Volume 40, Number 7
March 26, 2014

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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

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

ISSN 0364-7625.

Publisher's Note: This issue is the final printed edition of Access Reports. After this issue, Access Reports will be available only as an email publication in Word or PDF format. To continue to receive the newsletter, subscribers must provide an email address for delivery. Many subscribers have already done so, but a number still have not provided email addresses. Please provide an email address as soon as possible. You can contact Access Reports at hhammitt@accessreports.com, by phone at 434 384-5334, FAX at 434 384-8272, or by mail at 1624 Dogwood Lane, Lynchburg, VA 24503. Thanks so much for your continued support.

Court Finds CIA Has Not Shown Records Are Not Readily Reproducible

After considering a serious challenge by a former CIA employee to the agency's claim that it cannot provide records in electronic formats without huge costs, Judge Beryl Howell has indicated that further briefing on the issue is probably pointless and that the parties will either have to agree to discovery or to hold a hearing. Howell recognized "the substantial costs in time and resources that may be incurred by both parties in the pursuit of standard discovery, such as document demands, interrogatories, and depositions. The parties may prefer to short-circuit an extensive discovery process and instead proceed directly to an evidentiary hearing to resolve the outstanding material factual disputes." She added that "although it is possible that deposition transcripts might provide the requisite material needed to resolve the factual disputes at issue, the voluminous briefing and multiple declarations filed by the defendant in at least two cases before this Court on this very issue tends to belie that conclusion."

The case involved several FOIA requests filed by former CIA employee Jeffrey Scudder for electronic copies of a number of Studies in Intelligence articles that Scudder contended, based on his personal experience, the agency had already prepared in electronic format. The agency responded by indicating that the records requested by Scudder were not

ACCESS REPORTS

readily reproducible in that format and even if it were able to produce the information electronically the costs involved would be more than printing all the articles out on paper.

Howell explained that she first needed to determine whether there were material facts remaining in dispute that would preclude summary judgment based on the existing court record. Pointing to several cases in which the D.C. Circuit had ruled that a hearing would be required to resolve disputes over the confidentiality of records under Exemption 4 (confidential business information), Howell observed that "the process of determining the applicability of Exemption 4 to withhold a responsive document shares one important similarity with determining whether an agency must disclose documents in an electronic format: namely, both inquiries trigger a fact-based analysis. . .[W]hile FOIA cases generally turn on application of law to undisputed material facts set out in agency affidavits, courts may occasionally confront contested questions of fact that must be answered first. The meaning of 5 U.S.C. § 552(a)(3)(B) and its key phrase of 'readily reproducible' sets the parameters for such a factual inquiry." Reflecting on the difference in the parties' positions, Howell noted that "the parties to the instant matter agree on this point regarding the fact-based nature of the 'readily reproducible' inquiry, but simply discount or reject outright the evidence presented by the other side about whether this FOIA requirement is met in this case."

Although case law on the meaning of "readily reproducible" is sparse, Howell indicated that *TPS, Inc. v. Dept of Defense*, 330 F.3d 1191 (9th Cir. 2003), was remarkably on point. In that case, a government contractor who had previously received files from the Defense Department in a "zipped" format, made a FOIA request for a zipped file. The agency denied the request, contending that "readily reproducible" meant that the format was used commonly enough to be considered "business as usual" and that zipped files did not qualify under that definition. The Ninth Circuit held that the plaintiff's declaration was sufficient to raise a question as to whether the agency could provide records in a zipped file format. Howell pointed out that "the situation described by the *TPS, Inc.* court is precisely the situation described in the instant matter: the plaintiff alleges that the requested records already exist and are maintained in the exact format requested by the plaintiff and that the defendant has provided such records, in such a format, to others. Despite the defendant's claims of incapability and incapacity, the defendant has not established through 'specific, compelling evidence' that complying with the plaintiff's request would constitute 'significant interference or burden' in the face of the plaintiff's contrary factual assertions, which are predicated on deep personal knowledge."

Scudder argued that the agency was required to disclose records in the format of the requester's choice if it were "technically feasible." Howell disagreed, noting that "the defendant is correct that 'it cannot be that "readily reproducible" simply means technical capability or feasibility.'" While pointing out that the term "technically feasible" appeared in a separate provision of FOIA, Howell indicated that "the plaintiff is partially correct that the common sense meaning of the word 'reproducible,' standing alone, is synonymous with 'technically feasible,' yet, just because an agency has the technical capability to reproduce responsive records in the requested format, the agency is not automatically obligated to do so under 5 U.S.C. §552(a)(3)(B). That obligation turns on the meaning of the full term 'readily reproducible.' The defendant too, is partially correct in that 'readily' does imply that an agency is relieved of its obligation to fulfill a format request that is onerous, but the defendant ignores the second sentence in 5 U.S.C. §552(a)(3)(B), which informs the meaning of 'readily' in the first sentence of this subsection: 'Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.'. . .It is in disregarding the full meaning of this second sentence, when read in conjunction with the first, that the defendant errs."

