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Washington Focus: The now discredited Rolling Stone article about sexual assaults on the University of Virginia's campus has made UVA and other universities rethink their interpretation of the Family Educational Rights and Privacy Act, a 1974 statute that threatens schools with the loss of federal funding if they have a policy of disclosing student information without consent. Designed originally to restrict schools from disclosing student academic records, FERPA, despite multiple amendments requiring schools to publish campus crime information, has become an all-purpose excuse for withholding almost any student-related record no matter how far removed from his or her academic records. According to the Charlottesville police, they were not permitted to have access to information relevant to their investigation of crimes involving UVA students. UVA President Teresa Sullivan has recently expressed an interest in working with Congress to possibly amend the statute to broaden a school's ability to cooperate with the police.

FOIA Amendments Fall Short in Congress

One of the many colorful aphorisms attributed to Yogi Berra is the observation that "it ain't over until it's over." That saying came true Dec. 12 when House Speaker John Boehner (R-OH) declined to take up recently passed Senate FOIA amendments, ensuring that the amendments would not pass the House before the end of the session. Although Senate action on FOIA amendments was always considered too close for comfort, at the end the only thing standing in the way of passage once the amendments finally passed the Senate Dec. 8 was Boehner's decision not to put them on the suspension calendar. Instead of a new series of substantive FOIA amendments, open government advocates now must contemplate starting anew with a Republican-controlled Congress.

The story of why two sets of parallel FOIA amendments that passed both Houses of Congress unanimously failed to cross the finish line has already been told, most thoroughly by Toby McIntosh writing for FreedomInfo.org: http://www.freedominfo.org/2014/12/foia-bill-post-mortem-mysteries-multiple-causes/. However, an examination of some

ACCESS REPORTS

of the strategies and tactics reveals the continued challenges faced by those in the open government community who believe, based on decades of painful experience, that the foreseeable harm language from the Holder memo needs to be codified and Exemption 5 (privileges) in particular needs to be amended in such a way as to limit the sink-hole it has become for records about government decision-making.

In hindsight, when things look much clearer than they did when the legislative battle was actually being fought, a primary mistake was to not pay enough attention to the House bill, which passed in February 2014, as a platform for moving forward. Instead, the advocacy community favored working with Sen. Patrick Leahy's (D-VT) Senate Judiciary Committee staff to create a bill more to its liking. As evidenced by the 2007 OPEN Government Act amendments, Leahy had been able to work successfully with Sen. John Cornyn (R-TX) to pass amendments supported by the open government community, providing a degree of bipartisan cover. Using the House bill largely as a measure of what was politically possible, the Senate bill was designed to encompass the advocacy community's agenda and to allow the Senate bill to be tweaked sufficiently so that it could pass the House once it got there.

But for whatever reason, Leahy and Cornyn did not produce a bill until June, four months after the House bill was passed, and did not seriously work on trying to move it through the Senate Judiciary Committee and then the full Senate until November. While members of the open government community waited anxiously and insisted there was still sufficient time to get FOIA amendments through Congress if everything went as planned, unexpected obstacles appeared in the Senate that delayed passage there even further. The bill did not pass the Senate until Dec. 8. By then there was not enough time left to pass the House unless everything went like clockwork.

Amending Exemption 5 was the cornerstone of the open government community's agenda and understanding the reasons why that attempt failed provides an interesting lesson in political attitudes and whether restricting such legal privileges is even politically possible. Exemption 5 covers a handful of legal privileges, most notably the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege. The case law on the deliberative process privilege has become so favorable to the government that agencies may withhold practically anything that can be shown to be related to the deliberative process. While protected records are required to be predecisional that requirement has become quite flexible as well. Further, facts are supposed to be disclosed as well, but agencies successfully argue that the disclosure of even facts sometimes would reveal the deliberative process. The attorney work-product privilege is supposed to protect the mental impressions and strategies of attorneys or staff working on behalf of an attorney in preparation for reasonably anticipated litigation. Again, the courts have broadened the parameters of the privilege to such an extent that anything prepared by an attorney or his staff with even the most tangential relation to likely litigation is entirely protected. Also, the privilege makes no distinction between opinion and fact and if the privilege applies it applies to everything.

The routine use of the deliberative process privilege by agencies has become so onerous that the Senate bill included several ways in which to limit the privilege. Under the deliberative process privilege, a balancing test would have been added to require that "the agency interest in protecting the records or information is not outweighed by the public interest in disclosure." The balance for invocation of the attorney-work product privilege would be that "the agency interest in protecting the records or information is not outweighed by a compelling public interest." The Senate amendment also indicated that Exemption 5 would not apply to records more than 25 years old, a time period based on the 25-year period for automatic declassification under the executive order on classification. Many advocates wanted a time limit of 12 years, based on the length of time for invoking privilege for records subject to the Presidential Records Act.

