Volume 40, Number 8
April 9, 2014

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: The National Security Archive has been leading the charge in urging agencies to update their FOIA regulations to reflect current statutory provisions and to clarify changes in technology that allow for better processing of FOIA requests. In its report released during Sunshine Week last month, the NSA found that 50 out of 101 agencies had not updated their FOIA regulations to reflect changes made by the 2007 OPEN Government Act or the 2009 Holder memo urging agencies to make disclosure the norm. While the recent FOIA amendments that passed the House require agencies to update their regulations, agencies are not legally required to revise or update regulations unless specifically mandated to do so by Congress. That was the case with the 1986 amendments that introduced fee categories and changes to the standard for public interest fee waivers. But the OPEN Government Act did not contain a comparable requirement to make changes and most agencies, led by the Justice Department, have taken the position that the provisions of the statute are self-evident and the agencies' only legal obligation is to abide by the statutory language. The NSA report makes several useful suggestions for updates, including mandating that agencies accept FOIA requests by email and post responses online, keep requesters apprised of the status of their requests, and streamline the inter-agency referral process.

D.C. Circuit Rules Public Interest Trumps Privacy in Political Corruption Case

In language rarely used by the D.C. Circuit in recent years, Circuit Court Judge Karen LeCraft Henderson has emphasized the important public interest in knowing more about how the Justice Department investigated charges of alleged corruption on the part of former House Majority Leader Tom DeLay (R-TX), ultimately leading to the decision not to prosecute DeLay. Although refraining from deciding whether or not the records were ultimately protected by Exemption 7(A) (interference with ongoing investi-gation or proceeding) or Exemption 7(C) (invasion of privacy concerning law enforcement records), the court rejected the

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agency's invocation of a *Glomar* response neither confirming nor denying the existence of records. Although the FBI never acknowledged that it was investigating DeLay, in August 2010 DeLay publicly announced that the Justice Department had informed him it had decided not to bring criminal charges against him related to the investigation of lobbyist Jack Abramoff. Shortly after DeLay's announcement, CREW filed a FOIA request with Justice for records pertaining to the FBI's investigation of DeLay. The FBI denied the request and CREW filed suit. The district court ruled that the records were categorically exempt under Exemption 7(A) and Exemption 7(C) and, in the alternative, that they were protected by Exemption 3 (other statutes), Exemption 7(D) (confidential sources), and Exemption 7(E) (investigative methods and techniques).

The D.C. Circuit first addressed whether DOJ's categorical withholding under Exemption 7(A) and Exemption 7(C) were appropriate. Henderson agreed that generally individuals had a privacy interest in whether they had been involved in an investigation. But in this case, Henderson pointed out, "DeLay's obvious privacy interest in keeping secret the fact that he was the subject of an FBI investigation was diminished by the well-publicized announcement of that very fact. Because DeLay's public statements confirmed he had been under investigation, the FBI's acknowledgement that it had responsive records would not itself cause harm by confirming that fact, rendering a *Glomar* response inappropriate." However, Henderson noted that "although DeLay's action lessened his interest in keeping secret the *fact* that he was under investigation, he retained a second, distinct privacy interest in the *contents* of the investigative file."

Against DeLay's privacy interest, Henderson identified a public interest "in shining a light on the FBI's investigation of major political corruption and the DOJ's ultimate decision not to prosecute a prominent member of the Congress for any involvement he may have had. . .That is, the relevant public interest is *not* to find out what DeLay himself was 'up to' but rather how the FBI and the DOJ carried out their respective statutory duties to investigate and prosecute criminal conduct."

DOJ contended that there was no public interest in the records. Rejecting the government's characterization, Henderson explained that "there is considerably more than nothing on the public interest side of the scale. Disclosure of the [FBI reports] and investigative materials could shed light on how the FBI and the DOJ handle the investigation and prosecution of crimes that undermine the very foundation of our government. Disclosure of the records would likely reveal much about the diligence of the FBI's investigation and the DOJ's exercise of its prosecutorial discretion: whether the government had the evidence but nonetheless pulled its punches. Indeed, we have repeatedly recognized a public interest in the manner in which the DOJ carries out substantive law enforcement policy." Henderson added that "we do not accept the DOJ's contention that there is *no* public interest in examining the FBI's investigation of, and the DOJ's decision not to charge, the former House Majority Leader for his alleged involvement in one of the most significant political corruption scandals in recent memory."

