Volume 40, Number 9
April 23, 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: Sen. Dianne Feinstein (D-CA), chair of the Senate Intelligence Committee, has called on the White House to lead the declassification process pertaining to the committee's summary of its report on the CIA detention and interrogation program. According to the Associated Press, Feinstein asked for the quick action to declassify and disclose the summary. She noted that "as this report covers a covert action program under the authority of the president and the National Security Council, I respectfully request that the White House take the lead in the declassification process." Her letter indicated that she did not intend to push for declassification of more than the 481-page executive summary for the time being. Feinstein said she hoped the executive summary could be reviewed and returned to the committee for public disclosure within a month. "Hopefully the declassification can be done in as little as 30 days. That may be wishful thinking, but I hope not."

Court Rules Official Confirmation Waives Protection for Legal Analysis

In an illustration that even the near-impregnable protection provided by Exemption 1 (national security) and Exemption 5 (deliberative process privilege) can sometimes be pierced when the government talks too much in public about the content of such protected documents, the Second Circuit has ruled that the Justice Department's Office of Legal Counsel must disclose the legal analysis in a memo it prepared for the Defense Department justifying the use of drones to kill U.S. citizens in non-combat areas. Finding recent events had eclipsed the district court's earlier ruling that the memo was properly classified and protected by both Exemption 1 and Exemption 5, the appeals court pointed out that the leak of a DOJ White Paper discussing the legality of the attacks in detail and its subsequent authentication and disclosure by the government provided the final piece of the puzzle constituting a waiver on the part of the government. However, the court recognized that large parts of the memo dealing with operational details remained properly classified and ordered OLC to disclose the memo in redacted form. Indeed, since

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much of the court's decision relied on its *in camera* review of the memo, portions of its opinion discussing the still-classified material was redacted until after any further appeals by the government were completed.

The case involved two consolidated suits for essentially the same set of documents. *New York Times* reporters Scott Shane and Charlie Savage requested the memo separately, while the ACLU requested not only the memo but other records related to the drone attack policy. While the plaintiffs argued that both exemptions had been waived by a number of references to the legal analysis made in speeches and congressional testimony by Attorney General Eric Holder, CIA Director John Brennan, then-DOD Counsel Jeh Johnson, and former State Department Counsel Harold Koh, the district court had ruled that none of the public comments sufficiently mirrored the memo's detailed legal analysis to constitute a waiver. But by the time of the appeals court ruling, the disclosure of the detailed DOJ White Paper convinced the court that the cat was out of the bag.

After a lengthy explication of the history of the requests and the district court's decision, Circuit Court Judge Jon Newman explained the appellate court's reasons for concluding that Exemption 1 and Exemption 5 had been waived as to the legal analysis. He observed that "in considering waiver of the legal analysis in the OLC-DOD Memorandum, we note initially the numerous statements of senior Government officials discussing the lawfulness of targeted killing of suspected terrorists, which the District Court characterized as 'an extensive public relations campaign to convince the public that [the Administration's] conclusions [about the lawfulness of the killing of [Anwar al--Awlaki] are correct.'" He explained that "even if these statements assuring the public of the lawfulness of targeted killings are not themselves sufficiently detailed to establish waiver of the secrecy of the legal analysis in the OLC-DOD Memorandum, they establish the context in which the most revealing document, disclosed after the District Court's decision, should be evaluated. That document is the DOJ White Paper, officially released on Feb. 4, 2013." Pointing out that Holder testified before the Senate Judiciary Committee in March 2013 that the OLC advice embodied the government's legal justification for such targeted attacks, Newman noted that "after senior Government officials have assured the public that targeted killings are 'lawful' and that OLC advice 'established the legal boundaries within which we can operate,' and the Government makes public a detailed analysis, waiver of secrecy and privilege as to the legal analysis in the Memorandum has occurred."

