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Washington Focus: According to the Washington Post, the Justice Department has agreed to allow companies issued national security letters to disclose, in broad terms, the volume of requests received and the ranges of how many customer accounts are targeted. Previously, companies were prohibited from disclosing any information, including whether they had received a national security letter. In announcing the new policy, the Justice Department indicated that "while this aggregate data was properly classified until [Jan. 27], the office of the Director of National Intelligence, in consultation with other departments and agencies, has determined that the public interest in disclosing this information now outweighs the national security concerns that required its classification." The five companies that started the process by submitting a series of filings to the Foreign Intelligence Surveillance Court—Facebook, Google, LinkedIn, Microsoft, and Yahoo—issued a statement noting that "while this is a very positive step, we'll continue to encourage Congress to take additional steps to address all of the reforms we believe are needed."

Flood Inundation Maps Protected by Exemption 7(F)

In a decision that may provide an avenue for many agencies to resurrect the broad protections of the now abandoned circumvention prong of Exemption 2 (internal practices and procedures), the D.C. Circuit has wholeheartedly embraced Associate Justice Samuel Alito's concurrence in *Milner v. Dept of Navy* as if it represented the Supreme Court's holding. By conflating security with law enforcement, Alito's concurrence assumes that any information that could be characterized as being created or compiled for security purposes can be protected as a law enforcement record under Exemption 7 (law enforcement records), particularly Exemption 7(E) (investigative methods and techniques) and Exemption 7(F) (harm to any person).

Although the case is far removed from the 911-inspired obsession with protecting previously public infrastructure

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information, it ironically replicates the circumstances present in *Living Rivers v. Bureau of Reclamation*, 272 F.Supp. 2d 1313 (D. Utah 2003), the leading decision in the immediate aftermath of 911. In that case, a district court judge accepted the government's claim that information about the condition of several dams could be withheld under Exemption 2 and Exemption 7(F) because disclosure of flood inundation maps projecting the effects downstream if the dam was breached could be used by terrorists to spot vulnerabilities.

In the D.C. Circuit case, PEER requested information from the U.S. Section of the International Boundary and Water Commission, a joint U.S.-Mexico entity created by treaty to implement the two countries' agreements regarding the Rio Grande River, concerning Amistad Dam and Falcon Dam. The U.S. Section released responsive records, but withheld a report about Amistad Dam prepared by a panel of expert advisors concerning the potential structural deficiencies of the dam and its embankment. The agency also withheld emergency action plans for responding to a dam failure and inundation maps for the two dams. The U.S. Section initially withheld the records under Exemption 2, but abandoned that claim after the Supreme Court's ruling in *Milner*. Instead, the agency asserted the panel report was protected by Exemption 5 (deliberative process privilege), and that the emergency plans and flood inundation maps were protected by Exemption 7(E) and 7(F). PEER filed suit and the district court agreed with all the agency's claims. PEER then appealed to the D.C. Circuit.

Writing for the court, Circuit Court Judge Brett Kavanaugh quickly dispensed with PEER's argument that the panel report was not protected by the deliberative process privilege because officials of the Mexican National Water Commission had assisted in preparing the report and they did not qualify under Exemption 5's inter-or intra-agency threshold. The U.S. Section replied that even if the Mexicans were outside the inter- or intra-agency threshold, they had acted to assist the U.S. Section, not as advocates of their own interests. Observing that "this is a legal issue of first impression," Kavanaugh ducked the issue altogether, explaining that "the problem is that we do not know if officials of the Mexican National Water Commission actually assisted in preparing the report." He indicated that "if the Mexican agency did not assist in preparing the expert report, the deliberative process privilege—and therefore Exemption 5—would cover the report. We therefore vacate the District Court's judgment as to Exemption 5 and the expert report and remand for the District Court to determine whether officials of the Mexican agency assisted in preparing the expert report."