DOJ argued that the identities of individuals appearing in investigations rarely revealed anything about government behavior. But Henderson pointed out that "here, however, the DOJ does not seek to withhold only the identities of private citizens; it seeks to withhold every responsive document *in toto*." The agency also claimed CREW was required to show evidence of agency misconduct. Henderson rejected the argument, noting that "CREW alleges no impropriety on the part of the FBI or the DOJ; it has nonetheless established a sufficient reason for disclosure independent of any impropriety. . .Whether government impropriety might be exposed in the process is beside the point."

Balancing the privacy interests against the public interest, Henderson observed that "there are substantial interests on both sides of the scale. Yet a categorical approach is appropriate only if 'a case fits into a genus in which the balance *characteristically* tips in one direction.'. . .Although a substantial privacy interest is at stake here, in light of the similarly substantial countervailing public interest, the balance does not characteristically

tip in favor of non-disclosure." However, Henderson warned that "we do not hold that the requested information is not exempt under Exemption 7(C). We simply hold that a *categorical* rule is inappropriate here."

DOJ had categorically withheld the records under Exemption 7(A) claiming there were still ongoing criminal investigations. When the case began several individuals remained to be sentenced. But Henderson observed that "the cases are [now] closed—not pending or contemplated—and therefore are not proceedings with which disclosure may interfere." She added that "a combination of factors leaves us with considerable uncertainty about whether a criminal investigation in fact continues to this day. . .It has been over 30 months since the DOJ filed its Declaration [in the case] and many more since the events underlying the investigation took place." She pointed out that "in the typical case. . .the requested records relate to a specific individual or entity that is the subject of the ongoing investigation, making the likelihood of interference readily apparent. Here, by contract, the documents requested relate to DeLay, who is no longer under investigation. . .[A]ssuming some individuals do remain under investigation, the relevant question is whether any of the responsive records, which are primarily about DeLay, would disclose anything relevant to the investigation of *those* individuals. . . [W]ithout more information about the degree of overlap, we cannot say that the circumstances 'characteristically support an inference' that disclosure would interfere with any pending enforcement proceeding." Explaining that "DOJ has not met its burden to warrant categorical withholding," she observed that "once again, we do not hold that the requested information is not exempt. On remand, the DOJ must clarify whether a related investigation is in fact ongoing and, if so, how the disclosure of documents relating to DeLay would interfere with it."

Henderson found the FBI's claims under Exemption 3, Exemption 7(D), and Exemption 7(E) insufficient. Addressing the agency's 7(E) claim, she noted that the agency's "near-verbatim recitation of the statutory standard is inadequate. We are not told what procedures are at stake. Nor are we told how disclosure of the [FBI reports] or investigative materials could reveal such procedures." She pointed out that "although Exemption 7(E) sets a 'low bar for the agency to justify withholding,' the agency must at least provide *some* explanation of what procedures are involved and how they would be disclosed." (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, Civil Action No. 12-5223, U.S. Court of Appeals for the District of Columbia Circuit, Apr. 1)

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 emails and text messages received by members of the San Jose City Council and their staff on their private computers or mobile devices are not public records for purposes of the California Public Records Act. Ted Smith requested records from the San Jose City Council, including messages received on private devices, arguing that city employees were the agents of the City and thus, their personal records pertaining to public business were subject to disclosure under the CPRA. The trial court agreed and the City appealed. The appellate court reversed, finding the definition of public records did not include communications received on private devices. The appeals court pointed out that "the plain language of [the statutory definition of public agency] denominates the legislative body as a whole; it does not appear to

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incorporate individual officials or employees of those entities." The court indicated that "we therefore cannot agree with Smith that individual city council members and their staff must be considered equivalent to the City for purposes of providing public access to their writings on public business. Because it is the *agency*—here, the City—that must prepare, own, use, or retain the writing in order for it to be a public record, those writings that are not accessible by the City cannot be said to fall within the statutory definition." Smith, joined by a number of media organizations as amicus curiae, argued that public bodies could evade access requirements by only using private devices. Calling the potential for such an evasion a "serious concern," the court observed that "such conduct is for our lawmakers to deter with appropriate legislation. It does not make a literal interpretation necessarily 'arbitrary, unreasonable, and absurd,' as Smith and the media contend." (*City of San Jose v. Superior Court of Santa Clara County; Ted Smith, Real Party in Interest*, No. H039498, California Court of Appeal, Sixth District, Mar. 27)

