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Washington Focus: Senate Majority Leader Sen. Mitch McConnell (R-KY) has moved to attach the "Cybersecurity Information Sharing Act of 2015" (S. 754), which was passed 14-1 in a closed-door vote by the Senate Intelligence Committee, to the annual defense authorization bill. By doing so, McConnell would prevent Senators critical of the bill from proposing changes on the Senate floor. The bill currently includes a provision allowing agencies to exempt information on data breaches shared by companies, much like in the Critical Information Sharing Act. A spokesman for Intelligence Committee Chair Sen. Richard Burr (R-NC) indicated that the FOIA protections were designed to make individuals and businesses "feel safe in sharing information with the government as well as with each other." Sen. Patrick Leahy (D-VT) criticized McConnell's move, noting that "Senator Burr's information sharing bill. . .erodes Americans' rights to know what their government is doing by weakening the Freedom of Information Act."

House Hearings Blast FOIA Implementation

The House Committee on Oversight and Government Reform held two days of hearings June 2-3 on the current state of FOIA implementation. The first day featured a number of journalists and representatives of public interest groups that sharply criticized the Obama administration's implementation of FOIA. VICE News reporter Jason Leopold, who has emerged as one of the most aggressive media users of FOIA, told committee members that while the Obama administration had gotten worse over time, its initial promises of transparency made its shortcomings that much worse.

The hearings were held by the committee both to pummel the Obama administration and to provide support and publicity for the current FOIA amendments being considered in the House. Many proponents of the amendments view last year's near failure to pass much the same mix of legislative proposals as evidence that Congress, given a bit more of a push, will pass them this term. The political problems created by the revelations of the existence of former Secretary of State Hillary Clinton's emails on a privately-held server that were

subsequently turned over to the State Department after Clinton's staff deleted more than 30,000 of them has added endless fuel to the partisan fire and allowed Republicans to tie the government-wide problems with FOIA implementation to the management style of Clinton. Indeed, Rep. Trey Gowdy (R-SC), a member of the Oversight and Government Reform Committee as well as chair of the House Select Committee on Benghazi, has threatened to cut the State Department's FOIA budget by 15 percent until State turns over any Clinton emails related to Benghazi.

The first day focused on a litany of horror stories from media and public interest groups illustrating how difficult and time-consuming the process continues to be for many requesters. On the second day, a group of agency Chief FOIA Officers as well as Melanie Pustay, director of the Office of Information Policy at the Justice Department, told incredulous committee members how well FOIA worked for most requesters. Generally it is true that agencies respond to most requests within a reasonable amount of time, although many of those responses invariably include some redactions, particularly for personal information. But for those whose requests are complex or touch on controversial subjects processing routinely takes months and frequently years and may still yield next to nothing in terms of the information released. That is why frequent requesters like Leopold have decided that their chances of getting the records are increased if they file suit.

In a piling on that was skewed towards complaints from conservative media and public interest groups, the committee was repeatedly told how frustrating and time-consuming the requesting process has become. Aside from Leopold, the committee heard testimony from reporter Sharyl Attkisson; Leah McGrath Goodman, finance editor of *Newsweek*; and David McCraw, assistant general counsel at the *New York Times*. McGraw identified three reasons he believed slowed the process, including the lack of training, the large number of referrals to other agencies that are not accountable for responding in a reasonable time, and predisclosure notification to business submitters, which McCraw characterized as "a source of endless delay."

Lisette Garcia, who testified on behalf of the FOIA Resource Center but who previously worked for Judicial Watch, focused on an issue that annoys requesters, but has not been frequently discussed. She complained that most agencies require requesters to commit to pay fees before the agency will begin to process their request. But many public interest requesters like Garcia believe they are entitled to a fee waiver or inclusion in a preferential fee category and are reluctant to commit to pay fees upfront when they do not know how the fee issue will play out. However, as Garcia emphasized, agencies routinely tell requesters that if they have not committed to paying fees within 10 days the agencies will administratively close the request for failure to comply with their regulations. Garcia argued that this practice has the practical effect of denying the request before it begins.