According to McIntosh, the Exemption 5 balancing test ran afoul of criticism from Sen. Dianne Feinstein (D-CA), who objected to applying such a requirement to the attorney-client privilege. Although Feinstein was the most vocal critic, other Democrats like Sen. Charles Schumer (D-NY), Amy Klobuchar (D-MN) and Richard Blumenthal (D-CT) supported Feinstein's objections and the public interest balance was dropped. A Senate staffer told McIntosh that "even at a staff level there was a lot of unease about bringing the balance test to a Member." There were temporary holds on the bill by Sen. Bob Corker (R-TN) and Sen. Tom Coburn (R-OK) that were resolved fairly quickly. More problematic were concerns expressed by Sen. Tim Johnson (D-SD), chair of the Senate Banking Committee, about rumblings from banking interests as to whether the amendments might affect protection for their records. Ironically, a recent D.C. Circuit decision, *Public Investors Arbitration Bar Association v. SEC* (D.C. Cir. 2014), had established that Exemption 8 (bank examination records) provided ironclad protection for such records. Johnson's concerns were apparently addressed by Leahy and he dropped his objection.

However, a totally unforeseen last minute hold came from Sen. Jay Rockefeller (D-WV) and it appeared for a few days that the bill wouldn't even get out of the Senate before the session ended. Rockefeller, apparently at the request of the FTC, put a hold on the bill complaining that the effect of the foreseeable harm test would make it more difficult to enforce consumer protection laws because agencies like the FTC would be inundated with needless litigation that would hamper agency resources and affect the quality of internal deliberations. While the insertion of the foreseeable harm test would minimally increase the agency's burden to justify withholding records, the FTC's complaint is one that goes back at least as far as the 1974 amendments when Congress made the FOIA more favorable for requesters. Government regulatory attorneys hate FOIA because they contend that entities under investigation or involved in litigation with the agency make FOIA requests to circumvent discovery and tie up agency resources. To believe the foreseeable harm test would exacerbate this situation by leaving regulatory agencies awash in FOIA requests is to make a mountain out of a molehill. Perhaps Rockefeller realized this because he settled for report language that said "it is the intent of Congress that agency decisions to withhold information relating to current law enforcement actions under the foreseeable harm standard be subject to judicial review for abuse of discretion."

The bill finally popped out of the Senate Dec. 8. But unless the House leadership had quickly embraced the bill's passage, there was little or no chance for it to get through the House as well by the end of the session. While Rep. Darrell Issa (R-CA), chair of the Government Oversight and Reform Committee, made tepid appeals in support of the bill, his primary response was to criticize the Senate for not adopting the House bill and passing it instead. The failure of FOIA legislation marks a setback for open government advocates but they will continue to press their case with Congress. But with Congress now controlled by Republicans, it is unclear to what extent FOIA amendments are a high legislative priority.

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 affirmed a trial court's decision finding the City of Los Angeles waived any privilege for several documents it inadvertently released to attorney Rachele Rickert, who was representing Estuardo Ardon in a class action suit challenging the validity of the City's telephone tax. In response to

Rickert's Public Records Act request for records pertaining to the tax, the City disclosed three documents that, after review, Rickert found were listed in the City's privilege log in the class action suit. She informed the City, which demanded that she return them and not rely on them in the class action suit. She declined and the City filed suit to force her to return the documents, arguing the documents had been disclosed by a low level employee inadvertently. The trial court ruled against the City, finding that a disclosure under PRA waived any privilege. The City appealed and the appeals court upheld the trial court. Noting that the City wanted judicial recognition of an exception to the waiver rule for inadvertent disclosures, the appeals court indicated that "disclosures pursuant to the PRA that are made inadvertently, by mistake or through excusable neglect are not exempted from the provisions of [the PRA] that waive any privilege that would otherwise attach to the production." The court also rejected the City's contention that waiver should not occur if done by a low level employee without authorization. The court pointed out that "such an exception would put it within the power of the public entity to make selective disclosures through 'low level employees' and thereby extinguish the provision in the PRA intended to make such disclosures available to everyone." (*Estuardo Ardon v. City of Los Angeles*, No. B252476, California Court of Appeal, Second District, Division 6, Dec. 10, 2014)