Howell explained that "the second sentence amplifies the importance of the requirement set out in the first sentence and imposes an over-arching obligation on federal agencies to be proactive ins satisfying format requests. . .[T]he second sentence requires an agency to take affirmative steps to maintain its records in a form that would be readily reproducible in response to FOIA requests for 'any form or format.' The defendant's

position that this subsection limits an agency's obligation to honor format requests to only existing formats ignores the plain statutory text in the subsection's first sentence as well as the proactive admonition in the subsection's second sentence." She added that "this is not the law. If the records are 'readily reproducible' in the requested format, the agency must honor the request."

The agency argued that because courts were to give substantial deference to agency determinations concerning the reproducibility of records in other formats its conclusion should be considered correct. But Howell pointed out that "such deference does not amount to a blanket exemption from judicial review of the agency's justification for declining to comply with a specific format request or failing to maintain records in readily reproducible formats. . ." She noted that "the defendant's position is that records are never 'readily reproducible' in electronic format from this agency. . .The defendant's position is difficult, if not impossible, to reconcile with the statutory language of 5 U.S.C. §552(a)(3)(B), particularly since the defendant itself created the security procedures it now says make the production of documents in electronic format 'prohibitively time consuming and costly.'" She observed that "taken as a whole, the plaintiff's serious allegations challenging the accuracy and veracity of the defendant's declarations have raised sufficient concern to overcome the 'substantial weight' this Court must afford the defendant's declarations under 5 U.S.C. §552(a)(3)(B)." (*Jeffrey Scudder v. Central Intelligence Agency*, Civil Action No. 12-807 (BAH), U.S. District Court for the District of Columbia, Mar. 12)

Views from the States...

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

California

A court of appeals has ruled that records filed in court pertaining to allegations of discrimination in seeking the death penalty are public court records that must be disclosed to death row prisoner La Twon Weaver by the District Attorney for San Diego County. In response to Weaver's request for a large number of court filings, the District Attorney claimed the records were investigative files under the California Public Records Act and that disclosure would invade the privacy of third parties in the records. The District Attorney also argued that to produce the records would cost at least $3,400. While the trial court upheld the District Attorney's claims, the appeals court reversed. The appellate court pointed out that "the issue we decide is whether the District Attorney's copies of judicial documents—which must be made available to the public upon request at the superior court—are investigatory documents under the CPRA or because they implicate privacy rights. We conclude the documents sought are not exempt from disclosure." The court pointed out that "the documents [Weaver] seeks are from [two] case files that were publicly filed in superior court, and involve motions for disclosure of information regarding claims of selective prosecution. As such, they are not investigatory files exempt from disclosure. . ." The court also observed that "disclosure of the documents Weaver seeks would not violate the privacy rights of either the defendants or victims in homicide cases. There is no reasonable expectation of privacy in documents required to be filed in court when those documents are not filed under seal." As to the public interest in disclosure, the court noted that "the public's interest in the fair administration of the death penalty is a longstanding concern in California, and it is inconceivable to us that any countervailing interest that the District Attorney could assert outweighs the magnitude of the public's interest." The court indicated that "the approximately $3,400 expanse of generating the list of cases at issue here is substantially less of a reason and pales in comparison to the interests of Weaver and the public in

ACCESS REPORTS

disclosure." (*La Twon Reginal Weaver v. Superior Court of San Diego County; Real Party in Interest, District Attorney's Office of San Diego County*, No. D063768, California Court of Appeal, Fourth District, Division I, Mar. 12)

Connecticut

The supreme court has ruled that the federal National Practitioner Data Bank and the Healthcare Integrity and Protection Data Bank, which are national clearinghouses for information concerning adverse actions taken against physicians and health care practitioners, are both confidential under federal law and cannot be disclosed to unauthorized third parties except to the extent the information originated from a state or local agency. The case involved an incident in Greenwich in which a doctor was accused of artificially impregnating a woman with sperm that did not originate from her husband. The case was settled and the physician was disciplined. The *Greenwich Times* requested the investigation report from the Commissioner of Public Health, including records provided from the National Practitioner Data Bank. The Commissioner disclosed some records, but withheld records from the National Practitioner Data Bank because they were confidential under federal law. The newspaper filed a complaint with the FOI Commission, which found that, while regulations pertaining to the Healthcare Data Bank prohibited disclosure, regulations pertaining to the National Practitioner Data Bank did not. The trial court upheld the FOI Commission's ruling and the Commissioner of Public Health appealed. While the FOI Commission took the position at the supreme court that subsequent amendments to the federal regulations pertaining to the databases clarified that both databases were not subject to disclosure, the U.S. Department of Health and Human Services, which had intervened in the case, argued that the regulations for both databases had always required that the records were not to be disclosed to unauthorized third parties. Agreeing that both databases were confidential, the supreme court observed that "there is no question that, under current law, the newspaper would not be entitled to either Practitioner Data Bank records of Healthcare Data Bank records, but nonetheless could receive information subject to disclosure under the [FOIA] that the department had obtained independently from other sources in its own files." (*Commissioner of Public Health v. Freedom of Information Commission*, No. 19046, Connecticut Supreme Court, Mar. 25)

