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In this Issue

Court Rejects Expedited Processing Claim 1

Views from the States 3

The Federal Courts 6

Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: The Associated Press reported Feb. 10 that a redacted email from Admiral William McRaven, head of U.S. Special Operations Command, disclosed to Judicial Watch as the result of a FOIA request, appears to provide documentary evidence that McRaven ordered the destruction of any photos of Osama bin Laden's corpse that still may have been in the possession of the Defense Department even though the AP had requested such photos 10 days earlier. The heavily redacted May 13, 2011 email from McRaven says in part: "One particular item that I want to emphasize is photos; particularly UBL's remains. At this point, all photos should have been turned over to the CIA; if you still have them destroy them immediately or get them" to a blacked-out location. The existence of McRaven's order to destroy the photos was revealed in a July 2013 draft report by the DOD Inspector General, but the reference did not appear in the final report. The email was released to Judicial Watch Jan. 31 in response to its request to the DOD IG for records relating to McRaven's "directive to purge." McRaven's redacted email was the only record the IG was able to locate responsive to the request.

Court Rejects Expedited Processing Claim

Relying primarily on the D.C. Circuit's decision last year in *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), Judge Ketanji Brown Jackson has ruled that an agency's grant of expedited processing requires only that the agency move the expedited request to its expedited queue and to process it as soon as practicable. Jackson rejected EPIC's request for a preliminary injunction that would have required the Justice Department to process its request within 20 days of the court's order granting the preliminary injunction. In *CREW v. FEC*, the D.C. Circuit found that, absent unusual circumstances, an agency was required to determine how it would respond to a FOIA request within the 20-day statutory time limit. If the agency failed to do so, the requester had exhausted his or her administrative remedies and could immediately go to court if they so chose.

ACCESS REPORTS

While the EPIC case involved a different set of circumstances, Jackson indicated that the holding in *CREW v. FEC* shaped her decision. EPIC had filed a request with the National Security Division at the Justice Department for reports submitted to Congress pursuant to the Foreign Intelligence Surveillance Act summarizing the use of pen registers or trap and trace devices. EPIC also requested expedited processing and a fee waiver. Two weeks after receipt of the request, NSD granted EPIC's requests for a fee waiver and expedited processing. After hearing nothing further, EPIC filed suit, contending DOJ had violated the time limits for responding to an expedited request and asking the court for a preliminary injunction requiring the agency to disclose the responsive records within 20 days of the court's order. In its memorandum supporting its request for a preliminary injunction, EPIC indicated that its request was prompted by articles in *The Guardian* describing the government's use of pen registers and trap and trace devices to collect bulk email and Internet metadata. EPIC said there was an urgent need for the records because of congressional debates over the limits of surveillance.

Jackson first explained that to succeed in its request for injunctive relief, EPIC must show a likelihood of success on the merits and that it would be irreparably harmed if injunctive relief was not granted. She noted that "EPIC's argument regarding likelihood of success flows from its belief that DOJ's failure to respond to the FOIA Request within 20 days, as set forth in the FOIA statute, constitutes a *per se* violation of the law that entitles the requester to get the requested records immediately." However, she observed that "but nothing in the FOIA statute establishes that an agency's failure to comply with this 20-day deadline automatically results in the agency's having to produce the requested documents without continued processing, as EPIC suggests."

She then turned to the *CREW v. FEC* holding, pointing out that "significantly for present purposes, *CREW* not only explains the timing and substance of the required FOIA response, it also unequivocally addressed the *consequences* that attach to an agency's failure to make the required 'determination' [as to how it will respond to the request] within the 20-day deadline." Indeed, "far from EPIC's reading of the FOIA to require an agency to immediately hand over all of the requested documents as a result of its failure to meet the deadline, *CREW* makes clear that the impact of blowing the 20-day deadline relates *only to the requester's ability to get into court*." She noted that "properly understood and applied, then, *CREW* substantially decreases the likelihood that EPIC will prevail on the merits of its argument that the NSD's failure to adhere to the 20-day deadline violates FOIA in a manner that entitles EPIC to a court order granting it immediate access to the requested records."

