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Washington Focus: The Senate has voted against attaching an exemption for cybersecurity data to the "Cybersecurity Information Sharing Act." Although the exemption was stripped from the bill, the Sunlight Foundation, one of the public interest organizations advocating against the exemption, noted that "this is a victory, but it is likely only temporary. The Senate can—and likely will—consider the bill on its own any time Sen. McConnell (R-KY) decides it is appropriate." . . .A coalition of open government organizations has sent a letter to Sen. Ben Cardin (D-MD), urging him to sponsor legislation that would require agencies with jurisdiction over prison facilities to process FOIA requests for records pertaining to facilities run by private contractors the same way they would process requests pertaining to facilities operated by the federal government. The letter noted that currently such requests are typically met with claims that much of the information is protected by Exemption 4 (confidential business information).

Court Rules Drone Strike Records Have Not Been Publicly Acknowledged

Although the government failed to persuade either the D.C. Circuit or the Second Circuit that even the existence of records acknowledging the policy and legal underpinnings of the targeted drone strikes against suspected terrorists abroad, including several who were U.S. citizens, was protected from disclosure under the Freedom of Information Act, Judge Rosemary Collyer, the district court judge whose original decision in favor of the CIA's invocation of a *Glomar* response neither confirming nor denying the existence of records on whether the agency had an intelligence interest in drone strikes got the ball rolling, has ruled on remand from the D.C. Circuit that any further records are completely protected by Exemption 1 (national security), Exemption 3 (other statutes), and Exemption 5 (privileges). As heartening as the D.C. Circuit and Second Circuit rulings may have been for open government advocates, Collyer's new ruling underscores the fact that when push comes to shove intelligence agencies almost always win in the end.

Based on what was already publicly known at the time, the ACLU made a FOIA request to the CIA in 2010 for

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records detailing the agency's use of drones for targeted killings. Collyer upheld the agency's *Glomar* response in 2011. But the D.C. Circuit reversed her ruling in 2013, finding that public statements made by President Barack Obama and others constituted public acknowledgement of the existence of the drone strike program. As a result, the appeals court ruled that the CIA could not use a *Glomar* response but instead was required to search for responsive records. The court recognized that any records the agency found might well be exempt, but explained that the extent of the public acknowledgement of the program was such that it vitiated the use of a *Glomar* response. The D.C. Circuit also warned the agency about using a so-called "no number, no list" response, indicating that such a response "would only be justified in unusual circumstances."

After the D.C. Circuit ruling, Attorney General Eric Holder wrote to Senator Patrick Leahy (D-VT) confirming that the U.S. had targeted and killed several individuals abroad, including at least one U.S. citizen. A FOIA suit filed by the *New York Times* and the ACLU in the Southern District of New York resulted in a 2013 district court decision that borrowed liberally from Collyer's earlier decision to rule that the CIA's "no number no list" response was appropriate. That decision, however, was overturned by the Second Circuit in 2014 and a legal memo from the Justice Department's Office of Legal Counsel providing the legal basis for drone strikes on U.S. citizens abroad was ordered disclosed.

Regardless of how much hope those two appellate decisions gave open government advocates, Collyer's new decision shows the status quo changes slowly if at all. In response to the ACLU's narrowed request, the CIA found 12 legal memos and thousands of intelligence products. The agency withheld all of them under Exemption 1, Exemption 3, and Exemption 5.

Attacking the Exemption 1 withholdings, the ACLU argued that legal analyses could not constitute sources and methods. Collyer pointed out that Section 1.4 of E.O. 13526 indicated that classifiable information had to "pertain to" intelligence activities. She pointed out that "for something to pertain to something else, it must be related or connected to such a thing. Thus, a legal analysis need not constitute an intelligence activity, source or method by itself to warrant protection so long as it *pertains to* an intelligence activity, source, or method. Here, CIA has withheld legal memoranda responsive to ACLU's request for legal memoranda that 'concern the U.S. Government's use of armed drones to carry out premeditated killings.' ACLU does not contend that drone strikes are not an intelligence activity or methods (or possibly reveal sources), nor could it. Thus, it is entirely logical and plausible that the legal analyses in the withheld memoranda pertain to intelligence activities, sources, and methods." The ACLU contended it was only seeking "factual information" about drone strikes, but Collyer explained that "to the contrary, ACLU seeks explicit details on U.S. drone strikes that would be 'sufficient to show the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known.' Such details could reveal the scope of the drone program, its successes and limitations, the 'methodology behind the assessments and the priorities of the Agency' and more. The Court has no doubt that this kind of detail would reveal intelligence activities, sources, and methods and is properly protected under Exemption 1."

The ACLU's primary focus was the extent to which the withheld records may have been officially acknowledged. Collyer found that there was no new public acknowledgement that would constitute a waiver of the CIA's exemption claims. She pointed out that "whether the government has acknowledged that CIA has an intelligence interest in drone strikes or an operational role in drone strikes will not aid ACLU. At best, these alleged disclosures identify the general nature of CIA's connection to drone strikes. By contrast, ACLU has requested granular details about every drone strike recorded on CIA charts or compilations. . .Because none of the information requested by ACLU matches these alleged factual disclosures, such disclosures do not constitute a waiver of the FOIA exemptions validly invoked here."

