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*Washington Focus: The Defense Department is considering asking for language in the 2016 National Defense Authorization Act that would essentially resurrect the circumvention prong of Exemption 2. Although the language restoring the circumvention prong has not yet been included in the draft bill, the proposal would allow agencies to withhold records that were "predominantly internal" if releasing them "could reasonably be expected to risk impairment of the effective operation of an agency or circumvention of statute or regulation.". . .The Senate Judiciary Committee has sent a letter to GAO asking it to study the amount of money spent by agencies on attorney's fees awards under FOIA. Criticizing the government's policy of often forcing requesters to sue for records, the letter observed that "withholding information from the public unless sued undermines the very spirit of FOIA and wastes significant taxpayer money in the process.". . .The House Homeland Security Subcommittee on Oversight and Management Efficiency approved the "DHS FOIA Efficiency Act" (H.R. 1615) May 20. The bill, sponsored by Rep. Buddy Carter (R-GA), requires the agency to update its FOIA procedures. Rep. Sheila Jackson Lee (D-TX) tacked on an amendment requiring the agency to adopt automated processing for FOIA requests. The bill in part tries to address the current 55,000 request backlog at the agency.*

## Senate Report Not Subject to FOIA

Judge James Boasberg has ended up with a handful of cases essentially dealing with the same issue – whether or not the CIA is required to disclose the Panetta Review, an unfinished review of CIA records furnished to the Senate Select Committee on Intelligence for its report on the government's detention and interrogation program, as well as the Senate Intelligence Committee's report, the executive summary of which was declassified at the direction of the Intelligence Committee and then disseminated to the executive branch and subsequently made public. Boasberg ruled in *Leopold v. CIA*, 2015 WL 1445106 (Mar. 31, 2015), that the Panetta Review was entirely protected under Exemption 5 (deliberative process privilege). Now, in a similar suit brought by the ACLU, Boasberg has reaffirmed his earlier ruling. He

has also found that the 6,963-page "Final Full Report" of the Senate Intelligence Committee is not subject to FOIA because it is a congressional record.

To understand the status of the Senate report, Boasberg reviewed the history of the arrangements made between the Senate Intelligence Committee and the CIA to facilitate the Committee's ability to review relevant records. The agency insisted that the review be conducted at the agency and that any materials generated by the Committee staff during the review process would be kept on a secure network at the agency. However, the Senate Committee insisted that such records were the property of the Committee and were not to be considered agency records for purposes of FOIA. Three years later, the Senate Intelligence Committee approved the report as well as a stand-alone executive summary. Both documents were circulated to executive branch agencies for review and, based on those agency comments, the report and the executive summary were revised. The Committee then voted to approve both documents, but to declassify and make public only the executive summary. Although only the executive summary was disclosed to the public, the Senate Committee provided copies of the final report to the executive branch. When the Republicans won control of the Senate after the 2014 elections, Sen. Richard Burr (R-NC), the new chair of the Senate Intelligence Committee, requested that copies of the report provided to executive branch agencies be returned to the Committee.

Boasberg started by pointing out that if Congress had intended to keep control of a record shared with the executive branch then the record was not subject to FOIA. Conversely, if Congress had not shown an intention to control a record shared with an agency, then it became an agency record when in the possession of the agency. Relying on *United We Stand America v. IRS*, 359 F.3d 695 (D.C. Cir. 2004), in which the D.C. Circuit found that a document provided by the Joint Committee on Taxation to the IRS with the admonition that "this document is a Congressional record and is entrusted to the Internal Revenue Service for your use only" constituted an intent to control the dissemination of the agency's response. Boasberg observed that "here, too, Congress's previously expressed intent to retain control over the Report militates heavily in Defendants' favor."

The ACLU argued the Committee restriction applied to the status of its work product while kept at the CIA and did not necessarily address disclosure further down the line. But Boasberg disagreed, noting that "by its express terms, however, the SSCI-CIA agreement is not so limited. It applies both to 'documents generated on the network drive' *and* to 'any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or members.' That language encompasses the Final Full Report. . ." He added that "while the ACLU is undoubtedly correct that SSCI had FOIA-related concerns arising from its usage of the CIA's network drive, the Committee was presumably also concerned about maintaining control over any public disclosure of its work product – regardless of which computer systems ultimately housed them."

