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Washington Focus: The Obama Administration announced July 4th, the 49th anniversary of the signing of the Freedom of Information Act by President Lyndon Johnson, a pilot program at seven agencies to explore the feasibility of publishing online records released to individual requesters. As part of the Open Government Initiative, the administration's pilot study will look at the resource commitments of such a program. Requests involving individuals seeking their own information will not be posted as part of the study. The participating agencies include the EPA, the National Archives and Records Administration, the Office of the Director of National Intelligence, the Millennium Challenge Corporation, and components of the Departments of Defense, Homeland Security, and Justice.

Court Finds Neither Side Persuasive On Status of Healthcare Benefits Data

Judge Gladys Kessler has ruled that neither Consumers' Checkbook nor the Center for Medicare and Medicaid Services have yet shown that they are entitled to summary judgment on the question of whether Qualified Health Plans offered by insurers participating in the Federally-Facilitated Marketplace created by the Affordable Care Act should or should not be disclosed before the Open Enrollment Period. In Consumer Checkbook's continuing efforts to gain access to much of the plans' benefits data after the data is required to be submitted but before it is made public as part of Open Enrollment, the organization failed to persuade Kessler that the records were not protected by Exemption 4 (confidential business information). But Kessler was equally unimpressed by the agency's claims that disclosure of such information before open enrollment began would likely cause competitive harm if disclosed.

Under the ACA, participating insurers were required to submit their initial 2015 QHP applications by June 27, 2014. After that time, insurers could not change their proposed service areas or add new insurance plans, but could amend their data. September 4, 2014 was the deadline for submission of final QHP application data. After that time, insurers could make changes only with the approval of CMS or the state, if relevant. In October 2014, the government provided insurers with final certifications of their ability to participate in the

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FFM. Insurers were then required to sign FFM agreements before the beginning of the Open Enrollment Period on November 15, 2015. The government does not consider data related to plan offerings to be final until an agreement is signed and the plan is confirmed, a process that usually takes place about two weeks before Open Enrollment. In response to Consumer Checkbook's requests for the data, the agency argued it was protected by Exemption 4 until it was made public during Open Enrollment. Consumer's Checkbook, in contrast, argued that once the applications were received there was very little chance that insurers' would change their plans and the data should be disclosed then.

The agency initially insisted that because it had previously provided Consumer's Checkbook the 2014 data the case should be dismissed as moot. Kessler noted that "plaintiff intends to request substantially the same information from Defendants every year and has requested an injunction barring the Government from withholding it under Exemption 4." She added that "the Government's argument rests entirely upon the presumption that it will prevail on the merits, and thus, puts the cart before the horse."

The government's primary contention was that "release of the requested plan benefits data at any time before the beginning of the Open Enrollment Period will cause participating insurers to suffer competitive harm. The agency pointed to 78 letters it received from insurers who had been given pre-disclosure notification letters asking for them to comment on the likelihood of competitive harm from release of their data as evidence that competition existed. After reviewing the letters, Kessler indicated she did not give them much credence. She observed that 'the Government has put forth no reliable evidence of actual competition between insurers participating in the FFM. The authors of the 78 letters HHS relies on were sent a carefully-worded letter presenting HHS' legal interpretation of Exemption 4 and asking whether each insurer's application information for a given plan year may be protected by Exemption 4. Therefore, it is not surprising that many of the letters describing the potential for competitive harm agree with the Government's position." The government also relied on the 78 letters to show that there was competition between insurers that offered FFM plans and insurers that offered plans not available through the FFM. Kessler explained that the letters, rather than describing actual competition, "could just as easily suggest hypothetical or potential competition rather than actual competition." She observed that the government "has not established that FFM-participating insurers face *actual* competition from any source."