Holder's letter provided no more support to the ACLU's waiver theory. She noted that "Mr. Holder never stated that these individuals were killed by drone strikes. As to their cause of death, Mr. Holder stated that the individuals were killed by 'U.S. counterterrorism operations.' Mr. Holder's statements about counterterrorism operations plainly do not 'match' the specific information ACLU requested about drone strikes and are insufficient as a matter of fact and law to compel disclosure of any of the withheld intelligence products." Rejecting the ACLU's public domain argument, Collyer observed that "ACLU has identified public statements regarding U.S. drone strikes in Yemen, Pakistan, and Somalia, but these references merely establish that the Obama Administration has spoken publicly about the same subject matter as the requested information. This does not satisfy. Prior disclosure of similar subject matter, without more, misses the mark." (*American Civil Liberties Union v. Central Intelligence Agency*, Civil Action No. 10-436 (RMC), U.S. District Court for the District of Columbia, June 18)

Views from the States…

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

Colorado

A court of appeals has ruled that Pitkin County failed to show that Elesabeth Shook was subject to criminal prosecution when the county code enforcement officer investigated a citizen complaint that she was having construction work done on her property without a permit. The code enforcement officer investigated the charge and after concluding that she was not in compliance, issued a notice of violation. Shook then obtained the necessary permit and the county attorney took no further action. Shook later requested records concerning the complaint and investigation. The county withheld the original citizen complaint, which included the name and phone number of the complainant, and the code enforcement officer's notes, claiming they were exempt under as law enforcement records. Shook filed suit and the trial court sided with the county. Reversing the lower court's decision, the appeals court noted that "the record does not support the [trial] court's finding that the records relate to an investigation by a prosecuting attorney. There is no dispute that in the context of the investigatory records exception, the term 'prosecuting attorney' refers to an attorney who prosecutes criminal matters. Nothing in the record before us suggests the county attorney investigated Shook's violation of the land use code with an eye toward future criminal prosecution." The court added that "nothing in the record before us establishes that the county attorney was authorized [by the county board of commissioners] to pursue a criminal prosecution." (*Elesabeth R. Shook v. Pitkin County Board of County Commissioners*, No. 14CA0671, Colorado Court of Appeals, Division IV, June 18)

Connecticut

A trial court has ruled that the FOI Commission properly dismissed frequent complainant David Godbout's complaint that all commission decisions be voided because it had failed to post notice of meetings on the Secretary of State's website. The commission told Godbout that it would not hear his complaint although he could file an affidavit. Godbout tried to attach 136 other complaints he had filed and disrupted the commission's meeting on whether to hear his complaint. Dismissing his case, the court noted that "because it was apparent from the face of the plaintiff's complaint that there was no merit to it, he was clearly not entitled to a hearing. The plaintiff holds the mistaken belief that a hearing is required in every administrative case. . . the plaintiff has not suggested any reason why there was a need for a hearing in this case or any showing of

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why the commission could not resolve his complaint on the papers." (*David Godbout v. Freedom of Information Commission*, No. HHB CV14-5016057S, Connecticut Superior Court, Judicial District of New Britain, June 18)

Georgia

The supreme court has upheld the lower court's ruling that records pertaining to a dismissed investigation of Christopher Evans, former Director of Operations for the Georgia Electronic Design Center at the Georgia Institute of Technology, for racketeering charges do not need to be disclosed because the investigation, which involves two other individuals, is still pending. Evans argued that the Georgia Bureau of Investigation should be required to disclose those records pertaining only to him, but the supreme court noted the evidence indicated the records could not be separated without disclosing information pertaining to the ongoing investigation. The supreme court pointed out that "there is no evidence that the racketeering investigation is concluded or that the file can be considered closed. Even assuming that the dismissal of the racketeering arrest warrants against Evans establishes that *he* is not the subject of a pending investigation, the evidence presented in the trial court was that the two other individuals arrested at the same time as Evans are suspected of being engaged in a racketeering scheme with him, and those investigations are still ongoing." (*Christopher Evans v. Georgia Bureau of Investigation*, No. S15A0103, Georgia Supreme Court, June 15)

Iowa

Resolving a single issue on remand from the supreme court, a court of appeals has affirmed the trial court's ruling that the Upper Explorerland Regional Planning Commission complied with the notice requirements of the Iowa Open Meetings Act when it continued to post notice of meetings on a bulletin board outside its meeting room. The commission, which serves five counties and has its office in Postville, traditionally posted notice of its meetings on a bulletin board outside its meeting room. The bulletin board, located down a hallway, was visible from the front entrance of the building, although its contents were not. The commission had placed another bulletin board in the vestibule of the building but continued to post its meeting notices only on the bulletin board outside its meeting room. Because of the confidential nature of the commission's work, individuals were not allowed to walk the hallway without permission, but permission had never been denied. The City of Postville argued that the notice did not adequately inform the public of the commission's meetings. The court of appeals, upholding the trial court, disagreed. The appeals court noted that "the statute does not require the notice of the meetings be viewable twenty-four hours a day, or that it be in the most visible place available. All that is required is that the Commission substantially comply with the requirement that the notice be posted 'in a manner reasonably calculated to apprise the public of [the] information' in a location that is 'easily accessible to the public and clearly designated for that purpose.'" We conclude substantial evidence supports the district court's conclusion that the Commission substantially complied with the IOMA in the posting of its meeting notices on the Commission's bulletin board." (*City of Postville v. Upper Explorerland Regional Planning Commission*, No. 14-1082, Iowa Court of Appeals, June 10)

