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Washington Focus: The Center for Effective Government has rated agency FOIA performance and given the best performing agency a "B" while concluding that a number of agencies failed its audit altogether. CEG looked at a combination of processing results, disclosure rules, and the quality of the agency's website and then awarded an overall grade. Sean Moulton, director of CEB's Open Government Program, noted that agencies could significantly improve their websites and regulations with a few minor additions or revisions, but that improving processing results would be more difficult. He told Federal News Radio that "the reality is if agencies see this as an investment and not just a flat-out expenditure for some bureaucratic check box, but an investment in communicating better with the public, it's really going to pay dividends for them down the road. The processing itself will become less expensive over the long term and many of these requests are in the best interest of the agency."

Court Once Again Reins in Use of CIA Act

For the second time in a year, a district court judge in the D.C. Circuit has ruled that Section 6 of the CIA Act, which the agency has routinely cited under Exemption 3 (other statutes) to protect records that would reveal information about the agency's functions, applies more narrowly to the functions of the agency's personnel, and not to the functions of the agency itself. In a case brought by Stephen Whitaker for records pertaining to his father's death as the result of the crash of a small plane flying from Spain to Germany in 1980, Judge Colleen Kollar-Kotelly joined Judge Beryl Howell in finding that the CIA had over-interpreted Section 6's disclosure prohibition. Kollar-Kotelly noted that "the use of the word 'functions' in the CIA Act is tied to the phrase 'of personnel employed by the Agency' which it modifies. Defendants read the CIA Act too broadly when they assert that it generally permits withholding of all information related to the 'functions' of the CIA. Rather, the use of the word 'functions' is limited by the statutory phrase 'of the personnel employed by the Agency.'"

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Whitaker made requests to the CIA, the Defense Department, and the State Department for records concerning his father, Harold Whitaker, who died in the 1980 plane crash. Stephen Whitaker believed his father was working with the CIA at the time of his death. The CIA issued a *Glomar* response neither confirming nor denying the existence of records. Whitaker's requests to the Defense Department went to Ramstein Air Force Base, the Army Human Resources Command, and the Army Criminal Investigation Command. Whitaker had also requested any records pertaining to U.S. Army Maj. Lawrence Eckmann, who was Harold Whitaker's co-pilot. None of the components found any responsive records. Whitaker asked the State Department for records concerning the investigation of the missing plane as well as Harold Whitaker's passport records. State found 19 responsive documents, but did not locate Whitaker's passport records.

Kollar-Kotelly turned first to the CIA's contention that any responsive records were protected by either the CIA Act or the National Security Act. She agreed with Whitaker that the agency's interpretation of the CIA Act was too broad based on precedent. She noted that "the D.C. Circuit has further emphasized the limited scope of withholding pursuant to this provision of the CIA Act, stating that that this section 'creates a very narrow and explicit exception to the requirements of the FOIA. Only the specific information on the CIA's personnel and internal structure that is listed in the statute will obtain protection from disclosure.'" She added that the D.C. Circuit had also drawn a distinction between the narrow scope of the CIA Act and the much broader coverage of the National Security Agency Act. She observed that "acquiescing in the CIA's broader reading of the provision to allow for withholding of any information related to the CIA's 'functions' would contravene this result, negating the distinction recognized by the D.C. Circuit between the CIA Act and the broader National Security Agency Act."

The CIA had considerably more success with its National Security Act claim, which allows the CIA to withhold information that would reveal intelligence sources and methods. Whitaker argued that records concerning the processing of his FOIA requests did not qualify as intelligence sources or methods. The agency responded that it protected information discussing Whitaker's requests for classified information that could reveal intelligence sources or methods. Kollar-Kotelly agreed that "to the extent that the CIA asserts that the FOIA processing materials themselves contain intelligence sources and methods, these materials may be withheld. Similarly, to the extent these documents discuss whether to disclose information *that would reveal intelligence sources or methods*, these materials may be withheld pursuant to the National Security Act." But she pointed out that "to the extent that the CIA asserts that the FOIA processing materials are themselves 'intelligence sources and methods,' the Agency goes too far. . . Although the FOIA processing materials 'may contain information that reveals intelligence sources and methods, this does not mean that [they] *themselves* are intelligence methods.'" She indicated that "the FOIA processing materials may contain intelligence sources and methods and thus may be withheld on the basis that their disclosure would reveal these intelligence sources and methods. However, they may not be withheld on the [grounds] that they simply *are* intelligence sources and methods."