Turning to Consumer Checkbook's arguments for disclosure, after having found the government's case so flimsy, Kessler found little support on that side either. She pointed out that viewed "in the light most favorable to the Government, one could conclude that there is actual competition from the letters' description of competitive harm that would arise from pre-Open Enrollment disclosure of plan benefits data. Moreover, Plaintiff has not countered the government's evidence (weak as it is) of actual competition with any documentary evidence of its own."

The government suggested several forms of competitive harm would arise if the data was prematurely disclosed. These included allowing insurers to undercut their competitors, discouraging plan innovation, and providing conflicting and confusing data to the public. Consumer's Checkbook contended that the issue of undercutting was exaggerated because the agency had publicly stated that more than 95 percent of policies would be renewed unchanged. But the agency told Kessler that this prediction was based on the status quo and disclosure of data at an earlier stage might prompt insurers to change their offerings. Kessler observed that "whether one concludes that early release of the requested data could lead to undercutting depends on the light in which the evidence is examined. . .The record presented by the Parties is so incomplete and confusing on the issue of undercutting, that it alone precludes granting either Motion for Summary Judgment on this issue." As to harm to innovation, Kessler noted that "Plaintiff is correct that the ACA 'has made it more difficult for [insurers] to compete on the basis of plan benefit design.'" As to creating confusion through the premature release of data, Kessler pointed out that "[the government] has failed to show that the harm it claims

will arise from consumer confusion would be *caused* by competitors' use of proprietary information as Exemption 4 requires."

Kessler also considered the effect disclosure might have on program effectiveness, known as the impairment prong in Exemption 4 case law. Here, the government primarily relied on its consumer confusion argument. Unconvinced, Kessler pointed out that "the Government does not explain why public release of data after the beginning of the Open Enrollment Period would not be equally confusing to consumers given that such data is 'regularly' updated after its release." She observed that applicants had to go through either the agency or an insurance professional when purchasing a policy. As a result, she noted that "the Government offers no reason why any confusion would not be cured upon a consumer's first interaction with the FFM itself." Declining to grant summary judgment to either party, Kessler warned the parties that "any future filings *must* contain clearer presentation of the facts underlying this case." (*Center for the Study of Services, also DBA Consumer' Checkbook v. United States Department of Health and Human Services*, Civil Action No 14-498 (GK), U.S. District Court for the District of Columbia, July 1)

Court Rules TRAC Entitled to Educational and News Media Fee Status

No one who works with FOIA believes fees allow agencies to recover the costs of implementing their FOIA programs. But fees remain a weapon that agencies occasionally trot out primarily to instill some fiscal discipline in requesters. Sometimes agencies decide to duke it out with some repeat requester whose ability to claim preferential fee status means they are legally entitled to vastly reduced fees. The most memorable of these battles took place in 1989 when the government tried to destroy the nascent National Security Archive by denying them educational or news media fee status. That attempt on the part of the government failed big time and the D.C. Circuit interpreted the fee provisions in *National Security Archive v. Dept of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), to include entities like the National Security Archive that used government records to issue publications on matters of public interest. As if one disaster wasn't enough, the government essentially tried the same argument in *EPIC v. Dept of Defense*, 241 F. Supp.2d 5 (D.D.C. 2003), with nearly identical results. Perhaps hoping that their persistence would eventually be rewarded, the government has now targeted TRAC. Although TRAC had been granted educational and media status by the Department Homeland Security in the past, one of the most frequent recipients of its requests, Immigration and Customs Enforcement, suddenly decided that TRAC was no longer entitled to educational or news media status and, instead, should be in the all others category, which provides two hours of free search and 100 pages of free duplication. As if that wasn't enough, ICE then concluded that TRAC was a commercial requester because it charged for access to certain parts of its website to defray the costs of operation.