Boasberg also rejected the ACLU's claim that a 2014 transmittal letter from former Intelligence Committee Chair Sen. Dianne Feinstein (D-CA) embodied the Committee's final decision on dissemination, providing for disclosure to executive agencies. He noted that "the Court. . .need not confine its consideration to the moment of transmission. On the contrary, SSCI's 2009 letter sets the appropriate backdrop against which Senator Feinstein's 2014 letter can be properly understood." He then observed that "her letter does not evince congressional intent to surrender substantial control over the Full SSCI Report. While it does bestow a certain amount of discretion upon the agencies to determine how broadly to circulate the Report, such discretion is not boundless. Most significantly, the dissemination authorized by the letter is limited to the Executive Branch alone. It plainly does not purport to authorize the agencies to dispose of the Report as they wish—*e.g.*, to the public at large." He explained that Congress "frequently transmits documents to the Executive Branch with the understanding that relevant agencies should make appropriate *internal* use of the information. Such tender should not be readily interpreted to suggest more wholesale abdication of control."

Finding that his earlier decision in *Leopold v. CIA* was controlling on whether or not the Panetta Review should be disclosed, Boasberg observed that "plaintiff's rehashing of Leopold's arguments – although at times more developed – is no more persuasive. The Court sees no reason to disturb its prior conclusion: the Panetta Review is properly characterized as both predecisional and deliberative."

The ACLU argued that former Sen. Mark Udall (D-CO) had lambasted the Panetta Review in remarks on the Senate floor as a smoking gun and indicated that the Senate Report concluded that "the CIA repeatedly provided inaccurate information to Congress, the President, and the public on the efficacy of its coercive techniques." Udall asserted that "the CIA is lying" about the Report's contents to "minimize its significance." But Boasberg played down the significance of Udall's remarks as any sort of direct rebuttal to the CIA's affidavits in the case before him. Instead, he noted that "his speech was intended to respond more broadly to statements made outside the litigation context by CIA Director John Brennan and other Agency officials, and his allegations must be viewed in that light." Boasberg also viewed the meaning of Udall's remarks in a somewhat different light, pointing out that "if Senator Udall's statements are correct, they serve to *confirm* rather than undermine, the Panetta Review's privileged status. That is, insofar as he asserts that the draft reviews contain analyses and conclusions rather than primarily facts, their deliberative nature is only bolstered."

The ACLU claimed the Panetta Review must contain a large amount of factual material that had been already made public. Boasberg indicated that "divulging which facts were culled for inclusion, or even the topics the agency officials selected for the Review, would risk 'exposure of their internal thought processes.' This logic retains its force even if the underlying facts have been otherwise shared with the public, for it is their inclusion in the Review that warrants protection as deliberative." (*American Civil Liberties Union v. Central Intelligence Agency*, Civil Action No. 13-1870 (JEB), U.S. District Court for the District of Columbia, May 20)

# Views from the States…

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

## Massachusetts

The supreme judicial court has ruled that the attorney work-product privilege is implicitly protected under the policy deliberation exemption where litigation against a public body actually exists and where the records do not fall within the "fact" work product exception for a reasonably completed study or report. To ensure that the results of requesting records under the public records act or under discovery would produce consistent results, the court further ruled that parties in discovery were entitled to have their right to work product determined based on the privilege recognized in the public records act. The case involved environmental litigation by residents of New Bedford affected by an industrial waste site operated by the City. The city solicitor then hired TRC Environmental Corporation to evaluate the claims and identify third parties that might be liable to pay part of the cleanup costs. The consultant prepared a report, which was requested by third parties. The trial court ruled that based on prior precedent such records were not protected by the public records act and would have to be disclosed in discovery. The case was then appealed to the supreme judicial court. Recognizing that its 1999 decision in *General Electric Co. v. Dept of Environmental Protection*, 711

