the time spent reviewing 2,462 pages of released records. But Chutkan noted that "while EPIC did not subsequently challenge any of the FBI's redactions or seek further Court-ordered relief after the FBI finally produced the requested documents, it needed to review the documents before making those decisions. Such review took place during this litigation and before the parties stipulated that the underlying matter was settled." The FBI also attacked the hourly rates for several EPIC attorneys, arguing that since they had less than three years experience they were not entitled to the lowest *Laffey* Matrix hourly rate of $245. Chutkan observed that "in categorizing staff under the *Laffey* Matrix, this Court has drawn a distinction between persons who are licensed to practice law and those who are not. The *Laffey* Matrix does not provide a category for licensed attorneys below '1-3 years' of experience. For this reason, the Court in its discretion finds that [two of the EPIC attorneys who were recent members of the bar] most fairly qualify as attorneys in the '1-3 years' experience category of the *Laffey* Matrix, and therefore their reasonable hourly fee is $245." However, since there was no evidence of whether a third attorney had become a member of the bar, Chutkan lowered his rate to $145. Chutkan also allowed EPIC to collect for the time spent arguing for a fee award. She noted that "the majority of EPIC's fee requests [are] warranted and supported and. . .therefore it declines any further reduction for 'fees on fees.'" (*Electronic Privacy Information Center v. Federal Bureau of Investigation*, Civil Action No. 2013-00442 (TSC), U.S. District Court for the District of Columbia, Nov. 5)

Judge Amy Berman Jackson has ruled that Prisology, a Texas non-profit organization that advocates for criminal justice reform, does not have **standing** to bring a FOIA suit charging that the Bureau of Prisons violated the EFOIA provision requiring agencies to make subsection (a)(2) records available by computer telecommunications because it has not shown that it suffered an injury-in-fact from the agency's failure to provide such records electronically. Jackson pointed out that Prisology's claim was that "since FOIA grants a legal right to access the records in question, defendant's interference with that right—through the refusal to publish those records—gives rise to an injury for Article III purposes." But Jackson observed that was insufficient for standing purposes. "Here, plaintiff has failed to point to any injuries sustained, by the organization itself or its members, as a result of defendant's conduct. . .While plaintiff explains in its opposition that it 'accomplishes its mission through various projects, which includes information dissemination to the public via social media and other mediums about criminal justice practices,' it has alleged no facts that would enable a court to conclude that plaintiff has been harmed by defendant's conduct in any concrete or particularized way." Jackson acknowledged the D.C. Circuit's observation that standing in a

FOIA suit required only a denial of requested information, but she pointed out that "in that process, it observed that it is a particular request for particular information that confers standing upon a FOIA plaintiff, and that there is no need for proof of *further* injury caused by the denial of a request. But that language involving the actual denial of a specific request for particular material is not sufficiently broad to cover plaintiff's grievance here about how defendant is complying with the law in general." She concluded that "because plaintiff has failed to assert an actual or imminent particularized injury, it lacks standing to bring this case, and the Court must dismiss plaintiff's FOIA claim." However, in a footnote Jackson provided some suggestions about how a plaintiff like Prisology might show standing. She noted that "the Court agrees that agencies are required by section 552(a)(2) to make certain documents available without any FOIA request. However, the filing of such a request—and its subsequent denial by the agency—may provide evidence of the injury suffered by that party relevant to its standing to bring suit." (*Prisology v. Federal Bureau of Prisons*, Civil Action No. 14-0969 (ABJ), U.S. District Court for the District of Columbia, Nov. 17)