Connecticut

A trial court has ruled that the FOI Commission used the wrong standard in assessing whether disclosure of identifying information about researchers at the University of Connecticut Health Center who potentially failed to comply with federal animal welfare guidelines would pose a security risk if disclosed to People for the Ethical Treatment of Animals. The commissioner of administrative services relied on a prior assessment by the department of public works to conclude that there was a reasonable risk. When PETA complained to the FOI Commission, the Commission, relying on guidance from a 2008 trial court decision interpreting the security exemption, concluded that the Health Center's concerns were neither pretextual nor irrational and upheld the Health Center's denial. PETA filed suit and the trial court reversed. Here, the trial court indicated that the Connecticut Supreme Court's interpretation of the security exemption in *Director, Dept of Information Technology v. FOI Commission*, 874 A.2d 785 (2005)—finding the agency was required to provide a sufficiently detailed record to justify its application of the exemption—was the proper standard for assessing agency claims. The court pointed out that the FOI Commission had "identified no evidence of a threat to researchers because they have violated [the federal] protocols. Its decision cites no study, incident, or testimony even suggesting that there were any reasonable grounds to believe that disclosure of the names of animal researchers who did not comply with federal guidelines will pose any greater risk of harm than has already occurred from the disclosure of the names of the broader set of all animal researchers [already in the public domain]." Rejecting the testimony of the head of security for the department of administrative services as nothing more than speculation, the court observed that "under *Director*, the department retained the burden of proving that the [security] exemption should apply. FOIC does not identify, nor does the record reveal, any other evidence that the department produced to establish the existence of a greater safety risk to noncompliant researchera than to animal researchers generally. Accordingly, not only did FOIC apply the wrong standard for review of the commissioner's decision, but the record of the hearing does not support its ultimate conclusion that the department had met its burden for nondisclosure under [the security exemption]." (*People for the Ethical Treatment of Animals, Inc. v. Freedom of Information Commission*, No. HHB CV14-6023464S, Connecticut Superior Court, Judicial District of New Britain, Dec. 19, 2014)

District of Columbia

A trial court has ruled that the D.C. Metropolitan Police Department and the District's Office of Attorney General conducted an adequate search for records concerning an investigation as to whether or not former "Meet the Press" host David Gregory should have been charged with possession of an illegal high-capacity ammunition magazine which he exhibited as part of an on-air interview. The police investigated the

charge, but the Office of the Attorney General declined to prosecute Gregory. William Jacobson, who writes the Legal Insurrection Blog, submitted requests to MPD and OAG for any records concerning the investigation. The District ultimately disclosed more than 200 pages with redactions made under the privacy and privileges exemptions. Jacobson appealed the District's decision, arguing the District had not properly justified its redactions. After reviewing the documents *in camera*, Judge Robert Okun indicated he was satisfied that the District's redactions were appropriate except for its claim that the attorney work-product privilege protected an affidavit from an MPD detective supporting an arrest warrant for Gregory. Okun first pointed out that, since the affidavit was drafted by a detective it was not eligible for the attorney work-product privilege. But he also noted that the affidavit constituted the agency's final decision in the case. He observed that "the Affidavit in question was the final version of a document completed by the MPD and submitted to the OAG in order for the OAG to make the decision whether to prosecute Mr. Gregory. The decision not to bring charges against Mr. Gregory was a final decision made by the OAG, communicated to the public, and memorialized in writing at the bottom of the Affidavit." (*William Jacobson v. District of Columbia*, No. 2013 CA 003283 B, Dec. 19, 2014)

Michigan

The supreme court has ruled that video surveillance recordings made at two fast food restaurants and used by the Dearborn Police to support its decision to issue citations to James Amberg's client are public records and must be processed in response to Amberg's FOIA request. Because the video surveillance recordings were taken at Tim Horton's and Wendy's, the police argued that they were not public records because they were not created by a public agency. Both the trial court and court of appeals agreed with Dearborn's argument, but the supreme court reversed. The court noted that "what ultimately determines whether records in the possession of a public body are public records within the meaning of FOIA is whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function. . .The undisputed facts show that defendants received copies of the recordings as relevant evidence in a pending misdemeanor criminal matter." The court observed that "the Court of Appeals majority claimed that the defendants did not use the recordings in the performance of an official function—specifically, their issuance of a criminal misdemeanor citation—because they did not obtain the recordings until after they issued the citation. While this may be true, the citation nevertheless remained pending when defendants received the recordings, and the issuance of the citation is not the only function that we must consider. In other words, even if the recordings did not factor into defendants' decision to *issue* a citation, they were nevertheless collected as evidence by defendants to *support that decision*. Indeed, that the relevant police file (which *was* disclosed to plaintiff) referred to the recordings (and how defendants acquired them) underscores defendant's official purpose in acquiring them." The court of appeals had ruled the case was moot once the police eventually disclosed the recordings and concluded that Amberg had abandoned his claim for fees and costs. The supreme court found no evidence that Amberg had abandoned his claim for fees and sent the case back to the trial court to resolve the remaining issues. (*James Amberg v. City of Dearborn*, No. 149242, Michigan Supreme Court, Dec. 16, 2014)