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N.E.2d 589 (1999) was outdated, the supreme judicial court ruled that the policy deliberation exemption encompassed the attorney work-product privilege. The court pointed out that "a decision made in anticipation of litigation is no less a 'policy' decision and is no less in need of the protection from disclosure provided by the [policy deliberation exemption] simply because it is made in the context of litigation." Recognizing the existence of the fact work product exception, the court then explained that "the administration of justice is better served by requiring a public agency to disclose in discovery any requested fact product that would be disclosed pursuant to a public records act request—even if it would otherwise be protected under [discovery] were it not a public record—rather than requiring the litigant to make a public records act request for these same documents." The City also argued the reports were covered by attorney-client privilege. The court, however, rejected the claim, noting that "the purpose of the derivative attorney-client privilege is to maintain the privilege for communications between the attorney and the client in circumstances where a third party's presence would otherwise constitute a waiver of the privilege, and that purpose is not fulfilled by shielding [the consultant's] analysis of technical data from disclosure." (*John DaRosa v. City of New Bedford*, No. SJC-11759, Massachusetts Supreme Judicial Court, May 15)

## New Jersey

A court of appeals has ruled that recent exemptions added to the Open Public Records Act on the recommendation of the Department of Law and Public Safety are not overly broad but that because of a change in the exemption protecting standard operating procedures a trial court erred in dismissing a challenge by the New Jersey Second Amendment Society for a guide on how to provide consistency in enforcing gun safety regulations. The department denied the request for the gun safety regulations, arguing that it was fell under the exemption for standard operating procedures. The trial court agreed, but when the case got to the appellate court the standard operating procedures exemption had been revised. The appeals court noted that under the circumstances it was necessary to remand the case to the trial court for a determination of whether the standard operating procedures exemption still applied to the gun safety guide. The appeals court also ruled on a challenge from the ACLU that an exemption protecting duty assignment information impinged on the public's right to get information about law enforcement officers' names, positions, and salaries. The court disagreed, noting that the challenged section "would not exempt overtime information unless it might reveal a particular officer's duty assignment." (*New Jersey Second Amendment Society, et al. v. Division of State Police*, No. A-2396-11T3, New Jersey Superior Court, Appellate Division, May 14)

## Ohio

The supreme court has ruled that the police department at Otterbein University, a private school, is an agency under the Public Records Act because it performs a government function. In rejecting a request from the student newspaper, the Otterbein campus police argued they were not subject to the Public Records Act. The supreme court disagreed, noting that "the mere fact that Otterbein is a private institution does not preclude its police department from being a public office for purposes of the Public Records Act. Otterbein's police department is 'performing a function that is historically a government function.'" The court observed that "the department is created under a statute for the express purpose of engaging in one of the most fundamental functions of government: the enforcement of criminal laws, which includes power over citizens as necessary for that enforcement." (*State ex rel. Anna Schiffbauer v. Larry Banaszak*, No. 2014-0244, Ohio Supreme Court, May 21)

## Oregon

In the first appellate review of the public interest exception allowing for disclosure of records pertaining to police disciplinary proceedings where the incident has been identified as a community impact

case and the police disciplinary proceedings have been reviewed by a Civilian Review Board, the court of appeals has ruled that the trial court did not err when it found that the public interest in non-disclosure outweighed the public interest in disclosure for an incident in which Eugene police used tasers when arresting several students at a protest. The police were accused of using excessive force during the arrests and the CRB referred to the incident as a community impact case. The CRB reviewed and agreed with the police disciplinary actions, which concluded the officers involved should not be disciplined. The ACLU of Oregon requested the records reviewed by the CRB, claiming a public interest in knowing whether the process worked appropriately. The trial court found, however, that because the parties agreed that the police disciplinary records were exempt unless their disclosure was in public interest, the ACLU of Oregon had not shown that disclosure was in the public interest. The court of appeals agreed, noting that the "evidence is sufficient to support the trial court's findings that there were competing public interests in this case—the interest in ensuring appropriate use of force by police and the interest in having a police department that can effectively review its own [conduct] and provide officer discipline, evaluation, and training. [The] evidence also supports the court's finding that the CRB was created to safeguard and balance those interests." The court found ACLU of Oregon had failed to make its case. The court observed that "the public-interest exception. . .allows for release of those records only when the public interest *requires* disclosure. Here, the court could reasonably determine that the ACLU failed to demonstrate that the public's interest in transparency required release of the records." (*American Civil Liberties Union of Oregon, Inc. v. City of Eugene*, No. 161024398 and No. A150403, Oregon Court of Appeals, May 20)