Kentucky

After reciting the egregious behavior of the Cabinet for Health and Family Services in prolonged litigation under the Open Records Act for records concerning child fatality cases, a trial court has awarded the *Louisville Courier-Journal* $229,000 and the *Lexington Herald-Leader* $73,000 in attorney's fees. The court pointed out that "the litigation tactics of the Cabinet, including the promulgation of administrative regulations, the removal [of the case] to federal court, and the unsuccessful appeal of the injunctive relief, vastly increased the amount of attorney time and expenses that the plaintiffs were required to incur. It would be patently unfair, and inconsistent with the purpose and plain language of the Act, to penalize the successful parties who had to go to court to vindicate their rights, by shifting the costs of the Cabinet's litigation tactics to the parties whose rights under the Open Records Act were violated." The court concluded that "the record in this case demonstrates that such preventable tragedies will continue to occur as long as the Cabinet's conduct in child fatality cases remains effectively shielded from public scrutiny. No one can expect the Cabinet to prevent all such tragedies, but the public can expect the Cabinet to take remedial steps to prevent systemic failure in child protective services from being repeated. Yet there is no way for the public to hold the Cabinet accountable if its conduct is forever hidden in confidential files." (*Courier-Journal, Inc. and Lexington H-L Services, Inc. v. Cabinet for Health and Family Services*, No. 11-CI-141, Franklin County Circuit Court, Commonwealth of Kentucky, Mar. 18)

Maryland

A court of appeals has ruled that a five-member Ethics Panel appointed by the Howard County Board of Education was performing an administrative function not subject to the Open Meetings Act when it heard two complaints against Allen Dyer, a former Board member, which were then considered by the full board in closed session. Dyer filed a complaint arguing the Board had violated the OMA by delegating the ethics complaint function to the Ethics Panel. The court found that the Ethics Panel was performing an administrative function for the Board and was not subject to the OMA. The court further pointed out that "contrary to Dyer's assertions, county boards of education may delegate functions to representatives." The court noted that "in the instant case, the Board properly delegated responsibilities to the Ethics Panel." (*Allen R. Dyer v. Board of Education of Howard County*, No. 2317 Sept Term 2012, Maryland Court of Special Appeals, Mar. 26)

New York

A trial court has ruled that detailed maps showing the location of telecommunications infrastructure in New York City are protected by an exemption in the Freedom of Information Law for the security of information technology assets. Benjamin Cordozo School of Law Professor Susan Crawford and Anjali Dalal, a resident fellow at the Information Society Project at Yale Law School, requested the maps from the New York City Department of Information Technology and Telecommunications to explore whether there was an income-bias as to which New York City neighborhoods had high-quality Internet access. The department ultimately denied access to the maps, citing exemptions for the security of any person and for the security of critical infrastructure. After reviewing two sample maps *in camera* Judge Shlomo Hagler agreed that they were protected by the critical infrastructure exemption. The plaintiffs argued the exemption was meant to apply only to cyber attacks and not physical attacks, but Hagler observed that "this security consideration is not merely focused on the method of attack, but on the preservation of both the electronic data and the physical system or infrastructure that carries the data. It would be illogical and unreasonable to protect only against cyber attack and permit an attacker to have access to the physical component such as the computer to retrieve the electronic data." Hagler was persuaded by the City's affidavit and its plea that "this Court should defer to the law enforcement's judgment to avoid the risk of harm or attack on the City's information technology assets and the resulting 'catastrophic' consequences." But Hagler was not satisfied that the City "has conducted a sufficiently diligent search to discover other responsive documents, even if not in a precise map form which provide petitioners with non-sensitive and non-exempt general information (that seems to be available to the public on respondent's own website) to ensure that all New York residents have equal access to high speed Internet connections in a non-discriminatory manner." (*Susan Crawford and Anjali Dalal v. New York City Department of Information Technology and Telecommunications*, New York Supreme Court, New York County, Mar. 20)

The Federal Courts...