Jackson explained that according to *CREW*, an agency's response to a FOIA request consisted of two steps, only one of which implicated the 20-day time limit. "First, an agency will gather and review documents and make a 'determination,' which is a decision regarding the scope of the documents the agency intends to produce and withhold, and the reasons for withholding any document. By statute, the agency is required to communicate this determination to the requester (and mention the right to appeal) within 20 days of receipt of the request. Then, after the determination has been made and communicated, the agency proceeds to the second step, which is to process the responsive documents and produce them to the requester 'promptly.' *CREW* also clearly recognizes that the 20-day determination deadline is not always practicable, and it explains what happens when that deadline is not met: in such a circumstance, the FOIA requester is deemed to have exhausted his administrative remedies and can proceed immediately to federal court, after which the agency 'may continue to process the request,' but will do so under the court's supervision."

EPIC relied on *EPIC v. Dept of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006), in which a district court had granted EPIC the identical kind of relief after Justice failed to respond to its request within the statutory deadline. But Jackson distinguished the earlier ruling by noting that "the judge in [the first *EPIC* case] did not have the benefit of the D.C. Circuit's decision in *CREW*, and in particular, its holding regarding the specific consequences that attach to an agency's failure to meet the 20-day deadline." She pointed out that the judge

in the first *EPIC* case had found a "presumption of agency delay" simply because DOJ had failed to respond to EPIC's request on time and had not presented any evidence to rebut the presumption. Here, Jackson indicated, DOJ had presented an affidavit from the NSD FOIA officer explaining that there were 13 other expedited requests in its queue before EPIC and that the volume of classified material made it impossible to respond in 20 days. Jackson observed that "even if a presumption of delay exists—and in light of *CREW* this Court is doubtful that it does—no such presumption even arguably arises on the facts of the instant case."

Instead of being entitled to all responsive records for a violation of the time limits as EPIC claimed, Jackson pointed out that if an agency granted a request for expediting processing it was required to move the request "to the front of the agency's queue" and the agency must process it "as soon as practicable." She noted that "DOJ has represented that EPIC's FOIA Request *was* moved to the head of the line of regular FOIA requests that the NSD is handling, and that EPIC's FOIA request is now in a queue of 13 other 'expedited' document requests." Jackson questioned why EPIC believed it was more entitled than the other 13 expedited requesters and indicated that EPIC had failed to "cast doubt on DOJ's representations about the current status of EPIC's FOIA Request relative to all others" or to show that NSD was not working to respond "as soon as practicable."

Jackson then found that EPIC could not show that it would be irreparably harmed if the records were not disclosed promptly. She observed that "while it is true that some courts have granted preliminary injunctions where 'time is of the essence,' EPIC's own subjective view of what qualifies as 'timely' processing is not, and cannot be, the standard that governs this Court's evaluation of irreparable harm, and EPIC offers nothing more than a bald assertion that DOJ is obviously not processing its FOIA Request in a timely fashion." She noted that EPIC had not shown that the records on the use of pen registers and trap and trace devices were vital to the current surveillance debate. Nor had EPIC shown that it was entitled to the documents under FOIA since many of them were classified. Weighing the interests between EPIC's demands for disclosure and the government's claims that it could not disclose the records that quickly regardless, Jackson concluded that "the bottom line is this: given the competing public interests at stake in this matter, and also EPIC's failure to provide any evidence that DOJ is intentionally dragging its feet until the surveillance storm blows over, this Court sees no need to short-circuit the NSD's ongoing document review process preliminarily and in the manner that EPIC's motion requests." (*Electronic Privacy Information Center v. Department of Justice*, Civil Action No. 13-1961 (KBJ), U.S. District Court for the District of Columbia, Feb. 11)

Views from the States…

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

Illinois

A court of appeals has affirmed the trial court's refusal to allow prisoner Jamal Shehadeh to amend his complaint against the Department of Corrections for alleged failure to charge more for copies than actual costs and for failing to respond to his requests within five business days as required by the statute. The court noted that "a public body may charge a FOIA requester 'fees reasonably calculated to reimburse its actual cost for reproducing and certifying public records;' these fees 'shall not exceed 15 cents per page' for reproducing records and 'shall not exceed $1' for certifying records. . .Shehadeh argues that the IDOC's actual cost for