Whitaker challenged the adequacy of the State Department's search because it failed to search for records about Maj. Eckmann, Harold Whitaker's co-pilot. Both Whitaker and the State Department relied on *Kowalczyk v. Dept of Justice*, 73 F.3d 386 (D.C. Cir. 1996), in which the D.C. Circuit held that an agency did not need to look beyond the information contained in a request for leads on responsive documents. However, the court also noted that agencies could not ignore obvious leads uncovered during its search. Whitaker argued that many of the records located during State's search focused more on Eckmann than on Whitaker and the agency should have realized that a further search for records on Eckmann would likely have located responsive records. Kollar-Kotelly agreed, pointing out that "although Plaintiff's request referred to his father by name as one of the plane's pilots, the request *also* referred specifically to a co-pilot on board the plane. The co-pilot was admittedly unnamed, but the request nevertheless identified a concrete second occupant of the plane, as opposed to merely a potential or hypothetical additional occupant. . .[H]ere, Plaintiff explicitly

referenced the co-pilot of the plane about which he sought records in his request. Accordingly, upon learning from its search for documents related to Harold Whitaker that the co-pilot referenced in the request was Lawrence Eckmann, the State Department was presented with a 'lead that [was] both clear and certain.' At this point, the Department was not required to 'speculate about potential leads' or the connection between the co-pilot to which Whitaker referred and Eckmann. The connection was obvious."

Kollar-Kotelly rejected Whitaker's claim that the State Department's failure to find his father's passport records implied that they had been improperly destroyed. Kollar-Kotelly instead noted that "despite Plaintiff's implicit assertions, the failure to retain these documents does not create liability on the State Department under FOIA. As the Supreme Court has made clear, 'FOIA is only directed at requiring agencies to disclose those "agency records" for which they have chosen to retain possession or control.'"

Whitaker argued the State Department improperly failed to process his father's records under the Privacy Act. The State Department had relied on the 1975 OMB Guidelines on the Privacy Act, which indicated that relatives did not have a right under the Privacy Act to the records of deceased family members. Although Whitaker contended the Supreme Court, in *Doe v.Chao*, 540 U.S. 614 (2004), had indicated the OMB Guidance was not entitled to deference, Kollar-Kotelly pointed out that the D.C. Circuit had subsequently found them entitled to deference in *Sussman v. U.S. Marshals Service*, 494 F.3d 1106 (D.C. Cir. 2007) and noted that "this Court is bound by the opinions of *both* the Supreme Court and the D.C. Circuit and has an obligation to read this body of case law consistently." She then pointed out that "in light of the OMB Guidelines interpreting the Privacy Act to preclude the exercise of Privacy Act rights by relatives on behalf of deceased individuals, the Court's rejects Plaintiff's argument that the State Department was required to process his requests for his father's records under the Privacy Act as well as FOIA. The Privacy Act does not speak to the access rights of relatives of deceased individuals." (*Stephen Whitaker v. Central Intelligence Agency, et al.*, Civil Action No. 12-316 (CKK), U.S. District Court for the District of Columbia, Mar. 10)

Views from the States…

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

Florida

A court of appeals has ruled that the State must give convicted child molester Lawrence Ingram a copy of the videotape statement made by the victim because statutory provisions requiring that a child's identity be redacted does not apply to a defendant. While serving a life sentence for his conviction, Ingram submitted a public records request for copies of images taken from his home computer and a copy of the victim's videotape statement. The State replied that state law required the government to protect the identity of the victim and since it did not have the technology to properly redact the information it would not disclose the videotape unless Ingram found someone who could redact the records properly. The trial court agreed with the government, but the appellate court reversed. The State argued that Ingram was no longer a defendant, but a convicted felon. Disagreeing, the appeals court pointed out that a prisoner was commonly referred to in statutes as a defendant. The court noted that "in the absence of a statutory definition manifesting a more narrow use of the term, we are constrained to construe the term as it is commonly used." The State also argued that the statutory provision providing an exception from disclosure for defendants only referred to criminal liability for disclosure and not disclosure itself. Rejecting that claim, the court observed that "the

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construction we attribute to this statute is consistent with a legislative recognition that the identity of the victim cannot be withheld from the defendant, his attorney, and others listed in the statute. Accordingly, under our interpretation, the statute appears to manifest a conscious attempt by the legislature to tailor the exemption as broadly as practical (but not overly broad) to protect the child's identity." (*Lawrence Andrew Ingram v. State of Florida*, No. 5D13-1519, Florida District Court of Appeal, Fifth District, Feb. 21)