Kentucky

The court of appeals has ruled that Utilities Management Group, a for-profit company providing management and operational services for the public waterworks of the Mountain Water District, part of Pike County's water district, which receives all its funds through contracts with Mountain Water District and the City of Pikesville, qualified as a public body in 2011 when the Pike County Attorney requested copies of its checks and expenses. UMG denied the request, arguing that it was not a public body. The Pike County Attorney complained to the Attorney General's Office, which ruled that since UMG derived more than 25

percent of its funding from public sources it was a public body for purposes of the Open Records Act. In 2012, the state legislature amended the funding provision to exclude funding through a contract as part of the 25 percent formula. Under the amended provision, UMG no longer qualified as a public body. The trial court ruled that the 2012 amendment applied in this case and that, alternatively, the 25 percent funding provision was unconstitutionally vague. The court of appeals reversed, finding no indication that the legislature had intended to apply the amendment retroactively. The appeals court noted that applying the amendment retroactively would adversely affect Pike County's rights. "The 2012 amendment fundamentally changed the nature of UMG's duties with respect to the ORA, and conversely, Pike County's rights. Application of the amendment in this case would cause Pike County to lose its right to compel UMG to produce documents that Pike County had a right to access when it originally requested them under the ORA." The court found that the fact that the legislature had not amended the provision until 38 years after it was originally passed was persuasive evidence that it was not unconstitutionally vague. The court pointed out that "simply because a statute could have been written more precisely, does not mean the statute as written is unconstitutionally vague." (*Pike County Fiscal Court v. Utility Management Group, LLC*, No. 2013-CA-000929-MR, Kentucky Court of Appeals, June 12)

New Jersey

A court of appeals has ruled that trial court erred when it found that law enforcement agencies had failed to show that most records pertaining to a high-speed chase of a stolen car, which resulted in the shooting death of the driver, were not required to be made by law and had ordered the law enforcement agencies to provide most of the denied records to two reporters from publications owned by the North Jersey Media Group. Reviewing the legislative history and case law of the criminal investigation exception, the appeals court instead concluded that the exception for records not required to be made by law was quite broad. Indeed, the appeals court found that only records such as 911 calls and motor vehicle incident reports qualified as being required by law. North Jersey Media Group argued that internal policies pertaining to records retention qualified as "required by law." The court rejected the claim, noting that "it would be anomalous to treat documents required to be preserved pursuant to internal directives as documents 'required by law.'" The court also questioned the trial court's dismissal of the State's claim that disclosure of witness statements might affect the reliability of other witnesses. The court pointed out that "where an investigation is ongoing, the public reporting of one witness's recollections may risk causing another witness to question his or her recollections, or intentionally or unintentionally conform them to the reported reality. Assessing the extent of the risk is a fact-sensitive inquiry." Because the trial court's ruling had made it unnecessary to consider the State's affidavit on the sensitivity of the records, the appeals court sent the case back to the trial court for further consideration as to whether other records were covered by the open investigation exception, as well as whether the reporters' common law right of access might apply. (*North Jersey Media Group, Inc. v. Township of Lyndhurst, et al.*, No. A-2523-14, New Jersey Superior Court, Appellate Division, June 11)

New York

A court of appeals has ruled that Anthony Bottom substantially prevailed in his FOIL suit against the Department of Corrections and Community Supervision and is entitled to attorney's fees. After the Department denied Bottoms' request under a variety of exemptions, the trial court told the agency to provide supporting affidavits, at which time the agency disclosed the majority of the records instead. The appeals court found the trial court had erred in denying Bottoms' request for attorney's fees without explanation. Remanding the determination of an attorney's fees award back to the trial court, the appeals court noted that "inasmuch as respondent ultimately provided all but one of the documents in the FOIL request, petitioner 'substantially prevailed' within the meaning of the statute. Further, respondent had no reasonable basis for its

blanket denial of petitioner's request. Indeed, respondent's contention that it had a reasonable basis for denying access to all of the requested documents is belied by its release of the majority of those documents when the court directed it to justify their nondisclosure." (*In the Matter of Anthony Bottom v. Brian Fischer, Commissioner, New York State Department of Corrections and Community Supervision*, No. 14-01994, New York Supreme Court, Appellate Division, Fourth Judicial Department, June 19)