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reproducing records is much less than 15 cents, given the price IDOC pays for paper, and that he therefore was overcharged. However, 15 cents per page is plainly reasonable and permissible under the plain language of [the statute]." Noting that the date of the letter the department sent to Shehadeh was within the five day time limit, the court pointed out that "there is no requirement that a person making a FOIA request actually receive the response within the five-business-days time frame." The court added that "nothing in the FOIA requires the IDOC to use the United States mail when responding to an inmate's FOIA request." (*Jamal Shehadeh v. Illinois Department of Corrections*, No. 5-12-0523, Illinois Appellate Court, Fifth District, Feb. 10)

Michigan

A court of appeals has ruled that the trial court did not err when it awarded Frank Lawrence $500 in punitive damages for the City of Troy's failure to respond to his multi-part request properly. The court noted that "we conclude that the maximum amount of punitive damages an individual can receive under the FOIA is $500, regardless of the number of records that were wrongfully withheld by the public entity." The court added that given the broad definition of 'a public record,' and the FOIA's use of the term to describe a multitude of documents (and collections of documents), it would be impossible for trial courts to determine how many 'records' an individual is actually asking for in his FOIA request." Lawrence also claimed the trial court should have awarded sanctions for the City's failure to admit that it actually had no records responsive to one of his requests. But the appeals court pointed out that "the trial court did not clearly err in denying plaintiff's request for sanctions because defendant did not make any positive representations in its affirmative defense that the requested records existed, and because [the City's affidavit] was actually responsive to the information plaintiff asked for in his request." (*Frank J. Lawrence, Jr. v. City of Troy*, No. 316395, Michigan Court of Appeals, Jan. 30)

New York

A court of appeals has ruled that the New York City Police Department properly withheld identifying information concerning witnesses in the 1996 investigation and conviction of Richard Rosario for second-degree murder. The Exoneration Initiative, a non-profit that investigates and litigates on behalf of indigent prisoners who claim they are innocent, requested the department's records on Rosario because of questions about his conviction, including a passerby whose testimony differed from the government's witnesses, as well as the fact that one witness was unable to identify Rosario at a police lineup. The trial court ruled that because there were questions about Rosario's guilt, the information should be disclosed and awarded the Exoneration Initiative $49,000 in attorney's fees. The appeals court, however, disagreed. Instead, the court noted that "disclosure of the information concerning [an eyewitness] is not mandated by the observation that his testimony was potentially exculpatory. While his failure to identify Rosario in a line-up is arguably exculpatory, his testimony at trial which largely corroborated the accounts provide by the People's other two witnesses raises the 'possibility of endangerment,' satisfying respondent's burden with respect to the information pertaining to [the witness]." The court then observed that "further, the disclosure of the information regarding the Passerby would also create a possibility that Passerby's life or safety could be endangered. While it is true that Passerby's statement might seem at odds with the account provided by the People's witnesses, the account is not dispositive." Because the court concluded the Exoneration Initiative was no longer the prevailing party, it found the group was not entitled to attorney's fees. Critical of the majority's holding, one judge dissented, noting that "here, any intrusion into individuals' privacy is outweighed by the possibility that Rosario is actually innocent and that evidence of actual innocence may be revealed." (*In re Exoneration Initiative v. New York City Police Department*, No. 00728, New York Supreme Court, Appellate Division, First Department, Feb. 6)

Washington

A court of appeals has ruled that while the Seattle Center failed to conduct an adequate search for records pertaining to access to AC outlets at the City Armory, its subsequent expanded search cured the deficiencies of its first search. As a result, the court agreed with the trial court that the Seattle Center should be penalized $10 a day for the 23 days it took to conduct an adequate search in response to a four-part request from Howard Gale. Gale's email request focused on the number of AC outlets available at the Armory and the Seattle Center searched its records under the terms "outlet" and "outlets." The Center provided Gale the documents it had located, but Gale complained that there should be more records. As a result, the Center conducted another search using "Wi-Fi" and found some other records and disclosed them, including a responsive record that had been misfiled. Gale then filed suit. Gale indicated for the first time a variety of search terms to be used. The Center did a third search using those terms and found another 38 records not previously disclosed to Gale. The trial court found the Center was in violation of the PRA until its second search. The trial court fined the Center the maximum $100 a day penalty, but lowered that to $10 a day after the Center asked the court to reconsider the penalty award. Gale argued the Center improperly interpreted his request too narrowly and that his request encompassed information about how the needs of the homeless and transients were addressed at the Armory. The court disagreed, noting that "review of that email indicates to the contrary. Nothing in his initial PRA request or his [subsequent] email mentions the term 'homeless' or 'transient.' The PRA does not 'require public agencies to be mind readers.' . . .[T]he City *did* produce responsive documents [by] including documents addressing the homeless/transient population at Seattle Center." Gale attacked the City's failure to use more expansive search terms. The court observed that "even assuming the City used *only* the search terms 'outlet' or 'outlets' and 'Wi'Fi,' in performing its second search, Gale fails to explain why these terms are unreasonable given the plain language of his PRA request. Indeed, those terms appear calculated to broadly encompass Gale's entire request." Gale had expressed dissatisfaction with the Center's first search, but when asked to provide clarification of what he thought was missing, Gale failed to respond. The court pointed out that "the [trial] court's findings regarding the City's request for clarification and Gale's failure to cooperate support its conclusion that the [second search] brought the City into PRA compliance." The court found the trial court had properly exercised its discretion in weighing the factors in favor of and against a penalty in concluding that the Center should be pay a $10 a day penalty. However, the court indicated that since an award of fees was mandatory to a prevailing party, Gale, although not eligible for attorney's fees because he was not an attorney, was still entitled to his reasonable costs. (*Howard J. Gale v. City of Seattle*, No. 70212-2-I, Washington Court of Appeals, Division 1, Feb. 10)