Judge Amy Berman Jackson has ruled that the Federal Energy Regulatory Commission properly withheld two records under **Exemption 5 (deliberative process privilege)** and **Exemption 6 (invasion of privacy)**. The Energy & Environment Legal Institute requested records concerning Norman Bay, a political appointee at FERC who served as the Director of FERC's Office of Enforcement. He later applied for the position as a civil service appointment but ultimately did not get the position. Only two records remained in dispute—one an email exchange between Bay and FERC Chief of Staff James Pederson, which the agency withheld under Exemption 5, and a record entitled "Executive Core Qualifications," which contained responses submitted by Bay to questions posed to him as part of the application for a career appointment, which the agency had redacted under Exemption 6. The Energy & Environment Legal Institute argued the email exchange was not predecisional because it post-dated the agency's decision not to appoint Bay. After reviewing the two documents *in camera*, Jackson rejected the plaintiffs' claim, noting that "but as FERC clarifies in reply, the 'decision' that the Bay-Pederson emails precede relates to 'personnel and administrative steps that were being preliminarily considered *after* [the civil service appointment of Bay] was no longer viable.' The Court's *in camera* review has confirmed FERC's contention that the redacted portions of the Bay-Pederson emails are 'predecisional' for that reason." The plaintiffs argued that Bay's ECQ responses were not protected by Exemption 6 because their disclosure would not embarrass Bay since they were favorable. Jackson, however, observed that "Bay's ECQ responses are not ineligible for withholding under Exemption 6 merely because he cast himself in a positive light." She also rejected the plaintiffs' claim that Bay had waived his privacy rights to such information when he subsequently testified before the Senate Energy Committee. Jackson pointed out that "the waiver analysis for FOIA purposes turns upon official disclosures made by the agency, not the individual whose privacy the agency is seeking to protect." Indicating the plaintiffs had failed to show any official confirmation of the information, she observed that "plaintiffs' mere suspicion that the content of the ECQs might overlap with and/or contradict statements Bay has made on the public record provides no basis for the Court to find a waiver here." In a footnote, Jackson said she was puzzled by why FERC had redacted the ECQ as it did. She noted that "FERC could have withheld the entire document under Exemption 6 so plaintiffs have already received more information than they were entitled to under the law." (*Energy & Environment Legal Institute v. Federal Energy Regulatory Commission*, Civil Action No. 14-0502 (ABJ), U.S. District Court for the District of Columbia, Nov. 5)

A federal court in California has ruled that the Department of the Army's failure to provide a substantive response to the law firm of Munger, Tolles & Olson's FOIA request for records concerning proposals submitted by Clark Realty Capital for several military housing projects was **egregious**, but that most of the agency's redactions under **Exemption 4 (confidential business information)** were appropriate. MTO

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represented Pinnacle, a management services company that had been working in partnership with Clark on several military housing projects. Clark had sued Pinnacle to dissolve the partnership and Pinnacle found out shortly thereafter that funding for the projects had been substantially increased. The law firm then submitted its FOIA request to the Office of the Assistant Secretary of the Army, Installations & Environment, which referred the request to the Army Corps of Engineers. The Army Corps of Engineers told MTO that it was sending business-submitted records to Clark for comment. It then released a single heavily redacted page. MTO appealed, but heard nothing further until the Office of the Administrative Assistant to the Secretary of the Army contacted the law firm and identified itself as the office responsible for processing the request. That office responded by releasing portions of 379 pages and withholding spreadsheets and other data under Exemption 4. The court found MTO had not shown a pattern or practice of delay on the part of the Army, but concluded the agency's behavior was egregious. The court noted that "the Army held onto Plaintiff's appeal for another 11 months before responding. A totally unjustified delay of over a year is 'egregious.'" The court added that "that the delay of Plaintiff's appeal appears to have been the result of bureaucratic mishandling rather than intentional obfuscation weighs some in the balance, but not enough to make the delay reasonable. Agencies are under an obligation to establish clear channels for FOIA requests; implicit in that obligation is that the agency and its employees will not mislead requestors as to the proper method for making a request." The court observed that it "will not excuse the Army's excessive delay simply because it has not created efficient mechanisms for referring FOIA requests to the appropriate entity—especially when it has affirmatively misinformed Plaintiff as to where the request should be directed." The court then found that almost all of the information withheld under Exemption 4 was appropriate. Finding that Clark did face competition in the military housing market, the court showed some sympathy to MTO's arguments that the data here had little bearing on future bids. But the court agreed with the Army that disclosure of the redacted information would provide insights into the overall picture of how Clark constructed a bid. After reviewing the records *in camera*, the court noted that "in the main, what has been redacted is the kind of information that would unfairly let competitor's look into Clark's internal decision-making process. The redacted information mostly consists of information showing how Clark organizes and phases the construction of new housing, how it reacts to unanticipated market conditions, how it approaches financing, and how it breaks down costs and spending to get the job done." The court observed that "for the most part, the Army's redactions are reasonably targeted to protect Clark's internal processes while still providing a great deal of general information about the Projects, the ways in which they were modified based on new information, and how those modifications might affect the availability and quality of military housing. The Army has struck a reasonable balance between providing information of public interest and protecting Clark's internal processes, and most of the information was correctly redacted." (*Munger, Tolles & Olson LLP v. United States Department of the Army*, Civil Action No. 13-06890 DDP, U.S. District Court for the Central District of California, Nov. 6)