Ohio

The supreme court has ruled that the London Correctional Institution improperly denied several requests from inmate James Carr for a memo sent by the prison chaplain instructing the mailroom how to screen religious materials regularly sent to inmates for unauthorized material and contraband. After the staff of the prison mailroom was replaced by contract employees, the chaplain sent a memo to the mailroom to explain the procedures for screening religious materials. Carr learned about the memo and asked both the mailroom and the chaplain to see the memo. After his request to see the memo was denied, he made a series of public records request to the prison's public records officer, describing the memo as having been written by the chaplain during a specific time frame. That request was denied as overbroad, as were subsequent requests asking for emails from the chaplain to the mailroom during a specified period. Carr then filed suit and the trial court sided with the prison. The supreme court reversed, finding that requiring the public records officer to contact the mailroom or the chaplain to locate the memo was not tantamount to doing research. The supreme court also indicated that "LCI has not shown that the chaplain's office sent vast numbers of memos and e-mails to the prison mailroom during January and February 2012. The supreme court proceeded to award Carr $1,000 in statutory damages. The supreme court rejected the prison's claim that Carr should be denied damages because he wanted to use the memo in a lawsuit alleging religious discrimination. The court noted that "Carr's supposed purpose for requesting the record cannot be used to deny his request for a prior version of the record. LCI improperly withheld public records that were fairly described by Carr." The court also dismissed the prison's claim that Carr's requests interfered with prison operations. The court pointed out that "LCI has provided no evidence that the production of the documents at issue here would have interfered with the integrity of its recordkeeping process or with the discharge of its employees' duties." (*State ex rel. James Carr v. London Correctional Institution*, No. 2014-0596, Ohio Supreme Court, June 18)

Pennsylvania

The court of appeals en banc has ruled that Governor Thomas Wolf did not have the constitutional authority to dismiss Erik Arneson, who had been appointed a week earlier by then-Governor Tom Corbett as executive director of the Office of Open Records, a quasi-judicial administrative body that adjudicates appeals under the Right to Know Law. Deciding a suit brought by Arneson to establish his right to be restored to the position, the majority found that by providing the executive director a six-year term with the ability to serve one more term, the legislature had indicated its desire to have the executive director subject only to termination for cause during his or her term. By staggering the term of the executive director of OOR so that it did not coincide with the governor's term, the majority explained, the legislature had intentionally meant to insulate the OOR from political pressure. The majority also found that OOR, even though it was housed in the Department of Community and Economic Development, an executive branch department, was intended to be an independent agency immune from the political considerations of the Executive. The majority noted that "to presume theoretically that the legislature would permit a governor to exercise coercive control over the inner-workings and dispositional tendencies of the OOR, and potentially deny to the public access to documents that it is otherwise entitled to, would be an absurd result." Chief Judge Dan Pellegrini dissented, noting that the ruling infringed on the governor's constitutional authority. He observed that the executive director of OOR did not require Senate confirmation and that the rule on staggering terms applied only to commissions with

multiple members and not to an office like OOR headed by a single executive. (*Erik Arneson v. Thomas W. Wolf*, No. 35 M.D. 2015, Pennsylvania Commonwealth Court, June 10)

Wisconsin

The supreme court has ruled that the Racine *Journal Times* is not eligible for attorney's fees in its suit against the all-volunteer Racine Board of Police and Fire Commissioners because it did not substantially prevail as the result of its public records litigation against the commission. When the Racine chief of police retired, the board initiated a search for a replacement. Its search resulted in two candidates who were current employees of the police department and one candidate from outside Racine. After the outside candidate withdrew from consideration, the board held a special meeting and voted to re-contact some of the earlier potential candidates to create a broader selection. Reporter Christine Won made a public records request asking for how the commissioners had voted. She did not cite any potential violation of the public meetings law pertaining to the vote. Her request was denied because the city claimed the material was deliberative. Won resubmitted her request, which was denied on the grounds of security concerns for one of the commissioners. However, the city indicated it was willing to provide information about the specifics of the vote after a new police chief was hired. Won demanded the information be released immediately and the newspaper then proceeded to file suit. About a week later, the city hired one of the candidates currently at the police department and provided information about the vote to Won. During the litigation, it became apparent that the commission did not have a record when Won made her request. Keith Rogers, one of the commissioners, typically took notes at commission meetings which were then reviewed by the commission secretary and adopted at the next commission meeting. Because Rogers was unable to physically attend the special meeting in February 2012, he did not take notes and the subsequent notes for the special meeting were not approved until its May 2012 meeting. The trial court dismissed the case after finding the newspaper had received the information it sought. On appeal, the court of appeals ruled that the newspaper's motion for attorney's fees remained unresolved, that the city was estopped from claiming that no responsive record existed at the time of Won's request, and that the trial court should determine the matter of attorney's fees. Both parties appealed to the supreme court. Acknowledging that both sides bore some responsibility for the lack of clarity in the dispute, the supreme court found that " it is difficult to imagine that a local reporter, sophisticated requester and wordsmith, who displayed familiarity with the Commission, would have thought that meeting minutes were available a mere two days after a special meeting was held and before they would have been completed." The supreme court observed: "Could both sides have done better? Yes. Although not required, the Newspaper could have specified that it wanted only an actual record or, more specifically, minutes. The Commission could have clearly replied that no record existed. However, the Newspaper's requests and the Commission's responses demonstrate a dialogue between the parties wherein information was provided in response to a request for information at a time when no record existed. Notably, the Newspaper does not complain that it failed to receive the record." Concluding that the newspaper was not entitled to attorney's fees, the supreme court noted that "the public records law does not declare the Newspaper prevailed in substantial part when it made the request and filed and served the lawsuit before any record existed, and when the Newspaper's request was for information, which was provided, even though the Commission was not required to provide information in response to a public records request." (*Journal-Times and Steve Lovejoy v. City of Racine Board of Police and Fire Commissioners*, No. 2013AP1715, Wisconsin Supreme Court, June 18)