One of most troubling aspects of *Living Rivers* was how the Bureau of Reclamation could be considered a law enforcement agency, typically considered a necessary threshold showing for eligibility to claim Exemption 7. But drawing from Alito's concurrence in *Milner* and over-interpreting the Supreme Court's ruling in *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989), which found that a record created for non-law enforcement purposes could become protected by Exemption 7 if it was subsequently used as part of a law enforcement investigation, Kavanaugh pointed out that "in this case, the U.S. Section therefore needs to establish that the emergency action plans and the inundation maps were created for law enforcement purposes or were later gathered or used for such purposes." PEER argued that "an agency must have some statutory law enforcement *function* in addition to a law enforcement purpose for the particular records at issue, before the agency can invoke Exemption 7." But Kavanaugh noted that "that argument is wrong both on the law and on the facts."

Kavanaugh explained that under Exemption 7 a record "must have been compiled for law enforcement *purposes*; the withholding agency need not have statutory law enforcement *functions*." He added that "the U.S. Section does perform a law enforcement function. The U.S. Section is a part of the Interagency Committee on Dam Safety, which has the statutory duty to establish programs and policies to 'enhance dam safety for the protection of human life and property.' That duty encompasses security and prevention of criminal or terrorist attacks." Then basing his claim on nothing more than Alito's observation that "crime prevention and security measures are critical to effective law enforcement as we know it," Kavanaugh

observed that "it is. . .apparent that the inundation maps serve security purposes—namely, to assist law enforcement personnel in maintaining order and security during emergency conditions, and to help prevent attacks on dams from occurring in the first place." He added that "in this context, preventing dam attacks and maintaining order and ensuring dam security during dam emergencies qualify as valid law enforcement purposes under the statute. Because the emergency action plans and the inundation maps were created in order to help achieve those purposes, among others, they were 'compiled for law enforcement purposes.'"

Satisfied that the records qualified under Exemption 7's threshold, Kavanaugh next turned to applying Exemption 7(E) and 7(F). He pointed out that the emergency action plans constituted guidelines protected under Exemption 7(E) because they "describe the surveillance and detection of the cause of an emergency dam failure as well as the process for evaluating the dam failure when the emergency subsides. The guidelines also set forth the security precautions that law enforcement personnel should implement around the dams during emergency conditions. The guidelines therefore describe how law enforcement personnel might investigate the cause of a dam failure. And because such investigations may constitute 'law enforcement investigations' when there is a suspicion of criminal sabotage or terrorism, we conclude that the emergency action plans contain guidelines 'for law enforcement investigations or prosecutions.'"

Kavanaugh explained that "Exemption 7(F) covers records that, if disclosed, 'could reasonably be expected to endanger the life or physical safety of any individual." He pointed out that "that language is very broad. The exemption does not require that a particular kind of individual be at risk of harm; 'any individual' will do. Disclosure need not *definitely* endanger life or physical safety; a reasonable expectation of endangerment suffices." He then indicated that "the confluence of Exemption 7(F)'s expansive text and our generally deferential posture when we must assess national security harms means that, in Exemption 7(F) cases involving documents relating to critical infrastructure, 'it is not difficult to show that disclosure may "endanger the life or physical safety of any individual."'" He noted that "terrorists or criminals could use [the inundation maps] to determine whether attacking a dam would be worthwhile, which dam would provide the most attractive target, and what the likely effect of a dam break would be." He then pointed out that "Exemption 7(F) does not require concrete evidence in every case. The terms 'could' and 'expected' in Exemption 7(F) evince congressional understanding of the many potential threats posed by the release of sensitive agency information. An agency therefore need only demonstrate that it reasonably estimated that sensitive could be misused for nefarious ends."