## Washington

A court of appeals has ruled that a provision in the Uniform Health Care Information Act prohibiting the Department of Health from disclosing medical records that could lead to the identification of individuals qualifies as a prohibitory statute under the Public Records Act and prevents DOH from disclosing to pro-life activist Jonathan Bloedow data on abortions performed at various identified abortion clinics in Washington. Bloedow submitted seven PRA requests for data on induced abortions performed at the named clinics. The agency gathered the information in spreadsheets, which, while not identifying patients, did identify the clinics. DOH told Bloedow that it had informed the various clinics about his requests and given them an opportunity to seek an injunction. The clinics filed for an injunction, which was granted by the trial court. Bloedow then appealed. The court found, and Bloedow admitted, that disclosure of the data in response to his targeted requests would implicitly identify the clinics. The court concluded that was sufficient to bring the data within the scope of the exemption. The court pointed out that "because production of the records in response to the targeted requests would identify the health care providers, the records are exempt from disclosure. . ." The court indicated that disclosure would also cause identifiable harm, noting that "disclosure of the records would jeopardize the ability of DOH to obtain the information from health care providers about abortions performed and, consequently, the requirement to 'promote and assess the quality, cost, and accessibility of health care.'" (*Planned Parenthood of the Greater Northwest, et al. v. Jonathan Bloedow*, No. 71039-7-I, Washington Court of Appeals, Division I, May 18)

A court of appeals has ruled that data routinely created by Jefferson County's software showing when county employees access the internet, is a public record even though the county had never used the record for any governmental purpose. Mike Belenski made four separate requests to the county, two of which were for IAL data. The county claimed the data was not a public record and, further, that Belenski's claim about his first request was now time-barred. The trial court ruled in favor of the county and Belenski appealed. The court of appeals noted that "county employees use the Internet to obtain information to perform their work. Therefore, there is no question that the IALs record work-related Internet use on a county-owned computer." The county argued Belenski had to show that the data was used by the county. But the court pointed out that

"there is no requirement under the Public Records Act that the IALs be 'used' by the government when the IALs are created by government employees using government computers and software in the course of their assigned work." The appeals court agreed that Belenski's request for records the county decided not to back up was too vague. The court observed that "by virtue of his request, Belenski was essentially seeking information associated with the County's approach or policy regarding storage and maintenance of electronic records. Belenski sought to determine whether there are records (and, if so, which records) that the County does not trouble itself to secure. . .Belenski's request was not for 'identifiable' public records within the meaning of the PRA." (*Mike Belenski v. Jefferson County*, No. 45756-3-II, Washington Court of Appeals, May 19)

### Wyoming

The supreme court has ruled that the minutes of closed sessions conducted by the Sheridan County School Board to discuss the improvement of recreational facilities at Sheridan High School are not exempt because they do not include any confidential information. When a reporter from Sheridan Newspapers discovered that the board was discussing the recreational facilities issue in closed session, he requested copies of minutes for those sessions. The board withheld the minutes, claiming they were properly exempt because the board was getting legal advice. The supreme court first rejected the claim that the pending litigation exception applied because there was no evidence of pending litigation. Turning to the attorney-client privilege exception, the court noted that "under the circumstances here, however, we conclude the minute of those sessions are not confidential because they reveal nothing substantive about the content of the legal advice the district attorney gave to the Board and their disclosure would not, therefore, invade the attorney-client privilege. To the contrary, the minutes contain only general information similar to that required under our rules of discovery when a party withholds information otherwise discoverable by claiming it is privileged." (*Sheridan Newspapers, Inc. v. Board of Trustees of Sheridan County School District #2*, No. S-14-0259, Wyoming Supreme Court , May 14)