A number of those testifying also identified the overuse of Exemption 5 (privileges) as a major problem. The bills currently before the House and Senate would address this overuse of Exemption 5 in historical records by restricting its use for records after 25 years. The recent decision by the D.C. Circuit upholding the CIA's decision to withhold a 27-year-old analysis of the Bay of Pigs operation has become a graphic illustration of how even with records that seem imbued with significant public interest agencies face no consequences when they decide to withhold such documents under the deliberative process privilege. Nate Jones, of the National Security Archive, was one of those testifying in favor of the restriction on the use of privileges after 25 years.

On the second day, the committee heard from government witnesses, including Pustay as well as Joyce Barr, Chief FOIA Officer at the State Department; Karen Neuman, Chief FOIA Officer at the Department of Homeland Security; Brodi Fontenot, Chief FOIA Officer at the Department of the Treasury; and Mary Howard, director of the disclosure office at the IRS. Predictably, Barr was grilled by committee

members concerning the agency's handling of Hillary Clinton's emails. When Gowdy asked her if she was satisfied that Clinton had turned over all public records, Barr responded that "she has assured us that she gave us everything. . .Like we do with other federal employees, we have to depend on them to provide the information to us. We've accepted her assurance that she's given us everything that she had."

Committee members were incredulous when Pustay told them that "the system works well for many requesters." Chavetz complained to Pustay about the fact that Justice had awarded itself a perfect score for its proactive release of records. He told Pustay that "you live in la-la land. You live in fantasyland, because it ain't working." However, the government witnesses put the lay to Chavetz's claim made at the previous day's hearing that a 2009 memo from the White House counsel instructing agencies to notify the White House when processing records that had EOP equities was the root cause of the massive delay in processing requests. Neuman indicated that "it's my understanding this happens very infrequently" and Howard said she had never seen the memo nor had she ever consulted the White House on any FOIA matter. Pustay said the memo was a reminder and that it "reflects the same practice that we've had administration to administration."

While the hearings produced more heat than light, they provided a useful opportunity for both the requester community and committee members to highlight their frustration at the problems in FOIA implementation. The House and Senate bills still remain on slightly different tracks and there is no apparent likelihood that FOIA amendments will be passed this session, although within the FOIA community there clearly remains support for amending the law, particularly to provide more reliable funding for OGIS.

Views from the States…

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

California

A court of appeals has ruled that non-personally-identifying talent management summaries created as the result of the participation of senior management of the North County Transit District in a leadership assessment program conducted by the Rady School of Management at the University of California at San Diego are not protected by either the personnel files or catch-all exemptions to the Public Record Act and must be disclosed to a reporter from Inewsource. After the reporter learned that senior management at the Transit District had attended the program, he made a request for any records concerning the results of the leadership assessment program. The program evaluated each participant individually, but also provided a non-identifying breakdown of the managers' performance evaluation. The Transit District claimed the records were exempt and the trial court agreed. However, the appeals court found that while any identifiable information fell within the personnel files exemption, non-identifiable records did not fall under the exemption. The court noted that "while the talent management summary provides information about the participants as a whole, the information cannot be linked to any individual participant." The court also found a public interest in disclosure of the non-identifiable evaluation material. The court explained that "the public. . .has an interest in knowing what was purchased with [the District's] funds, whether the program was worth what the District spent, and whether the Program provided utility to the District." The court added that "while the Program focused on the competence of individual managers, the District's ability to perform its duties depends on the abilities of the individuals within the District's organization to act competently." The court indicated that additional information in the participant reports was only indirectly relevant to the competency of the

management team. However, responding to inewsource's suggestion that names could be redacted to make such data non-identifiable, the court agreed and observed that once personal information was redacted the exemption no longer applied and even the marginal public interest in disclosure outweighed the non-existent privacy interest. The court also rejected the Transit District's argument that under the catch-all exemption the public interest in non-disclosure outweighed the public interest in disclosure. Commenting on the potential abuse of the public interest to support non-disclosure, the court pointed out that "courts must be alert to contentions by government entities that exaggerate the interest in nondisclosure, lest they be used as a pretext for keeping information secret for improper reasons, such as to avoid embarrassment over mistakes, incompetence, or wrongdoing." (*Inewsource v. Superior Court of San Diego County; North County Transit District, Real Party in Interest*, No. D067118, California Court of Appeal, Fourth District, Division 1, May 26)