A court of appeals has ruled that a handful of records located by the Washington State Association of Cities in response to requests by Arthur West were not responsive to his request for records concerning the Association's support of legislation that would allegedly weaken the Public Records Act. The situation was complicated by the fact that West had sued the Association over a series of requests and it was unclear exactly what requests remained in dispute. Nevertheless, the Association found several emails written to Rep. Mike Armstrong, the sponsor of the legislation, but contended that none of them were about the subject of West's remaining disputed request. The trial court agreed with the Association and, after finding West's suit was frivolous, awarded them attorney's fees. West then appealed. The appeals court upheld the trial court's ruling. Assessing the content of the records, the court noted that "the fact that Armstrong was a sponsor of the bills does not mean that every email to him necessarily involved the bills." As to another set of records, the court pointed out that "entries within the time frame are not automatically responsive to the request. The entries at issue are monthly statements to a law firm representing AWC. . .Bills for legal services related to a PRA request are not the same as 'lobbying or correspondence concerning the Public Records Act." The court then approved the trial court's award of fees to the Association. The court observed that "we agree with the trial court that West's motion for reconsideration was meritless and failed to identify any errors of law. . .The

ACCESS REPORTS

trial court's attorney fee award was not unreasonable and we affirm." (*Arthur West v. Washington State Association of Cities*, No. 43787-2-II, Washington Court of Appeals, Division 2, Feb. 4)

The Federal Courts…

The D.C. Circuit has ruled that a group of Missouri dog breeders has not shown that disclosure by the Animal and Plant Health Inspection Service of "Block 8" data concerning the sale and purchase of dogs each year is protected by either **Exemption 4 (confidential business information)** or **Exemption 6 (invasion of privacy)**. The Humane Society requested records on the Missouri dog breeders in 2009. APHIS initially decided that the information was covered by Exemption 4 and 6 and redacted the information before disclosing the records to the Humane Society. The Humane Society appealed, but filed suit before its appeal was decided. However, the agency solicited further comments from breeders on whether disclosure of the information would cause competitive harm. After reviewing the responses, the agency decided the information should be disclosed and notified the affected breeders. The Missouri breeders then filed a reverse-FOIA suit to block disclosure of the data. Writing for the court, Circuit Court Judge Judith Rogers explained the arbitrary and capricious standard of review used in reverse-FOIA suits. "Unlike a typical FOIA case, in which the court would undertake its own analysis of the interests at stake, under this deferential standard of review, the court does not substitute its judgment for that of the Department, but the Department must 'examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' The court does not defer to 'conclusory or unsupported suppositions." However, she added that "the court will 'generally defer to the agency's predictive judgments as to the "repercussions of disclosure."'" Rogers noted that the agency had found that "competitors would not be able to use gross revenue and inventory data to undercut licensees' pricing because there were too many variables, such as breed, age, quality, and market demands, to make a price per dog calculation feasible." The Missouri breeders argued the district court had failed to take into consideration the fact that the Humane Society was trying to run them out of business. But Rogers quickly dispensed with the breeders' claims, pointing out that D.C. Circuit case law held that Exemption 4 "'does not guard against mere embarrassment in the marketplace or reputational injury' of the kind appellants describe. Additionally, substantial competitive harm must 'flow from the affirmative use of proprietary information by competitors." She pointed out that "appellants seem to recognize that the Humane Society is not a competitor of commercial dog breeders and dealers and that this court's precedent is against them." Rogers found the breeders' Exemption 6 claims slightly more substantive, but that they still fell short. Noting that the agency was required to determine if a substantial privacy interest existed and to balance that interest against any public interest in disclosure, Rogers indicated the agency concluded that some similar data was already publicly available and observed that "the Department discounted comments expressing concern about alleged harassment incited by the Humane Society, explaining that many of the comments regarding privacy concerns did not address the specific information at issue. . .and that 'the licensees' association with the industry' is public knowledge." The agency found that disclosure would allow the public to "gauge the effectiveness of inspections by comparing data on Block 8 with publicly available inspection reports." The breeders argued the agency had understated the privacy concerns and overstated the public interest in disclosure. They also claimed the agency had failed to show that disclosure would "contribute *significantly* to public understanding of the operations or activities of the government." But Rogers noted that "this misstates the standard. The quote from *Dept of Defense v. FLRA* on which they rely articulates the 'core purpose of the FOIA,' not the required nexus between the information at issue and public understanding of government activity. The proper inquiry is whether the information 'sheds light' on government activities, and whether it would 'appreciably further' public understanding of the government's actions." She added that "contrary to appellants' assertion, the records offers no indication that members of the public lack the expertise necessary to meaningfully