Illinois

The First District Appellate Court has ruled that *Rock River Times v. Rockford Public School District*, 977 N.E.2d 1216 (2012), decided by the Second District Appellate Court, misinterpreted 2010 amendments to the attorney's fees provisions of the Illinois Freedom of Information Act and that plaintiffs are entitled to fees if they prevail by forcing an agency to disclose records after filing suit. However, the court concluded that Uptown People's Law Center, a non-profit organization representing confined prisoners, was not entitled to fees. Uptown filed several FOIA requests with the Department of Corrections. After the agency failed to respond, Uptown filed suit and requested attorney's fees. The department disclosed the records and argued the case was moot since Uptown had not prevailed, relying on *Rock River Times*, in which the Second District concluded that 2010 amendments to the attorney's fees provision of the Illinois FOIA must have been intended to codify the U.S. Supreme Court's holding in *Buckhannon* awarding fees only when a plaintiff received court-ordered relief. The Second District concluded that because the legislature had amended the provision by deleting the word "substantially" before "prevail" and making an award mandatory rather than discretionary. By the time the First District considered the case, even the Department of Corrections was no longer arguing that *Rock River Times* was correct, but the First District decided to rule on the issue anyway. Addressing the *Rock River Times* decision, the First District pointed out that "while we agree with the Second District that 'substantially prevails' was modified to 'prevails' to deliberately effectuate a change, we find the modification was intended to ensure that successful plaintiffs could obtain attorney fees regardless of the extent to which they had prevailed, no matter how slight." The court added that "we find the removal of the word 'substantially' was intended to increase the instances in which a plaintiff obtains attorney fees after receiving a requested document, not to decrease those instances." The court then found the attorney's fees provision was intended to compensate plaintiffs for costs. The court noted that "a non-profit legal organization [is prohibited] from being awarded legal fees that were not actually incurred in pursuing a FOIA request on the organization's behalf." (*Uptown People's Law Center v. Department of Corrections*, Illinois Appellate Court, First District, Fourth Division, Feb. 27)

A court of appeals has ruled that files opened by the Chicago Police Department in response to citizen complaints related to various police officers are not protected by the exemption for employee grievances or disciplinary cases and must be disclosed to reporter Jamie Kalven except to the extent they may contain protected deliberative process material. The police argued that citizen complaints could be related to a future adjudication. But the court noted that "while information obtained during the investigation may potentially be introduced during adjudication of a disciplinary case, a [citizen complaint] does not initiate that adjudication, nor can [citizen complaints] themselves be considered disciplinary. Indeed, if a complaint is unsubstantiated, then no disciplinary adjudication ever occurs and that [citizen complaint] necessarily cannot 'relate to' an adjudication." While the court was willing to accept that the citizen complaint files might have some deliberative material, it pointed out that the exemption "does not allow a public body to withhold an entire file on the basis that some portions of it may fall under the deliberative-process exemption. Should defendants wish to claim this exemption for portions of a [citizen's complaint] file, that is an issue that can be discussed on remand." (*Jamie Kalven v. City of Chicago*, No. 1-12-1846, Illinois Appellate Court, First District, First Division, Mar. 10)

A court of appeals has ruled that the Department of Financial and Professional Regulation is not required to provide the *Chicago Tribune* with a list of initial complaints filed against 22 identified physicians. Although the newspaper requested records concerning the 22 physicians, it continued to insist throughout the request and litigation process that it would be satisfied with a list of claims. The appeals court found the newspaper had failed to identify public records responsive to its request. The court noted that "plaintiff essentially requested the Department to compile 'the number of initial claims the Department received for a set of 22 physicians.' The Department advised plaintiff it did not maintain a record of the number of initial claims received against individual license holders. The Department was not obligated under FOIA to answer plaintiff's 'general inquiry question' concerning the number of initial claims since this would have required creating a new record." (*Chicago Tribune Company v. Department of Financial and Professional Regulation*, No. 4-13-0427, Illinois Appellate Court, Fourth District, Mar. 6)

Kentucky

The Attorney General's Office has rejected the Louisville Metro Police Department's claim that a request from Tom Stone for all emails sent to employee Sharon King for six months is unreasonably burdensome. Stone, who allegedly habitually made voluminous requests for records about employees who had angered him, requested all of King's emails—business and personal—received at her government email address for six months. The police asked Stone to narrow his request, but he refused. In response, the police said his request was too vague and burdensome and that they would not respond unless Stone narrowed his request. Stone then complained to the Attorney General's Office. Ordering the police to respond within a reasonable period of time, the AG noted that "Mr. Stone's request, while unquestionably implicating a vast number of emails, cannot be properly characterized as impermissibly 'broad' or 'vague.'" The AG added that "however, given his unwillingness to narrow the scope of the request, as well as the estimated number of responsive emails, and the necessity of reviewing each in order to determine whether any redactions are necessary, the Attorney General finds that a reasonable delay in producing the requested emails would certainly be justified." The AG then decided the police should be able to process the request in three months. (No. 14-ORD-044, Office of the Attorney General, Commonwealth of Kentucky, Feb. 28)