Judge Christopher Cooper didn't take long to throw out all of ICE's arguments. In a decision that chastised ICE for even thinking about such a move, Cooper found that TRAC qualified for both educational and news media fee status. Sue Long and David Burnham, co-directors of TRAC, which is located at Syracuse University, argued that TRAC "carried out an active program of scholarly research specializing in gathering and analyzing federal government data and that TRAC publishes its findings in research reports available on its website, which is hosted on Syracuse University servers." Long and Burnham pointed out that TRAC's relevant publications included some 25 immigration-related reports over the last nine years, including a recent report analyzing the effect of changes in ICE guidelines for immigrant detention. The agency noted that TRAC's website indicated that it had locations outside of Syracuse and that it received some funding from other sources. Cooper responded by observing that "nothing in the FOIA statute or its implementing regulations limits the definition of 'educational institution' to an entity with only one location or funding source. Nor does the existence of TRAC's other locations or funding sources demonstrate that TRAC's

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connection to Syracuse University is somehow contrived." Cooper pointed out that "plaintiffs are professors who made the request for records for use in their research at a university research center. They were therefore entitled to a presumption of educational status."

Although Congress intended the fee categories to facilitate agencies' ability to catalog requesters into pertinent groups, an aside in OMB's Fee Guidance indicating that requesters that would normally be in a preferential fee category might occasionally make a request outside the parameters of their fee category has evolved into an opportunity for agencies to challenge the fee status of such a requester by questioning the subject of the request. ICE did so here, claiming that TRAC failed to show how its request for three databases furthered its educational purpose. Cooper strongly implied that ICE should not have made that argument in the first place. He noted that "while Plaintiffs perhaps could have satisfied the Department's concerns by simply providing the requested representation, the materials they submitted to ICE detailed TRAC's extensive history of analyzing records from federal databases and publishing its findings in reports on immigration enforcement. Given TRAC's established methodology and publication history, the most logical conclusion for ICE to have drawn was that Plaintiffs intended to use the requested data for similar research reports in the future. . .ICE has offered nothing to suggest that TRAC has altered its research methodology since the agency last granted it preferred requester status."

Cooper found ICE's concern about TRAC's subscription services to be the most rational argument the agency made. But he pointed out that "that being said, 'Congress did not intend for scholars (or journalists and public interest groups) to forego compensation when acting within the scope of their professional roles.' Consistent with that principle, TRAC's subscription service does not disqualify it from educational requester status so long as the request is being made to further TRAC's scholarly mission and not principally to enable it to sell the raw data to third parties."

Cooper then proceeded to dismantle ICE's arguments for denying TRAC news media status. ICE noted that the D.C. Circuit in *National Security Archive v. Dept of Defense* defined news media as using a variety of sources. Cooper observed that "incorporating information from a range of sources, however, is not essential for news media status." Next, ICE asserted that TRAC had not identified a public interest in the data. Cooper explained that "the agency cites no case, statute, or regulation to support its skepticism regarding the public's interest in reports based on the requested records. The Court has little difficulty concluding that information about enforcement of our immigration laws would be of interest to the public."

ICE contended that TRAC had not shown how it would disseminate the raw data to the public. Cooper pointed out that TRAC 'has published immigration reports and bulletins accessed by millions of people, and Plaintiffs stated to the agency that it will continue to do so in the future. Here again, Plaintiffs might have avoided unnecessary litigation by explaining how they intended to use the requested records. But they were not required to do so. TRAC's past activities amply demonstrated its ability to transform the requested data into a distinct work and distribute it to the public." Finally, ICE argued that TRAC's reports were devoid of editorial skill, but simply summarized government data. Cooper explained that "the Department cites no support for ICE's refusal to grant preferred status based on its subjective assessment of TRAC's editorial skill." He added that "Plaintiffs' uncontested representations that they intend and have the ability to disseminate new research to the public were sufficient to meet the definition of representatives of the news media."