Resolving the remaining issues in litigation between Marquette County and the Wisconsin Professional Police Association over access to invoices from outside attorneys hired by the county, an appeals court has ruled that the county failed to show why either the attorney-client privilege or the attorney work-product privilege applied to redactions made by the county. Observing that the county bore the burden of showing that

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the redacted records if disclosed would reveal privileged information, the court found the county had provided little more than a recitation of boilerplate language for both privileges. After reviewing the unredacted invoices, the court indicated that "many of the redacted portions do not appear to even arguably reflect the content of communications, but rather, appear simply to refer to the fact that there was a contact between parties or a contact between the County with its attorneys." As to the work-product claims, the court pointed out that "many of the redacted portions state that counsel will begin or continue to work on something that could potentially qualify as attorney work product, such as a memorandum or a drafted brief. However, the County provides no reason to think that entries suggesting the creation of attorney work product have the effect of actually disclosing work product." (*Wisconsin Professional Police Association v. Marquette County*, No. 2014AP2634, Wisconsin Court of Appeals, June 18)

The Federal Courts…

A federal magistrate judge in California has ruled that templates used by DOJ attorneys to request cell site simulator warrants as part of investigations are protected by **Exemption 5 (attorney work product privilege)**, but that the agency has not shown that other related records that do not qualify for the privilege are protected under **Exemption 7(E) (investigative methods and techniques)**. The ACLU of Northern California requested the information and after EOUSA and the Criminal Division denied many of the records as attorney work product, the ACLU filed suit. The ACLU argued that in a previous decision pertaining to similar records, Magistrate Judge Maria-Elena James had found that the attorney work product privilege did not apply to many of the records. The government had appealed that decision to the Ninth Circuit, but both the ACLU and DOJ agreed to let James decide the current case even though the Ninth Circuit had not yet ruled on the earlier case. After reviewing the records *in camera*, James largely agreed with DOJ that the templates were protected as attorney work product. The ACLU argued that the agency was required to show that the templates were created for specific litigation. But James rejected that claim, noting that "the actual purpose of the documents is to obtain the sought-after information, but the ultimate goal of that information is to use it towards the prosecution of alleged criminals. In that prosecution, a criminal defendant may challenge the Government's evidence through a motion to suppress, which in turn may implicate a number of the same factual and legal issues addressed in these withheld documents. In this sense, the court cannot divorce the non-litigation purpose—i.e., simply procuring court authorization to obtain the suspected evidence—from the litigation purpose—i.e., forming the support for the criminal case and developing arguments to protect against attempts to prevent the acquitted evidence's use." She observed that "the litigation purpose and concerns in the later adversarial setting permeate the document's non-litigation purpose." James rejected DOJ's claims that records that did not qualify as attorney work product were nonetheless protected under Exemption 7(E). Noting that the Ninth Circuit required disclosure of techniques that were publicly known, James pointed out that "even reviewing these documents *in camera*, the Court cannot say that they reveal more than what is generally available to the public or that they risk circumvention of the law such that the application of Exemption 7(E) is required." The agency had withheld a search warrant that had been sealed in another case. James observed that the existence of a sealing order did not serve to withhold a record unless the order's purpose was to prohibit any disclosure. Finding that the sealing order did not provide a basis for withholding the record, she indicated that "the Government's assertion that the court intended the documents to remain sealed is inconsistent with the Order that for intents and purposes allows the Government to decide when to unseal those documents." (*American Civil Liberties Union of Northern California v. Department of Justice*, Civil Action No. 13-03127-MEJ, U.S. District Court for the Northern District of California, June 17)

The D.C. Circuit has ruled that EOUSA properly withheld the dates on which two grand juries met under **Exemption 3 (other statutes)**. Prisoner James Murphy made two requests to EOUSA for records concerning the grand jury that led to his indictment for possession and distribution of heroin and the grand jury that considered evidence against Richard Byrd. Murphy filed suit before EOUSA had responded to either request. However, the agency provided a substantial amount of the information Murphy had requested, but refused to disclose the dates for the grand juries, claiming they were protected by Rule 6(e) on grand jury secrecy. While the district court originally questioned the adequacy of the agency's affidavit, it later looked at the withheld information *in camera* and ruled in favor of the agency. On appeal, Murphy, with the aid of court-appointed counsel, argued that disclosure of the dates of the grand jury would not reveal matters occurring before the grand jury. Calling the EOUSA's Exemption 3 claim "both logical and plausible," Circuit Court Judge Karen LeCraft Henderson suggested two plausible scenarios in which knowing the date on which the grand jury met would allow Murphy or some other defendant to compare the schedule of a potential witness with the dates on which the grand jury met to deduce that someone had testified against him, possibly leading to retaliation. Acknowledging that such an inference was not conclusive, Henderson observed that "exemption 3 is not limited to circumstances that are *certain* to reveal a witness's identity." She pointed out that "the EOUSA has demonstrated how disclosing the specific dates and times of day a grand jury met to consider a particular 'matter' makes it more likely that a witness's identity can be discovered." She added that "because disclosing the day-and-time information Murphy sought would tend to reveal the complexity and 'scope, focus, and direction of the grand jury investigations,' that information is protected from disclosure by Rule 6(e) even if no disclosure of witness identity or risk of retaliation exists." Amicus argued that the government had not shown that disclosure of dates and times would lead to witness identification. Henderson noted, however, that "an explanation is no less plausible because it posits persuasive hypotheticals rather than real-world examples." Henderson rejected amicus's claim that the passage of five to seven years since the grand jury met diminished the chance that a witness could be identified. Henderson pointed that "we have previously decided FOIA cases seeking years-old grand jury information and not once intimated that the passage of time made Rule 6 inapplicable." Henderson also rejected amicus's **segregability** argument. She observed that "here, however, there is no segregability problem. Murphy requested specific 'information—*i.e.* the dates and times of day the grand jury met to consider his case and Byrd's case. Once the EOUSA declined to disclosure the requested information, there was nothing to segregate." (*James E. Murphy v. Executive Office for United States Attorneys*, No. 14-5044, U.S. Court of Appeals for the District of Columbia Circuit, June 16)