A court of appeals has ruled that the trial court did not have jurisdiction to rule on the declaratory judgment motion filed by Citizens United Against Corrupt Government because the group did not allege an actual injury and the issue was now moot. The Troy City Council held a closed meeting to consider applications for city manager and select finalists who would be interviewed in a subsequent open meeting. The council's closed meeting produced a list of five finalists, who were later interviewed in an open meeting, after which the council selected a new city manager. CUACG requested a copy of the minutes for the closed meeting and the city denied its request. CUACG then filed suit for a declaration that the meeting was improper and that the minutes should be disclosed. While CUACG argued that all meetings in which

deliberations were held were required to be open, the city contended the court should dismiss the case for lack of an actual controversy. The trial court dismissed the case, finding CUACG had not complied with the rules governing declaratory judgments. The appellate court agreed, noting that "even through defendant's closed session may have violated plaintiff's rights, declaratory judgment in this circumstance would not guide plaintiff's future conduct in order to preserve plaintiff's legal rights. The alleged injuries—the improper holding of a closed session and the improper withholding of the minutes of that session—have already occurred. Plaintiff does not seek to prevent further injury, only to see the minutes from the closed session and a declaration that the session was improperly held." Finding the controversy moot as well, the court observed that "a mere declaration at this point that defendant violated the [Open Meetings Act], without a request to invalidate the decision stemming from that alleged violation 'cannot have practical legal effect upon the then existing controversy.'" One judge concurred in the result only, criticizing the majority for gutting OMA relief through a novel use of the declaratory judgment rule. The judge indicated that "I cannot accept the majority's crabbed view of this powerful remedy." (*Citizens United Against Corrupt Government v. Troy City Council*, No. 313811, Michigan Court of Appeals, Dec. 4, 2014)

New York

A trial court has ruled that the New York City Police Department has not shown why disclosure of records on the Z-backscatter van, a vehicle capable of using an x-ray device to detect drugs and certain bomb-making equipment that had been purchased by the New York City Police and previously used by federal law enforcement agencies, would reveal exempt criminal investigative methods and techniques. ProPublica reporter Michael Grabell made a complex request to the NYPD for records pertaining to the van, including information about the health risks from radiation. The agency denied the request entirely, claiming disclosure would reveal investigative methods and techniques that would allow would-be terrorists to evade detection. Although Grabell significantly narrowed his request based on the agency's objections, the agency continued to insist that no records could be disclosed. Aside from Grabell's request for records indicating where the van could not be used, which Judge Doris Ling-Cohan found were protected by attorney-client privilege, she concluded the City's affidavit did not justify withholding the records in their entirety, although she ruled some records could be properly redacted. Rejecting the NYPD's claims, she pointed out that the agency's affidavit "consists largely of repeated, conclusory statements that the disclosure of any records pertaining to the Van(s) would allow would-be criminals to circumvent the Van(s) potential effectiveness. However, the standard to exempt a document from disclosure is quite high in that a party seeking to withhold documents that are sought pursuant to FOIL must tender a 'factual basis' for claiming that the documents come within one or another exemption." (*Michael Grabell v. New York City Police Department*, No. 24388, New York Supreme Court, New York County, Dec. 9, 2014)

Oklahoma

The supreme court has recognized a constitutionally-based executive privilege that protects advice provided to the governor and other senior executives. Ruling in a case in which Gov. Mary Fallin had specifically waived the privilege, the court nonetheless decided that the existence of such a privilege was an important enough legal issue for the court to rule on the merits. Vandelay Entertainment had requested records from Fallin related to funding and implementation of programs under the federal Affordable Care Act. She made more than 51,000 pages of documents available, but withheld some documents under a claim of executive privilege. Vandelay sued and the trial court, ruling in favor of Fallin, recognized a common law executive privilege. Once the trial court had recognized such a privilege, Fallin specifically waived the privilege for the disputed documents, which were disclosed. Nonetheless, the supreme court decided to rule on whether or not the privilege existed. Finding an inherent executive privilege in the Oklahoma constitution, the court pointed out that "by vesting the Governor with supreme executive power and delegating

discretionary decisionmaking authority to the Governor, we believe the people placed checks on their access to certain types of confidential advice the Governor considers, and on legislative power to mandate disclosure of such advice." But the court noted limitations on the privilege, mainly that the governor had the burden of showing a court that a records qualified for the privilege and, further, that the privilege could be overcome by a showing by the requester of the existence of a substantial or compelling need and that the public interest in disclosure outweighed the interest in maintaining confidentiality. (*Vandelay Entertainment, LLC v. Mary Fallin*, No. 113,187, Oklahoma Supreme Court, Dec. 16, 2014)