The government argued that disclosure of the OLC legal analysis would inhibit agencies from asking OLC for legal advice knowing the advice might be publicly disclosed at some point. Saying that "the argument proves too much," Newman added that "if this contention were upheld, waiver of privileges protecting legal advice could never occur." He pointed out that the government had publicly adopted the OLC legal analysis by continually relying upon it as the basis for its actions in public comments. Newman suggested that "agencies seeking OLC legal advice are surely sophisticated enough to know that in these circumstances attorney/client and deliberative process privileges can be waived and the advice publicly disclosed. We need not fear that OLC will lack for clients." He also rejected the government's claim that readers would be confused by the memo without related previous documents. He indicated that "the reasoning in the OLC-DOD Memorandum is rather elaborate, and readers should have no difficulty assessing the reasoning on its own terms." But he pointed out that "the loss of protection for the legal analysis in the OLC-DOD Memorandum does not mean, however, that the entire document must be disclosed. . .The Government's waiver applies only to the portions of the OLC-DOD Memorandum that explain legal reasoning."

Newman found the government had waived the protection of Exemption 1 as well to the extent of the legal analysis contained in the memo. He noted that "we recognize that in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation, but that is not the situation here where drone strikes and targeted killings have been publicly acknowledged at the highest levels of the Government. We also recognize that in some circumstances legal

analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts. Aware of that possibility, we have redacted the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities."

He also indicated that the three-part test for what constituted an official disclosure taken from *Wilson v. CIA*, 586 F.3d 171 (2nd Cir. 2009)—that the information be as specific as the information previously released, that it match the information previously disclosed, and that the information had been made public through an official and documented disclosure—was satisfied as well. But Newman questioned the validity of any requirement that publicly disclosed information be identical to that being sought by a FOIA requester. He noted that "in reaching this conclusion, we do not understand the 'matching' aspect of the *Wilson* test to require absolute identity. Indeed, such a requirement would make little sense. A FOIA requester would have little need for undisclosed information if it had to match precisely information previously disclosed." In a footnote, Newman traced the lineage of *Wilson* to three D.C. Circuit cases—*Wolf v. CIA*, 473 F. 3d 378 (D.C. Cir. 2007), *Fitzgibbon v. CIA*. 911 F.2d 755 (D.C. Cir. 1990), and *Afshar v. Dept of State*, 702 F.2d 1125 (D.C. Cir. 1983)—and pointedly noted that "*Afshar*, the ultimate source of the three-part test does not mention a requirement that the information sought 'match[es] the information previously disclosed.'" That being said, Newman observed that "with the redactions and public disclosure [already made], it is no longer either 'logical' or 'plausible' to maintain that disclosure of the legal analysis of the OLC-DOD Memorandum risks disclosing any aspect of 'military plans, intelligence activities, sources and methods, and foreign relations.' The release of the DOJ White Paper, discussing why the targeted killing of al-Awlaki would not violate several statutes, makes this clear. . .Whatever protection the legal analysis might once have had has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the DOJ White Paper."

Besides issuing a *Glomar* response to neither confirm nor deny many of the records, the government had also relied on a "no number, no list" response, which, while confirming that records might exist continued to protect the number and type of records. After an *in camera* review of a *Vaughn* index submitted by OLC, Newman announced that "the *Vaughn* index submitted by OLC *in camera* must be disclosed, and DOD and CIA must submit classified *Vaughn* indices to the District Court on remand for *in camera* inspection and determination of appropriate disclosure and appropriate redaction." But he agreed with the government that disclosure of such indices "does not necessarily mean that either the number of the listing of all documents on those indices must be disclosed" if they might reveal information about the scope of military operations. However, he added that "no reason appears why the number, title, or description of the remaining listed documents must be kept secret." (*New York Times Company and American Civil Liberties Union v. United States Department of Justice, et al.*, No. 13-422(L) and No. 13-445 (Con), U.S. Court of Appeals for the Second Circuit, Apr. 21)

Views from the States…

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

Arkansas

The Supreme Court has ruled that the home address of a utility customer in Brinkley is not protected by any exemption under FOIA and must be disclosed to Jon Hopkins. The Brinkley Water & Sewer Department redacted home addresses from Hopkins' multiple requests for the account records of a specific