## The Federal Courts…

In a challenge by journalist Jason Leopold to redactions of various costs from the publicly disclosed executive summary of the Senate Intelligence Committee report on the CIA's use of detention and interrogation techniques, Judge James Boasberg has ruled that the redactions were appropriate under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. After the executive summary of the Senate Intelligence Committee report was made public with redactions, Leopold sued the CIA challenging redactions concerning the cost of CIA detention facilities abroad, amounts paid to unknown countries, the size of monetary cuts to CIA intelligence programs, sums given to previously detained individuals, and compensation for medical services. Leopold argued the agency should have been required to provide a separate explanation for each redaction. Boasberg disagreed, noting that the CIA's affidavits "read in conjunction with the released portions of the Executive Summary, provide sufficient detail for Leopold and the Court to evaluate whether they fall within the scope of Exemptions 1 and 3. The content of the information withheld is clear, as evidenced by Leopold's own rather specific articulation of the expenditures he wishes to unveil." The CIA had cited Section 102A(i)(1) of the National Security Act of 1947, which protects intelligence sources and methods, as the basis for its redactions under Exemption 3. The agency argued that disclosure would reveal the funding priorities of the CIA and that "disclosing the amounts of these various expenditures could provide insight to adversaries as to the resources available to, and by extension the capabilities of, the Agency" and that "in some cases, the amount of money spent for a given activity could allow for the identification of the foreign country that provided assistance to the CIA." Indicating that he

found "this explanation to be reasonable," Boasberg observed that "a trained intelligence analyst might, for instance, be able to deduce the relative importance that the CIA places on each detainee or the interrogation methods that were applied from the amounts spent on his medical treatment or given to him as compensation." Leopold argued that the link between the expenditures and the agency's intelligence priorities was too tenuous. But Boasberg pointed out that "in essence, Leopold asks the Court to credit his judgment about the effects of disclosure over those of the agency. This is something it clearly cannot do." He added that "the Court, additionally, sees no principled reason to find that only actual expenditures, as opposed to proposed expenditures, could reveal information about the agency's sources and methods. It would seem entirely plausible, for instance, that the *proposed* expenditures related to a CIA facility could just as easily reveal sensitive information about its location, purpose, and methods." Leopold claimed that disclosure of some expenditures cast doubt on the need to withhold other cost data. Boasberg noted that "far from casting doubt on the Agency's judgments about which sums could lead to the unauthorized disclosure of its sources and methods, the release of other expenditures suggests that the CIA has only withheld those that would unjustifiably compromise our national security." Leopold also contended the agency had not shown how the expenditures related to foreign relations as required under the Executive Order on Classification. Boasberg observed that "it seems rather clear that the expenditures at issue in this case—which related to the United States' interrogation and detention activities in foreign countries to extract information from foreign nationals—pertain to its foreign activities and relations. Despite having access to the unredacted portions of the Executive Summary, moreover, which indicate the nature of the redacted expenditures, Plaintiff has not pointed to any particular expenditures that he believes do not properly fall within this category." (*Jason Leopold v. Central Intelligence Agency*, Civil Action No. 13-1324 (JEB), U.S. District Court for the District of Columbia, May 14)

Judge Tanya Chutkan has ruled that the State Department has failed to show that it conducted an **adequate search** for records pertaining to retired Foreign Service Officer Joan Wadelton's complaints about her non-promotion. Wadelton requested the Bureau of Human Resources, which was the target of her non-promotion challenge, and the Office of the Undersecretary for Management for any email regarding her. Melinda Chandler, the Director of Grievance, conducted an electronic search, including her email account, and Undersecretary for Management Patrick Kennedy searched his emails. Management also searched the Retired Records Inventory Management System. Wadelton argued the agency's search was too limited. Chutkan agreed, noting that "defendant's justification for limiting its search in this case raises more questions than it answers and does not confirm that Chandler's files were the only files 'likely to contain responsive documents'" because it was not clear why Chandler was the only person in her Bureau likely to have responsive records or whether other staff might have responsive records. The agency had explained that Kennedy's office did not maintain any paper records. Although it later clarified this to mean only Kennedy's personal office, Chutkan pointed out that "without additional clarity, State's representations seem to suggest that no one in Management ever prints and preserves any documents." Wadelton argued that neither Chandler nor Kennedy should have been allowed to search their emails personally because it was a conflict of interest. But Chutkan observed that "plaintiff's assumption that Chandler and Kennedy must have acted in bad faith because they were at one point named as defendants in Wadelton's lawsuit against the Government does not rise to the level of proof necessary to overcome this presumption." The agency had claimed that some records were protected by **Exemption 5 (privileges)**, citing the attorney work-product privilege and the deliberative process privilege. Chutkan examined whether Wadelton's complaints to the Inspector General and the Office of Special Counsel qualified as anticipated litigation. She indicated that Wadelton's complaints to OIG and OSC reported suspected violations of the law. She noted that "it is clear then, that both OSC and OIG were investigating 'particular transactions' such that documents related to the investigation ought to fall within the scope of the work-product protection." She found other documents qualified for the deliberative process