TRAC had requested a declaratory judgment establishing that TRAC was entitled to educational or news media status for all future requests, noting that it frequently requested records from ICE and would continue to do so in the future. Cooper declined to provide the requested relief. He pointed out that "agencies must make an independent fee status determination for each request and, as Plaintiffs acknowledge, ICE has granted

TRAC preferred status in the past. Plaintiffs therefore have not shown that ICE has violated FOIA by systematically rejecting their fee classification requests. While ICE may have erroneously denied TRAC's request in this case, TRAC could alter its research activities in the future or request information that is inconsistent with its scholarly or journalistic interests. Absent evidence of either development, the Court is confident that ICE will assess future TRAC requests in accordance with the reasoning set forth in this opinion." (*Susan B. Long, et al. v. Department of Homeland Security*, Civil Action No. 14-00807 (CRC), U.S. District Court for the District of Columbia, June 29)

Views from the States…

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

Maryland

The Court of Appeals has ruled that Teleta Dashiell's sustained citizen's complaint against Sergeant John Maiello of the State Police pertaining to a racially derogatory comment Maeillo left on Dashiell's voicemail after he had called her as part of an investigation is a personnel record that is exempt under the Public Information Act. Maiello was investigated and disciplined as a result of Dashiell's complaint. However, Dashiell was not given access to the investigation and requested records under the PIA. The State Police withheld the records, claiming they were exempt as personnel records. The trial court agreed. But the appeals court found that under the recent Court of Appeals ruling in *Maryland Dept of State Police v. Maryland State Conference of NAACP Branches* 59 A.3d 1037 (2013), the State Police were required to provide a *Vaughn* index to allow the trial court to determine if any further information could be disclosed through redaction of personal information. Writing for the court, Court of Appeals Judge Lynne Battaglia explained that another decision, *Montgomery County v. Shropshire*, 23 A.3d 205 (2011), held that records in the personnel file of an individual were completely exempt under the personnel records exemption, and that *NAACP Branches* essentially constituted an exception to that rule. Battaglia noted that in *NAACP Branches*, which dealt with racial profiling complaints against the State Police, the court required the State Police to disclose more information by redacting personally-identifying information so that no specific officer was identified, but more information was disclosed pertaining to the overall performance of the agency. Dashiell argued that there was a difference between sustained and unsustained complaints. But Battaglia rejected that contention, pointing out that "the plain language of the Public Information Act does not differentiate between 'sustained' and 'unsustained' complaints. . .[M]andatory disclosure of personnel information related to sustained findings could chill the disciplinary process, rendering those in control less willing to sustain a finding of misconduct." Dashiell also argued that she was a "person in interest" in relation to the complaint, which provided an exception to the rule of non-disclosure. The court rejected the claim, noting that "the subject of the investigation in the present case is the officer targeted by the investigation. Ms. Dashiell, thus, is not 'a person in interest.'" Court of Appeals Judge Shirley Watts dissented. Urging the court to recognize an exception to the personnel records exemption for a sustained disciplinary finding, she observed that "the administration of the discipline is an action of—and thus reflects the judgment of—the law enforcement agency, not the officer. Thus, a record of discipline based on a sustained complaint against a law enforcement officer is not a personnel record; instead, it is among the very types of documents that the Public Information Act is designed to make available to the public: a document that reflects how a public agency responds to an employee's proven misconduct." (*Maryland Department of State Police v. Teleta S. Dashiell*, No. 84 September Term, 2014, Maryland Court of Appeals, June 25)

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Pennsylvania

A court of appeals has ruled that video recordings from two state police cars pertaining to a traffic incident are not categorically exempt under the criminal investigation exemption, but to the extent they contain footage of the state police investigating the traffic incident the agency can redact that footage. Michelle Grove requested the recordings taken when the state police responded to a traffic incident. The state police denied the request, claiming the video was covered by the criminal investigation exemption. Grove complained to the Office of Open Records, which rejected the state police's claim because they failed to show the recordings pertained to a criminal investigation. Finding the recordings were not categorically exempt, the court noted that "the [Mounted Video Recordings] are created to document troopers' performance of their duties in responding to emergencies and in their interactions with members of the public, not merely or primarily to document, assemble or report on evidence of a crime or possible crime." The court indicated that "MVRs can contain witness interviews, interrogations, intoxication testing, and other investigative work. . .We agree that such portions of an MVR are investigative information exempt from disclosure. . .The facr that parts of a public record contain exempt information does not, however, immunize the non-exempt portions from disclosure; rather, in such circumstances,, the agency must produce the record with exempt information redacted." Finding that one of the recordings contained witness interviews, the court allowed the state police to redact that portion and disclose the rest. (*Pennsylvania State Police v. Michelle Grove*, No. 1146 C.D. 2014, Pennsylvania Commonwealth Court, July 7)