Colorado

The supreme court has ruled that the provision in the Colorado Open Records Act that allows a records custodian to ask a court to determine whether a record is required to be disclosed is subject to the provision for mandatory attorney's fees for a prevailing party, but because Marilyn Marks did not prevail under the circumstances, she is not entitled to attorney's fees in her suit against Chaffee County Clerk Joyce Reno. Marks requested a copy of a non-personally identifiable voted ballot. Reno, believing ballots were exempt, denied the request, but filed suit with the trial court for a determination. The trial court agreed that the ballot was protected, but the parties then agreed to wait until legislation making non-identifiable ballots public was resolved. The legislature voted to make such ballots public and Reno then provided a sample ballot to Marks. Marks then filed for attorney's fees. The trial court ruled that because the suit had been initiated by Reno Marks was not eligible for fees because she was not the prevailing party. The appeals court reversed, finding that the mandatory attorney's fees provision in CORA would be useless if public bodies could avoid fees altogether by filing suit first. The supreme court agreed, but went on to find Marks was not the prevailing party because she had not obtained a favorable ruling in court. Explaining how the provisions could be reconciled, the supreme court observed that a safe harbor provision required that requesters notify a public body three days before filing suit to give them a final opportunity to disclose records short of going to court. The supreme court noted that the public body-initiated suit likewise gave them an opportunity to have the court make a good faith determination. But if the public body lost, then it was subject to the same mandatory attorney's fees regardless of who originally filed suit. The supreme court found that under the unique circumstances here the trial court had not erred by ruling that the county clerk did not have to disclose the ballot. As a result, Marks had been properly denied access and was not the prevailing party for purposes of an attorney's fees award. (*Joyce Reno v. Marilyn Marks*, No. 14SC235, Colorado Supreme Court, May 26)

Connecticut

The court of appeals has affirmed the FOI Commission's interpretation of a statutory provision that makes gun permit applications confidential until a permit is actually granted. Reporter Edward Peruta requested pending gun permit applications from the Department of Emergency Services and Public Protection. The agency denied access and Peruta appealed to the FOI Commission, arguing that the language of the statute only applied when a permit was actually granted and not while it was pending. The FOI Commission ruled that such an interpretation would lead to an absurd result by allowing disclosure of records that were clearly meant to be exempt just because the permit had not yet been fully processed. Peruta then filed suit. The trial court agreed with the FOI Commission. Peruta then appealed. However, he had no more luck with the appellate court. At the appeals court, Peruta argued that the statute allowed law enforcement officials to disclose names during the application process and, as a result, the names were already publicly available. But the appeals court agreed with the trial court that such seemingly contrary provisions could be reconciled. The

court noted that the section "expressly authorized local issuing authorities to conduct investigations into the suitability of applicants to carry pistols or revolvers. When [that section] is read together with the provisions setting forth the exemptions from disclosure. . ., it is evident that investigators are authorized to disclose the names and addresses of applicants [only] during their investigation." (*Edward A. Peruta v. Freedom of Information Commission*, No. 36436, Connecticut Appellate Court, June 9)

Hawaii

The Office of Information Practices has found that a student at the University of Hawaii at Manoa is entitled to neither a copy of his certified transcript nor the original copy of his diploma because neither record is subject to the Uniform Information Practices Act. OIP observed that "a certified official transcript is a new document because its creation involves formatting and certification in order to be 'official' and is not merely a reproduction of a readily retrievable compilation of an existing education record already maintained by UH. The UIPA does not compel either the creation or distribution of *new* original documents, but rather it mandates that agencies allow inspection or provide copies of *existing* government records, unless an exception or exemption to required disclosure applies." As to the official diploma, OIP noted that "the UIPA does not require UH to give Requestor his official diploma because Requester is requesting to obtain the original government record, not a copy. The UIPA only requires that an agency allow inspections or provide a *copy* of a government record, upon request, unless an exception or exemption to required disclosure applies." (OIP Opinion Letter No. F15-03, Office of Information Practices, Office of the Lieutenant Governor, Hawaii, June 2)