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privilege unless they pertained to final decisions. She faulted the agency's failure to sufficiently explain its **segregability** analysis, observing that "if the final decision is reflected somewhere in those notes, that decision is likely not shielded from disclosure and, to the extent reasonable and practicable, should have been produced with redactions over the legitimately privileged material. Either the final decision is not reflected in the documents, in which case full withholding is appropriate, or the final decision is reflected in the documents, in which case State must provide additional information justifying the decision not to redact the predecisional material and produce the final decision." (*Joan Wadelton v. Department of State*, Civil Action No. 13-412 (TSC), U.S. District Court for the District of Columbia, May 26)

Judge Amy Jackson Berman has ruled that the FDIC properly invoked **Exemption 6 (invasion of privacy)** to protect personal information about candidates interviewed by for the Corporate Employee Program. Brian Neary, a disappointed applicant, asked the agency for records identifying the names, addresses, and dates interviewed of all applicants for the CEP recruitment events so that he could identify people for a class-action EEOC complaint alleging age discrimination. The agency told Neary the records were categorically exempt. Neary appealed, arguing that the agency was infringing on his freedom of speech and willfully preventing him from identifying members for a class-action complaint. The agency rejected Neary's arguments and he filed suit. Berman rejected Neary's claims as well. Agreeing that the personnel information was projected by Exemption 6, she noted that "indeed 'courts generally recognize the sensitivity of information contained in personnel-related files and have accorded protection to the personal details of a federal employee's service.' There is no reason why the same reasoning would not apply to information about job applicants maintained in an agency's personnel files." Neary's intention to use the information in an EEOC complaint was inadequate to establish a public interest favoring disclosure. Berman indicated that "plaintiff maintains that disclosure of the requested information would permit him to establish the 'numerosity' requirement of his purported class action complaint before the EEOC. But plaintiff's interest in gathering information for use in civil litigation he seeks to initiate is not sufficient to give rise to a public need for the information, as 'FOIA was not intended to be a discovery tool for civil plaintiffs.'" Neary suggested the agency could send the data directly to EEOC. But Berman pointed out that "the Court cannot act as a conduit or a depository of records as plaintiff proposes because its jurisdiction under FOIA is limited to" ordering disclosure of records that are improperly withheld. She also rejected his claim that because the names of interviewees were available on a list posted at the FDIC during the recruitment event they had been publicly disclosed. Berman observed that "third-party information contained in lists—such as those offered here—created for use at a job recruitment event while 'technically public may be practically obscure. . .[and] an individual's privacy interest in limiting disclosure or dissemination of information does not disappear just because it was once publicly released.'" (*Brian Neary v. Federal Deposit Insurance Corporation*, Civil Action No. 14-1167 (ABJ), U.S. District Court for the District of Columbia, May 19)

Rejecting the State Department's plan to process 55,000 pages of former Secretary of State Hillary Clinton's emails and post them on the agency's website by January 2016, Judge Rudolph Contreras has ordered the agency instead to release the Clinton emails on a rolling basis starting June 30, 2015 by posting seven percent of the emails. Under the order, the agency is expected to complete 51 percent of the emails by October 30 and finish them entirely by January 29, 2016. (*Jason Leopold v. U.S. Department of State*, Civil Action No. 15-0123 (RC), U.S. District Court for the District of Columbia, May 27)