PEER argued that Exemption 7(F) should not be interpreted so broadly and pointed to the Second Circuit ruling in *ACLU v. Dept of Defense*, 543 F.3d 59 (2d Cir. 2008), which was subsequently vacated by the Supreme Court in 2009. In *ACLU v. Dept of Defense*, the Second Circuit rejected the Defense Department's claim the Exemption 7(F) was broad enough to cover anyone who might be harmed by violence in the Middle East as the result of disclosure of detainee photos. Finding no particular need to even consider the Second Circuit's rationale, Kavanaugh pointed out that "the Second Circuit itself conveyed that a threat to the population living downstream of a dam would be sufficiently specific to satisfy the exemption. In this case, the U.S. Section points to the same kind of potential harm to a similarly circumscribed population, meaning that the U.S. Section would prevail even under the Second Circuit's approach." (*Public Employees for Environmental Responsibility v. United States Section, International Boundary and Water Commission, U.S.-Mexico*, No. 12-5158, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 22)

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Views from the States…

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

Colorado

A court of appeals has ruled that Chaffee County Clerk Joyce Reno is required to pay Marilyn Marks' attorney's fees for gaining access to an anonymous ballot cast in the 2010 election. Marks requested access to a 2010 ballot during the 2011 election period. Believing that disclosure at that time would be unduly burdensome and require a number of observers, Reno filed suit asking the court to determine if access was permitted under the Colorado Open Records Act. Instead of proceeding with the court action, the parties agreed to wait for the outcome of legislation designed to clarify access to ballots. Once that legislation passed, Reno provided Marks with a ballot. The only remaining issue was whether Marks was entitled to attorney's fees as the prevailing party. The trial court found she was not and Marks appealed. The appeals court reversed, noting that the statutory provision allowing the custodian to file suit to block disclosure protected the custodian from attorney's fees when the court ruled in her favor. Since the court had not ruled in Reno's favor, the statutory exception to the rule of mandatory attorney's fees did not apply. The court pointed out that "the requester who must defend an action brought by the custodian is a 'prevailing applicant' if the custodian fails to obtain an order restricting inspection. . ." The court added that "CORA's costs and attorney's fees provision does not afford the trial court discretion." The appeals court sent the case back to the trial court to determine a fee award, including Marks' fees for appealing the case. One judge dissented, arguing that CORA provided a trial court with discretion to determine if a requester was a prevailing party. The judge observed that "if the legislature intended to award fees to any applicant, who ultimately obtains a document under CORA, it would have plainly said so." (*Joyce Reno v. Marilyn Marks*, No. 12CA2613, Colorado Court of Appeals, Division IV, Jan. 16)

Illinois

A court of appeals has ruled that the 102 State's Attorney's offices are not subject to FOIA because the legislature specifically amended the State's Attorneys Appellate Prosecutor's Act in 2010 to make state's attorneys part of the judicial branch, which is not subject to FOIA. The case involved a request from Matthew Grosskopf to the Livingston County State's Attorney's Office for records concerning a 2001 murder trial. The Livingston County State Attorney denied the request and Grosskopf appealed to the Public Access Counselor. The Public Access Counselor found the Livingston County State Attorney was subject to FOIA. The Livingston County State Attorney then filed suit against the Public Access Counselor, which claimed there was no cause of action since its opinion was non-binding. Grosskopf then filed suit against the Livingston County State Attorney and the trial court agreed the office was subject to FOIA. But the appeals court disagreed, solely on the basis of the 2010 amendment to the SAAP Act. The court pointed out that the legislature changed the statutory definition of the State's Attorneys from "an agency of state government" to "*a judicial* agency of state government." The court agreed with Grosskopf that "the State Attorney's office is not part of the judicial branch of government. The judicial branch exercises judicial power, which is the power to adjudicate cases. . .[N]either SSAP nor State's Attorneys exercise such judicial power." But, the court observed, "we must presume that the legislature was aware of agencies of state government—like SAAP—that it has created and would further be aware that SAAP performs no judicial functions. . .The General Assembly must have had some reason for passing [the] legislation. . .and the only reason we can see is to provide SAAP with a FOIA exemption." (*Seth P. Uphoff v. Matthew E. Grosskopf*, No. 4-13-0422, Illinois Appellate Court, Fourth District, Dec. 12, 2013)