Washington

A court of appeals has ruled that the law firm of Robbins, Geller, Rudman & Dowd failed to show that the Uniform Trade Secrets Act protected information in its response to a solicitation from the Attorney General's Office for firms that would like to be eligible to represent the Washington State Investment Board in potential future securities litigation and provide related services such as portfolio monitoring. Vincent Gresham made a Public Records Act request for records submitted in response to the solicitation. Robbins Geller filed suit to block disclosure when the Attorney General's Office indicated its willingness to disclose the responses. The trial court found the records were protected under the Uniform Trade Secrets Act and issued an injunction prohibiting the AGO from disclosing them. Gresham then appealed. The appeals court found the records were not protected by either the Uniform Trade Secrets Act or any related proprietary or financial records exemptions in the PRA. Gresham introduced evidence that Robbins Geller had not objected to disclosure of similar information in response to earlier government-issued solicitations in Washington and Florida. Rejecting the law firm's claim that its client lists were protected, the court noted that "Robbins Geller has not shown that it took reasonable efforts to maintain secrecy of the portion of the list previously published. . .Moreover, Robbins Geller does not point to evidence of its efforts to keep the list secret in other contexts—it responds only to Gresham's mention of the Florida and Washington Responses." Gresham argued that because business submitters were not allowed under the federal FOIA to argue that the government's interests would be harmed by disclosure, the law firm could not argue government harm in this case. The court

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disagreed, noting that there were crucial differences between the federal FOIA and the PRA, most notably that "because the PRA includes an express provision giving interested parties the right to seek judicial determination that records are exempt and an injunction preventing their disclosure, Robbins Geller is not barred from asserting the exception or its public loss component." Although Gresham had asked for attorney's fees if the court ruled in his favor, the court pointed out he was not eligible for fees in these circumstances. "A PRA claimant 'prevails' against an agency only if the agency wrongfully withheld the documents. [The PRA] does not authorize an award of costs, attorney fees, or penalties in an action brought by a private party to prevent disclosure of public records held by an agency where the agency has agreed to release the records but is prevented from doing so by court order." (*Robbins, Geller, Rudman & Dowd, LLP v. State of Washington and Office of the Attorney General*, No. 44520-4-II, Washington Court of Appeals, Division 2, Mar. 4)

Wyoming

The supreme court has ruled that the trial court erred in finding that the Supervisor of the Oil and Gas Conservation Commission did not act arbitrarily or capriciously under the state Administrative Procedure Act when he concluded that the identities of various chemicals used in hydraulic fracturing qualified as trade secrets. The supreme court found the trial court had used the wrong standard and that the lower court needed to determine if the chemical names qualified as trade secrets under the Wyoming Public Records Act. Providing some guidance for the trial court, the supreme court adopted the trade secrets standard used under the federal FOIA. The case began when the Powder River Basin Resource Council and a coalition of public interest groups requested names for chemicals used by certain producers. The Supervisor indicated the chemical names constituted trade secrets and the coalition filed suit under the APA, arguing the Supervisor's refusal to disclose the chemical names was arbitrary or capricious. The trial court found the Supervisor had not acted arbitrarily or capriciously and affirmed his decision. The coalition appealed to the supreme court. Explaining that the case was litigated under the wrong statute, the supreme court indicated that in a new proceeding "the district court is required to determine as a matter of fact on evidence presented to it whether the information sought is a trade secret, and not whether the Supervisor acted arbitrarily or capriciously under the deferential administrative standards applied in the original proceedings." Instead, the supreme court pointed out, the trial court would need to determine if the chemical names qualified as trade secrets using the interpretation of trade secrets in federal FOIA interpretation. Under this standard, the supreme court observed, "a trade secret under the WPRA is a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort, with a direct relationship between the trade secret and the productive process." (*Powder River Basin Resource Council v. Wyoming Oil and Gas Conservation Commission*, No. S-13-0120, Wyoming Supreme Court, Mar. 12)

The Federal Courts…

Judge Ketanji Brown Jackson has ruled that the FBI has not shown it conducted an **adequate search** for records concerning the criminal conviction of organized crime figure Anthony Sciacca. The agency located about 650 pages and released about 440 pages in full or in part, withholding records under a variety of exemptions but primarily **Exemption 7(A) (interference with ongoing investigation or proceeding)**. Magistrate Judge John Facciola found the agency had failed to show that it had disclosed all **segregable portions** and the FBI objected to Facciola's recommendations. The FBI argued that it need not disclose records when they are so heavily redacted that they would have no intelligible text. Jackson, however, noted that "while it is true that Defendants need not produce documents where redactions would cause them to have 'minimal or no information content,' Defendants must do more than simply *state* that they withheld documents