Pennsylvania

A court of appeals has ruled that an informal investigation stemming from an anonymous tip that PPL Electric Utilities had restored service to a low-priority neighborhood after a November snowstorm before serving more high-priority neighborhoods is protected under the noncriminal investigation exemption. The complaint was investigated by the Public Utility Commission's Bureau of Investigation & Enforcement and the commissioners approved a $60,000 civil penalty against PPL. Two reporters requested the tip letter and the investigatory documents. The PUC denied both requests under the noncriminal investigation exemption. The reporters filed complaints with the Office of Open Records, which ruled that provisions of the Public Utility Code requiring disclosure of investigatory records when relied upon by the commissioners required the PUC to disclose the tip letter and investigatory file. PUC appealed and the utility intervened. The appeals court found that neither the Public Utility Code nor the Right to Know Law required disclosure of the records. The court pointed out that the disclosure provision of the Public Utility Code applied only when the commissioners had made a decision, not the agency, and the PUC had provided an affidavit explaining that the commissioners did not have access to any of the supporting documents. The court observed that "the use of 'commission' in this portion of [the Public Utility Code] refers to the Commissioners, not the entirety of the PUC because the Commissioners alone are empowered by majority vote to make a decision, enter into a settlement, or take official action. Further, only the Commissioners' actions are subject to the requirements of the [open meetings provisions of the] Sunshine Act." Turning to the noncriminal investigation exemption in the Right to Know Law, the court noted that "the documents were created or collected as part of an informal investigation, the purpose of which was to determine compliance with regulations, the existence of any violations of the law and whether to pursue prosecution." The court agreed that disclosure "could lead to public utilities and employees being less likely to cooperate and provide relevant information out of fear of retaliation or public embarrassment." (*Pennsylvania Public Utility Commission v. Andrew Seder and Scott Kraus*, No. 2132 C.D. 2013 and No. 2254 C.D. 2013, Pennsylvania Commonwealth Court, Dec. 3, 2014)

Washington

In an en banc decision, the supreme court has ruled that the City of Lakewood violated the brief explanation requirement in the Public Records Act when it failed to explain why the statutory citations it provided as the basis for withholding driver's license information pertaining to three police officers who were charged for different offenses actually applied. David Koenig made the requests to the City of Lakewood for records related to the arrest of a police officer for patronizing a prostitute, another police officer involved in an accident, and a third police officer prosecuted for assault. The City provided Koenig with records, but redacted driver's license information under several exemptions, including, ultimately the federal Drivers Privacy Protection Act. Koenig sued the City for violating the brief explanation provision of the PRA and asked for attorney's fees. The trial court found the brief explanation provision could not form the basis for liability, but the appellate court ruled in favor of Koenig. The supreme court noted that "our inquiry here does not turn on whether the explanation was correct, but rather on whether it provided sufficient explanatory information for requestors to determine whether the exemptions were properly invoked. It did not; the city's

ACCESS REPORTS

responses either failed to cite a specific exemption or failed to provide any explanation for how a cited 'other' exemption applied to redacted driver's license numbers in the specific records produced." The court added that "because the city's response did not meet the requirements of the PRA, we hold that Koenig is entitled to attorney fees." (*City of Lakewood v. David Koenig*, No. 89648-8, Washington Supreme Court, Dec. 11, 2014)

The Federal Courts…

A federal court in New York has ruled that the Bureau of Land Management has shown that disclosure of qualitative data pertaining to the agency's methodology for setting a fair market value for coal leases in the Powder River Basin in Montana and Wyoming is protected by **Exemption 5 (privileges)**. In an August, 2014 ruling in a case brought by the NRDC, Judge Paul Engelmayer ruled that since the vast majority of 28 leases have involved single bidders and the rest attracted only two bidders the agency's statutory mandate to receive fair market value was determinative of the lease amount. But while Engelmayer found the quantitative data for appraising the leases was protected by the privilege covering governmental economic interests, the agency had not yet shown that qualitative data was privileged as well. Based on supplemental affidavits filed by the agency, Engelmayer noted that "BLM uses a common qualitative methodology to estimate the fair market value of each tract of land. Disclosure of fully unredacted reports would reveal the factors that BLM considers at each stage of the valuation process, how its appraisers evaluate those factors, and the weight each factor is given. . .Although courts have sometimes required the Government to disclose single factors relevant to multi-factor analyses, NRDC has not identified, and the Court has not found, authority that would require the Government to disclose *every* factor it considers *and* its method for evaluating those factors." Engelmayer pointed out that "some of the salient information is identical for every fair market value estimate. . .Because this data remains static across reports, at least for some period of time, disclosure would provide bidders with the exact information BLM will use to estimate fair market value for future lease sales." NRDC argued that some of the information was commercially stale. But Engelmayer observed that "that characterization, even if accurate, does not preclude the information from Exemption 5 protections. As long as BLM relies on such information, disclosure will harm the Government's commercial interests." He agreed with the agency's argument that the qualitative and quantitative data was inextricably intertwined. He explained that "the appraisers consider 'both quantitative and qualitative factors' in the course of a unified analysis. . .Moreover, access to qualitative narratives in unredacted reports would allow prospective bidders to determine at least some of the numeric figures BLM uses to reach its fair market value estimates." (*Natural Resources Defense Council, Inc. v. United States Department of Interior and Bureau of Land Management*, Civil Action No. 13-942 (PAE), U.S. District Court for the Southern District of New York, Dec. 11, 2014)