compare inspection reports and Block 8 information. Moreover, appellants err in suggesting that a public interest in disclosure of Block 8 information can only exist where there is evidence of agency impropriety." She concluded that "the Department has reasonably explained why there is a sufficient public interest and why release of this information would not constitute a 'clearly unwarranted' invasion of personal privacy. To prevail, appellants must demonstrate that conclusion is arbitrary and capricious or contrary to law, and they have failed to do so." (*Carolyn Jurewicz, et al. v. United States Department of Agriculture and Humane Society of the United States*, No. 12-5331, U.S. Court of Appeals for the District of Columbia Circuit, Feb. 4)

Judge James Boasberg has ruled that the EPA properly withheld portions of a draft under **Exemption 5 (deliberative process privilege)** and assessed Hall & Associates $431 in **fees**. Hall & Associates represented the Great Bay Coalition, a group in New Hampshire dissatisfied with the EPA's National Pollutant Discharge Elimination System permit for the Great Bay Estuary. The Coalition accused the agency of "scientific fraud" in its decision and Hall & Associates submitted a total of 18 FOIA requests to the agency, ultimately agreeing to accept records concerning EPA Region 1's responses to the allegations of scientific misconduct. The agency located four responsive documents totaling 26 pages. Although Region 1 claimed that all four records contained deliberative material, the agency released three of them after determining that disclosure would not cause any foreseeable harm. However, it redacted portions of a draft letter prepared by a Region 1 attorney responding to the Coalition's accusations of misconduct. Since Hall & Associates was classified as a commercial requester, the agency assessed 1.5 hours of search time and 8.5 hours that a Region 1 attorney spent reviewing the records for responsiveness and for the application of exemptions. Hall & Associates claimed the $410 in review time was unreasonable. Boasberg noted that the agency attorney spent 8.5 hours "reviewing the documents collected from Region 1 managers and staff, determining whether any FOIA exemption applied, conferring with program staff—through multiple rounds of discussion—about whether materials deemed deliberative should nonetheless be disclosed on a discretionary basis, summarizing the agency's analysis in a memorandum, and coordinating the Region's response with EPA headquarters." He explained that "plaintiff offers no substantive response to EPA's argument" and pointed out that "a plaintiff's bare assertion that a fee assessment is unreasonable, however, is insufficient to avoid summary judgment." Hall & Associates argued that the records were not privileged because the redacted materials pertained to the agency's scientific misconduct and that the draft from Region 1 represented the agency's response to the allegations and did not go through any further review at EPA headquarters. Calling that claim "puzzling," Boasberg indicated that "it is unclear exactly what would be different if Region 1 *had* written the response" since "EPA already sent the final version of the letter to Plaintiff." Noting that Hall & Associates implied in passing that the redactions were not predecisional because they dealt with events that had already taken place, Boasberg observed that "deliberations over how to respond to allegations concerning a past event are without a doubt 'predecisional' to the actual response—in this case, the final response letter that EPA issued on September 27, 2012. . .That the letter was written after Region 1 had made its regulatory decisions is obviously irrelevant." (*Hall & Associates v. United States Environmental Protection Agency*, Civil Action No. 13-830 (JEB), U.S. District Court for the District of Columbia, Feb. 4)