Maryland

The Court of Special Appeals has ruled that Anne Arundel County properly responded to requests from the ACLU of Maryland for records compiled by former county executive director John Leopold pertaining to potential political opponents. After Leopold was elected, he instructed his executive protection officers to compile dossiers on potential political opponents. Major Edward Bergin of the State Police became suspicious that the executive protection officers were misusing county files and interviewed two of them. His suspicions then developed into an investigation that resulted in Leopold being convicted. The ACLU and other organizations made a total of five requests for the Bergin tapes of his interviews along with all other records pertaining to the compilation of dossiers. Anne Arundel responded to all five requests and provided records, but withheld the Bergin tapes because it claimed they were part of an ongoing investigation. The ACLU then filed suit for the records as well as a claim that the compilation of the dossiers invaded their privacy under provisions of the Public Information Act similar to those of the federal Privacy Act forbidding the maintenance of records pertaining to protected activities. The trial court ruled in favor of Anne Arundel County on all counts and the ACLU appealed. The Court of Special Appeals upheld the two counts pertaining to disclosure of records, but found the trial court had erred in finding the ACLU did not have a cause of action challenging the legality of the compilation of dossiers. Turning first to the privacy claim, the County argued that it had not created records but merely compiled existing records into other files. The court, however, disagreed, noting that "the act of compiling the dossiers is a 'use' of the documents they contained under any sensible definition of the word, even if the documents were already in hand for some other purpose." The court also found that Leopold was not immune from liability because his actions were intentional. The trial court had concluded that because the ACLU had not shown actual damages it could not prove that it was harmed. But the Court of Special Appeals pointed out that at the pleading stage the ACLU only had to allege that it suffered damages and that further proceedings would be needed to determine if any damages could be proven. The court then found the County had responded to all the requests and appropriately withheld portions of various records. As to the Bergin tapes, the court explained that because the tapes were eventually

disclosed there was no longer a claim to challenge the County's initial withholding of the tapes. (*American Civil Liberties Union Foundation of Maryland, et al. v. John R. Leopold*, No. 85 Sept. Term 2014, Maryland Court of Special Appeals, May 28)

Nevada

The supreme court has ruled that a directory of email addresses for the Clark County School District is a public record and that the trial court improperly considered the potential distraction disclosure might have on student learning. The Nevada Policy Research Institute requested the directory from the school district, which was denied on the basis that it was not a public record and that it was confidential. The trial court ruled in favor of the school district after considering the downstream impact disclosure might have on the schools. The supreme court found that the directory was a public record because it "was created and kept in the performance of [the school district's] duty to educate children." The school district claimed the record was confidential based on an exemption covering email addresses furnished in confidence to a public body. But the supreme court noted that "the directory of CCSD teachers' email addresses is composed of email addresses both created and maintained by CCSD, not provided *to* CCSD." The court concluded that the trial court's consideration of non-relevant interests in ruling in favor of the school district was premature and that the public records act required an ability to challenge claims made by public bodies and that 'applying that principle favoring adversarial testing, we conclude that NPRI was inadequately heard on this issue." (*Nevada Policy Research Institute v. Clark County School District*, No. 64040, Nevada Supreme Court, May 29)

Ohio

A court of appeals has ruled that Board of Trustees of Wayne Township did not violate the public records act when it declined to produce handwritten notes taken by Marie Graham, the township's fiscal officer, during township trustee meetings and when it took the township 22 days to furnish records requested y Richard Santefort because they were mismailed. Finding that the handwritten notes were not public records, the court observed that "Graham's handwritten notes were not used by the township as records. No one at the township had access to Graham's handwritten notes and the township did not keep a copy. Furthermore, because Graham relies on her recollection of the township trustee meetings in addition to her handwritten notes, such notes do not contain sufficient facts and information to reflect an accurate record. While not identical to the official record, to the extent Graham relied on her handwritten notes, [Santefort] was provided with the information as it was incorporated into the official minutes of the township's meetings." As to the mailing, the court indicated that "even though relator did not actually receive the requested documents until 22 days after his written request, the township timely responded by mailing documents to an address associated with relator within two days. Furthermore, the trial court found that relator was contacted by the township once the mailing was returned." (*State of Ohio ex rel. Richard A. Santefort v. Board of Township Trustees of Wayne Township*, No. CA2014-07-153, Ohio Court of Appeals, Twelfth District, Butler County, May 26)