The D.C. Circuit has ruled that NIH properly issued a privacy *Glomar* response neither confirming nor denying the existence of records concerning an investigation of alleged improprieties by several animal researchers at Auburn University working under an NIH grant. The allegations came in the form of a complaint filed by People for the Ethical Treatment of Animals after it had conducted an eight-month undercover investigation at the Auburn lab. PETA filed a complaint naming the three researchers with both NIH and the Department of Agriculture. While Agriculture provided a copy of PETA's complaint to the

ACCESS REPORTS

organization indicating the allegations were "partially valid," the court record apparently did not confirm whether or not NIH received PETA's complaint. PETA then made several FOIA requests to NIH concerning any investigation conducted pertaining to the researchers. In response, NIH issued a *Glomar* response citing **Exemption 6 (invasion of privacy)**. The Department of Health and Human Services affirmed the NIH decision based on both Exemption 6 and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Because PETA agreed that Exemption 7(C) would apply, the D.C. Circuit proceeded to analyze the case under that exemption. PETA argued that the researchers' privacy interests were diminished because both Auburn and Agriculture had confirmed the existence of complaints. But the D.C. Circuit noted that "notwithstanding other entities' acknowledgement of investigations, NIH's own official acknowledgement that it had investigated the named researchers would carry an added and material stigma." To overcome that privacy interest, PETA was required to show that disclosure would shed light on government activities or operations. The court pointed out that "there is. . . no cognizable FOIA interest in examining whether private individuals conduct animal research in an appropriate manner: that interest does not speak directly to *governmental* activity." Acknowledging that there was a public interest in learning more about government investigatory procedures, the court indicated that "that interest, without more, [is] insufficient to justify disclosure when balancing against the substantial privacy interests weighing against revealing the targets of a law enforcement investigation." However, the court agreed that PETA's requests encompassed records that might not stigmatize the researchers if disclosed. Addressing PETA's hypothetical that NIH might have declined to investigate based on lack of resources, the court concluded that "a *Glomar* response is valid for such records. If NIH were required to acknowledge responsive documents in instances where there was no investigation but were permitted to give a *Glomar* response in cases where there had been one, it would become apparent that a *Glomar* response really meant that an investigation had occurred. The agency must be permitted to issue a *Glomar* response in both situations to maintain the uncertainty essential to *Glomar*'s efficacy." Since PETA's requests asked for records about *any* investigation, the court agreed that there might be investigatory records that did not focus on an individual. The court observed that "because there would be no disclosure of the existence of an investigation of the named researchers, the privacy interest at stake would be diminished. . .Acknowledging an investigation that did *not* target the researchers would serve to advance that public interest [in the investigatory process] without unduly compromising the researchers' privacy interests." (*People for the Ethical Treatment of Animals v. National Institutes of Health, Department of Health and Human Services*, No. 12-5183, U.S. Court of Appeals for the District of Columbia Circuit, Mar. 14)

Judge Beryl Howell has ruled that Customs and Border Protection properly withheld information about its assessment for the need for a fence between Texas and Mexico under **Exemption 7(E) (investigative methods and techniques)**, but that the public interest in disclosure of names and addresses of property owners impacted by the building of the fence outweighs the privacy interests under **Exemption 6 (invasion of privacy)**. Denise Gilman, a professor at the University of Texas Law School, made a request to CBP for records concerning the construction of the fence along the Texas-Mexico border. After she filed suit, she agreed to bifurcate the email production and non-email production of records. She and the agency also agreed that it would disclose emails being released as part of *CREW v. DHS*, although the CREW litigation was somewhat broader in scope since it applied to the entire length of the fence and not just that portion running between Texas and Mexico. The parties agreed that as emails were disclosed to CREW they would also be disclosed to Gilman. Gilman challenged the agency's withholding of name and address information for people potentially impacted by the wall and of records assessing the need for fencing in certain areas. She also contended the agency improperly claimed that email attachments from the CREW litigation were not responsive to her request. Noting that there was a privacy interest in the name and address information, Howell found that the public interest in disclosure outweighed the privacy interests. She explained that "there is a great public benefit to learning the social impact of CBP's construction of the wall. Revealing the

identities of landowners in the wall's planned construction site may shed light on the impact on indigenous communities, the disparate impact on lower-income minority communities, and the practices of private contractors. The information, after appropriate analysis, could reveal CBP's decisionmaking and conduct as it relates to the Texas-Mexico border wall planning and construction, thus it helps the public 'learn something directly about the workings of the *Government*.'" Reviewing the case law, Howell observed that "these cases establish that where the requester has articulated a legitimate public interest in the information, courts have ordered disclosure of names and addresses, even if such information is associated with financial information, views held by the landowner, or would risk unwanted contact." She added that 'the public interest in learning how CBP negotiated with private citizens regarding the planning and construction of the border wall is significant. This public interest outweighs the privacy in landowners' names and addresses in the CBP emails." Turning to the agency's Exemption 7(E) claims, Howell pointed out that the agency had demonstrated that 'the redacted information is related to the enforcement of federal laws, as the assessment of border vulnerabilities is directly related to the potential violation of federal immigration laws and the CBP's duty to deter illegal immigration and to apprehend illegal immigrants." Gilman argued that the information focused more on the geography of the border region rather than investigative methods. But Howell observed that "the discussion of publicly available information, itself, reveals what information CBP considers when analyzing its vulnerabilities at the border, and this analysis, itself, is not publicly known and may risk circumvention of the law." While Gilman contended that the parties agreement to disclose the emails as they were released during the CREW litigation included all email attachments as well, the CBP argued the agreement obligated it only to disclose the emails disclosed to CREW. Howell agreed with the agency. She pointed out that "contrary to the plaintiff's contention, the responsive documents to which the plaintiff is entitled are defined both by the search conducted by CBP, and also the documents actually produced in *CREW*. Since the email attachments were not actually produced in *CREW* because they were deemed nonresponsive, they correspondingly need not be produced to the plaintiff." (*Denise Gilman v. U.S. Department of Homeland Security*, Civil Action No. 09-0468 (BAH), U.S. District Court for the District of Columbia, Mar. 14)