Faced with nearly the identical claims adjudicated several months ago by Judge John Bates, Judge Ketanji Brown Jackson has ruled that U.S. Citizenship and Immigration Services properly invoked **Exemption 6 (invasion of privacy)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)** to redact records concerning Nelson Mezerhane Gosen's asylum application, but because of the existence of evidence suggesting that certain records the agency claimed were protected by **Exemption 5 (deliberative process privilege)** were created after the agency granted Mezerhane Gosen asylum, she rejected those claims and encouraged the parties to either settle their differences or for the agency to file supplemental affidavits supporting its Exemption 5 claim. Mezerhane Gosen, who owned the Venezuelan television station Globovision and was a critic of the current Venezuelan regime, applied, along with his immediate family, for political asylum. After waiting for three years, Mezerhane Gosen requested his Alien file. His daughter, whose asylum application was dependent on her father's application, also requested her Alien file separately. USCIS disclosed 500 pages, but withheld in

full or in part 140 pages. Mezerhane Gosen appealed administratively and the agency partially released four documents that had previously been withheld entirely. Mezerhane Gosen then filed suit. However, Bates ruled on his daughter's suit first, finding the agency had supported the Exemption 7(C) and 7(E) claims but that the Exemption 5 claims remained unresolved. Finding that Bates' decision was persuasive, Jackson reached the same conclusion. Jackson found the agency had redacted only personally-identifying information, rejecting Mezerhane Gosen's contention that the redactions bore on the agency's misconduct in failing to notify him in 2010 that his asylum application had been granted, instead of waiting until 2013 when the agency officially notified him. Jackson pointed out that "the documents themselves simply do not shed any light on this matter—Exemptions 6 and 7(C) have been used to redact only names and some identifying information, and nothing that could possibly help to prove or disprove USCIS's alleged misconduct." Mezerhane Gozen argued that because USCIS had published a great deal of material on the asylum adjudication process information about the process was already publicly known and did not qualify for Exemption 7(E) protection. But Jackson observed that "the mere fact that some information about the asylum process is available does not automatically prevent USCIS from withholding any information about the process." Like Bates, Jackson, after reviewing the records *in camera*, found that all the records withheld under Exemption 5 probably qualified as deliberate. But faced with nearly the same evidence presented to Bates—that a 2010 entry in a USCIS database indicated that Mezerhane Gozen's asylum application had been granted as well as two occasions in 2013 when Mezerhane Gozen's son-in-law was told by immigration or customs officials that he should have applied for travel documentation available only for individuals' whose asylum applications had been granted—Jackson pointed out that "although the documents withheld appear to be deliberative, Plaintiff has raised sufficient doubt about the timing of the asylum decision such that it cannot be established one way or the other, based on the current record, that the withheld documents are predecisional." (*Nelson J. Mezerhane Gozen v. United States Citizenship and Immigration Services*, Civil Action No. 13-1091 (KBJ), U.S. District Court for the District of Columbia, Dec. 4, 2014)

A federal court in California has awarded the Sierra Club nearly $170,000 in **attorney's fees** for its FOIA suit against the EPA for records submitted by Luminant Generation Company under the Clean Air Act. In response to requests submitted by the Sierra Club and the Environmental Integrity Project, the agency identified more than 300,000 pages submitted by Luminant. Because the EPA was required to provide predisclosure notification to Luminant, the agency informed the requesters that it could not meet the 20-day time limit and ultimately denied the request pending completion and review of Luminant's confidentiality claims. The requesters appealed the decision and the agency denied their appeal pending completion of its review. At no time did the agency provide the requesters an estimated date of completion. The Sierra Club and EIP then filed suit and began to explore settlement through the court's mediation program. The parties agreed that EPA would provide all documents within six months for which Luminant had withdrawn any exemption claim at a rate of 1,600 pages a month. Using this arrangement, the EPA was able to disclose 44,000 pages, but the parties could not resolve their dispute pertaining to the remaining 300,000 pages. Pursuant to a new round of court-ordered settlement discussions, EPA agreed to process a new targeted request for information in its possession of the type requested in the original request. As a result, the agency disclosed another 61 documents and the parties agreed to dismiss the case. The Sierra Club then filed a motion for attorney's fees. The EPA first argued the Sierra Club did not have **standing** because they were not a party to the original request. Rejecting the claim, Magistrate Judge Maria-Elena James noted that "despite Sierra Club being unnamed in the initial FOIA request, the Court finds that the EPA fully acknowledged Sierra Club as an interested party to the request and has continually treated them as such." She added that "additionally, since the initiation of this suit, the EPA has continually recognized Sierra Club as a party to the initial FOIA request." Although the EPA argued strenuously that the Sierra Club was not the prevailing party because the agency did not agree to change its position, but instead was finally able to process the documents