Texas

A court of appeals has ruled that the common law right of privacy protects the birthdates of individuals in records maintained by the City of Dallas. In response to several unrelated requests which included birth date data, the City asked the Attorney General for an opinion as to whether the common law right of privacy qualified as a prohibition against disclosure. The AG ruled the City had failed to show the common law right qualified under the Public Information Act and ordered the City to disclose the birth date information. The City then filed suit challenging the AG's opinion. The trial court ruled in favor of the City. The appeals court agreed, noting that in *Texas Comptroller of Public Accounts v. Attorney General*, 354 S.W. 3d 336 (Tex. 2010), the supreme court had ruled that the common law right of privacy protected the birth dates of public

employees, primarily because of the potential of identity theft. The court observed that "although the supreme court's decision in *Texas Comptroller* concerned the privacy right of public employees, we do not see why the court's concerns about identity theft and fraud would not apply equally to members of the general public, and, in turn to claims of confidentiality under [another exemption]." The court added that "there is no dispute that the redacted date-of-birth information at issue is not of legitimate public concern; the City has therefore established that the information is 'confidential by judicial decision'. . ." (*Ken Paxton v. City of Dallas*, No. 03-13—00546-CV, Texas Court of Appeals, Austin, May 22)

Wisconsin

A court of appeals has ruled that notes taken by individual employees during an investigation of improprieties surrounding the school athletic program in Wisconsin Rapids were created and used for personal purposes and are not records subject to the public records law. Jeff Williams, a reporter for the Voice of Wisconsin Rapids, requested the notes taken during employee interviews. The school district denied access, claiming the records fell within the personal use exception. After reviewing the notes *in camera*, the trial court ruled in favor of the school district, indicating that the notes were quintessentially personal in nature and were taken for the personal use of individual employees. The appeals court agreed, rejecting the newspaper's broad argument that notes used as part of a governmental function could not be considered personal under the public records law. The court noted that "if a rule were announced today that all notes related to authority functions are public records, there can be no doubt that countless documents currently treated as personal notes and discarded in the ordinary course of authority business would have to be retained and made available reasonably promptly upon request." The newspaper argued that regardless of how the notes were treated, employees had to realize the notes might eventually be used to support the school district's position if litigation occurred. But the court pointed out that "these arguments are built on the mere possibility, which is always going to be present in cases involving the personal use exception, that any document created for the personal use of the originator and retained might later lose its personal use status." (*The Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District*, No. 2014AP1256, Wisconsin Court of Appeals, June 4)

The Federal Courts…

The D.C. Circuit has ruled that the Bureau of Prisons may not make a categorical claim under **Exemption 6 (invasion of privacy)** or **Exemption 7(C) (invasion of privacy concerning law enforcement records**) to withhold personally identifying information from records showing the amounts of money the Bureau paid in connection with lawsuits and claims filed against it from 1996-2003. Prison Legal News requested the records and after it filed suit in 2005, BOP provided 11,000 pages of records, nearly 3,000 of which contained redactions. Relying on an updated *Vaughn* index, the district court upheld the agency's exemption claims. Assessing the agency's affidavits, the D.C. Circuit explained that 'here, it is difficult to see how the categories [in the agency's declaration] support application of exemption 6. The categories, centered as they are on specific types of filed documents, include a wide range of claims covering various degrees of privacy interests." Further, the court noted, the agency's declaration "fails to distinguish between redacting the identity of the alleged victim and the identity of the alleged perpetrator. This distinction is significant with respect to the employees' interest in keeping their information private. But the Bureau has made no effort to distinguish between the privacy interests of employees who are victims and those who are perpetrators. In fact, it has offered little support for redacting information that would identify perpetrators. The district court failed to give any weight to the distinction between the accused and the accuser when balancing private and