On remand from the Ninth Circuit, a federal court in Montana has ruled that the Forest Service improperly redacted personal information from records pertaining to a hostile workplace investigation of the Trapper Creek Job Corps Center. The investigation was conducted by the agency based on complaints filed by Mark Kowack, an employee of the Center. The investigation concluded that Kowack's allegations were not substantiated. Kowack then filed a FOIA request for records of the investigation. After portions of the records were withheld by the Forest Service under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**, Kowack filed suit. Based on the agency's *Vaughn* index, the district court ruled in favor of the agency. Kowack then appealed to the Ninth Circuit. The Ninth Circuit reversed, finding the agency's *Vaughn* index seriously inadequate and sent the case back to the district court. There, the agency provided a supplemental *Vaughn* index. The district court found that *Vaughn* index inadequate and after reviewing the documents, which included witness statements and administrative documents, the court found the agency had continued to redact more information than was appropriate under the Ninth Circuit's ruling. The Forest Service argued that Center employees could face retaliation and embarrassment as the result of greater disclosure. But after reviewing the records *in camera*, the court noted that "much of the redacted information does not implicate a privacy interest, but merely casts a negative light on the operation of the Center or

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includes comments and opinions that are not identifying in nature." The court added that "there is no cognizable privacy interest in information that references or describes Kowack alone. Exemption 6 cannot be invoked to withhold from a requester information pertaining only to him or herself." Recognizing a public interest in disclosure of some of the information, the court pointed out that "*in camera* review shows that much of the content of the witness statements and administrative documents provides insight into the operations and management of the Center. This kind of information sheds light on the Forest Service's performance of its statutory duties and lets the citizens know what their government is up to." Balancing the privacy interest against the public interest in disclosure, the court observed that "the challenge in this case is providing a complete and accurate record of whether the Forest Service, as an agency, acted appropriately under the circumstances." The court indicated that "here, the disclosure of certain personal information is necessary to provide an accurate picture of the agency conduct." The court added that "the public interest in disclosing most of the substantive content of the witness statements and the summaries is only strengthened by the divergent conclusions one could draw from reviewing the redacted and unredacted documents. Accordingly, the reasonably segregable portions of the record must be disclosed." (*Mark Kowack v. United States Forest Service*, Civil Action No. 11-95-M-DWM, U.S. District Court for the District of Montana, June 16)

A federal court in Washington has ruled that U.S. Immigration and Customs Enforcement has failed to show that incentive rates used by Talton Communications in 2009 to obtain a contract to provide phone services for ICE detention centers are protected by **Exemption 4 (confidential business information)**. Prison Legal News, which had been investigating the phone rates charged to prisoners, requested the information. Nearly a year after filing the request, and four months after filing suit, ICE provided most of the records, but withheld the 2009 incentive rates, claiming that disclosure could harm Talton Communications' ability to compete for a 2015 contract. The court rejected the agency's claim that disclosure of the incentive rates would harm Talton, noting that "the record shows that *price* was the deciding factor in 2009, and that the performance incentive rate was *one piece* of Talton's price proposal." The court added that "that a contractor's performance incentive rate will be the single determinative factor in a future bidding process is pure speculation and. . .cannot support a finding that Talton is likely to sustain substantial competitive harm from disclosure of the performance incentive rate." Prison Legal News argued the agency's year-long delay constituted egregious behavior on the part of the agency. The court agreed and pointed out that "response times of this sort clearly exceed the unambiguous time allowance contemplated by Congress." (*Prison Legal News v. United States Department of Homeland Security*, Civil Action No. C14-479 MJP, U.S. District Court for the Western District of Washington, at Seattle, June 18)