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once Luminant withdrew its confidentiality claims. But James found the settlement agreement had constituted a change. She pointed out that "the June 27, 2011 scheduling order in this case changed the legal relationship between the parties because prior to its issuance the EPA 'was not under any judicial direction to produce documents by specific dates.'" The EPA argued the settlement agreement did not establish either party as the prevailing party. But James, finding that phrase had no effect on the parties, observed that "the parties cannot circumvent FOIA by contract." Even though Sierra Club had not shown that it disseminated the records, James found they had satisfied the public interest factor, noting that "given the purpose of Plaintiffs' organizations to oversee and enforce compliance with the CAA, the Court finds that Plaintiff's provide a significant public benefit. . .[I]t is evident that the data [the records] contain is being used to inform Plaintiffs ongoing oversight and enforcement efforts." Although she found the EPA had acted responsibly, she observed that "while the Court recognizes the EPA's challenge in reviewing the voluminous records, the statute cannot be construed to provide an indefinite period for substantiating a confidentiality claim. Additionally, the EPA acted unreasonably in failing to communicate and work with Plaintiffs to create an agreed upon completion date." James found the Sierra Club's calculation of fees was reasonable, although she trimmed off about $18,000 for several instances of overbilling. The agency complained that attorney Dave Bahr was requesting compensation at hourly rates above $500 when he had admitted he was charging the Sierra Club $150 an hour. But the Sierra Club provided affidavits from four attorneys experienced in FOIA litigation in the San Francisco area, all of whom attested the hourly rates requested were reasonable. She noted that the Supreme Court had previously rejected any suggestion that compensation for doing work for public interest organizations should differ from that done for private litigants, pointing out that "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." (*The Sierra Club, et al. v. United States Environmental Protection Agency*, Civil Action No. 11-00846-MEJ, U.S. District Court for the Northern District of California, Dec. 8, 2014)

A federal court in California has **vacated** its previous ruling finding that the Department of Justice had properly withheld an Office of Legal Counsel memo concerning the targeted killing of Anwar al-Awlaki after the Second Circuit ordered the agency to disclose the same memo to the New York Times and the ACLU in separate FOIA litigation. Once the memo was disclosed in the *New York Times* case, DOJ disclosed the same redacted memo to the First Amendment Coalition. The First Amendment Coalition then filed a motion with the federal district court in California asking it to vacate its previous ruling, and, further, to award the Coalition **attorney's fees**. Relying on the Supreme Court's decision in *United States v. Munsingwear, Inc*, 340 U.S. 36 (1950), the First Amendment Coalition argued that "vacatur is required because Defendant's decision to release the OLC-DOD memorandum and the CIA memorandum in August rendered the case moot while it was still under review." The government asserted that the case was more akin to a settlement agreement and did not require vacating the previous decision. Finding that neither situation applied, Judge Claudia Wilken concluded that "the case is moot based on both parties' decision to abandon their right to review. . .[The government] voluntarily disclosed the CIA memorandum to Plaintiff in this case and, when asked to state its position on whether this case is moot, responded that there were no issues left for this Court to consider. At the same time, Plaintiff abandoned its right to pursue its motion for reconsideration. . .[T]he Court was not called upon to consider Plaintiff's motion for reconsideration of the summary judgment order. . . Accordingly, the Court now exercises its discretion to vacate its summary judgment order." Wilken then rejected the First Amendment Coalition's attorney's fees motion, finding the Coalition had not substantially prevailed in the litigation. She pointed out that "Defendant in this case released the documents largely as a result of the Second Circuit's ruling in *NY Times*, not as a result of the ruling in this case. Moreover, Plaintiff voluntarily abandoned its motion for reconsideration of the Court's order and agreed that no issues remained for litigation instead of pursuing an appeal." (*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, Dec. 15)