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public interests." The D.C. Circuit found BOP had not considered degrees of public interest either. The D.C. Circuit pointed out that "the public interest in disclosure will vary based on the individual's role in a given claim—victim, perpetrator, witness, medical professional diagnosing an inmate, and so forth—and the nature of the claim itself. These differences in interest do no warrant the categorical approach taken by the [agency]. The specific form used to lodge a claim reveals little about the public interest at stake, and so use of the claim form categorically to justify redactions does not reflect the balancing of interests that FOIA requires." Remanding the case back to the district court, the D.C. Circuit indicated that "on remand, the Bureau must fashion a coherent catalogue of the documents still in dispute and the district court must balance the privacy and public interests in light of the Bureau's new submissions." The D.C. Circuit noted that "we are not foreclosing use of a categorical approach. . .But the redactions in this case vary greatly, and the categories are not drawn based on the individual's privacy interest or the public interest in disclosure." (*Prison Legal News v. Charles E. Samuels*, No. 13-5269, U.S. Court of Appeals, June 5)

A federal court in California has ruled that the CIA has shown that it conducted an **adequate search** for records concerning several individuals related to the assassination of John F. Kennedy, but that because John Roselli's potential involvement in the JFK assassination was investigated by the Church Committee the agency was required to search its operational files for any records related to Roselli. Anthony Bothwell submitted two FOIA requests for records about identified individuals who allegedly had some role in the investigation of the Kennedy assassination. The agency said it had no responsive records on Roselli, David Morales, Thane Eugene Cesar, or Enrique Hernandez. The agency also said it would neither confirm nor deny the existence of records on Jean Souetre. In her prior decision, Magistrate Judge Jacqueline Scott Corley found that the agency had not provided sufficient information about the search and instructed the agency to provide a better explanation. This time around, Corley found the agency's explanation sufficient except for its failure to search its operational files on Roselli. She noted that "the description of the final search itself now names the databases that the [National Clandestine Service] and the [Directorate of Support] searched, provides an explanation of the agency's database systems more generally, both with respect to each directorate's electronic databases, and the agency-wide index of paper records, and explains away the earlier inconsistency regarding [whether the NCS searched for records about the named individuals or limited its search only to whether there was an unacknowledged affiliation with any of the individuals]." Corley rejected Bothwell's contention that the CIA had purposefully failed to indicate that it had not searched its operational files, pointing out that "the agency's position has been referenced throughout summary judgment briefings" and adding that "the Court does not glean from [the agency's statement that the CIA Information Act exempts operational files from FOIA disclosure obligations] that the CIA is somehow misleading either Bothwell or the Court." The agency argued that because Roselli was not a target of the Church Committee, the exception to the CIA Information Act requiring the agency to search operational files when an individual was subject to an acknowledged investigation did not apply. But Corley indicated the agency was reading the exception too narrowly. She observed that "documents regarding Roselli would have been key to the Church Committee's investigation of whether the CIA advised the Kennedy administration of its involvement with him." The CIA argued that "because a search of the JFK collections database [created under the JFK Assassination Records Collection Act] would be adequate to uncover relevant operational files, the CIA was under no separate obligation to start from scratch and begin a new search for assassination-related operational files as such an approach would be unreasonable." Corley pointed out that "Defendant argues that because *Plaintiff* believe such documents are relevant to the Kennedy assassination they should be in the in the database. Defendant's response is inadequate: the question is whether Defendant would have placed the responsive documents in the database, and it carefully makes no representation that it has done so or would have done so." (*Anthony P.X. Bothwell v. John O. Brennan*, Civil Action No. 13-05439-JSC, U.S. District Court for the Northern District of California, June 4)