Connecticut

A trial court has affirmed the FOI Commission's decision finding that the public interest in disclosure of portions of arrest records for two public defenders outweighs the privacy interest of the two attorneys. Reporter Alexander Wood requested any arrest records concerning public defenders George Flores and David Smith. After the Public Defender's Office failed to respond to the request, Wood complained to the FOI Commission. The FOI Commission found the records were not covered by an exception that prevented disclosure of public defender records to inmates or individuals committed to a mental institution. The FOI Commission also found they were not protected by HIPAA. The FOI Commission agreed that, since Smith's conviction had been expunged by successfully completing a diversion program, his court records were not disclosable. However, since Flores' substance abuse case was still ongoing, his records were subject to disclosure. Finally, the FOI Commission found that the public interest in the arrest records of public defenders outweighed any personal privacy interest. Flores and Smith then filed suit to block disclosure of the records. The court rejected the exception for inmates and committed individuals, noting that "here the request was made by a member of the public, a journalist, not an inmate or committed person. Therefore the provisions of [the exception] are inapplicable to this freedom of information request. The provision was enacted specifically to apply only to the inmate or committed person situation and should not be expanded beyond its language or intended meaning." The court dismissed the public defenders' privacy argument, noting that "the redacted three-page Human Resources memorandum is of public concern, as it discusses the steps to be taken by a public defender to recover from his drug misuse and return to regular employment. There is nothing in the document that is highly offensive. Similarly with regard to Flores, the documents are of public concern as demonstrating the procedure he has followed to return to work. . .The public record exists that shows an arrest for Flores on a substance abuse charge. Further, mere mention of a medical issue is insufficient to require application of the [privacy] exemption." (*George Flores and David Smith v. Freedom of Information Commission*, No. CV 13-6020905S, Connecticut Superior Court, Judicial District of New Britain, Apr. 7)

A trial court has ruled that Nancy Burton does not have standing to challenge the FOI Commission's decision not to impose a civil penalty on Daniel Esty, Commissioner of the Connecticut Department of Energy and Environmental Protection, for his initial failure to respond to Burton's email request. Burton complained to the FOI Commission that the Department had failed to respond to her request and asked the FOI Commission to sanction Esty for his failure. The FOI Commission found the Department had subsequently responded to Burton and declined to penalize Esty. Burton then filed suit, alleging the FOI Commission had improperly declined to penalize Esty. Because any penalty would go to the State of Connecticut rather than Burton, the court agreed with Esty that she did not have standing to challenge the decision not to penalize Esty. The court noted that "the petitioner is not aggrieved. She has not alleged a specific personal and legal interest in the declination of award. The petitioner has not pleaded any interest separate from the interest of the community as a whole." Burton also claimed she had standing because the question of whether the agency

responded fully was still unsettled. But the court pointed out that "as the petitioner has asserted that this issue is pending before [the FOI Commission] following a hearing in another appeal, the issue regarding completeness of production of records is not ripe for adjudication, depriving this court of jurisdiction." (*Nancy Burton v. Freedom of Information Commission*, No. CV13-5015882 S, Connecticut Superior Court, Judicial District of New Britain, Apr. 7)

Louisiana

A court of appeals has ruled that records pertaining to the cancellation of a contract between the Department of Health and Hospitals and Client Network Services for Medicaid billing services are not made confidential because a portion of them had been requested by the Attorney General as part of his investigation of alleged misconduct by Client Network Services in procuring the contract. After the Division of Administration terminated the contract, David McKay, CSNI's attorney, requested records on the contract. Both the Department of Administration and the Department of Health and Hospitals began to process the request and worked with McKay to come up with appropriate search strategies. McKay then was informed that the departments would not comply with the request because the Attorney General had asserted the law enforcement privilege for the records because they were part of an AG investigation. McKay filed suit and the trial court found the records were protected only to the extent of communications between the departments and the Attorney General that might reveal work product material. The appeals court agreed with the trial court's ruling. Rejecting the AG's claim that the records were confidential, the appeals court noted that "this case involves public records not exempt from disclosure in the hands of their original and present custodians, which the Attorney General seeks to shield from disclosure as privileged. The Attorney General's request for those records does not serve to exempt them from the public records doctrine." The Attorney General argued that disclosure would rob the law enforcement exemption of any practical effect in a criminal investigation involving records held by a public agency. But the court observed that "the disclosure does not reveal the Attorney General's investigative process because hundreds of thousands of documents are responsive to McKay's request such that those of particular interest to the Attorney General are just part of a massive group of records. The [trial] court denied the disclosure of those records which might tend to show the mental impressions, conclusions, opinions, or investigative processes of the Attorney General's office." (*Michael McKay v. Division of Administration*, No. 2013 CA 1265, Louisiana Court of Appeals, First Circuit, Mar. 21)