Maine

The Supreme Judicial Court has ruled that the privacy exemption covering tax information includes information generated by Maine Revenue Service and is not limited to identifiable taxpayer information. The law firm of Preti Flaherty Beliveau & Pachios had litigated the issue of whether its nonresident partners were liable for taxes owed on partnership distributions or whether such earnings could be attributed for tax purposes to the professional corporation. After losing its tax litigation, the law firm requested information from Maine Revenue Service concerning the apportionment applied to other firms with nonresident partner income. Maine Revenue Service denied the request, citing the tax privacy exemption. The law firm argued thr provision only applied to information supplied by taxpayers. The court disagreed, noting that "even when strictly construed, the language of the [tax privacy exemption] creates a broad sweep that protects all information from whatever source, provided pursuant to [the tax code], including information generated by the Maine Revenue Service." The court indicated that "[the tax privacy exemption] unambiguously mandates that all taxpayer-specific information received or generated by the Maine Revenue Service pursuant to [the tax code] is confidential, including federal tax return information, and is not subject to disclosure under the [Freedom of Access Act]." (*Preti Flaherty Beliveau & Pachios LLP v. State Tax Assessor*, No. Cum-13-165, Maine Supreme Judicial Court, Jan. 16)

Maryland

The Court of Special Appeals has ruled that the Comptroller of the Treasury is required to produce a list of unclaimed property owners in response to a request by tracer Henry Immanuel. Under the Abandoned Property Act, the Comptroller is required annually to publish a list of the last-known names and addresses of individuals who appear to be the owners of property valued at $100 or more. Immanuel asked the Comptroller to sort the list of those individuals entitled to the 5,000 most valuable property accounts, excluding the precise value of each item. Although the Comptroller had provided Immanuel such lists since 1978, it stopped providing them in 1992 based on an Attorney General's opinion finding that the Comptroller was prohibited under the Public Information Act from disclosing the monetary value of individual items of unclaimed property to the public. Immanuel requested the list in 2011 and the Comptroller denied the request, arguing that the disclosure would improperly reveal financial information and that extracting the data would impermissibly require the agency to create a new record. The trial court ruled the records should be disclosed since the Comptroller fulfilled similar requests for a fee and financial information could be protected by redacting the value of the items. At the appellate court, the court pointed out that "the process of extracting or sorting the information Mr. Immanuel requests from this database is no different in principle from the process of producing something less than the full contents of a paper file. Mr. Immanuel must, of course, pay the appropriate fee, but the Comptroller may not withhold information contained in his abandoned property claims database on the grounds that extracting or sorting otherwise responsive data from that database would require him to create a new public record." The court added that "we disagree that the mere act of extracting, sorting, or formatting data the Comptroller collects and maintains in a database requires him to create a new record. In the context of the Comptroller's database, Mr. Immanuel's formatting and sorting requests raise only mechanical questions that bear on the *burden* the request entails." However, the court found Immanuel's request for a ranking of the values of abandoned property went too far. The court noted that "we are persuaded that the one thing the order does reveal—the claims' comparative value—discloses incremental financial information about the claim beyond the information the Abandoned Property Act requires the Comptroller to disclose. For that reason, Mr. Immanuel is not entitled to a list sorted by dollar value." (*Comptroller of the Treasury v. Henry Immanuel*, No. 1078 Sept. Term 2012, Maryland Court of Special Appeals, Jan. 29)