A court of appeals has ruled that PG Publishing Company, which owns the Pittsburgh *Post-Gazette*, does not have standing to challenge email record retention policies of the Governor's Office of Administration and the Pennsylvania Department of Education. During its attempt to get emails from the Department of Education through a Right to Know Law request, the paper discovered that employees were allowed to delete emails after five days if they determined that they were of no value. The court found PG Publishing had a common law right to pursue such an action on behalf of the public. But the court then found that PG Publishing had not shown a likelihood that agency employees had violated the State Records Management Manual. In dismissing the case, the court noted that "the minor discretion afforded employees in carrying out the mandates of the Manual and other GOA directives is proper and indeed necessary until the GOA employs executive officials or lawyers to review each and every e-mail an employee proposes deleting pursuant to the retention schedule before it is deleted." (*PG Publishing Company, Inc. v. Governor's Office of Administration*, No. 481 M.D. 2014, Pennsylvania Commonwealth Court, July 9)

The Federal Courts…

Judge Emmet Sullivan has ruled that the IRS conducted an **adequate search** for records showing that an individual had been recommended for an audit because of a tax-exempt organization application. Based on allegations that the IRS had singled out conservative organizations for undue scrutiny of their 501(c)(4) tax-exempt applications, Judicial Watch requested records showing any individual that was referred for audit during that time period. The agency searched the records of its Tax Exempt and Government Entities Division for any indication that such a referral had occurred. After finding no records at the Tax Exempt and Government Entities Division, the agency proceeded to search for any referrals to its other three divisions. That search also turned up no records. While Judicial Watch did not directly challenge the search, it argued that other evidence indicated that such referrals may have been made and pointed to the fact that IRS officials had talked to the Justice Department about criminally prosecuting individuals who had allegedly provided false information on their applications. Sullivan rejected that analogy, noting that "how that bears on whether

the IRS referred individuals internally for audit based on information contained in a 501(c)(4) application is entirely unexplained." Judicial Watch also claimed the IRS used names that appeared on donor lists to identify individuals for an audit. But Sullivan pointed out that "donor lists, moreover, are submitted to the IRS for other purposes, so it is meaningless that they may have been received by IRS officials. Any correlation between a name on a donor list and an audit cannot, without more, overcome the presumption that the IRS's detailed explanation of its audit-referral processes and its search thereof was complete and correct in determining that no responsive referrals occurred during the relevant time period." Judicial Watch suggested that the IRS's search was inadequate because it did not search its email system. Sullivan, however, agreed with the agency that such a search, particularly without any evidence that any responsive records would be located, was unduly burdensome. The IRS argued that such a search would require individual searches of the email accounts of 16,000 employees. Sullivan indicated that "it is speculation at best to say that there exist communications discussing decisions to audit an individual based upon 501(c)(4) applications." He concluded that "even if there was a small likelihood of success, the Court, according the IRS's affidavits the appropriate presumption of good faith, finds that the IRS has established a very significant burden that would render Judicial Watch's proposed search unreasonable." (*Judicial Watch, Inc. v. Internal Revenue Service*, Civil Action No. 13-1759 (EGS), U.S. District Court for the District of Columbia, July 3)