Oregon

A court of appeals has ruled that when the acting manager of Clackamas River Water, disclosed CDs containing several months of emails sent and received on its email system to former board members Warren Mitchell and Patricia Holloway the district implicitly decided not to exercise its discretion to withhold records and that the two former board members cannot be required to return the CDs so that CRW may review them for privacy concerns. After CRW failed to respond to his public records request, Mitchell requested that the district attorney order CRW to respond. CRW provided six CDs to the district attorney, indicating that the district had not verified their contents. The district attorney told CRW that generally email was publicly disclosable and it was CRW's responsibility to review the records for exemptions. However, CRW's acting manager provided 24 CDs of emails to Mitchell, who then provided them to Holloway. After CRW hired a new general manager, the district tried to retrieve the CDs from Mitchell and Holloway. It finally asked the court to order Mitchell to return the CDs. Mitchell argued the district had little chance of winning and the court agreed, but nevertheless issued an order prohibiting Mitchell from disseminating the CDs. Mitchell appealed the decision. The appellate court reversed the trial court's ruling, noting that "the public records law imposes disclosure obligations, and exemptions from those obligations, on public entities; it does not impose any obligations or exemptions on private parties." The court observed that "the public records law does not

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prohibit disclosure of exempt records; it gives public agencies and officials the *option* to withhold records from disclosure. When CRW's employee released documents to defendants after the district attorney made it clear to CRW that it was *CRW's* obligation to identify and withhold any exempt information that it did not wish to release, CRW manifested an intention to refrain from exercising its option to withhold. Plaintiffs cite no authority, nor have we found any, for the proposition that an agency that has released possibly exempt documents can have second thoughts and recall them for a do-over." (*Clackamas River Water v. Patricia Holloway and Warren Mitchell*, No. LV11040413 and No. A149667, Oregon Court of Appeals, Mar. 26)

The Federal Courts…

A federal court in California has ruled that Customs and Border Protection properly invoked **Exemption 7(E) (investigative methods and techniques)** to withhold information about the location and operations of drones. EFF requested information about the agency's use of drones and after filing suit focused specifically on the agency's Exemption 7(E) claims. District Court Judge Phyllis Hamilton noted initially that the agency and EFF had different interpretations of the scope of the two prongs of Exemption 7(E), which in its first clause protects investigative methods and techniques, and in its second clause, protects guidelines for investigations or prosecutions to the extent such disclosure would risk circumvention of law. While EFF argued that both the first and second prongs were limited by the term "risk of circumvention of the law," the agency asserted that the risk of circumvention phrase applied only to guidelines. Hamilton agreed with the agency, but observed that the agency had met its burden under Exemption 7(E) even it were required to show that disclosure of the techniques it withheld would risk circumvention of law. EFF argued that because counties in Arizona were quite large, disclosing the names of counties would not reveal protected techniques. But Hamilton indicated that "EFF has focused on a narrow set of examples where risk of circumvention of the law is at its relative lowest, but looking at the entirety of EFF's request for location-based information, the court finds that disclosing the location of drone operations would reveal where done efforts are focused, and therefore would disclose law enforcement techniques and procedures." EFF suggested that because drones were often visible from the ground their locations were generally available to the public, but Hamilton noted that "this argument is far too attenuated to show that the locations of drone operations are 'generally known.' EFF establishes only that some drones may be visible in some instances—which does not come close to establishing the locations of all CBP drone operations. . .are 'generally known.'" She rejected EFF's claims that various aspects of drone operations were public knowledge. Instead, she pointed out that "while some capabilities of drones may be known, that does not make further detailed information about drones routine and generally known." EFF argued that disclosure of the fact that CBP used drones would not seriously impact its ability to track criminal activity. Hamilton, however, pointed out that "even if other measures (aside from drones) are used, disclosure of the location of drone operations may still increase the risk of circumvention of the law. While the use of other measures may indeed dampen the increase in risk, it does not eliminate the risk." Hamilton explained that disclosure of other techniques would risk exposing the agency's vulnerabilities. She observed that "by revealing the criteria used by CBP to assess threats, and the capabilities and vulnerabilities of CBP drones, the information would allow persons to avoid detection and exploit vulnerabilities." (*Electronic Frontier Foundation v. Department of Homeland Security*, Civil Action No. 12-5580 PJH, U.S. District Court for the Northern District of California, Mar. 31)