Judge James Boasberg has ruled that the Criminal Division of the Department of Justice properly withheld records pertaining to the authorization of wiretaps from federal prisoner Anthony Ellis. Ellis originally requested records concerning any electronic surveillance involving him. The agency told him such records were protected under Exemption 3 (other statutes). He appealed and ultimately suit. In his suit he asked for records authorizing wiretaps. The Criminal Division conducted a search of two records systems and disclosed 677 pages and withheld 2,651 pages. Ellis challenged the **adequacy of the search** by arguing that databases at the FBI and EOUSA should also have been searched. Boasberg noted that "plaintiff, however, brought suit specifically against Criminal Division supervisors—who were subsequently replaced by DOJ as the named Defendant—and he did not name the FBI or EOUSA. As Justice correctly observes, the above indices are not within the Criminal Division's control, but rather are housed in separate components within DOJ." The agency claimed most of the records it withheld fell under **Exemption 5 (attorney work product privilege)**. Accepting the agency's claims, Boasberg noted that "these types of documents, in short, are classic work product, the disclosure of which would risk putting DOJ's lawyers' thought processes and

strategy on public display. The records include research and analysis, as well as recommendations about possible courses of action, created in preparation for criminal prosecution." He said it was a closer call as to other records that "possess a partially administrative character. These documents include system logging notes indicating that [the supervising office] has received a request from a prosecutor for permission to apply for a Title III order and emails from ESU attorneys to AUSAs acknowledging receipt of Title III applications. Because these quasi-administrative records were compiled in anticipation of a specific criminal prosecution and are not generic agency records maintained for some conceivable future litigation, this Court joins several other courts in this District that have held that the work-product privilege protects them." (*Anthony Ellis v. United States Department of Justice*, Civil Action No. 13-2056 (JEB), U.S. District Court for the District of Columbia, June 22)

A federal court in Louisiana has ruled that the magistrate judge erred in using the standard for granting a **preliminary injunction** when considering a FOIA suit filed by immigration attorney Michael Gahagan against Immigration and Customs Enforcement, Customs and Border Protection, and the State Department for records pertaining to his client Theodore Weegar. Because Gahagan had requested injunctive relief if appropriate, the magistrate judge decided he was requesting a preliminary injunction blocking the agencies from refusing to disclose responsive records. As a result, the magistrate judge found that Gahagan had failed to carry his burden of proving that he was entitled to an injunction. The magistrate judge's report recommended that the court rule against Gahagan and further order the agencies to provide supplemental affidavits supporting their exemption claims. The magistrate judge was persuaded by two district court decisions from the D.C. Circuit in which the plaintiffs had requested preliminary injunctions as well as summary judgment. Judge Nannette Jolivette Brown noted that "Gahagan has not moved for a preliminary injunction. Rather, his two motions seek relief that falls squarely within FOIA's statutory framework. The motions are governed by the standards and burdens of proof that apply to a motion for summary judgment in the FOIA context." Reviewing the case as a straightforward FOIA case, Brown first rejected Gahagan's claim that U.S. Citizenship and Immigration Services had improperly referred records to ICE, prolonging the time for processing his request. Noting that his time delay contention was moot because ICE and the other agencies had already responded to his request, Brown pointed out that "ICE's 'routing' of Gahagan's FOIA request is not a *per se* violation of FOIA." She then found that both ICE and CBP had failed to adequately explain their searches and ordered them to supplement their affidavits. Gahagan argued ICE's search had located responsive records, but that the agency had then concluded that some of them were non-responsive. Addressing the issue, Brown observed that "if the agency prepares and executes an appropriate query, then the information located and produced as a result of the query should be responsive. ICE has not explained why it found the above-described documents when executing Gahagan's search, or why it ultimately redacted them and produced them to Gahagan." She ordered the agency to provide the documents for *in camera* review. Brown found ICE had properly withheld records concerning databases accessible in an NCIC search under **Exemption 7(E) (investigative methods and techniques)**. The State Department had withheld two records concerning a consular officer's research when reviewing Weegar's visa applications. Brown agreed with the agency that the records were properly withheld under **Exemption 3 (other statutes)**, citing § 222(f) of the Immigration and Nationality Act. (*Michael Gahagan v. United States Customs and Border Protection, et al.*, Civil Action No. 14-2619, U.S. District Court for the Eastern District of Louisiana, June 17)

Judge Christopher Cooper has ruled the Executive Office for Immigration Review can continue to claim that certain information is non-responsive to the American Immigration Lawyers Association's request for records pertaining to complaints against immigration judges. EOIR had originally withheld some records as non-responsive based on its claim that the redactions made it easier to understand the complaint files.

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Cooper had told the agency it could not rely on that claim and would need to reprocess the material. As a result, the agency disclosed 568 pages in full and 57 pages in part, but continued to withhold portions of 64 pages as non-responsive. AILA argued that Cooper had forbidden the agency from claiming records were non-responsive. But Cooper pointed out that his order only addressed "material withheld from complaint records *on the basis that withholding non-responsive information about other complaints made it easier to understand the subject complaint file.* The Court never meant to suggest that EOIR could not redact *any* material as 'non-responsive.'" Cooper noted that according to EOIR the "material discusses totally irrelevant topics such as office cleaning, vacation plans, and medical condition of EOIR staff. Thus, so long as the information in question 'is clearly and without any doubt unrelated to the subject of the request' and its redaction will not interfere with AILA's ability to understand or contexualize the responsive material, EOIR is not obligated to produce it." AILA also argued that allowing the agency to make exemption claims at this point was contrary to *Maydak v. Dept of Justice*, 218 F.3d 760 (D.C. Cir. 2000), where the D.C. Circuit ruled agencies must make all their exemption claims at the same time. Cooper explained that here "EOIR had no obligation to process material it had designated as non-responsive prior to summary judgment briefing and, understandably, did not do so. Once the Court found a portion of this material to be responsive, the agency was certainly within its rights to process it for relevant FOIA exemptions, as it would for any other material it would produce in response to a FOIA request." (*American Immigration Lawyers Association v. Executive Office for Immigration Review*, Civil Action No. 13-00840 (CRC), U.S. District Court for the District of Columbia, June 23)