A federal court in Virginia has awarded the American Bird Conservancy $106,000 in **attorney's fees** for its suit against the Fish and Wildlife Service for records pertaining to the dangers wind energy development pose to birds. American Bird Conservancy made three FOIA requests for records and although the agency disclosed records for all three, it withheld some records under various exemptions, including Exemption 7(A) (interference with ongoing investigation or proceeding). Two months after the Conservancy filed suit, the Office of the Secretary at the Department of the Interior released an additional 1200 pages. Several months later when the Conservancy filed its motion for summary judgment, the agency disclosed the records previously withheld under Exemption 7(A), indicating the investigation was no longer open. After a court-ordered *in camera* review, the agency released other documents. The agency argued that the Conservancy was not entitled to attorney's fees because its suit did not cause the agency to disclose the records. While the Conservancy claimed DOI's release of the 1200 documents was the result of its suit, the agency argued the release was due to the fact that it took several months to gather responsive records, review them, and then disclose them. The court sided with the government, noting that "it was not unreasonable for defendants to take four-and-a-half months to respond to plaintiff's FOIA request, especially considering the volume of the documents to be produced and the fact. . .that prompt steps were taken to identify, review, and release the responsive documents." The court, however, rejected the agency's assertion that it dropped the Exemption 7(A) claim because the status of the documents had evolved and were no longer exempt. The court pointed out that "the timing of this document release, in conjunction with the fact that plaintiff's summary judgment response specifically attacked the withholding of documents on Exemption 7(A) grounds, corroborates plaintiff's contention that plaintiff's summary judgment filing was the cause of the release. . .The fact that the determination to disclose these documents occurred after consultation with the Department of Justice—presumably including the summary judgment records—persuasively suggests that the [later] document release was the result of reconsideration of defendants' position with respect to these documents based on plaintiff's summary judgment filing." The court observed that since other documents had been released after the court-ordered *in camera* review, their disclosure also entitled the Conservancy to attorney's fees. The court found that some of the documents clearly touched upon matters of public interest and that the agency's claim that Exemption 7(A) was applicable was not persuasive. The agency argued that since the Conservancy had only prevailed on two specific sets of releases, its fee request should be discounted to reflect its level of success. But the court noted that "plaintiff could not have known [beforehand] that these documents would be the only source of its entitlement to attorney's fees since, by definition, the contents of the released documents were unknown when plaintiff initially submitted its FOIA requests. To penalize and limit plaintiff to an attorney's fees award related only for hours expended related to these document release would be to ignore the realities of the 'normal FOIA litigation process.'" The Conservancy argued that its D.C.-based attorney should be compensated at hourly rates for D.C. attorneys; the court found that prevailing rates in the Eastern District of Virginia were the appropriate measure of compensation. Reducing the Conservancy's hourly rates by about $100 an hour, the court concluded that a fee of $106,000 was appropriate. (*American Bird Conservancy v. U.S. Fish and Wildlife Service*, Civil Action No. 13-723, U.S. District Court for the Eastern District of Virginia, Alexandria Division, June 9)

A federal court in Maryland has ruled that the Army Corps of Engineers conducted an **adequate search** for records concerning the environmental consequences of leaving metal in place on a property owned by Purnell and Mary Ann Shortall and that because the Shortalls' complaint had alleged only that the Corps had not responded to their request at the time it was filed their suit became **moot** once the agency responded. The Shortalls were told by the Maryland Department of the Environment that they were responsible for removing metals from their property. Believing that a 1991 recommendation by the Corps of Engineers to leave the metal in place supported their position, the Shortalls made a FOIA request to the Baltimore District

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Office of the Army Corps of Engineers. The staffer handling their request left the Corps shortly after beginning to process the request and it was not until Mrs. Shortall contacted the office to ask about the status of the request that the Corps realized the request had not been processed further. The Corps conducted a search and found no records. Mrs. Shortall challenged the response and the Shortalls filed suit. The Corps then broadened its search and found some archived records which it sent to the Shortalls. The Corps argued that the case was moot once it responded. The court agreed, noting that "that the Corps did not produce letters the Shortalls believe were received by them relates not to whether a search was conducted (the Shortalls concede it was) but to the adequacy of such search. The complaint does not allege an inadequate search by the Corps and [the Shortalls'] argument to that extent in their opposition cannot constitute an amendment of the pleadings." The court pointed out that "the 'controversy' in the Shortalls' complaint that 'Defendants failed to produce documents' fell away when the Corps produced documents." The court rejected the Shortalls' claim for **attorney's fees** as well. The court observed that "there is no suggestion that the Corps' conduct was spurred on by the lawsuit or that the Corps took an intractable position that it was forced to change due to litigation." (*Purnell A. Shortall, et al. v. Baltimore District U.S. Army Corps of Engineers*, Civil Action No. WMN-14-3904, U.S. District Court for the District of Maryland, June 4)