for this reason. Rather, they must give the Court some basis on which to evaluate their claim that no reasonably segregable information exists in those documents." She pointed out that "indeed, based on the information Defendants have thus far provided, this Court cannot even ascertain which documents the FBI has entirely withheld, as opposed to those it has produced with redactions." Jackson observed that "additionally, despite the complex system that Defendants used to label and identify various pages of their response to Sciacca's FOIA request, Defendants have missed the mark with respect to a much more fundamental task: their duty to provide a straightforward listing of the documents and information that have been withheld pursuant to a FOIA exemption." Indicating that the agency's declaration referred only to "pages," she noted that "nowhere do Defendants explain what types of documents these pages belong to, who created the documents and for what purpose, and how the exemptions relate to the nature of the documents themselves. . . [A]lthough all parties acknowledge that Defendants redacted some of the responsive documents while withholding others completely, [the agency's declaration does not provide] any information about which specific documents fall into which category (produced in full, redacted, or withheld) and why. . .[W]ithout this type of information, it is simply impossible for the Court to determine whether the exemptions were properly applied." She observed that "the [agency's declaration] seems to put the cart before the horse insofar as it elaborately identifies Defendants' asserted exemptions, but neglects to provide an overall picture of the universe of documents at issue as is necessary for the Court to be able to put those exemption justifications in the proper context." Ordering the agency to supplement its declarations, she noted in a footnote that "what Defendants need to do—and what they have thus far failed to do—is provide enough information about the documents themselves so that the Court can understand why a particular code category is relevant to a particular document." (*Anthony Sciacca v. Federal Bureau of Investigation*, Civil Action No. 08-2030 (KBJ)(JMF), U.S. District Court for the District of Columbia, Mar. 6)

A federal court in New York has ruled that the Justice Department properly withheld almost all of two memos written by the head of DOJ's Criminal Appellate Section concerning the government's ability to use GPS tracking in light of the Supreme Court's recent decision in *United States v. Jones*, 132 S. Ct 945 (2012) under **Exemption 5 (attorney work-product privilege)** and **Exemption 7(E) (investigative methods and techniques)**. After the existence of the memos was made public at a conference, the ACLU requested the memos. DOJ redacted all but the introduction of the first memo and all but the introduction and brief summary of *Jones* in the second memo. After reviewing both memos *in camera*, Judge William Pauley agreed with the agency's redactions. The ACLU argued that in the criminal law enforcement context the work-product privilege applied only to documents created in response to a specific set of facts and actual claims and did not apply to an objective analysis of governing law. But, relying on the D.C. Circuit's decision in *Delaney, Migdail & Young v. IRS*, 826 F.2d 124 (D.C. Cir. 1987), Pauley noted that when a memo's function was to provide advice on how the government should respond to legal challenges, a specific-claim requirement was not needed to find that the attorney work-product privilege applied. Pointing out that "it is the *function* of the documents that is critical, not their intended audience," Pauley indicated that although "the memoranda were prepared for the benefit of prosecutors. . .they discuss not how prosecutors should interpret and apply the laws they are charged with enforcing—the criminal code—but how to defend the Government against accusations of unlawful searches or seizures." Pauley rejected the ACLU's contention that the memos constituted the working law of the agency. Instead, he observed that "DOJ's interpretation of the Supreme Court's decision in *Jones* has no legal effect; the results of the DOJ's arguments will be borne out in the courts." Turning to Exemption 7(E), Pauley explained that the first memo "does not fall within Exemption 7(E) because its topic is limited to GPS tracking and it does not reveal any investigative techniques not generally know to the public." By contrast, Pauley pointed out that "the [second] memorandum contains detailed information concerning various investigative techniques not widely known and therefore falls within Exemption 7(E)." Noting that "*in camera* inspection is appropriate to determine whether portions of

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documents may be released while keeping exempt portions secret," Pauley indicated he was satisfied that DOJ had released all reasonably segregable portions of the memoranda. (*American Civil Liberties Union Foundation v. United States Department of Justice*, Civil Action No. 12-7412 (WHP), U.S. District Court for the Southern District of New York, Mar. 11)