Judge Rosemary Collyer has ruled that the Federal Energy Regulatory Commission properly withheld records under **Exemption 5 (deliberative process privilege)** and **Exemption 6 (invasion of privacy**) in response to requests submitted by John Odland and Michael Mojica, two residents of Minisink, New York, who were opposed to a natural gas compressor station the agency approved for their neighborhood. Because

the plaintiffs had not appealed the agency's withholdings under Exemption 4 (confidential business information) and Exemption 7(F) (harm to individual), Collyer found they had **failed to exhaust administrative remedies** as to those exemption claims. She noted that "administrative exhaustion of their Exemption 5 challenge does not save their claim here. Administrative exhaustion applies to issues and not to whole requests. Because FERC relied on Exemptions that were not administratively appealed by Plaintiffs, Plaintiffs' challenge to FERC's decision to withhold those records has not been exhausted. To be clear: even if the Court were to decide that Exemption 5 did not apply to [two disputed documents]. Plaintiffs would not be entitled to their release because FERC also withheld these records under Exemption 4 and 7(F)." Collyer upheld all the agency's Exemption 5 claims. The plaintiffs challenged records prepared in response to a congressional inquiry, claiming it did not constitute an agency "decision." Collyer noted that "the deliberative process privilege is not aimed at the protection of agency decisions; it protects the *deliberative process* from disclosure. Because FERC has shown that the withheld portions of these emails were pre-decisional and deliberative, Exemption 5 was properly invoked." What the plaintiffs appear to have been arguing inartfully was that Congress does not qualify under the inter- or intra-agency threshold of Exemption 5 and records shared with Congress are not privileged. The plaintiffs also objected to withholding records about the agency's response to its public inquiry. But Collyer pointed out that "the Circuit has held that an internal discussion regarding the *implementation* of a policy is exempt from disclosure under Exemption 5. [The agency] did not assert that these emails merely contain FERC policies. Instead, [the agency] explained that these emails include FERC staff discussion about how to handle the increased public attention. Such discussions were pre-decisional and deliberative, as they were part of the give and take among staff." The plaintiffs wanted a list of homeowners in the potentially affected areas. The agency withheld the list under Exemption 6. The plaintiffs argued that there was the public interest in ensuring that FERC had properly notified property owners outweighed any privacy interest. Collyer, however, rejected the claim, observing that "plaintiffs do not seek the landowner names and addresses in order to 'shed light' on whether FERC *sent* notice; instead, Plaintiffs seek to determine whether notice was *received*. Whether notice was received is irrelevant to FERC's conduct and thus is not a matter of public interest." (*John Odland, et al. v. Federal Energy Regulatory Commission*, Civil Action No. 13-141 (RMC), U.S. District Court for the District of Columbia, Mar. 27)

Judge Paul Friedman has ruled that the FBI properly withheld personal information from records pertaining to investigations of Aaron Swartz under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, but that it has not adequately explained why it limited its **search** to records concerning the government's investigation of Swartz. Ryan Shapiro requested all the agency's records on Swartz, and after conducting an index search, the agency located 23 pages that had been released as the result of a previous FOIA request. The agency disclosed four pages entirely, redacted 17 pages, and withheld four pages because they were duplicates. Friedman agreed with the agency that its redactions of names and contact information for FBI employees, third parties, and a non-FBI federal employee were appropriate under the privacy exemptions. The agency contended that it had properly interpreted Shapiro's request as confined to criminal investigations of Swartz. Friedman disagreed and ordered the agency "to consider whether responsive records would reasonably reside outside the Central Records System and either perform any additional appropriate searches in databases or records systems outside the CRS or explain why additional searches would not be appropriate." The agency defended its decision to conduct an index search rather than a full-text search by stating that a full-text search was not warranted. But Friedman pointed out that "although the Court recognizes that a full-text search may not be warranted in every case, it finds the FBI's explanation as to why it was unwarranted here to be lacking." Friedman also questioned the agency's decision concerning the cut-off date for the search, which did not pick up other FOIA requests for Swartz's records submitted after Shapiro's request was received. Friedman observed that "in the present case, the FBI

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has not informed the plaintiff or the Court what the cut-off date was or whether the third-party requests were received after the processing of plaintiff's request. The Court therefore is unable to determine whether the FBI's decision to withhold the third-party requests is a reasonable one." (*Ryan Noah Shapiro v. Department of Justice*, Civil Action No. 13-0729 (PLF), U.S. District Court for the District of Columbia, Mar. 31)