Judge Ketanji Brown Jackson has ruled that the Navy has so far failed to show how a signature page containing the names of three agency employees who were part of the source selection board for contracts awarded by the Navy for development of alternative sources of electricity is protected by **Exemption 6 (invasion of privacy)**. Jackson also rejected a last-minute claim by the Navy that the signatures were protected by **Exemption 5 (deliberative process privilege)**. Judicial Watch had requested records about the alternative energy source contracts and the dispute finally boiled down to a challenge to the agency's decision to withhold the signature page under Exemption 6. After that issue had been briefed in court, the Navy indicated the signatures were also protected by Exemption 5, a claim Judicial Watch responded to in supplemental filings. Noting that "'all FOIA exemptions [are] to be raised at the same time in the original district court FOIA proceedings,'" Jackson observed that "it is not clear that the Exemption 5 argument in this case is even properly before the Court." However, since both parties had fully addressed the claim, she decided to proceed. She explained that "in asserting that Exemption 5 applies to the names on the redacted signature pages at issue here, Defendant relies solely on the fact that the Memorandum [containing the signatures] itself was a predecisional document because the recommendation of the [Source Selection Board] as laid out in the Memorandum was not binding on the [Source Selection Authority]" She pointed out that "Exemption 5's deliberative process privilege does not authorize the name redactions because the signatories' names themselves are facts that do not qualify as predecisional, and in any event, Defendant offers no rationale for why the names should be considered deliberative (and none easily comes to mind)." She indicated that the names qualified for protection under the broad interpretation of what constituted a "similar" file under Exemption 6. But she pointed out that "Defendant's effort to establish that negative consequences

ACCESS REPORTS

will befall the signators of the Memorandum is entirely speculative, and thus falls short of establishing a substantial privacy interest." The agency argued disclosure would prevent the employees from doing their job effectively. However, Jackson noted that "unlike Exemption 5, Exemption 6 is not aimed at protecting the integrity of an agency's workflow; rather, its purpose is to avoid disclosures that 'would constitute a clearly unwarranted invasion of personal privacy.' And Defendant has offered no rationale that connects the release of the names to any *privacy* interest that the signatories have in their ability to perform their duties effectively, much less any credible reason for why the release of the names of those who signed a work memorandum would have any effect on that performance." Jackson told the agency to supplement its affidavits if it wished to continue to withhold the names. (*Judicial Watch, Inc. v. Department of the Navy*, Civil Action No. 12-172 (KBJ), U.S. District Court for the District of Columbia, Mar. 17)

Judge Rosemary Collyer has ruled that the FBI conducted an **adequate search** for records concerning the Occupy Houston protest movement, including allegations of an assassination plot, and properly applied **Exemption 1 (national security)**, **Exemption 3 (other statutes)**, and **Exemption 6 (invasion of privacy)** to the handful of records it found. However, since Collyer found the agency had not provided sufficient justification that the records were compiled for law enforcement purposes, she told the agency to either supplement its claim under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** or disclose those portions of the records. In response to several requests from prolific requester Ryan Shapiro, the agency located 17 pages, releasing five pages in part and withholding 12 pages entirely. Shapiro claimed the agency had used search terms that were too narrow, but Collyer pointed out that the agency not only conducted broader secondary keyword searches, but, using a 2011 request as a template, used far more terms pertaining to the Occupy movement. Those searches yielded 454 potentially responsive pages, which were whittled down to 12 pages. Collyer noted that "FBI was not required to search every record system; it was only required to conduct a reasonable search of those systems of records *likely* to possess the requested information. Here, FBI exceeded this standard." Shapiro argued the agency's Exemption 1 claims failed to explain the harm to national security if information was disclosed. But Collyer indicated that the agency's affidavit was "sufficiently detailed for these purposes. It defines what constitutes an intelligence activity or method, and describes with reasonable detail the information withheld so as to demonstrate that Exemption 1 applies without revealing the exact information at issue. . .[The agency affidavit] is sufficiently tailored to Mr. Shapiro's document requests, even if parts of it have been relied upon in other cases." She noted that "in reality, Mr. Shapiro's issue with the [agency affidavit] is that it does not reveal the information he wants. . . That FBI did not disclose what might appear to be minor details about plots against Occupy Houston leadership or law enforcement's response to Occupy Houston protests is not consequential." She upheld the agency's use of the National Security Act to protect sources and methods, rejecting Shapiro's contention that the statute only applied to foreign intelligence. Finding that because Shapiro only contested redactions made under Exemption 7(C), he had waived any challenge to redactions under Exemption 6. Collyer agreed with Shapiro that the agency had not shown a law enforcement reason for collecting records on Occupy Houston. Rejecting a broad claim that the records pertained to an assessment of terrorist threats, she noted that "neither the word 'terrorism' nor the phrase 'advocating the overthrow of the government' are talismanic, especially where FBI purports to be investigating individuals who ostensibly are engaged in protected First Amendment activity." *Ryan Noah Shapiro v. U.S. Department of Justice*, Civil Action No. 13-595 (RMC), U.S. District Court for the District of Columbia, Mar. 12)