Judge Beryl Howell has ruled that the Department of Homeland Security properly withheld two memos sent to Secretary Janet Napolitano from legal counsel concerning the Obama administration's decision not to deport children of illegal immigrants under **Exemption 5 (deliberative process privilege)**. Judicial Watch sued both Homeland Security and the Department of Justice for withholding records. DHS located 2,039 responsive pages, disclosing 387 pages entirely and 322 pages with redactions. Judicial Watch did not challenge the agencies' search, but ultimately decided to focus only on the two DHS memos, both dated June 14, 2012—a four-page memo to Napolitano from DHS General Counsel Ivan Fong entitled "Authority to Exercise Deferred Action for a Discrete Class of Individuals" and a 21-page White Paper on the deferred action program. Judicial Watch claimed that because the documents were dated the day before the final decision was announced it was unlikely that they were predecisional because, very likely, the final decision had already been made. Judicial Watch pointed to two other contemporaneous documents concerning a draft press release and a draft media communications strategy and argued such topics would not have been addressed unless the final decision on the program had been made. But Howell noted that the evidence showed otherwise. "The drafting of the challenged documents in the weeks leading to their issuance on June 14, 2012 was concurrent with discussions on legal and policy considerations of the program. . .Indeed, the fact that the media and communications strategy are both described as draft documents on the Updated *Vaughn* Index confirms, rather than undercuts, the agency declarant's assertion that 'substantive legal and policy aspects of the [deferred action] decision were under review at the time the communications plan was developed.'" Judicial Watch also pointed to DHS emails suggesting the decision had been made. Howell, however, observed that "the emails do not contain 'undisputable evidence' contradicting DHS' claim that the final decision was made on June 15, 2012, but instead reflect the deliberative process as described by DHS, namely, that the final policy decision and communications and media strategies were developed concurrently and the policy was being edited up until June 15, 2012." Finding that both memos were deliberative, she noted that they were from subordinates to their superior and pointed out that "the fact that the authors of these documents were lawyers whose role is to provide legal advice also confirms that these records were deliberative." She explained that "the contents of the two challenged documents were 'part of a discussion about potential approaches to the proposed deferred action policy and legal considerations' and 'were created as part of the decision-making process.' Such legal advice is highly indicative that the records contributed to the Secretary's decisionmaking." (*Judicial Watch, Inc. v. U.S. Department of Justice, et al.*, Civil Action No. 12-01350 (BAH), U.S. District Court for the District of Columbia, Feb. 28)

Judge Colleen Kollar-Kotelly has ruled that Alejandro Espinoza had **exhausted his administrative remedies** because EOUSA failed to deny his request for a **fee waiver**, but that since he was not entitled to a fee waiver the agency properly refused to process his request further until he agreed to pay fees. Espinoza, who had been convicted on federal drug charges in New Mexico, requested records on the discovery by the U.S. Attorney that evidence had been withheld from him during his trial and the presentence report of Debra James. He requested a fee waiver, saying that there was a public interest in disclosure of records that could free an innocent man. But he indicated if his fee waiver was denied he wanted all the records he was entitled to for free and an explanation of further costs. The agency denied the request for James' presentence report without a privacy waiver and after two hours of search time in the U.S. Attorney's Office for the District of New Mexico found that any responsive emails had been archived at EOUSA headquarters. That search was estimated to take four hours at a cost of $325. Meanwhile, Espinoza had filed suit. A month later, the agency

informed Espinoza of the estimated costs, that it did not know how many responsive records might be found, and that if it did not hear back from Espinoza within 30 days it would close his request. Espinoza argued that the agency was prohibited from assessing fees because it had missed applicable deadlines. However, Kollar-Kotelly indicated the provision did not apply to fee waiver requests, but pointed out that "the problem for defendants, though, is that EOUSA has never rendered a final decision on plaintiff's fee waiver request to trigger the exhaustion requirement." The agency argued that by providing an estimated charge for processing the request, it had implicitly denied Espinoza's fee waiver request. Rejecting the claim, Kollar-Kotelly noted that "defendant's implicit denial rationale flies in the face of FOIA's particularized fee provisions and DOJ's implementing regulations, and, if accepted, would improperly render those provisions meaningless." She added that "since this record is devoid of an administrative review of and final decision on plaintiff's clearly articulated fee waiver request, the Court finds that the exhaustion requirement was not triggered." Kollar-Kotelly then found Espinoza had not shown a public interest in disclosure or an ability to disseminate the information and, thus, was not entitled to a fee waiver. Finding "no hindrance to EOUSA's ability to assess search fees," Kollar-Kotelly pointed out that "having found that plaintiff is not entitled to a fee waiver, the Court determines that he must pay the reasonably assessed search fees (and any subsequently imposed duplication fees), before obtaining judicial review of EOUSA's treatment of his request for first-party records." She observed that "since under DOJ regulations, the request is 'not. . .considered received' until the requester agrees to pay assessed fees, EOUSA is under no statutory obligation to produce responsive records; therefore, no improper withholding has yet occurred." (*Alejandro Espinoza v. Department of Justice*, Civil Action No. 12-1950 (CKK), U.S. District Court for the District of Columbia, Feb. 27)