A federal court in Utah has ruled that the FBI conducted an **adequate search** for a memorandum issued by former FBI Director Louis Freeh that allegedly went to all FBI employees to advice them that Freeh had been in contact with the Comptroller General regarding several FBI investigations, that Freeh was drawing "a bright line in the sand" and that anyone obstructing an investigation would be fired. Dennis Williams, who claimed to be a former FBI agent, indicated specifically that the memo was issued in 1993. After searching for the memo, the agency did not find any Freeh memo from 1993, but found one quite similar in tone issued in 1994 and sent the memo to Williams in response to his request. Williams rejected the possibility that the 1994 memo could be the one he thought was issued in 1993 and eventually filed suit. Williams challenged the search by arguing the agency should have conducted a manual search of Freeh's personnel file, the personnel file of then-assistant director Thomas Pickard, the FBI's Office of Congressional Affairs, and records prepared of Freeh's December, 21, 1993 meeting with the Comptroller General. The court rejected all Williams' claims. The court noted that "Director Freeh's [personnel] file would not contain a copy of each document the Director authored. It is even less clear why it would be reasonable to expect that Thomas Pickard's personnel file would contain a memorandum authored by Director Freeh and distributed to all employees." The court observed that "in any case, the FBI's search need only be reasonable, not exhaustive. . .It is reasonable to expect that a memorandum authored by the Director of the FBI and distributed to all FBI employees would be located in the search the FBI already conducted. That the search was reasonable is reinforced by the fact that it uncovered another memorandum from approximately the same time, authored by Director Freeh, including similar language to the language allegedly in the Freeh Memorandum and distributed to all FBI offices." Rejecting Williams' claims of the existence of various files and drives the agency used to hide records, the court pointed out that "it is not clear why the FBI would be attempting to hide a document which was allegedly sent to *all* FBI employees and which merely stated that the obstruction of investigations merits termination." Williams suggested that a March 1994 story in the *Los Angeles Times* about Freeh's instructions to employees showed that the memo must have been written in 1993. But the court, approving the FBI's decision to limit the search to 1993, noted that "it was reasonable to limit its search in this way because Williams assured the FBI that a document would be responsive only if it was distributed in 1993. It is not 'strange' at all that a memorandum allegedly sent in March of 1994 was not located by the FBI's search. Even if it had been located, the document would not have been responsive to Williams' request." Williams attacked the agency's affidavit, claiming it was not based on personal knowledge. But the court observed that "often, hearsay is permitted in an agency affidavit where the statements are made by agency personnel under the supervision of the declarant and concern the searches those employees conducted." Nevertheless, the court agreed that a statement made by Freeh's former speechwriter in response to a query by the FBI Historian was hearsay and should be ignored. (*Dennis O. Williams v. Federal Bureau of Investigation*, Civil Action No. 13-00056-DN, U.S. District Court for the District of Utah, Mar. 31)

Judge Ketanji Brown Jackson has ruled that disclosure of documents concerning a risk model used by the Education Department's Inspector General to assess risks of misuse of federal funds by state and local education agencies does not **moot** a request submitted by Brustein & Manasevit. However, she granted the agency's summary judgment motion after finding the agency had conducted an **adequate search** and found all responsive records. In its semi-annual report to Congress, the IG revealed the existence of the risk model. Brustein & Manasevit then filed a request for documents explaining the risk model and the agency located three documents. However, the agency withheld the documents entirely under **Exemption 5 (privileges)** and

Exemption 7(E) (investigative methods and techniques). Sometime after Brustein & Manasevit filed suit, the agency changed its mind and disclosed the three documents entirely. It then asked Jackson to find that the case was moot because all the responsive documents had been disclosed. Jackson rejected the agency's mootness claim, pointing out that "the production of documents in the context of a FOIA case does not automatically render the case moot because the plaintiff may still have 'a cognizable interest' in having a court determine the adequacy of the agency's search for records." She noted that "Plaintiff vigorously maintains that the dispute is still alive and well because there are additional documents related to the Risk Model that DOE has not located or released, and therefore DOE's search was obviously inadequate." Having found the case was not moot, Jackson proceeded to approve of the adequacy of the agency's search and disclosure of responsive documents. Noting that the agency had provided an affidavit from the individual in the IG's Office who created and maintained the risk model, Jackson observed that the employee's "attestation that 'all records related to' the Risk Model are stored on his own work computer, which he personally searched in response to Plaintiff's FOIA request, eliminates any material questions of fact regarding the scope of the search and also effectively disposes of any adequacy issue." She dismissed Brustein & Manasevit's claims that the search was inadequate because it did not uncover other documents, pointing out that "Plaintiff here has provided nothing beyond rank speculation about the possible existence of materials that explain the various factors in the Risk Model in its attempt to undermine the clear conclusion that DOE's search was reasonable and adequate." (*Brustein & Manasevit, PLLC v. United States Department of Education*, Civil Action No. 13-0714 (KBJ), U.S. District Court for the District of Columbia, Mar. 31)