A federal court in Connecticut has ruled that the Defense Contract Management Agency conducted an **adequate search** for records concerning the cancellation and settlement of a contract with Sikorsky and Boeing that included continued manufacture of the Comanche Helicopter in Bridgeport at site leased by Sikorsky from DiNardo Seaside Tower and has approved of most of the redactions made under **Exemption 4 (confidential business information)** and **Exemption 6 (invasion of privacy)**. Sikorsky and Boeing were

awarded a contract by the Army in 2000 to manufacture the Comanche Helicopter. In anticipation of the contract, Sikorsky renewed a terminated contract for manufacturing space with DiNardo. DCMA administered the contract, which was terminated by the Army in 2004. As part of the settlement, the contract was modified to include a $7 million payment for the Bridgeport site. The law firm of Carmody & Torrance, representing DiNardo in a state action, filed a FOIA request with DCMA for documents about the contract settlement and its consequences for the Bridgeport site. DCMA found 60 payment vouchers and referred the request to Defense Contract Audit Agency, which located an additional 241 pages. DCMA ultimately disclosed 75 pages heavily redacted under Exemption 4 and Exemption 6. Carmody argued not only that the search was inadequate, but the agency's prolonged response time was a per se violation of FOIA. District Court Judge Janet Hall rejected the timeliness argument. She noted instead that "while the long unexplained delays present here dismay this court, Carmody's statutory remedy *is* the instant suit. The decision not to file suit immediately following the lapse of any exhaustion requirement—perhaps in the hope of catching more flies with honey than vinegar—cannot transform repeated delays on the agency's part prior to filing suit into a basis to order discovery." Finding the agency's search was adequate, Hall pointed out that "Carmody's assertion that, given the settlement amount DCMA *must* have in its possession more responsive documents pertaining to the [Bridgeport site] is mere speculation and is insufficient to rebut the presumption of good faith to which agency affidavits are entitled." Carmody argued further that the records released referred to other records not produced. But Hall observed that "it is true a requester like Carmody will rarely, if ever, be in a position to prove the existence of other responsive records in the agency's possession. Mere reference, however, to documents not produced is insufficient to undermine the adequacy of DCMA's search, where, as here, that adequacy is supported by reasonably detailed, nonconclusory declarations by responsible agency personnel." Hall then found Sikorsky faced actual competition. She noted that "while the information in the instant case is scarcely recent, it does not appear to be obsolete or valueless to Sikorsky's competitors. Disclosure of such information would likely give competitors advantages in future bids against Sikorsky." After conducting an *in camera* review, Hall indicated that while the bulk of the Exemption 4 claims were appropriate, there were several portions of records that were not protected. She then approved of the agency's withholding of identifying information about low-level employees. She noted that "the public interest in this case is negligible or nonexistent. Carmody's own need for the information in connection with the State Court Action is immaterial to the public's interest in government accountability under FOIA." (*Carmody & Torrance v. Defense Contract Management Agency and United States Department of Defense*, Civil Action No. 11-1738 (JCH), U.S. District Court for the District of Connecticut, Mar. 13)

Judge James Boasberg has ruled that Customs and Border Protection properly applied **Exemption 7(E) (investigative methods and techniques)** and **Exemption 5 (deliberative process privilege)** to withhold portions of several documents concerning the agency's policies for legal representation of detainees. The American Immigration Council made a broad request to CBP, but the dispute finally focused on the withheld documents as well as a document the agency claimed was non-responsive. After an *in camera* review, Boasberg agreed with the agency's claims. Because the pages from the agency's Border Patrol Handbook were entitled "Advice of Rights," the AIC contended they likely were responsive. But Boasberg noted that the pages "only address CBP's procedure for advising individuals of their rights when detained. This procedure occurs outside the presence of counsel, and the redacted pages do not contain any protocols or guidelines for dealing with counsel or requests for counsel." Before turning to the exemption claims, Boasberg pointed out that AIC had gotten an unredacted version of one document from another source and now challenged only those portions that had been redacted previously. But Boasberg observed that "plaintiff already has obtained the redacted information, and it does not explain why it needs the Court to order this material released again. As Plaintiff has already received the relief it seeks, the court holds this request to be moot. . ." As to the other exemption claims, Boasberg agreed with the agency. AIC contended that much of the information withheld under Exemption 7(E) did not pertain to a law enforcement function. Boasberg observed that "each of the