In yet another ruling in federal prisoner Jeremy Pinson's FOIA suit against the Justice Department, Judge Rudolph Contreras has appointed counsel to Pinson, but has denied his various sanction motions against DOJ. Because of restrictions on the ability of prisoners to retain documents, Pinson argued that counsel

should be appointed to represent him and that, further, DOJ should be sanctioned because the Bureau of Prisons restricted his ability to receive documents. DOJ agreed that a counsel should be appointed to represent Pinson and suggested such a counsel "for the limited purpose of reviewing the FOIA responses and challenging any alleged deficiencies would be appropriate and in the interests of justice." DOJ noted that "counsel could also benefit Mr. Pinson by serving as custodian of any documents that the BOP will not allow him to possess while in prison." Contreras agreed, observing that "because Mr. Pinson is currently unable to view documents relevant to this litigation, and in light of the fact that a number of his FOIA claims have proven meritorious and survived Defendants' motions for partial summary judgment, appointment of counsel is appropriate and will serve the interests of justice." Contreras found that DOJ had done its best to work with Pinson in receiving motions and noted that "but this FOIA litigation is not the proper vehicle for Mr. Pinson to challenge BOP security policies." (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, May 15)

Judge Reggie Walton has ruled that the FBI has shown that it properly withheld records under **Exemption 7(D) (confidential sources)** and **Exemption 7(E) (investigative methods and techniques)**, but because Walton had previously rejected EOUSA claims of Exemption 7(D) and **Exemption 7(F) (harm to safety of an individual)**, that agency has not adequately explained why confidential source information can now be protected under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. John Petrucelli made a number of requests to EOUSA and the FBI for records about his criminal investigation and conviction. In a prior ruling in the case, Walton accepted withholding claims made by both agencies but found they had not adequately justified other claims. This time he accepted the FBI's claims. Petrucelli argued that the confidential informants had testified at his trial and were no longer confidential. Walton noted that "the plaintiff seeks records pertaining to himself, his arrest, a criminal investigation of his activities, and his criminal trial. However, none of the plaintiff's FOIA requests seeks records pertaining to third party [witnesses]. The FBI is not obligated to search for or release records other than those specifically requested by the plaintiff. Nor is the FBI obligated to locate and retrieve information pertaining to any third party merely because the third party testified at trial or because the plaintiff has learned the third party's identity." Walton found that the redaction of the ratings column in FBI FD-515 status reports was appropriate under Exemption 7(E). Turning to EOUSA's claims, he pointed out that "it is unclear whether the EOUSA relies solely on FOIA Exemption 7(C) or whether it continues to maintain that FOIA Exemption 7(D) and 7(F) apply with respect to the same information. And if, for example, the EOUSA continues to withhold information regarding the identities of confidential sources and the information these sources provided, it has failed to demonstrate that or explain why FOIA Exemption 7(C). . .protects not only confidential sources themselves but also 'information furnished by. . .confidential sources.'" (*John A. Petrucelli v. Department of Justice*, Civil Action No. 11-1780 (RBW), U.S. District Court for the District of Columbia, May 26)

The D.C. Circuit has ruled that a constitutional privacy claim can survive a finding that a plaintiff does not have a remedy under the **Privacy Act**. In a case brought *pro se* by Osama Abdelfattah, a Jordanian national with permanent residence status in the U.S., Abdelfattah asserted a number of privacy claims based on allegedly inaccurate information about him contained in the Treasury Enforcement Communications System, the former acronym for the database used by Customs and Border Protection. Because he had once lived in the same house as an individual who was tied to the 911 investigation, his name popped up as being a potential terrorist, leading to his being interviewed several times by the FBI, who, according to Abdelfattah, tried to force him to become an FBI informant. The district court had found that TECS was exempt from the Privacy Act's amendment remedies and Abdelfattah did not dispute that finding on appeal. He did, however, challenge the district court's finding that suit under the Privacy Act foreclosed any similar constitutional

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privacy claims. But the D.C. Circuit pointed out that "our precedent does not foreclose, however, the equitable relief of expungement of government records for violations of the Constitution. We have repeatedly recognized a plaintiff may request expungement of agency records for both violations of the Privacy Act and the Constitution." The court observed that "Abdelfattah seeks equitable relief for the Department's alleged violations of the Constitution, and Congress's provision of specific Privacy Act remedies does not bar his claims." The court went on to find, however, that Abdelfattah had not shown that he had a protected constitutional right to expungement. (*Osama Abdelfattach v. United States Department of Homeland Security*, No. 12-5322, U.S. Court of Appeals for the District of Columbia Circuit, May 15)