A federal court in Michigan has ruled that the FBI has shown that it conducted an **adequate search** for records concerning the inclusion of the "Juggalos" as a gang in the 2011 National Gang Intelligence Center report. In a prior ruling, the court indicated the agency had failed to adequately explain its search, including its decision not to search for other FBI records pertaining to investigations of the Juggalos after the 2011 report. This time the agency submitted a supplementary affidavit from the Unit Chief of the NGIC to satisfy the court's remaining concerns. The new affidavit indicated that the NGIC analyst responsible for the inclusion of the Juggalos as a gang in the 2011 report relied on a 156-page hard copy file compiled from contributions by local and state law enforcement and that the file was produced in response to the request. With this new information, the court agreed with the FBI that the plaintiffs' request pertained only to the agency's decision to classify the Juggalos as a gang in the 2011 NGIC report and not any subsequent agency records pertaining to the Juggalos. The court noted that "the [affidavit] indicates that the NGIC uses information it receives from state and local law enforcement agencies to identify emerging trends in gang

activity and, in this case, when it identified the Juggalos as one such trend, it solicited additional information on the topic from state and local agencies. Using the information received by state and local agencies, as well as open-source reporting, the NGIC then reported on the Juggalos in its 2011 report. . .Because the analyst compiled and relied exclusively on the materials contained in the hard-copy file folder, the contents of the folder would have contained all of the information concerning the Juggalos for the report, including information in favor of characterizing the Juggalos as a gang, as well as information that weighed against characterizing the Juggalos as such." (*Hertz Schram PC v. Federal Bureau of Investigation*, Civil Action No. 12-14234, U.S. District Court for the Eastern District of Michigan, Nov. 5)

The Third Circuit has affirmed the trial court's decision that the Department of Justice properly withheld records from Natarajan Venkataram concerning its decision not to prosecute his D.V.S. Raju, his co-defendant, for defrauding New York City by laundering $6.2 million through his companies in India. While the government decided not to prosecute Raju, Venkataram was convicted and sentenced to 15 years in prison. In response to Venkataram's FOIA request and subsequent suit, the agency disclosed 352 pages, but withheld 165 pages. On appeal, Venkataram focused solely on the government's denial of its four-page agreement with Raju to drop criminal charges, arguing that it had been publicly acknowledged as a result of Venkataram's trial. The Third Circuit pointed out that for information to be considered officially acknowledged for FOIA purposes it had to be essentially identical to information that had been previously disclosed. In this case, the court noted, Venkataram had failed to provide proof of prior disclosure. The court pointed out that "he argued in the District Court only that this *document* had been officially acknowledged, not that 'the *specific information*' in the document had been acknowledged. While this argument could potentially overcome a Glomar response—where the Government 'refuses to confirm or deny the existence of records'—it is not sufficient in a case like this one, where the Government acknowledges the record but argues it is protected from disclosure." Venkataram also argued disclosure of the agreement would be in the public interest because it would reveal that the government had acted improperly. The court, however, disagreed, noting that "contrary to Venkataram's contention, information about [the dismissal of charges against Raju] representing just a single data point, will reveal little about the Government's use of prosecutorial discretion." (*Natarajan Venkataram v. Office of Information Policy*, No. 13-4404, U.S. Court of Appeals for the Third Circuit, Nov. 7)

Judge Beryl Howell has ruled that the Treasury Department has shown that it conducted an **adequate search** in response to Dennis Irving's request to the Office of the Public Debt. Howell had earlier questioned the agency's search because the Office of the Public Debt had not sufficiently described the three records systems it searched. Finding its supplementary affidavit now provided an adequate explanation, Howell rejected Irving's claim that Treasury was required to search all its databases for responsive information. She noted that "just because a plaintiff requests that 'all' locations be searched does not require an agency to perform such a search." She added that "moreover, the fact that the plaintiff addressed his request to BPD's disclosure office and specifically identified BPD as the office within Treasury ffom which records were sought further supports the reasonableness of the defendant's search." (*Dennis William Irving v. Department of the Treasury/Bureau of the Public Debt*, Civil Action No. 13-1233 (BAH), U.S. District Court for the District of Columbia, Nov 6)

A federal court in California has awarded Jeannette Burmeister $139,000 in **attorney's fees** for her FOIA suit against the Department of Health and Human Services for records concerning the agency's decision to have the National Institute of Medicine conduct a study of chronic fatigue syndrome. In its previous ruling in favor of Burmeister the court observed that "the government may not artificially narrow this request to

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exclude 'background' records, such as records relating to the decisionmaking process about whether and how to engage the Institute of Medicine for this endeavor." Finding Burmeister deserved the entire amount she had requested, the court noted that "Ms. Burmeister is clearly the prevailing party in the litigation. Moreover. . . the government's conduct throughout its dispute with Ms. Burmeister was unreasonable." (*Jeannette K. Burmeister v. United States Department of Health and Human Services*, Civil Action No. 14-00133-VC, U.S. District Court for the Northern District of California, Nov. 7)