A federal court in Louisiana has ruled that U.S. Citizenship and Immigration Services conducted an **adequate search** for the Alien file of a client of immigration attorney Michael Gahagan even though the I-485 Receipt Notice Gahagan had requested was not initially located and was not discovered until a second search was conducted. The court also found that USCIS's referral of 33 pages to Immigration and Customs Enforcement did not significantly impact the time in which Gahagan received those records. Gahagan requested Lloyd Patterson's I-485 receipt notice from USCIS. Because Patterson's alien file contained several I-485 applications, the agency decided to process the entire file. The agency disclosed 429 pages three weeks after receiving Gahagan's FOIA request, but it did not uncover the I-485 receipt notice until a subsequent search including the Texas Service Center was conducted. The court found that the agency's three-week response time was clearly adequate under the statute. The court also found that the agency had conducted an appropriate **segregability analysis** that had resulted in only five pages being withheld entirely because they included third-party personal information. The court noted that "the court finds no evidence of bad faith on the part of USCIS with regard to the fully redacted documents. . ." Noting that under *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983), an agency referral could not significantly impair a requester's ability to obtain records in a timely fashion. Applying the *McGehee* standard to the circumstances in this case, the court observed that "reasonableness is the standard to be applied and the Court concludes that a four month wait is not unreasonable. The referral has not significantly increased the amount of time Plaintiff must wait, and therefore does not constitute an improper withholding." (*Michael W. Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 15-796, U.S. District Court for the Eastern District of Louisiana, June 11)

In another case brought by Gahagan, a federal court in Louisiana has ruled that affidavits provided by Immigration and Customs Enforcement and the Executive Office for Immigrration Review explaining the agencies' exemption claims and providing unredacted versions of the documents for comparison purposes satisfies the requirement for a *Vaughn* index. The court noted that "the additional information and documents provided in response to the Court's previous Order and Reasons satisfy ICE's obligation relative to a *Vaughn* Index. The Court is able to derive from the [agency's] declaration an explanation as to why ICE contends

each redacted portion is exempt from disclosure. Additionally, any allegedly inadequate explanations provided by ICE are sufficiently supplemented by the unredacted documents supplied to the Court for *in camera* inspection." Gahagan also argued that the agencies had failed to adequately explain their searches. Finding the affidavits largely sufficient, the court nevertheless told ICE that it must explain its decision not to search hard-copy records. As to EOIR, the court noted that its affidavit indicated it had searched the most likely source for the records. The court observed that "a reasonable search should account for sources that are 'likely' to have responsive documents." (*Michael Gahagan v. United States Department of Justice, et al.*, Civil Action No.13-5526, U.S. District Court for the Eastern District of Louisiana, June 24)

In Memoriam

Tom Riley, who spent much of his professional life promoting open government in Canada and providing much needed training to both government and non-government staffers, died May 30. I had the privilege of knowing Tom well and working closely with him on a number of projects for nearly 15 years. When I first became editor of *Access Reports* in August 1985, the newsletter included a regular column called "News From Canada," which was written by Tom. Whereas the U.S. FOIA passed in 1966, was strengthened in 1974, at the same time the Privacy Act was passed, Canada did not take the plunge until nearly a decade later in 1983 when the Canadian Parliament passed the Access to Information Act and the Privacy Act. Both statutes have much in common with the U.S. statutes, but the Canadians provided a separate Information Commissioner and Privacy Commissioner to oversee the implementation of the respective statutes and to act as an ombudsman in disputes. At a time when ASAP was still finding its sea legs as an organization dedicated primarily to training for access and privacy professionals, Canadian counterparts established CAPA, the Canadian Access and Privacy Association, to act as a focal point for training and discussion opportunities at the federal level in Canada. Tom's consulting company, Riley Information Services, was already involved in creating and promoting training opportunities and the creation of CAPA served as a rallying point in identifying an audience for such training opportunities. As provinces like Ontario, Quebec, British Columbia, and Alberta created their own freedom of information and privacy acts, establishing commissioners with jurisdiction over both areas, Tom's training programs expanded. Because of my professional connection with Tom, I was able to participate in a number of programs he sponsored throughout Canada and that entrée led in turn to forging friendships with a number of extremely talented and dedicated Canadian access and privacy professionals who remain close friends today. Once the majority of Canadian laws had been created, Tom continued to be a presence in other English-speaking countries that were developing FOI and privacy laws. He played an important role in advocating and promoting the passage of an access and privacy code in Hong Kong and worked with South Africa as well. When the United Kingdom finally decided to add a right of access to its existing data protection law, Tom, while not playing a crucial part, certainly served as an important resource on the Canadian experience.

But aside from being a consummate professional, Tom was a dear friend. He opened a number of doors for me and enriched my life immeasurably. Although I had not worked with him for a number of years, memories of his kindness, generosity and intellectual curiosity will remain with me always. His contributions are legendary and he is truly someone who will be sorely missed.

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