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individual, claiming the information was protected by both statutory and constitutional privacy interests. While the trial court agreed with the Water & Sewer Department, the Supreme Court did not. The Court first noted that Attorney General Opinions concluded that such information was not protected. The Water & Sewer Department argued the Federal Trade Commission's Red Flags Rule intended to prevent identify theft protected the information. But the Supreme Court pointed out that "we do not agree with BW&S's contention that, to prevent and mitigate identity theft, a person's home address is considered to be 'within the same family' of the other items listed in the definition [in the Red Flags Rule] or that a person's home address is akin to a person's social security number or date of birth." The Court also rejected the department's claim that the information was protected by a constitutional right of privacy. Finally, the court dismissed the BW&S's contention that public policy supported the privacy of customer addresses. The Court noted that "whether certain records should be exempt from the FOIA is a public-policy decision that must be made by the General Assembly and not the courts. . .[I]t is the job of the General Assembly to establish exemptions under the FOIA, and arguments for additional exemptions must be addressed to the General Assembly because this court 'can only interpret the exemption as it is written.'" (*Jon Hopkins v. City of Brinkley*, No. CV-13-733, Arkansas Supreme Court, Apr. 3)

Illinois

A court of appeals, relying on the 2012 ruling in *Sage Information Services v. Humm* by an appellate court in another district, has affirmed *Humm* and ruled that a 2010 amendment to FOIA limited county clerks to the cost of production for electronic records rather than a reasonable cost based on the Property Tax Code. Sage Information requested the electronic property tax records for Winnebago County and the county clerk indicated they would cost $6,290 at a rate of five cents a parcel. The county clerk argued that rate was permissible under the Property Tax Code and that FOIA's cost structure did not apply. But the appeals court agreed with Sage that the earlier decision in *Humm* was dispositive in finding that the 2010 amendment to FOIA prohibited agencies from charging other than reproduction costs for electronic records. The county clerk argued that since the Property Tax Code allowed her to charge for paper records and, at the same time, allowed county clerks to maintain their records electronically, the provision must also apply to electronic records as well. The court disagreed, noting that the provision of the Property Tax Code "authorizes, but does not require, assessors to keep records in electronic form exclusively. It does not *expressly* authorize them to charge more than cost for the electronic reproduction of these records. It does not *expressly* authorize them to charge the same fees for electronic records as they may charge for paper records. Therefore, under the plain language of [the fee provision] of the FOIA, [the fee provision in the Property Tax Code] does not allow defendant to escape the cost-only rule for electronic records." (*Sage Information Services v. Brenda M. Suhr*, No. 2-13-0708, Illinois Appellate Court, Second District, Apr. 14)

New York

A court of appeals has ruled that records from the Attorney General's Office discussing how to communicate with the press concerning its investigation of AIG are both predecisional and deliberative and protected by the deliberative process privilege. Howard Smith argued the records were ministerial in nature and did not pertain to public policy. But the court pointed out that "the documents in question—although relating to respondent's decision to commence the AIG litigation—consist of internal discussions on the entirely separate decision regarding what information to disclose to the public about the pending AIG litigation and how best to do so." Rejecting the implication that the importance of the policies discussed played a role in deciding whether or not they were privileged, the court noted that "unlike the federal statute, however, FOIL's exemption for intra-agency material sets forth four specifically enumerated statutory exceptions that guide its interpretation and application—none of which pertains to the importance or significance of agency decisions at issue." The court concluded that "public disclosure of materials reflecting

the process by which respondent formulates its policy concerning statements to and interactions with the press regarding ongoing litigation would, in our view, have the precise effect of stifling open, honest and frank communication that the intra-agency exemption was designed to protect against." (*In the Matter of Howard I. Smith v. New York State Office of the Attorney General*, No. 516176, New York Supreme Court, Appellate Division, Third Department, Apr. 10)

Texas

A court of appeals has ruled that logs of motor vehicle accidents maintained by the San Antonio Police Department are exempt under a provision of the Transportation Code making information related to a motor vehicle accident confidential unless the requester provides two of three elements: the date of the accident, the location of the accident, or the name of any person involved in the accident. A local media outlet requested copies of all accident logs for specific dates and the police denied the information citing the Transportation Code. The City asked the Attorney General to rule on the disclosability of the information and the AG concluded that the provision applied only to accident reports and not broader information that might somehow be related to an accident. The City then filed suit against the Attorney General. The trial ruled in favor of the AG, but the appellate court reversed. The appeals court noted that "in ordinary use, the phrase 'relates to' is very broad. The Legislature's use of the phrase, 'information that. .. .relates to a motor vehicle accident' has the effect of broadening the scope of the [confidentiality provision] to render more than the actual accident reports confidential." The appeals court observed that "the Attorney General's contention that the deletion of specific categories of information means the Legislature intended a narrowing, rather than a broadening, of the information rendered confidential does not persuade us otherwise. Had the Legislature intended only accident reports to be confidential, it would have said so." (*City of San Antonio v. Greg Abbott*, No. 03-11-00668-CV, Texas Court of Appeals, Austin, Apr. 10)