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New York

A trial court has ruled that the Nassau County Police Department improperly withheld documents concerning incident reports, arrest reports, payments to confidential sources, and records on a notorious local murder from *Newsday* based on claims that the records were protected under the privacy exemption, were considered confidential, and that disclosure would interfere with ongoing or future investigations. *Newsday* argued that the names of confidential sources could be redacted while the amounts paid should be disclosed. The police contended that redactions would be so expansive that no useful information could be disclosed. The court pointed out that "on the present record the Court cannot evaluate [the police's] contention that redaction cannot be performed without eviscerating the records in their entirety, and [this] statement, standing alone, is insufficient as a reason for withholding all documents. Agencies of government may be required to produce records that contain information that may be withheld under a statutory exemption and other information that is not so protected, with redaction of the former. A blanket refusal based on the 'mixed' nature of requested documents cannot be countenanced." Saying that "the undisputed public interest favors disclosure" of the withheld records concerning the local murder case, the court rejected the interference with investigations exemption, noting that "there has been no showing as to how production of the records sought would cause the negative effect cited. The Court therefore cannot find that an exemption under the statute has been satisfied." (*Newsday LLC v. Nassau County Police Department*, No. 50044(U), New York Supreme Court, Nassau County, Jan. 16)

The Federal Courts…

Judge James Boasberg has ruled that the EPA's **representative sampling** of ten percent of the documents withheld in response to the Competitive Enterprise Institute's request for emails sent from former EPA Administrator Lisa Jackson's secondary email accounts pertaining to certain topics is sufficient to show that the agency conducted an **adequate search**. Boasberg found as well that with few exceptions the agencies claims under **Exemption 5 (deliberative process privilege)** were appropriate. After the revelation that Jackson and others at the EPA used secondary email accounts under various aliases to conduct government business, CEI submitted its request for Jackson's email from the pseudonymous account. EPA produced 11,782 responsive documents, disclosing 5,084 in full and 4,983 in part, while withholding 1,715 in full. Rather than require the agency to submit a *Vaughn* index for all the documents, Boasberg ordered the agency to provide a sample of ten percent of the fully withheld documents and one percent of the partially withheld documents, providing a sample of 172 fully withheld documents and 50 partially withheld. Before commencing the sampling, the agency's Office of General Counsel reviewed the documents and decided some had been miscategorized. As a result, 251 documents were changed from "withheld in full" to "withheld in part, released in part" and 48 were changed from "withheld in full" to "produced in full." The agency mailed these 299 newly produced documents two weeks before it filed its summary judgment motion. CEI argued that the agency's recategorization of 299 documents was contrary to *Bonner v. Dept of State*, 928 F.2d 1148 (D.C. Cir. 1991), because it tainted the sample. In *Bonner*, the D.C. Circuit held that the State Department's decision to reclassify a significant portion of a sample after the *Vaughn* index had been submitted changed the character of the sample sufficiently so that there were questions about whether it was still representative. But here, Boasberg noted that "the 299 belatedly released records were never a part of the sample *Vaughn* index, but rather came from the total collection of withheld documents. Only *after* their release did EPA take a sample of the remaining documents that it still intended to withhold. There is therefore no connection between the release of these records and the representativeness of the sample EPA has provided, and no reason to doubt that the sample accurately reflects the remainder of the documents withheld." CEI complained that the EPA used boilerplate descriptions to justify many of its redactions. Boasberg responded that "while CEI has

pointed out a great deal of duplication in EPA's justifications for its redactions, such repetition is permissible under the law of this circuit." Although EPA had invoked the attorney-client and work-product privilege, because CEI had not contested those withholdings, Boasberg decided to focus only on its challenges to deliberative process privilege claims. CEI claimed that emails about media coverage were not deliberative. Boasberg disagreed, noting that "Exemption 5 has indeed been found to cover agency deliberations about how to respond to media inquiries regarding prior agency actions, as well as discussions about press coverage of existing agency policies, and suggested talking points about how to answer questions regarding duties assigned to agency employees. These deliberations are considered 'predecisional' so long as they were 'generated as part of a continuous process of agency decision making [on] how to respond to on-going inquiries.'" CEI characterized an email concerning a proposed phone call to Sen. Dianne Feinstein as merely about whether to accept the call. But Boasberg observed that "that characterization of the document is hardly fair, since the *Vaughn* entry also states that 'the information and advice provided' in the document 'related to . . .how to prepare for potential points of debate or discussion.' That more substantive discussion was not 'peripheral' to agency policy and was appropriately withheld." Boasberg declined CEI's invitations to consider problems in documents outside the sample. He noted that "the Court, however, reminds Plaintiff that the entire point of the sampling procedure was to limit to a reasonable number the withholdings that EPA needed to explain and defend." CEI contended that former Administrator Carol Browner's White House email address had been improperly redacted. Boasberg indicated that "it is clear that White House staff have a powerful privacy interest in their work email addresses while they are employed, but it is less certain whether much interest remains after they have left the government." He concluded that "there is a public interest, therefore, in knowing whether Browner used her personal or official email address to communicate with EPA and whether the official email address she used reflected her real name or an alias, both for the sake of future FOIA requesters and for those curious about White House compliance with federal record-keeping laws." (*Competitive Enterprise Institute v. United States Environmental Protection Agency*, Civil Action No. 12-1617 (JEB), U.S. District Court for the District of Columbia, Jan. 29)