Judge Colleen Kollar-Kotelly has ruled that the FBI conducted an **adequate search** for records pertaining to a multi-part request concerning the investigation and conviction of Sholom Rubashkin for mail fraud and related financial crimes. Kollar-Kotelly also found the FBI had properly invoked **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, **Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods and techniques)** to withhold or redact records. Rubashkin operated Agriprocessors, a kosher meatpacking plant in Postville, Iowa that employed hundreds of illegal immigrants. He was arrested after his plant was raided in 2008 and convicted in 2011. Lawrence Rosenberg, Rubashkin's

attorney, submitted a detailed 39-paragraph request to the FBI for records pertaining to the raid of Agriprossessors and Rubashkin's subsequent investigation and conviction, including a lengthy list of 101 individuals. In an earlier decision, Kollar-Kotelly upheld most of the agency's claims but found the agency had not yet adequately explained its search and that a handful of exemption claims had not been adequately justified. This time around, Kollar-Kotelly found the agency had complied except in minor respects. Rosenberg complained the agency had failed to explain why it only searched its Central Records System. But Kollar-Kotelly noted the agency had explained that after searching the CRS there were no indications that responsive records might exist elsewhere. She noted that "courts have consistently held that the results of a search are relevant in so far as the content of the responsive records may indicate potentially responsive records in other unsearched locations." But in this case, the agency found no indications of the existence of other records after searching the CRS. As a result, Kollar-Kotelly observed that "the FBI conducted a broad search for potentially responsive records in the database most likely to contain such records and had no factual basis—before or after conducting that search—to believe that responsive documents were likely to be found in any other location." Although Rosenberg complained that the agency continued to withhold too much information under Exemption 7(C), Kollar-Kotelly pointed out that "the FBI's redactions [are] particularly appropriate and necessary to protect the privacy interests of third parties given the small community in which the crime that is the subject of Plaintiff's FOIA request took place." Kollar-Kotelly acknowledged that the agency was able to withhold more information in instances where Exemption 7(D) applied. She agreed with the FBI that many individuals spoke with an implied assurance of confidentiality. She indicated that "the Court finds that the severity of the crime and the close association that certain informants had with Mr. Rubashkin, Agriprocessors, or Mr. Rubashkin's fraudulent activity permit a reasonable inference that for these informants 'the communication in all likelihood would not have been made if confidentiality had not been assured.'" While the FBI had withheld information about reports submitted under the Bank Secrecy Act under Exemption 7(E), Kollar-Kotelly now accepted the agency's suggestion that they were protected under **Exemption 3 (other statutes)**. She noted that "while the FBI's discussion of the BSA was initially offered as a justification for the applicability of Exemption 7(E), the FBI's argument regarding the applicability of the BSA's exemptions as the basis for Exemption 3 is no different. Thus, the Court finds Plaintiff had an opportunity to respond to the argument that is the foundation of the FBI's invocation of Exemption 3. In light of this, and the BSA's clear command that records of BSA reports shall not be disclosed, the Court finds it appropriate to consider the FBI's invocation of Exemption 3 'in order to achieve a just result.'" (*Lawrence Rosenberg v. United States Department of Immigration and Customs Enforcement, et al.*, Civil Action No. 12-452 (CKK), U.S. District Court for the District of Columbia, Feb. 3)