Virginia

The Supreme Court has ruled that the University of Virginia properly withheld records under the Virginia Freedom of Information Act concerning former climate science professor Michael Mann from the American Tradition Institute because they constituted proprietary data of a public university. ATI requested all of Mann's records during his tenure at UVA. The University identified 34,000 potentially responsive records and asked ATI to deposit an initial $2,000 to cover costs. UVA later contacted ATI and indicated it had identified 8,000 responsive records, but had used up the initial deposit when reviewing 1,000 records for possible exemptions. UVA told ATI it would need another $8,500 to cover costs, which ATI deposited. After UVA missed its deadline for disclosing records, ATI filed suit. The trial court adopted a broad Supreme Court definition of "proprietary," while ATI argued VFOIA's university data exemption applied only to competitive harm to the university. The trial court ruled that some records were Mann's personal correspondence not subject to VFOIA, but that many of the records were properly withheld under the university research exemption. At the Supreme Court, the Court agreed that its definition of proprietary applied. The Court pointed out that "we reject ATI's narrow construction of financial competitive advantage as a definition of 'proprietary' because it is not consistent with the General Assembly's intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges. In the context of the higher education research exclusion, competitive disadvantage implicates not only financial injury, but also harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression. This broader notion of competitive disadvantage is the overarching guiding application of the exemption." The Court observed that "because we do not attribute to the General Assembly an intention to disadvantage the Commonwealth's public universities in comparison to private colleges and universities, we

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hold that the higher education research exemption's desired effect is to avoid competitive harm not limited to financial matters." ATI challenged UVA's claim that it could charge for reviewing the documents for exemptions. The Court found such charges were encompassed by the term "search." The Court pointed out that "in the context [of VFOIA], 'searching' includes 'inquiring or scrutinizing' whether a disputed document can be released under federal and state law. Therefore, the ordinary meaning of 'searching' in this statutory provision permits a public body to charge a reasonable fee for exclusion review." (*American Tradition Institute v. Rector and Visitors of the University of Virginia*, No. 130934, Virginia Supreme Court, Apr. 17)

West Virginia

The Supreme Court has ruled that public bodies may charge search fees for responding to FOIA requests as long as those fees are reasonable. Richard and Lorinda Nease requested records for the City of Nitro. The City provided some of the records, but told the Neases that requested records dating back to 2007 would require manual review and that the Neases would be required to pay for the time spent to search and copy the records. The Neases sued, arguing the West Virginia FOIA's fees provision was restricted to the cost of reproducing records. The trial court agreed, finding that if the legislature had meant the fee provision to apply to search time it would have said so. But the Supreme Court disagreed. The statutory language allows for recovery of "fees reasonably calculated to reimburse [the public body] for its actual cost in making reproductions of such records." The Supreme Court found that "by constraining their focus to the meaning of 'actual costs,' a separate critical statutory term was overlooked. . .Through the wholesale omission of any discussion of the term 'fees,' the trial court and the Neases skirted crucial statutory language that must be considered in resolving the matter before us." Pointing out that the legislature had approved per hour search fees for certain agencies, the Court noted that "through the Legislature's formal approval of legislative rules which establish the use of agency-specific search fees under authority of FOIA, there can be no dispute that search fees may be included as part of a FOIA request. . .Consequently, we hold that pursuant to [the FOIA], a public body is vested with the authority and discretion to impose a search or retrieval fee in connection with a FOIA request to provide public records provided that such fee is reasonable." One justice dissented, blasting the majority's reasoning. The dissent observed that "in finding that 'fees' stands alone and in addition to the cost in making reproductions of such records, the majority opinion reads the statute at issue in a way that is foreign both to the law of this Court as well as any reasonable understanding of the English language." (*Ron King, et al. v. Richard J. and Lorinda J. Nease*, No. 13-0603, West Virginia Supreme Court of Appeals, Apr. 10)

The Federal Courts…

The First Circuit, ruling that the public interest in disclosure of the names of six individuals picked up in New Hampshire as part of a nationwide sweep for aliens with prior criminal convictions or arrests outweighs their privacy interest, has shown how courts continue occasionally to ignore the holding of *Reporters Committee* to achieve what seems to them a more satisfactory result. The Union Leader had requested the names, addresses, and personal identifiers for the six aliens arrested in New Hampshire after Immigration and Customs Enforcement announced the details of the results of the nationwide operation. ICE provided details of the criminal backgrounds of the six aliens, but redacted identifying information under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The district court agreed with the agency and the Union Leader appealed. Noting the Union Leader now only challenged the withholding of the names of the aliens, the First Circuit dispensed with the newspaper's claim that there was no constitutional expectation of privacy in arrest records. The court noted that "this reliance is misplaced, because 'the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution.'"