Resolving several remaining issues from the magistrate judge's recommendation, Judge Beryl Howell has ruled that the Justice Department has failed to show that a sealing order cited by the agency as the basis for withholding a material witness warrant qualifies either as a sealing order under *Morgan v. Dept of Justice*, 923 F.2d 195 (D.C. Cir. 1991) or under **Exemption 3 (other statutes)**. Howell ruled in favor of the agency, however, on the issue of whether third-party information concerning the conviction of Khalid Awan was protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(D (confidential sources)**. DOJ contended that the material witness warrant was sealed by the Southern District of New York, but the agency was unable to provide any evidence beyond allegations that this was standard operating procedure. Howell observed that the government's statement "shed no light on the *court's* intent or purpose behind the sealing order at issue here, and the defendants' declaration is similarly unhelpful. Hence, the Court finds that the defendants have not established the Southern District's sealing order as a proper basis for withholding the over decade old material witness warrant affidavit under the FOIA." The agency asserted the affidavit was also protected by Rule 6(e) on grand jury secrecy. But Howell pointed out that "after careful review of the affidavit supporting the material witness warrant *in camera*, the Court finds not only that it is not a grand jury document but that it contains no information tending to reveal a secret aspect of the grand jury's investigation." She added that "in addition, the first four pages of the withheld document consist of background information about the September 11, 2001 events that, even if grand jury material, is so 'sufficiently widely known that it has lost its character as Rule 6(e) material.'" Howell found that Awan had not shown that third-party information had been disclosed during his trial. She indicated that "the plaintiff has not met his burden of showing what, if any, information was the subject of testimony at his criminal trial. Hence, the Court finds that the defendants are entitled to summary judgment on their redaction of the names of a person, even, if that person was named in a judicial opinion, under Exemptions 7(C) and

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7(D), as well as their redaction of third-party information from the material witness warrant affidavit." (*Khalid Awan v. United States Department of Justice*, Civil Action No. 10-1100 (BAH/JMF), U.S. District Court for the District of Columbia, Jan. 17)