ACCESS REPORTS

withheld records has a rational nexus to the agency's law-enforcement duties, including the prevention of terrorism and unlawful immigration." He added that "whatever the policy merits of the agency's approach, Congress has determined that CBP should be tasked with preventing unlawful entry and handling the concomitant security risks" and noted that "AIC offers no argument for why the control of persons detained in federal custody as the result of law-enforcement operations should not be considered related to an investigation, or, ultimately a prosecution, and the Court sees none either. In fact, the treatment of suspects—what rights they are afforded, how they are interrogated, how long and in what conditions they are detained—would appear to go to the heart of law-enforcement 'investigations' and 'prosecutions.'" AIC argued that emails from superiors to subordinates should not be presumed to be deliberative if they no longer asked for feedback on options. Rejecting that claim, Boasberg observed that after *in camera* review he found that "the emails involve CBP employees of various subordinate levels and specifically discuss a request for clarification from Headquarters." (*American Immigration Council v. United States Department of Homeland Security*, Civil Action No. 11-1972 (JEB), U.S. District Court for the District of Columbia, Mar. 21)

Judge Colleen Kollar-Kotelly has ruled that the FBI conducted an **adequate search** for records concerning the investigation and conviction of Lorenzo Stephens for drug charges in connection with a gang called the Brick yard boys in Richmond and that it properly withheld information under various subparts of **Exemption 7 (law enforcement records)**. Stephens argued that the agency should have searched the files of specific named witnesses. But Kollar-Kotelly, finding the agency's search was both detailed and thorough, observed that "such a search would have been futile because the FBI would have no obligation to disclose any responsive records absent the respective third-party's consent or proof of death." Stephens' primary challenge to the exemption claims was that information was being withheld that had been made public during his trial. Kollar-Kotelly noted that "plaintiff must cite to particular parts of the record to show that the requested information is identical to that in the public domain. It is not the Court's role to search through a party's exhibits, even those of a *pro se* litigant, with the hope of finding the alleged matching pieces. . .The Court finds that plaintiff has not established what, if any, withheld information responsive to his sweeping request is in the public domain to compel its release." The FBI had withheld source information under **Exemption 7(D) (confidential sources)**. While some claims were supported by explicit assurances of confidentiality, others were not. As to the implicit assurance of confidentiality, Kollar-Kotelly pointed out that "this FOIA record, coupled with plaintiff's conviction for conspiracy to possess with intent to distribute cocaine base, presents the very circumstances 'where the violent nature of the crime at issue—homicide, drug trafficking, [and] gang-related crime—"characteristically supports an inference of confidentiality" that a court can generically apply to all informants.'" (*Lorenzo Deshon Stephens v. Department of Justice*, Civil Action No. 13-0323 (CKK), U.S. District Court for the District of Columbia, Mar. 18)

A federal court in New York has ruled that Immigration and Customs Enforcement conducted an **adequate search** for records concerning former ICE employee Adam Conti and a handful of other employees who, like Conti, were subjects of investigation by the Office of Responsibility. Conti had worked for ICE in New York and at one point had obtained permission to engage in outside employment. However, he was accused of improprieties related to his outside employment and was ultimately demoted and decided to leave. He then filed a whistleblower action with the Merit Systems Protection Board. As part of that proceeding, he made a number of FOIA requests for records pertaining to other OPR investigations. After numerous complex searches, the agency ultimately disclosed 3,049 pages. Conti challenged the adequacy of the search, particularly because he had received more than 300 pages of emails during his MSPB proceeding that ICE had not located in response to his FOIA requests. But the court observed that "requiring DHS to search for documents Plaintiff already possesses would be a meaningless exercise. In sum, Plaintiff's proof of missing documents fails to render DHS' search unreasonable." The court rejected Conti's claim that there was a public interest in disclosing records about OPR investigations and noted that "plaintiff points to no authority which supports the proposition that private information relating to a law enforcement investigation is no longer

private simply because the investigation has been closed. Indeed, FOIA appears to protect private investigations whether they are ongoing or closed." But the court agreed with Conti that several unredacted investigatory reports he received during discovery for his MSPB proceeding contained personal information that had been redacted in response to his FOIA request. Finding that information was now in the public domain, the court ordered ICE to unredact any information that had come from those reports. The court also rejected some of the agency's claims made under **Exemption 7(E) (investigatory methods and techniques)**, noting that "some of the Exemption 7(E) redactions withhold information already in the public domain." (*Adam Conti v. United States Department of Homeland Security*, Civil Action No. 12-5927 (AT), U.S. District Court for the Southern District of New York, Mar. 24)