The appeals court then distinguished the Union Leader case from *Reporters Committee*, pointing out that "although the *Reporters Committee* Court recognized a privacy interest in an individual's criminal history, it did not have occasion to consider the *strength* of that privacy interest. Instead, the Court simply found no countervailing public interest. . ." The court then explained that "the Union Leader has stated that it has no intention of contacting the individuals, and that it only seeks to review the public records of their prior arrests and convictions" and concluded that "although the arrestees have a cognizable privacy interest in their names, that interest is attenuated both by the status of their underlying convictions and arrests as matter of public record and by the limited nature of the Union Leader's proposed investigation." Such a conclusion seems totally at odds with the holding in *Reporters Committee* where the Court emphasized that the plaintiff's purpose for requesting the records had no relevance to whether the records were disclosable. The First Circuit agreed that the facts in this case were similar to those in *New York Times v. Dept of Homeland Security*, 959 F.Supp.2d 449 (SDNY 2013), in which the district court found that disclosure of the names of detained aliens whose deportation was subsequently overturned would allow the newspaper to find out more information about the agency's behavior. The First Circuit noted that "the Union Leader can point to 'evidence that would warrant a belief by a reasonable person' that such negligence [by the government] might have occurred: namely, the redacted forms ICE has already produced, which document the apprehension of aliens who had been convicted of crimes and/or ordered removed from the United States as long as 23 years before their 2011 arrests. Although that delay is hardly conclusive evidence of negligence, or other wrongdoing on the part of ICE, we believe that it is at least enough to warrant a reasonable belief 'that the alleged Government impropriety *might* have occurred.'" The court added that "disclosure of the redacted names will enable the Union Leader to investigate public records pertaining to the arrestees' prior convictions and arrests, potentially bringing to light the reasons for ICE's apparent torpor in removing these aliens. . . That public interest outweighs the arrestees' attenuated privacy interests in their underlying arrests and convictions, which are already matters of public record." (*Union Leader Corporation v. U.S. Department of Homeland Security*, No. 13-1752, U.S. Court of Appeals for the First Circuit, Apr. 18)

Ruling that it was bound by the Sixth Circuit's decision in *Detroit Free Press v. Dept of Justice*, 73 F.3d 93 (6th Cir. 1996), a federal court in Michigan has ruled that the Marshals Service must disclose mug shots of four Highland Park police officers who had been publicly indicted on federal drug and public corruption charges because they are not protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Currently, states within the Sixth Circuit are the only geographical area in which mug shots are available. The court explained that after the 2004 Supreme Court decision in *National Archives v. Favish*, 541 U.S. 157, in which the Court recognized a privacy right for survivors and indicated that crime scene photos were routinely protected by Exemption 7(C) unless the requester could identify a legitimate likelihood of government misconduct, the Marshals Service decided the *Detroit Free Press* decision was no longer good law and stopped disclosing mug shots within the Sixth Circuit until the revised policy was rejected twice by district courts in Detroit and Akron. Nevertheless, the Tenth and Eleventh Circuits, in *World Publishing Co v. Dept of Justice*, 672 F.3d 825 (10th Cir. 2012), and *Karantsalis v. Dept of Justice*, 635 F.3d 497 (11th Cir. 2011), considered whether mug shots were protected by Exemption 7(C) and ruled in favor of the government. Because neither case was accepted for review by the Supreme Court, the government was stuck with the anomalous situation in the Sixth Circuit and decided to start the process of challenging the continued validity of the *Detroit Free Press* decision by denying the newspaper access to the mug shots. The court dispensed with the Marshals Service's claim quickly, noting that "as DOJ acknowledges, this Court, which is squarely situated within the Sixth Circuit, is bound by *Free Press I* as the law of this circuit. It necessarily follows that DOJ is unable to discharge its burden of justifying its nondisclosure of the four booking photographs at issue." The Free Press argued that the agency's claim was precluded by the doctrines of *res judicata*—that the issue had already been decided in previous litigation involving the same parties—and