Judge James Boasberg has ruled that the Department of Homeland Security has still not shown that it conducted an **adequate search** for records concerning detention policies, but that it properly withheld 12 disputed documents under **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods and techniques)**. Boasberg had previously ruled against the agency on the adequacy of its search and had explained in detail what was required to make the search sufficient. However, this time he observed that "although Defendants repeatedly excoriate [American Immigration Council] for 'wast[ing] enough of the Court's and Defendant's time,' the reality is that Defendants have wasted their own time by neglecting to follow the Court's clear instructions, set out in its prior Opinion, about what they must do to prevail in this matter." A primary focus of the previous opinion was that Immigration and Customs Enforcement had not shown that it had searched all locations likely to have responsive records. Despite its strenuous objections, Boasberg found the agency still had not explained why it searched some locations and not others. He pointed out that "while Defendants may wish this were so, the language of the declaration speaks for itself. Nowhere does it affirm that ICE searched 'the only' offices likely to have responsive records. Although, as Defendants note, the adequacy of a search does not depend on 'whether additional potentially responsive documents exist,' the problem here is that Defendants have failed to confirm that they searched 'all files likely to contain responsive materials,' not that other potentially responsive records may exist elsewhere." Because AIC continued to argue that ICE should have searched various offices, Boasberg noted that "the Court cannot judge the merits of AIC's contention without knowing Defendants' position on whether any of those locations are likely to have responsive documents. In the absence of an affidavit containing the specific assertion that ICE searched *all* files likely to contain responsive documents—or, the contrapositive, that the files ICE did not search were not likely to contain responsive documents—the Court cannot conclude that Defendants' search was adequate." Boasberg found the agency had properly withheld of the 12 disputed documents under either the deliberative process privilege, the attorney work-product privilege, or the attorney-client privilege. As to its use of Exemption 7(E) to withhold portions of two documents, Boasberg rejected AIC's assertion that the documents did not pertain to either an investigation or prosecution. Noting that "AIC infers too much from just two words," Boasberg observed that "clearly, the enforcement of immigration laws relates to law-

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enforcement 'investigations' and 'prosecutions,' as does the detention of those suspected of violating such laws." (*American Immigration Council v. United States Department of Homeland Security*, Civil Action No. 12-856 (JEB), U.S. District Court for the District of Columbia, Mar. 5)

Judge Ellen Segal Huvelle has ruled that the Department of Housing and Urban Development conducted an **adequate search** and provided sufficient information in its *Vaughn* index and accompanying declaration to allow Huvelle to determine that the agency had properly invoked **Exemption 5 (privileges)** to withhold information from Judicial Watch concerning the City of St. Paul's use of a "disparate impact" theory of analysis for housing. Judicial Watch filed suit after HUD failed to respond within the statutory time limit. The agency searched 11 offices and provided a *Vaughn* index identifying more than 500 redacted or withheld records. Judicial Watch challenged the agency's search, noting that its declaration did not explain how the search was conducted in various offices. But Huvelle pointed out that "the government is not required to search everywhere a document *might* be. Instead, it is only required to search those places where a document is *likely* to be. Though some agencies may choose to search for responsive documents in a centralized fashion, using consistent search terms and techniques across various departments, nothing in FOIA's text or relevant case law requires an agency to do so. To the contrary, it is permissible for an agency to rely on subject matter experts to conduct individualized searches for documents when responding to FOIA requests." Huvelle rejected Judicial Watch's contention that the agency's declaration was inadequate because it did not identify which Exemption 5 privilege applied to specific documents. Huvelle noted that courts within this jurisdiction have repeatedly emphasized that a *Vaughn* index must simply 'indicate in some descriptive way which documents the agency is withholding and which FOIA exemptions it believes apply.'" She added that "to be sure, it would have been helpful for defendant to identify by name which specific privilege applies to which entries in its *Vaughn* index, as opposed to relying on [the agency's] declaration. Yet, so long as the Court is able to determine the existence of each essential element of an incorporated privilege, defendant should not be penalized for failure to identify a specific privilege by name." Judicial Watch argued the agency's declaration did not contain the elements of each privilege. But Huvelle explained "none of these alleged elements is required in order to establish the existence of the three privileges upon which defendant relies." Addressing Judicial Watch's challenge to the attorney-client privilege, she pointed out "the entries in the *Vaughn* index specifically identify the author and recipients of each communication, as well as the contents of the document. The narrative justifications also explicitly identify which communications were specifically 'among attorneys' and which were not. This provides a sufficient basis for plaintiff and the Court to assess whether an attorney-client relationship existed and whether the content of the communications was confidential." (*Judicial Watch, Inc. v. United States Department of Housing and Urban Development*, Civil Action No. 12-1785 (ESH), U.S. District Court for the District of Columbia, Feb. 28)