Judge James Boasberg has ruled that Uzoma Kalu, a physician in Columbus, Ohio, has failed to show that responses she received from the IRS, the Transportation Security Administration, and the FBI pertaining to her requests for records showing why she had been targeted during travel and for a tax audit were inadequate, although Boasberg found some shortcomings with some of the agencies' responses. The IRS refused to accept the Form 2848 Power of Attorney submitted by Daniel Stotter on her behalf, while both the TSA and FBI invoked *Glomar* responses neither confirming nor denying the existence of responsive records as they pertained to whether she was or was not on a travel watch list. The IRS argued that Stotter had not provided sufficient information about the records he was requesting on Kalu's behalf. Boasberg sided with the agency, but noted that "the confusion appears to stem from the different meanings that the parties attribute to the terms 'tax records' and 'return information.' While it seems that Kalu does not wish to obtain the sorts of tax forms ordinarily filed in the course of completing one's annual tax returns—such as 1099 Forms and W-2 Forms—it appears that she does want certain 'return information,' as that term is defined in the Internal Revenue Code." Suggesting that Kalu resubmit her request with a valid form, Boasberg explained that "although some of the agency's references to tax forms may have ignored the focus of Kalu's request, Stotter may have also misinterpreted the agency's references to 'tax records' and 'return information.' The Court hopes that this clarification will aid the parties as they attempt to reach an administrative resolution of this matter." As a result, Boasberg declined to consider 45 pages of records the IRS had located in an internal search. Turning to the TSA, Boasberg found the agency had properly invoked a *Glomar* response under the Aviation and Transportation Security Act because identifying whether Kalu was on the travel watch list was considered sensitive security information. Kalu argued that the agency could not rely on a *Glomar* response for records that were created erroneously. But Boasberg indicated that "if records showing some sort of error do exist, TSA would not have to acknowledge such a fact because that would disclose SSI—*e.g.*, that Plaintiff was on a watch list." Boasberg pointed out that TSA had a Traveler Redress Inquiry Program that allowed individuals like Kalu to challenge their treatment by TSA during travel. Boasberg, however, faulted the agency's limitations on Kalu's specific request that all records pertaining to her be searched. He noted that "while the breadth of Kalu's request might have supported TSA's limiting its search to documents and files that contain her name, the Court fails to see how it supports the agency's decision to search for documents based on three seemingly random topics." Kalu had challenged the FBI's *Glomar* response. But Boasberg indicated that the agency had not addressed the issue in its briefs. As a result, he declined to rule on the issue

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until the FBI provided a further explanation. (*Uzoma Kalu v. Internal Revenue Service*, Civil Action No. 14-998 (JEB), U.S. District Court for the District of Columbia, July 1)

A federal court in Colorado has ruled that PacifiCorp, an electric utility company providing electricity in Wyoming and five other states, substantially prevailed in its FOIA suit against the EPA, but because the litigation was motivated primarily by PacifiCorp's commercial interests, it is not entitled to **attorney's fees**. PacifiCorp filed suit after the agency failed to respond to its request for records pertaining to a regional haze implementation plan for Wyoming. PacifiCorp had made the request to obtain information for submitting public comments. Although the court granted PacifiCorp most of the relief it requested, it found the company was not entitled to attorney's fees. The court noted that "PacifiCorp's argument that it derived no commercial *benefit* from the FOIA requests is unavailing as such bare statements, without more, do not support such a conclusion. . .While the issue of the EPA's rulemaking concerning the haze program for Wyoming may affect all entities thereby regulated and the public in general, the evidence shows that is not what precipitated this litigation." PacifiCorp argued that its request had benefitted the public by providing for a more robust public debate. But the court pointed out that "while there is evidence that PacifiCorp submitted comments after it received the EPA's initial responsive documents, there is no evidence that such comments disseminated any information received." The court found that the agency's claim that it was not required to disclose factual material that qualified as attorney work product, while not settled in the Tenth Circuit, was not unreasonable. (*PacifiCorp v. United States Environmental Protection Agency*, Civil Action No. 13-02187-RM-CBS, U.S. District Court for the District of Colorado, July 1)