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collateral estoppel—that the issue of the case had already been decided by the court. The district court instead found that neither doctrine precluded the government from continuing with its challenge. The court noted that "DOJ contends that USMS's continued compliance with *Free Press I* creates a risk that USMS will take action in direct conflict with the law as articulated in both the Tenth and Eleventh Circuits. . .[I]n addition to acting in contravention to the rule enunciated in the Tenth and Eleventh Circuits, USMS would also be in violation of its statutory duties as described in the Privacy Act." The court rejected the idea that the original Sixth Circuit decision was somehow non-reviewable. The court pointed out that "while axiomatic that the Sixth Circuit is not bound by the legal interpretations expressed by co-equal appellate courts elsewhere in this country, this alteration to the legal landscape, in addition to other events unnecessary to this Court's determination, may provide the requisite grounds to grant a rehearing en banc should the Sixth Circuit decide that the issue is sufficiently important to hear anew." The court granted the agency a stay of disclosure until government appeals were completed. The court awarded the Free Press attorney's fees, but only if it remained the prevailing party after appeal. (*Detroit Free Press, Inc. v. United States Department of Justice*, Civil Action No. 13-12939, U.S. District Court for the Eastern District of Michigan, Southern Division, Apr. 21)

In a rather unfortunate case of bad timing for the plaintiffs, a federal court in California has ruled that the legal analysis contained in the Justice Department's Office of Legal Counsel memo pertaining to targeted drone strikes was properly withheld by the Justice Department under **Exemption 1 (national security)** and **Exemption 5 (deliberative process privilege)** and that public comments by various high government officials did not constitute a waiver of either exemption. The court relied primarily on last year's decision by a district court in New York, but, ironically, that decision was overturned by the Second Circuit ten days after the California court had ruled. In response to a suit filed by the First Amendment Coalition for the legal analysis contained the OLC memo, Judge Claudia Wilken reviewed essentially the same set of facts, finding that speeches and congressional testimony by Attorney General Eric Holder, CIA Director John Brennan, and former Defense Department Counsel Jeh Johnson did not disclose the same level of detail as contained in the OLC memo. Wilken also was aware of the existence of a leaked DOJ White Paper, which was key to the Second Circuit's decision, but not aware of the government's subsequent confirmation of the authenticity of the DOJ White Paper. Finding that Holder, Brennan, and Johnson had not disclosed the substance of the legal analysis, Wilken pointed out that "here, it appears that the document requested includes more detail than that contained in the speeches and interviews cited by Plaintiff." She added that "moreover, legal citations are not 'facts' that can be acknowledged. The D.C. Circuit has held [in *Public Citizen v. Dept of State*, 11 F.3d 198 (D.C. Cir. 1993)] that Exemption One is not waived if an official discusses the 'general subject matter' of the records requested. Plaintiff makes much of the fact that the unclassified White Paper prepared for Congress has been leaked and acknowledged by the government. However, there has been no 'official disclosure' of the White Paper." The Coalition argued that the government had waived Exemption 5 by publicly discussing the legal analysis. But Wilken pointed out that the only time the OLC memo had been mentioned was when White House Press Secretary Jay Carney said the memo had been provided to Congress in relation to the DOJ White Paper. Wilken observed that "at most, this might support an argument that the government has expressly relied on the leaked White Paper because it has referred the press and the public to that document. Stating that the President has provided Congress with OLC advice 'related to the subject of' the White Paper is far from an express adoption of the analysis in the DOD memorandum." Wilken found that disclosure of the OLC memo to Congress did not constitute a waiver based on 5 U.S.C. 552(c), which provides that "this section is not authority to withhold information from Congress." Wilken agreed that DOJ's *Glomar* response neither confirming nor denying that legal analysis had been provided to other agencies was appropriate because such a disclosure would indicate what agencies had considered targeting Anwar al-Awlaki. (*First Amendment Coalition v. U.S. Department of Justice*, Civil Action No. 12-1013 CW, U.S. District Court for the Northern District of California, Apr. 11)