A federal court in Louisiana has ruled that Rafael DaSilva is entitled to **attorney's fees** for his suit against U.S Citizenship and Immigration Services, but because his attorney's time sheet lacked sufficient detail the court ordered the attorney to provide further justification for his fee request. DaSilva made a request to USCIS for his Alien File and for emails concerning him from various USCIS employees. While the agency produced his A-File within several months, it failed to conduct a search for emails. DaSilva had already filed suit before the agency disclosed any records and he pointed to the lack of emails as evidence that the agency's search was inadequate. The agency admitted that it had neglected to search for emails and DaSilva ultimately received more than 1,000 pages of emails. DaSilva asked the court to award him attorney's fees. The agency argued its disclosure was because of the normal administrative process and not as a result of DaSilva's suit. The court agreed that because the agency released his A-File early on DaSilva was not eligible for fees for that disclosure, but that the agency's search for emails was prompted by DaSilva's suit. The court found that "plaintiff's self interest is sufficient motivation for the pursuit of his lawsuit." However, the court noted that

if the agency's behavior was unreasonable DaSilva might still be entitled to fees. While USCIS argued it had processed the request "in the same manner it handles a typical request," the court found this "unpersuasive." The court pointed out that "defendant submitted sworn declarations that disclosure was complete when searches were still ongoing. . .[T]here is no indication that, were it not for the pending litigation, Defendant would have revisited the request for emails." The court indicated that "Defendant's sworn declarations and pleadings, which reiterated that plaintiff sought email communications, and then asserted that 'all communications' would be in his A-file, are plainly misleading." Finding DaSilva was entitled to a fee award, the court next examined the amount that should be awarded. The court noted that his attorney had seven years experience as an immigration attorney but that the record provided no evidence of his experience concerning FOIA. The court found that $200 an hour was an appropriate rate, but because the attorney's time records were insufficient, the court ordered the attorney to provide a revised set of time records. (*Rafael Ellwanger DaSilva v. U.S. Citizenship and Immigration Services*, Civil Action No. 13-13, U.S. District Court for the Eastern District of Louisiana, Feb. 24)

A federal magistrate judge in California has ruled that while CIA Director John Brennan should be dismissed as a defendant in Anthony Bothwell's FOIA suit, his complaint sufficiently indicated that he was suing the CIA as well to survive a motion to dismiss the agency as a defendant. Bothwell made a request for records on several individuals involved in the investigation of the assassination of John F. Kennedy and another request for records on individuals involved in the investigation of the assassination of Robert F. Kennedy. The CIA denied both requests and Bothwell filed suit, naming Brennan as the defendant. The CIA argued that neither Brennan nor the agency was properly served notice of the complaint. Further, the CIA claimed that an individual like Brennan was not a proper defendant under FOIA and that, because the complaint did not name the CIA in the caption, neither was the agency. The magistrate judge agreed that Brennan had not been personally served as the rules required, but that by serving the Attorney General and the CIA Litigation Section, Bothwell had properly notified the agency. The magistrate judge then found that Brennan was not a proper party because FOIA applied only to agencies. However, the magistrate judge explained that "plaintiff, in the 'parties' section [of his complaint], specifically identifies the Defendant as 'an agency of the Executive Branch of the United States Government.' In addition, Plaintiff consistently alleges that the CIA is the party responsible for any wrongdoing. . ." The magistrate judge concluded that "because the CIA is sufficiently identified in the body of the Complaint, Plaintiff's failure to name the CIA in the caption does not mandate dismissal of the Complaint against the CIA." (*Anthony P.X. Bothwell v. John O. Brennan*, Civil Action No. 13-5439 JSC, U.S. District Court for the Northern District of California, Mar. 6)

Judge John Bates has dismissed CREW's suit against the IRS under the Administrative Procedure Act after finding that CREW did not have **standing** to challenge the agency's failure to revise its regulations concerning 501(c)(4) social welfare organizations. CREW argued that while the statute defined such organizations as being *exclusively engaged* in social welfare activities, the IRS required only that the organizations be *operated primarily* for social welfare purposes, meaning in practice that 49 percent of their activities could be for political purposes without any requirement of public disclosure. As a result, CREW pointed out that it had suffered an informational injury because it could not get donor information about such organizations. If the agency was forced to revise its regulations to more closely reflect the statutory language, CREW argued that organizations would file under Section 527 applicable to political organizations instead. But Bates noted that "the fatal flaw in CREW's interpretation, as defendants point out, is that nothing requires the organization in question to file under section 527." He observed that "although it is possible that some 501(c)(4) organization would make those choices, that possibility, which is based upon speculation about the independent decisions of third parties not before this Court, does not create a legal entitlement to the

information CREW seeks. Hence, the necessary ingredient for informational injury-in-fact is missing." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of the Treasury, Internal Revenue Service*, Civil Action No. 13-732, U.S. District Court for the District of Columbia, Feb. 27)

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