A federal magistrate in Nevada has found the redacted portion of an email between a manager and an employee of the BATF is not covered by **Exemption 5 (deliberative process privilege)** because it is neither predecisional nor deliberative. Dealing with the single email as part of a larger request from Normand Bergeron, the agency had submitted the email to the court for *in camera* inspection. After reviewing the unredacted email, the magistrate judge ruled against the agency. He noted that "the manager is asking directly whether an agency policy exists or not. The redacted portion, with the benefit of *in camera* review, does not amount to a predecisional decision on its face because it is not a recommendation, proposal, or suggestion made before the implementation of the policy." He added that "the redacted portion is not the agency's predecisional deliberations but rather consisted of an answer and an opinion which needed more substantiation through research. Generally, postdecisional material that explain or justify a decision already made do not fall within the deliberative process privilege." The magistrate judge observed that "significantly, this court's *in camera* review finds that disclosure of the redacted portion would not enable the public to deduce or reconstruct how the agency arrived at its decision." (*Normand Bergeron v, Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives*, Civil Action No. 13-00625-MMD-WGC, U.S. District Court for the District of Nevada, June 26)

A federal court in Ohio has ruled that the DEA conducted an **adequate search** for exhibits connected to Jose Rodriguez's conviction for drug trafficking and properly withheld one exhibit under **Exemption 7(D) (confidential sources)**. Rodriguez claimed the exhibits had been altered at the time of trial and requested any records in the possession of DEA. After a search, DEA located one exhibit, but denied Rodiguez's request based on several subparts of Exemption 7. Both exhibits recorded conversations that included a confidential source and law enforcement officers in which an accomplice of Rodriguez offered to sell drugs. The court found that the existing recording was covered by Exemption 7(D). The court noted that "plaintiff alleges no facts demonstrating that [the remaining exhibit] was ever played at his trial." The court added that "there is no question of material fact that [the remaining exhibit] contains information provided by a confidential

informant." (*Jose Rodriguez v. Department of Justice, Drug Enforcement Administration*, Civil Action No. 14-173, U.S. District Court for the Southern District of Ohio, Eastern Division, June 29)

Judge Tanya Chutkan has ruled that the SEC properly rejected John Bravata's **Privacy Act** request to amend inaccurate records because Bravata failed to identify the records systems he believed contained the inaccurate records and, further, any records would be in systems of records exempt from the statute's amendment provisions. Bravata and his partner, Richard Trabulsy were convicted of defrauding investors in their equity fund through a ponzi scheme that paid dividends to earlier investors by using funds brought in by subsequent investors. While Bravata's conviction was on appeal, he sent the SEC a notification alleging that many of the records relied upon to convict him were inaccurate or inauthentic. The agency treated his letter as a Privacy Act request and told him that he would need to provide authentication of his identity and, further, indicate what systems of records he believed were inaccurate. Bravata's only response was to reiterate his original allegations and the SEC moved to dismiss his claim for failure to exhaust his administrative remedies. Chutkan agreed with the agency, noting that "plaintiff neither provides additional information to assist the SEC in identifying the desired records, nor specifies the system of records where he believes the records likely would be maintained. Furthermore, Plaintiff's [second] letter merely claims that the SEC records are inaccurate or inauthentic, without specifying the substance of the amendment he desires and submitting materials supporting his contention that the SEC's records are inaccurate." Chutkan found that any system of records that contained allegedly inaccurate records would also be exempt. She noted that "because these files are exempt from the amendment provision of the Privacy Act, even if Plaintiff had exhausted his administrative remedies, the SEC would not have been obligated to amend or correct any record it maintained pertaining to Plaintiff or the enforcement proceedings against him." (*John Bravata v. Securities and Exchange Commission*, Civil Action No. 14-1276 (TSC), U.S. District Court for the District of Columbia, July 6)