A federal court in Pennsylvania has ruled that Speaking Truth to Power has not shown why the Department of Defense or the Department of Energy should be added as defendants in the organization's FOIA suit against the National Nuclear Security Administration for records pertaining to Broken Arrow incidents involving nuclear weapons that had the potential to lead to war. STTP sent the request to Defense, Energy and NNSA. Energy indicated that any involvement the agency had previously with nuclear weapons was taken over by the establishment of the NNSA. Defense said it did not have any records and Energy referred the request to NNSA. Sandia Corporation, the contractor for NNSA, found some records, but told STTP that Defense had primary responsibility for reporting Broken Arrow incidents. The court noted that because Defense had denied STTP's request for expedited processing, it was not required to file an administrative appeal on that issue. But, the court observed, "STTP challenges not DOD's denial of expedited processing but rather its failure to find responsive documents. There is no exception to the exhaustion requirement under this circumstance." STTP argued Energy should be added to its complaint because the agency had implied that it had been responsible for Broken Arrow incidents before NNSA was established. But the court indicated that "[DOE] counsel wrote that DOE had merely been 'involved' in the nuclear program and that NNSA later assumed responsibility for that involvement, not that DOE had exclusive control over the nuclear weapons program. There is simply no plausible basis for an action against DOE that would be sufficient to survive a motion to dismiss." (*Speaking Truth to Power v. United States Nuclear Security Administration*, Civil Action No. 14-1421, U.S. District Court for the Eastern District of Pennsylvania, June10)

In a related case, a federal court in Pennsylvania has ruled that Speaking Truth to Power is not eligible for **attorney's fees** in its case against the Defense Department because it did not substantially prevail. STTP requested records about Bent Spear and Dull Sword reports from the Air Force Air Command, the Office of the Secretary of Defense, and the National Nuclear Security Administration. All three components acknowledged receipt of the request and indicated they would begin processing the request. STTP filed suit less than a month after receiving DOD's acknowledgment letters. All three DOD components found responsive records and STTP did not challenge their responses. Finding that STTP had not shown that its lawsuit had caused the agency to disclose more records, the court explained that "STTP does not contest the Government's assertion that the disclosures would have been the same regardless of whether a complaint had been filed. At no point did any of the agencies in question refuse to produce records, and STTP did not challenge the documentation it received." The court added that "in the absence of any exigent circumstances

or obduracy on the part of the target agencies, it is inappropriate for information seekers to eschew the administrative process in favor of premature litigation in federal court. The attorney's fee provision in FOIA was not meant to encourage the use of judicial resources in this fashion." (*Speaking Truth to Power v. United States Department of Defense, et al.*, Civil Action No. 14-1181, U.S. District Court for the Eastern District of Pennsylvania, June 9)

After reviewing an *in camera* affidavit submitted by the FBI and the CIA to support their claims under **Exemption 1 (national security)**, **Exemption 3 (other statutes)** and, in the case of the FBI, under **Exemption 7(E) (investigative methods and techniques)**, a federal court in Utah has ruled that the FBI has adequately substantiated its exemption claims. Accepting the agency's claims, the court noted that "having conducted a thorough *in camera* review of the documents (or portions thereof) withheld by the agency, in conjunction with the agency's claimed reasons for so withholding the information, the court concludes that the claimed exemptions are valid. The FBI has demonstrated, through its previously filed declarations and supplemental Vaughn index which was submitted for in camera review along with the withheld documents) that it has withheld sensitive information because that information logically falls within the scope of the claimed exemption. . .The declarations and coded redactions that the FBI has submitted adequately explain the nature of the withheld material and why it falls within the scope of the claimed exemptions, without providing so much detail that the protected information is disclosed." (*Jesse C. Trentadue v. Federal Bureau of Investigation*, Civil Action No. 12-974 DAK, U.S. District Court for the District of Utah, Central Division,