A federal court in Connecticut has ruled that the Defense Department and various components of the Armed Services have so far failed to show that they conducted an **adequate search** for records concerning the use of personality disorder and adjustment disorder discharges to separate members of the Armed Forces from service. The court also found that searches conducted by Veterans Affairs were adequate. Responding to multiple complex requests submitted by Vietnam Veterans of America, the military took the position that the requests pertained to separation policies but not to separation orders for individuals. The court disagreed, noting that "although many of the specifically enumerated items refer to aggregate data and policies, the last sentence of the introductory paragraph makes it clear that the plaintiffs are seeking all records related to the use of personality disorder and adjustment disorder discharges to separate service members." DOD estimated the cost of search and duplication at $770,000 while Veterans Affairs estimated costs in excess of $50 million. As a result, both agencies argued the requests were unduly burdensome. The Vietnam Veterans suggested they would accept a sample of 5.6 percent of the estimated pages, but because the plaintiffs had not made that suggestion until the case was in litigation, the court decided to first assess whether the agencies had conducted an adequate search. While it was clear to the court that the agencies had given serious consideration to locating responsive records, time and again the court faulted the agencies for their failure to provide adequate explanations of why they decided to search one location and not another and their shortcomings in failing to describe records systems and the searches that were conducted. Although the court found many of the searchs inadequate, it also found that heavy redactions made under **Exemption 6 (invasion of privacy)** were appropriate. The Vietnam Veterans argued the agencies could not redact service members' rank, date of service and place of last assignment. But the court pointed out that it was the totality of information that tipped the balance towards privacy in this case. "The information contained in the separation packets is highly sensitive," the court noted, "and the individual service members have a strong interest in not having that sensitive information linked to them." The court also agreed that DOD had properly redacted the names of employees below a certain rank or position. The court pointed out that "the public interest in this case is negligible or nonexistent. The plaintiffs have articulated no public interest that would be served by releasing the employees' names." (*Vietnam Veterans of America, et al. v. Department of Homeland Security, et al.*, Civil Action No. 10-1972 (AWT), U.S. District Court for the District of Connecticut, Mar. 31)

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In a previous decision in the case, the court rejected the Defense Department's claim that Vietnam Veterans had **failed to exhaust administrative remedies** because they had not appealed the agency's letter indicating their request would be unduly burdensome and would require payment of significant fees. The court noted that "while the letter seems to indicate that the DOD might be willing to release certain of the requested document in the future, it did not provide a final determination of the issue. Second, the letter did not advise the plaintiffs of their right to appeal." The court added that "to the extent the letter is construed to request that the plaintiffs respond after they reviewed the released documents, such a request is not contemplated by the statute. The statute only provides for tolling the statutory period if the agency requests more information from the requester or communicates with the requester to clarify issues regarding fee assessment." (*Vietnam Veterans of America, et al. v. Department of Homeland Security, et al.*, Civil Action No. 10-1972 (AWT), U.S. District Court for the District of Connecticut, Mar. 28)

Judge Royce Lamberth has ruled that Office of Legal Counsel memoranda concerning the Bush-era warrantless wire-tapping program is protected by **Exemption 1 (national security)** and **Exemption 5 (deliberative process privilege)**. After reviewing the ten documents withheld by the Justice Department in responses to requests by EPIC and the ACLU, Lamberth noted that the documents "are properly classified" and "each record contains confidential, pre-decisional legal advice protected by the deliberative-process and attorney-client communications privilege." He pointed out that the D.C. Circuit's recent decision in *EFF v. Dept of Justice* finding an OLC memo prepared for the FBI could be withheld entirely under Exemption 5 was dispositive. He observed that "this Court sees no principled way to distinguish the OLC opinion in the *Electronic Frontier Foundation* case from the ten OLC memoranda in this case." (*Electronic Privacy Information Center v. United States Department of Justice*, Civil Action No. 06-96 (RCL) and *American Civil Liberties Union v. United States Department of Justice*, Civil Action No. 06-214 (RCL), U.S. District Court for the District of Columbia, Mar. 31)

Judge Rudolph Contreras has ruled that the Army conducted an **adequate search** for records concerning the 20-year-old conviction of Edgar Rodriguez for rape of a nine-year-old girl between 1988 and 1990 and properly withheld records under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. In response to Rodriguez's request for records of his criminal investigation, the Army Criminal Investigative Division found 36 pages of records. The agency was unable to find several exhibits and concluded that they had been destroyed. The Army withheld records concerning the child victim's statement, her medical and psychological records, as well as assorted personal information under Exemption 6 and Exemption 7(C). Rodriguez argued the search was inadequate because the agency failed to locate the missing exhibits. But Contreras pointed out that "contrary to plaintiff's argument, the fact that the defendant failed to find all the requested information, specifically exhibits nine through twelve, is not dispositive. . .[C]ourts look to the appropriateness of the methods used when analyzing the adequacy of a FOIA search. Therefore, despite the defendant's inability to produce the missing documents, the search was sufficiently thorough and reasonable for the circumstances." Describing several subsequent searches the Army conducted to find the missing exhibits, Contreras observed that "these additional searches and steps taken in an effort to uncover the missing document further establish that the plaintiff has not rebutted the defendant's presumption of good faith." Contreras explained that while all the agency's privacy redactions were appropriate, the child victim's records were particularly sensitive. He considered the D.C. Circuit's ruling in *Roth v. Dept of Justice*, 642 F.3d 1161 (D.C. Cir. 2011), in which the court found a public interest in knowing whether the government had withheld information in a capital murder case. But he pointed out that "although the plaintiff maintains a claim of innocence, unlike in *Roth*, any public