Judge Thomas Hogan has ruled that the FBI has failed to show that it qualifies for an *Open America* **stay** and has ordered the FBI to process 30,000 records responsive to Angela Clemente's request at a rate of 5,000 pages a month. Clemente, a forensic analyst, had been involved in research concerning allegations of corruption between the FBI and high-ranking members of organized crime, allegedly covering up crimes committed by individuals who were working as FBI informants. Clemente's particular focus was on Gregory Scarpa. She made a request to the FBI for any records concerning Scarpa. At the time Clemente filed suit, the agency indicated it had located 30,000 documents and had processed a total of 1,420 pages of which 920 pages had been disclosed to Clemente. The agency offered to process Clemente's request at the rate of 500 documents per month. Clemente told the agency she was in ill health and was likely to die before the records were processed at that rate. The agency then suggested 1,500 documents per month and Clemente countered with 5,000 pages per month in light of her health condition. The agency then asked Hogan for a stay. But Hogan noted the FBI had recently lost a similar *Open America* case in *EPIC v. FBI*, 933 F. Supp. 2d 42 (D.D.C. 2013). In both cases, the FBI contended its workload had gone up from 911 requests per month in 2005 to 1,716 requests per month in 2012. But Hogan pointed out that "the FBI does not provide monthly request data for the intervening years. However, the public data provided by the Department of Justice shows that though there are more FOIA requests now than in 2005, the number of requests has actually dropped by over 25% between FY 2008 and FY 2012." Judge Colleen Kollar-Kotelly had found in *EPIC* that guidelines issued by DOJ in 2009 caused the size and complexity of requests to increase. Hogan agreed with Kollar-Kotelly that "the FBI does not explain how a change in its own agency's policy 'should support a finding for exceptional circumstances as opposed to being considered part of the "predictable workload" the statute specifically states does not justify a stay.'" The FBI also pointed to the large number of FOIA suits against it, but Hogan observed that "this 'anecdotal evidence' does not demonstrate anything about the FBI's 'workload as it has developed over time.' Without more information, this Court cannot conclude that obligations resulting from various lawsuits are more than the predictable workload of the agency." Hogan indicated that "in this case, Clemente is investigating very serious allegations of corruption." Noting that he had reviewed Clemente's medical records, he observed that "the Court is concerned that if the FBI processed documents at the rate it has proposed Clemente may not be able to complete her important research." Ordering the agency to process her request at the rate of 5,000 pages a month, he concluded that "the Court is cognizant that the FBI's resources are limited, but finds that Clemente's proposed processing rate is reasonable in light of the importance of her work and the possibility that she may have only a limited time in which to do it." (*Angela Clemente v. Federal Bureau of Investigation*, Civil Action No. 13-108 (TFH), U.S. District Court for the District of Columbia, Jan. 27)

In upholding a magistrate judge's recommendation that the IRS conducted an **adequate search** and provided all non-exempt records to Kelly Roe, a federal court in Colorado has explained what level of detail an agency must provide to justify its search. Roe argued the agency had failed to adequately justify its search because it only submitted an affidavit from the employee who supervised the search. But Judge Christine Arguello rejected the claim, noting that James Hartford, Senior Counsel in the Office of the Associate Chief Counsel, explained "how he directed numerous other employees located at various IRS offices across the United States to use specific strategies designed to obtain the correct records for Plaintiff. That each of the employees involved in the search did not document the step-by-step process they went through in their individual searches does not undermine the fact that their combined efforts produced a reasonable search for purposes of the FOIA." Arguello indicated that "further, this Court will not impose on an agency subject to FOIA a *per se* requirement that it produce *separate* affidavits from different officials working in different offices, upon a request as far reaching as Plaintiff's. Rather, an affidavit from one individual who oversaw the

search can be sufficient as long as the methodology employed in directing the search was reasonable and the efforts at conducting the search detailed in an affidavit with sufficient specificity." (*Kelly Roe v. Commissioner of Internal Revenue Service*, Civil Action No. 12-02344, U.S. District Court for the District of Colorado, Jan. 22)