Judge Christopher Cooper has ruled that the U.S. Postal Inspection Service properly withheld records that might identify child victims contained on CD ROM discs taken from the residence of John Davis, who was later convicted of trafficking in child pornography. Davis, who was sentenced to 235 months, requested the names of the 16 movie files seized from his home. The USPIS located a search warrant and search warrant inventory list and released three pages after redacting them under **Exemption 3 (other statutes)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The agency claimed 18 U.S.C. § 3509(d), which prohibits disclosure of names or other personal information about child victims, provided an exemption for the redactions. Davis argued that the agency could "manually print the names of each file" to avoid identifying any children. But Cooper pointed that "Davis misunderstands the nature of FOIA exemptions. USPIS' justification for withholding these documents would extend to any documents containing the same information. . .[A]ccording to USPIS' affidavits—which the Court accepts as true absent evidence to the contrary—the movie titles themselves either reflect the names of the child victims or include information by which the child victims could be identified, such as their descriptions and ages." Davis also argued that "his sentence was enhanced by 5 levels because the offense allegedly involved 600 or more images, yet neither he nor his defense counsel actually viewed the images. Thus he seeks evidence to show that the CD ROM files' content did not warrant the upward adjustment." Finding Davis' claim had no bearing on his request, Cooper pointed out that "Davis' personal interest in the requested information does not amount to a public interest of such magnitude that it outweighs the individuals' substantial privacy interests. Furthermore, FOIA is not a substitute for discovery in a criminal case." (*John S. Davis v. United States Postal Inspection Service*, Civil Action No. 13-01972 (CRC), U.S. District Court for the District of Columbia, Dec. 15)

A federal court in Missouri has ruled that the Bureau of Prisons properly invoked **Exemption 7(C) (invasion of privacy concerning law enforcement records)** to withhold records concerning Assistant U.S. Attorney Cindy Hyde's conclusion that Russell Marks' life sentence should not be reduced because of information he provided DOJ in hopes of getting a sentence reduction. After talking with BOP staff, Hyde concluded Marks should not be considered for a sentence reduction. Marks then filed a FOIA request for records concerning who Hyde spoke with at BOP. Hyde specially prepared a document for Marks listing her contacts and the dates of her meetings, which was released to Marks. Two other documents—seven pages of handwritten notes and a two-page letter from Hyde to a BOP official—were withheld. After reviewing the documents *in camera*, the court rejected Marks' claim that disclosure of the records would shed light on government operations or activities. The court noted that "Marks only repeats his prior assertions that the other inmates' conduct [which he reported to BOP officials] was serious and amounted to an escape and that the information he provided was accurate. None of these allegations demonstrate misconduct or impropriety on the Government's part." The court added that "Marks also implies the documents might be important to his efforts to compel the filing for a [sentence reduction], but this is not a public interest sufficient to overcome the privacy concern." However, the court indicated that some of the records could be disclosed if personally-identifying information was redacted. The court pointed out that "the privacy concerns arising from release of the names can be obviated by redacting that information. Revealing the information with the names redacted will not implicate any privacy concerns." (*Russell Marks v. United States Department of Justice*, Civil Action No. 13-3380-ODS, U.S. District Court for the Western District of Missouri, Southern Division, Dec. 12, 2014)

A federal court in Ohio has ruled that the IRS conducted an **adequate search** for records concerning the estate of William Ruben Meadors, who apparently amassed a fortune from land and oil holdings and whose heirs were still fighting over his estate, and his wife Racheal Clairanda Meadors King. Jacqueline Kohake requested the estate's tax returns. The IRS used its Integrated Data Retrieval System to search for

records and found nearly 800 responsive records at a National Archives facility in Philadelphia. All the records, related to civil enforcement activities taken or contemplated by the IRS in 1991 or 1992, were disclosed to Kohake. Kokake challenged the search by arguing the agency failed to search for records from the U.S. Attorney for the Northern District of Texas and the Jefferson City Courthouse. But the court pointed out that FOIA obligated agencies only to search for records in their custody and control. The court indicated that "a reasonable search by Defendant would not include the files of the United States Attorney for the Northern District of Texas or documents located in the Jefferson City Courthouse." Kohake contended the agency failed to provide a previous FOIA request submitted by another heir. Accepting the agency's explanation, the court noted that "the Defendant. . .destroys FOIA requests based on the later of two years from receipt, six years from a final agency determination, or three years from a final court determination. As such, the [other heir's] request, which was made in 1998 as part of a final court determination in 2000, would have been destroyed. Because this destruction was well before Plaintff's FOIA request was made, there is no liability for failing to produce this information." Kohake also had submitted a number of supplemental documents and claimed they supported her assertion that the search was inadequate. The court, however, observed that "for the most part, these documents provide background information about the Estate of William Ruben Meadors and do not identify any deficiencies in the search conducted by Defendant." (*Jacqueline Kohake v. Department of the Treasury*, Civil Action No. 12-959, U.S. District Court for the Southern District of Ohio, Western Division, Dec. 1, 2014)