Judge Reggie Walton has ruled that the Department of Housing and Urban Development conducted an **adequate search** for records concerning the Skyland Shopping Center in the District of Columbia, even though there was some initial confusion concerning whether or not the agency or the District of Columbia had the records. Peter DeSilva made a request for the records and the agency initially indicated that the records were in the possession of the District of Columbia Department of Housing and Community Development. But HUD subsequently decided that several staffers at the agency had responsive records and the agency withheld 54 pages under **Exemption 4 (confidential business information)** and **Exemption 5 (privileges)**. DeSilva decided not to challenge the exemption claims, but questioned the adequacy of the search. To better explain its search, the agency provided supplemental affidavits that Walton found satisfactory. DeSilva argued that more records must exist, but Walton pointed out that "these conclusory and speculative assertions are insufficient. . .Here, the plaintiff in one breath questions the scope of HUD's involvement with the Skyland project, and in the next insists that HUD's involvement was so substantial that the agency must have additional records." Although HUD had expected to get responsive records from the District during the processing of the request, the records did not come into the agency's possession for another three weeks. Walton noted that "the agency had neither obtained nor was in control of the documents when its FOIA production was completed, much less 'when the FOIA request [was] made.'" He added that since DeSilva had conceded the agency's exemption claims by failing to challenge them, "even if the defendant had been in control of the documents, the plaintiff would not be entitled to an order requiring the defendant to produce them." (*Peter DeSilva v. United States Department of Housing and Urban Development*, Civil Action No. 12-366 (RBW), U.S. District Court for the District of Columbia, Apr. 10)

Judge Amy Berman Jackson has ruled that Craig Samtmann, a former FBI agent, failed to file his **Privacy Act** suit within the two-year statute of limitations because he knew several years earlier that an agency memo existed that was used as the basis for denying his request for reinstatement. Samtmann joined the FBI in 1992. In 2003, he took a job in the FBI's Office of Law Enforcement Coordination where questions arose about his attendance and use of leave, resulting in a memo. Samtmann resigned in 2004, but contacted the FBI in 2006 to ask for reinstatement. His request was denied in 2007 and he asked for an informal explanation of the decision. In 2008 and 2009 he filed FOIA requests for his records. In response to his second request, a copy of the 2003 memo was released as was a previously undisclosed internal version of the 2007 letter rejecting his request for reinstatement referencing the 2003 memo. In response to Samtmann's Privacy Act suit, the agency argued that his request for damages for improper disclosure was time-barred. Jackson agreed. She noted that "as early as 2008 and more than four years before he filed his original complaint, plaintiff revealed that he was aware that the FBI was maintaining a document that he believed to be erroneous." Samtmann argued the statute of limitations should be tolled because the agency failed to provide the record until much later. But Jackson pointed out that "the critical inquiry when applying the limitations provision of the Privacy Act is when plaintiff has or should have had knowledge of a document's existence or disclosure, not when he obtained definitive proof." She added that "it is not clear that the FBI was under any legal obligation to provide the document when plaintiff asked for more information about the employment decision, but even if it was, a failure to transmit the document in 2007 did not hinder plaintiff's ability to lodge the claims that accrued later, in 2008." (*C. Craig Samtmann v. United States Department of Justice*, Civil Action No. 12-0693 (ABJ), U.S. District Court for the District of Columbia, Apr. 7)

In Memoriam

One of the pleasures of spending nearly 30 years editing *Access Reports* has been the privilege of meeting so many interesting, thoughtful and dedicated individuals working in all aspects of open government.

One of those individuals whose friendship and insights I particularly admired, Ivan "Ike" Izenberg, died Apr. 23. I first met Ike at an ASAP luncheon in the mid-80s while he was working as a retired Foreign Service Officer at the State Department on declassification of agency records. Ike was a member of what another professional friend referred to euphemistically as "old men in tennis shoes" whose primary goal was to withhold as many historical records as possible, but, while good for a laugh, that description never came close to encapsulating Ike's zest for life and his wonderful wry sense of humor. I felt honored that Ike usually contacted me when he was in Washington and his generosity and continued interest in access issues never wavered, even after he and his wife retired to Albuquerque. After that move, Ike actually became more involved with these issues and worked closely with Sandia Laboratories trying to develop better ways of reviewing and redacting classified information. The last time I saw Ike was at least four years ago, but the memories of his company will last a life-time. He was a dear and respected friend and I miss him already.

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