interest in knowing whether the defendant withholds information that could corroborate that claim does not outweigh the privacy interests at stake." In contrast with *Roth*, Contreras observed that "not only has the defendant [here] made clear what documents it specifically withheld and what information it specifically redacted, but the plaintiff, in response, has only provided unsubstantiated support for why this redacted or withheld information may potentially be relevant." He noted that "by the very nature of these exhibits, it is clear that there is a substantial privacy interest in withholding the thoughts and medical diagnosis of a minor child, who is now an adult. Furthermore, the plaintiff advances no public interest that would outweigh the child victim's privacy interest in the psychological/medical records." After finding the child victim's records were protected by Exemption 6 and Exemption 7(C), Contreras agreed that they were exempt under the Federal Victim's and Witness Protection Act as well. (*Edgar Rodriguez v. U.S. Department of Army*, Civil Action No. 12-1923 (RC), U.S. District Court for the District of Columbia, Mar. 27)

Judge Ketanji Brown Jackson has ruled that prisoner James Riccardi may not challenge the Executive Office for U.S. Attorneys' decision to deny him **expedited processing** because he cannot show that the agency did not conduct an adequate search and provide all the records responsive to his request. Riccardi, convicted of child pornography charges, requested information about his case, but narrowed the scope of the request to records pertaining to a plea bargain agreement. The agency conducted three different searches and only found references to plea agreements in records submitted during an earlier habeas corpus hearing. Although Riccardi insisted that there must be a written record of any plea agreement, Jackson concluded that "Riccardi simply has not produced any evidence that casts doubt on Defendants' declarations establishing that it conducted a reasonable search for records, and that the search did not, in fact, uncover any written plea offers that were then improperly withheld from the FOIA production." Turning to his expedited processing challenge, Jackson noted that "this Court is divested of jurisdiction over a claim regarding 'an agency denial of expedited processing' once 'the agency has provided a complete response to the request.'" She pointed out that "Riccardi bears the burden of establishing that this Court does, in fact have jurisdiction over his expedited processing claim, which means that he must demonstrate that a 'complete response' to his FOIA request was not provided in this case. This is a burden that Riccardi is unable to bear, given that there is no dispute that the agency produced all the records that it located, and in light of the Court's conclusion that the agency conducted a reasonable search." (*James Riccardi v. United States Department of Justice*, Civil Action No. 12-1887 KBJ), U.S. District Court for the District of Columbia, Mar. 27)

A federal court in Texas has dismissed Gerald Stone's FOIA suit for lack of **jurisdiction** because Stone had not provided any evidence that the Justice Department had improperly withheld records. Stone requested information that AUSA Tammy Reno used at his criminal sentencing that included a requirement that he pay restitution to victims. DOJ conducted a search, but found no records. Stone then sued. DOJ contended that the court did not have jurisdiction to hear Stone's case because the agency had not improperly withheld records. The court explained that the agency had mounted a factual attack on the court's jurisdiction and noted that "if the defendant supports the motion with evidence, then the attack is factual. . .In response to a factual attack, the plaintiff, as the party seeking to invoke jurisdiction, has the burden of submitting evidence and proving by a preponderance of the evidence the existence of subject matter jurisdiction." Pointing out that under the Supreme Court's ruling in *Kissinger v. Reporters Committee*, 445 U.S. 136 (1980), jurisdiction was dependent on showing that the agency had improperly withheld agency records, the court noted that "Defendant presented evidence that it searched for but was unable to locate any documents responsive to Plaintiff's request for records. Defendant's evidence also details the efforts taken by the DOJ in searching for the requested records. Defendant has therefore presented evidence that it has not improperly withheld agency records." The court indicated that "Plaintiff was required to submit evidence and prove by a preponderance of

the evidence the existence of subject matter jurisdiction. Plaintiff's two and one-half page response to Defendant's motion, however, consists merely of unsupported arguments. As a result, Plaintiff has not met his burden of coming forward with evidence that the DOJ improperly withheld agency records." (*Gerald Stone v. United States Department of Justice*, Civil Action No. 12-4528-L, U.S. District Court for the Northern District of Texas, Dallas Division, Mar. 28)

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