After reviewing the document *in camera*, Judge Robert Wilkins has ruled the Department of Labor properly withheld a record containing notes of a meeting on whistleblower issues under **Exemption 5 (deliberative process privilege)**. PEER had requested all records provided by OSHA to GAO in 2010 concerning its whistleblower protection programs. Wilkins had previously found the disputed document was protected, but agreed with PEER that the agency had not adequately explained why non-exempt information could not be segregated and released. After reviewing the document *in camera*, Wilkins agreed with the agency that the record could not be segregated. He noted that "while it might seem that revealing discussions of current policies would not involve disclosure of information that is 'deliberative' in nature, such is not the case here. Instead, in this context, disclosing information regarding current policies may provide insight into how the agency contemplates addressing a particular problem. Specifically, knowing that the agency contemplates addressing a particular problem by changing policy X, rather than policy Y, provides insight into the agency's deliberative process." (*Public Employees for Environmental Responsibility v. U.S. Department of Labor*, Civil Action No. 10-1706 (RLW), U.S. District Court for the District of Columbia, Mar. 20)

Judge Emmet Sullivan has ruled that EOUSA provided all its records concerning the trial of Charlene Schmitz in the District for Southern Alabama. Schmitz contended that the agency should have searched through the court's own docket. But Sullivan noted that "plaintiff misunderstands FOIA's coverage. She faults defendant for not providing 'the "internal" docket (the one utilized by the Court),' but 'the federal courts are not subject to the FOIA.' Furthermore, EOUSA's disclosure obligations extend only to documents it controls and possesses at the time of the FOIA request. Plaintiff refers to the declarants' purported admission that the released document contains omissions, but EOUSA has no control over the courts' 'internal' docketing system or court documents in general. Hence, even if the docket is incomplete, this fact fails to raise a genuine dispute about the reasonableness of defendant's search." (*Charlene Schmitz v. United States Department of Justice*, Civil Action No. 12-0649 (EGS), U.S. District Court for the District of Columbia, Mar. 20)

A federal judge in Florida has ruled that John and Joanna Roberts may continue with their APA claim against the IRS for their tax records. The IRS investigated the Roberts but the case was ultimately dismissed by a court. Nevertheless, the agency continued to audit their tax returns and the Roberts filed a request for their records. The agency claimed some records did not exist, while others were exempt. The agency also argued that the Roberts could not proceed under the APA because they had a satisfactory remedy under FOIA. However, the court disagreed, noting that "Plaintiffs request separate findings pursuant to the APA, specifically, that the agency action was arbitrary and capricious, and constitutes a retaliatory 'reprosecution' of a previously dismissed indictment, a remedy facially distinct from that which the Plaintiffs request under FOIA. At this juncture, and based on the Court's analysis of the four corners of the Complaint, the Court finds that Plaintiffs' FOIA and APA claims are sufficiently distinct and non-duplicative." (*John and Joanna Roberts v. Internal Revenue Service*, Civil Action No. 13-1731-T-33TBM, U.S. District Court for the Middle District of Florida, Tampa Division, Mar. 17)

A federal court in Oregon has adopted a magistrate judge's recommendation finding that the Department of Health and Human Services properly withheld notes taken by an investigator for the Office of Civil Rights during the investigation of a complaint filed by Jerry Menchu, a medical interpreter for the Legacy Health System, after he was issued a no-trespass order for allegedly stalking a fellow employee. Menchu filed a civil rights complaint claiming he had been discriminated against on the basis of his ethnicity and sex. His complaint was dismissed, but Menchu requested a copy of the notes taken by the investigator. Although the court had already found the notes were exempt under FOIA, the agency claimed they were also exempt under (d)(5) of the **Privacy Act**, which exempts records compiled in anticipation of a civil action or proceeding. The magistrate judge noted that if Menchu's complaint had been upheld it would have been heard by the Department Appeals Board. The court observed that "since the purpose and function of the DAB hearing is the same as civil litigation, it qualifies as a 'civil action or proceeding' under the Privacy Act." The court added that "documents prepared during preliminary investigations that may, but need not necessarily, result in administrative hearings or litigation are still compiled for that purpose." (*Jerry Alexander Menchu v. United States Department of Health and Human Services*, Civil Action No. 12-01366-AC, U.S. District Court for the District of Oregon, Mar. 21)

■ ■ ■

This is the last hard-copy edition of *Access Reports*. After this issue, the newsletter will be available only via email in Word or PDF versions. Subscribers currently receiving *Access Reports* in hard-copy need to provide an email address for future deliveries and identify the format in which they want to continue to receive the newsletter. Email addresses and choice of format can be sent to hhammitt@accessreports.com or by calling (434) 384-5334.