Judge Rosemary Collyer has ruled that National Security Counselors is not **eligible for attorney's fees** because there is no practical distinction between the organization and its executive director Kel McClanahan. After settling several cases with the CIA and the DIA, National Security Counselors filed for attorney's fees. Both agencies argued that NSC had not really prevailed and that it had exaggerated its fees, but their main argument was that NSC was not separate from attorney McClanahan. Collyer agreed, noting that "of course, a lawyer can submit FOIA requests and litigate their denial, but he cannot claim fees without a true, independent client. There is no such client here." McClanahan, who previously worked with Mark Zaid, chartered National Security Counselors in 2009 and incorporated it in 2011. Collyer indicated that McClanahan identified himself as the founder and CEO and referred to National Security Counselors as a "non-profit public interest law firm." But, Collyer observed, aside from identifying Bradley Moss as NSC's deputy executive director, she could find no indication that anyone besides McClanahan worked for NSC. Collyer explained that in *Kay v. Ehrler*, 499 U.S. 432 (1991), the Supreme Court ruled that attorneys were not entitled to statutory attorney's fees awards for representing their own firm. Applying *Kay v. Ehrler*, Collyer pointed out that "the record shows little, if any, distinction between Mr. McClanahan and National Security Counselors." She added that "despite its formal incorporation, the record contains no evidence that National Security

Counselors publicly identifies itself as an incorporated entity, or in any other way distinct from Mr. McClanahan." She observed that "on this record, the Court finds that there is no client separate from Mr. McClanahan. Despite his experience in national security law, his status as a *pro se* attorney renders him ineligible for an award of attorney's fees." Expressing concern that attorneys like McClanahan could use FOIA primarily to obtain attorney's fee awards rather than using it as a way to obtain government records, Collyer concluded that "it is undeniable that FOIA permits an individual to request disclosure from government agencies. But without a true client, the Government is under no obligation to subsidize self-serving activity." (*National Security Counselors v. Central Intelligence Agency*, Civil Action No. 11-442 (RMC), U.S. District Court for the District of Columbia, Feb. 12)

A federal court in Illinois has ruled that David Rubman **exhausted his administrative remedies** and that his suit against U.S. Citizenship and Immigration Services may continue. Rubman requested statistical data on the number of H-1B visa applications, approvals, denials, and withdrawals for each fiscal year from 2009-2012. The agency responded with a single-page summary. Rubman expressed dissatisfaction with the response, indicating that he wanted more data. The agency replied that, although there were some emails related to the calculations, they were not responsive to his request. Rubman filed an administrative appeal, which the agency rejected on the grounds that it had fully responded. Rubman then filed suit. The agency contended that Rubman had not exhausted his administrative remedies because his administrative appeal was filed too late. The court, however, disagreed. The court pointed out "Rubman's appeal was dismissed on the merits; that is, it was determined that Rubman's FOIA request had been honored in full. As the administrative body elected not to enforce a procedural bar against Rubman, neither will this court." The court also rejected the agency's contention that Rubman did not have standing because his request had been granted in full. The court observed that "Rubman extensively details why, in his view, the request was not fully honored. The Court declines at this stage of the pleadings to wade into the labyrinth of conflicting statistical interpretations. The Court lacks sufficient information to determine the correctness of the parties' claims on these disputed issues. These disputes are, as Rubman accurately posits, more appropriate for the summary judgment stage of the litigation process." (*David Rubman v. United States Citizenship and Immigration Services*, Civil Action No. 13-5129, U.S. District Court for the Northern District of Illinois, Eastern Division, Feb. 12)

The Ninth Circuit has ruled that Thomas Robins may proceed with his suit against Spokeo, Inc, a website that provides users with personal information about individuals, because he has shown the company may have violated his statutory rights under the **Fair Credit Reporting Act**. Robins sued Spokeo, alleging it maintained and sold inaccurate information about him that prevented him from obtaining employment. The district court initially ruled that Robins did not have standing because he failed to identify any injury, but allowed the suit to proceed after Robins amended his complaint to allege an injury. However, the court ultimately concluded that Robins failed to show an actual injury and once again dismissed the suit on standing grounds. The Ninth Circuit, however, found Robins did have standing. Rejecting Spokeo's contention that Robins could not sue without showing actual harm, the court explained that "the statutory cause of action does not require a showing of actual harm when a plaintiff sues for willful violations." The court added that "when, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages." The court then pointed out that "Robins's personal interests in the handling of his credit information are individualized rather than collective." The court found that Robins could show that his alleged injury was caused by the violation of FCRA and that FCRA provided a potential remedy. The court observed that "first, there is little doubt that a defendant's alleged violation of a statutory provision 'caused' the violation of a right created by that provision. Second, statutes like the FCRA

frequently provide for monetary damages, which redress the violation of statutory rights." (*Thomas Robins v. Spokeo, Inc.*, No. 11-56843, U.S. Court of Appeals for the Ninth Circuit, Feb. 4)

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