Judge Ellen Segal Huvelle has ruled that the Justice Department conducted an **adequate search** for records pertaining to the 1996 termination of former Assistant U.S. Attorney Raymond Granger, whom requester Howard Bloomgarden suggested had been fired for anti-semitic comments. Bloomgarden requested Granger's termination records, believing they might contain evidence that Granger had committed misconduct in Bloomgarden's case. EOUSA searched personnel files in both Washington and Brooklyn and told Bloomgarden that it found no records. However, since the most recent address EOUSA had for Bloomgarden was his attorney, the agency sent the response to the attorney. Bloomgarden filed a sworn declaration that he did not receive the response. The agency then searched the National Personnel Records Center and located files on Granger, but found no termination letter. EOUSA first argued that Bloomgarden had **failed to exhaust his administrative remedies** because it had responded to Bloomgarden and he had failed to file an appeal. But Huvelle noted that "the central question at issue here is not the date on which the defendant mailed the letter, but rather the date on which plaintiff received it." She added that "the plaintiff in this case filed both a complaint and a declaration (under the penalty of perjury) stating that he never received a response from defendant" and because "a disputed issue of material fact exists, the Court will not grant defendant's motion for summary judgment on exhaustion grounds." Huvelle found the agency had conducted a targeted search and that its decision to search the NPRC was further evidence of its good faith. She noted that "though the NPRC was unable to locate the particular documents that plaintiff hoped it would find, it was able to locate Granger's personnel file, which further demonstrates the adequacy of the scope of defendant's search and rebuts any conclusory allegations made my plaintiff that the defendant failed to act in good faith in its attempt to locate responsive documents. Huvelle rejected Bloomgarden's contention that the records must still exist, noting instead that "to the contrary, such documents—if the DOJ still had access to them after more than fifteen years—would almost certainly been found during the course of defendant's multiple searches, especially the search of the NPRC." (*Howard Bloomgarden v. United States Department of Justice*, Civil Action No. 12-0843 (ESH), U.S. District Court for the District of Columbia, Jan. 20)

The Eighth Circuit has ruled that, while 7 U.S.C. § 2018(c) of the Food Stamp Act qualifies as an **Exemption 3 (other statutes)** statute, it does not apply to aggregate redemption data not supplied by a retailer and that, as a result, the Department of Agriculture must disclose yearly redemption amounts for stores accepting food stamps under the Supplemental Nutrition Assistance Program to the Sioux Falls *Argus Leader*. Food stamp purchases are now done through an electronic benefit transfer card and transaction data from third-party processors is maintained in an agency database. When the newspaper requested the information, the agency claimed it was exempt under both Exemption 3 and **Exemption 4 (confidential business information)**. The newspaper filed suit and the district court concluded that the retailer spending information was exempt from disclosure because the data was "the type of information that *can be* obtained under the authority of § 2018," although in practice it is not obtained from individual retailers. While the *Argus Leader* agreed that § 2018(c) qualified as an Exemption 3 statute, it argued that the redemption data was not covered by the statutory provision. The Eighth Circuit agreed, finding the provision covered only redemption data supplied by a retailer. The court noted that "because the retailer spending information is not 'submit[ted]' by 'an applicant retail food store or wholesale food concern,' the information is not exempt from disclosure. The department, not any retailer, generates the information, and the underlying data is 'obtained' from third-party payment processors, not from individual retailers." The court pointed out that "the statute makes clear that only information obtained under § 2018(c)—submitted by a retailer—is exempted. When the statute says 'obtained' it means 'obtained' not '*can be* obtained' as the district court reasoned. Here, however else the

spending information could be obtained, the department actually obtained it from third-party payment processors, not the retailers themselves." (*Argus Leader Media v. United States Department of Agriculture*, No. 12-3765, U.S. Court of Appeals for the Eighth Circuit, Jan. 28)

A federal court in Illinois has dismissed former Foreign Service officer John Erwin's FOIA suit after finding that he failed to file his motion for reconsideration within 30 days as required by local court rules. In arguing that the court erred by not appointing counsel to help him, Erwin indicated the local rules were too confusing for someone who was not an attorney. But the court noting that Erwin had attended the University of Illinois and the University of Chicago and had been able to pass the foreign service officer's test, pointed out that "the complaint itself, as one would expect from somebody of Erwin's formidable educational and professional background, was highly articulate and well-organized, marshaling the relevant facts and law as well as many lawyers could have done. Given that FOIA cases generally are decided on the papers, the court was justified in concluding that Erwin, in light of his education, intelligence, and ability to convey factual and legal matters in writing, was more than capable of handling the case on his own." (*John Erwin v. United States Department of State*, Civil Action No. 11-6513, U.S. District Court for the Northern District of Illinois, Eastern Division, Jan. 22)

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