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Washington Focus: A coalition of open government groups has sent a letter to Senate Majority Leader Mitch McConnell (R-KY) and Senate Minority Leader Harry Reid (D-NV) urging them to remove four separate Exemption 3 provisions currently included in the Hire More Heroes Act (H.R. 22), the likely legislative vehicle for passing the transportation bill in the Senate. The provisions include exemptions for records provided to the Transportation Department pursuant to a review or audit of a public transportation agency safety plan, safety scores assigned to motor vehicle/trucking companies and their drivers, accident footage from audio or video cameras in intercity rail and commuter trains, and information related to tank cars used in high hazard flammable train service.

Court Rules Phone Metadata Protected by Terms of Court Order

In affirming that metadata collected from telephone calls as part of the National Security Agency's surveillance program is protected by Exemption 1 (national security) and Exemption 3 (other statutes), Judge Beryl Howell has made it clear that both exemptions provide ample protection for such data. She has also added a new wrinkle that serves to expand the accepted bases for withholding the data, finding that the Foreign Surveillance Court Orders allowing the NSA to conduct the surveillance act as a court-ordered prohibition on its disclosure under FOIA.

The case before Howell provided a somewhat more plausible claim than the basis for several of the cases that have previously reached district court in which the plaintiff starts with the assumption that because the NSA collects all electronic data it must have everybody's individual data as a result. While that premise formed the basis of this case, the FOIA litigation was brought by Agility Public Warehousing Company, a Kuwaiti logistics company that provided food to U.S. troops stationed in Iraq, Kuwait, Qatar and Jordan from 2003 through 2010 as a part of a series of contracts with the Defense Logistics Agency. The company was indicted in 2009 in the Northern District of Georgia on charges of conspiracy to defraud the United States. Agility requested NSA data on

itself, alleging that it had communicated from Kuwait with its U.S.-based attorneys at Skadden, Arps, Slate, Meagher & Flom. The law firm was a customer of Verizon Business Network Services, which had been publicly identified as one of the carriers subject to specific FISC Orders. The agency searched its Office of General Counsel, its acquisition organization and its logistics organization for any records pertaining to the contracts or litigation mentioned in Agility's FOIA request. The agency indicated that it could neither confirm nor deny the existence of any records related to its surveillance program.

Agility challenged the agency's *Glomar* response, arguing both that the information did not fall under Exemption 1 or Exemption 3 and also that the existence of the data had been publicly acknowledged. Howell found that disclosure of the information would risk revealing sources and methods. She agreed with the agency that "such information would permit adversaries to change their communications behavior or otherwise 'alert targets that their existing means of communications are potentially safe.' As a result, disclosure 'could reasonably be expected to cause exceptionally grave and irreparable harm to the national security by providing. . .adversaries a road map that instructs them on which communication modes or personnel remain safer or are successfully defeating NSA's capabilities.'" Agility contended that admitting the agency had records on Agility would not harm the agency because it was publicly known the agency was engaged in a bulk collection program. Howell pointed out that the same argument had been rejected in another case involving NSA data collection, *Competitive Enterprise Institute v. NSA* 2015 WL 151465 (D.D.C. 2015). There, Howell explained, the court indicated that "were the agency required to confirm or deny the existence of such records for specific individuals, it would begin to sketch the contours of the program, including, for example, which provider turned over data and whether the data for those providers is complete." She noted that "just as in *Competitive Enterprise Institute*, the Court finds the NSA's explanation regarding the classification and potential national harm to be both 'logical' and 'plausible'" Having found that Exemption 1 covered the records, she indicated that Section 102A(i)(1) of the National Security Act of 1947, which was cited under Exemption 3, also provided complete coverage.

Turning to the issue of public acknowledgement, Agility argued that two publicly acknowledged FISC Orders showed that the NSA had collected data from Verizon Business Networks Services. Howell indicated that "the plaintiff argues, at a minimum, the NSA has acknowledged the existence of records relating to its communications sent through Verizon Business Networks between April 25 and July 19, 2013, and, at a maximum, has acknowledged the existence of records relating to communications sent through Verizon Business Network Services and other providers since at least May 2006." Relying again on the *Competitive Enterprise Institute* decision, Howell observed that "the court concluded that the 'sources do not give any indication that the government collects metadata for *all* U.S. phone customers or even the subject of all Verizon Wireless users. As such, they do not show that the government has the specific records they seek.' The court's analysis turned on whether NSA had acknowledged the participation of a service provider in the collection program." Agility pointed out that the government had admitted collecting data from Verizon Business Network Services. But Howell indicated that "the plaintiff is correct, but only with respect to those documents obtained as a result of the officially acknowledged Secondary Order, *i.e.*, the telephony metadata collected from Verizon Business Network Services between April 25, 2013 and July 19, 2013." She observed that "with respect to other telephone service providers and other periods of time, the plaintiff has not pointed to any disclosures documenting the specific telephone service providers that participated in the program and during what periods of time. Such imprecision will not suffice to overcome the NSA's Glomar response." Agility asserted that it was logical to conclude that the NSA's surveillance program was much broader than the limited FISC Order. But Howell indicated that "logical deductions may not substitute for official acknowledgments, however."

Having found a discrete subset of data collected from Verizon Business Network Services had been publicly acknowledged and was not covered by a *Glomar* response, Howell looked at whether that data could

be properly withheld. Here, she turned to *Morgan v. Dept of Justice*, 923 F.2d 195 (D.C. Cir. 1991), a case in which the D.C. Circuit indicated that a court order sealing records could serve as a prohibition on disclosure only if one of the purposes of the order was to prohibit public disclosure. She pointed out that "a review of the *Morgan* factors reveals that the NSA has no discretion to disclose the requested documents and its withholding in the present case was proper." She observed that "the Primary [FISC] Order permits the agency to access metadata records only in certain defined circumstances," including access "for purposes of obtaining foreign intelligence information." She indicated that the uses of the data permitted by the FISC Order did not allow "the NSA the discretion to access the metadata for purposes of complying with the plaintiff's FOIA request." She explained that "to permit FOIA plaintiffs (and thereby the public at large) access to all the collected metadata would be to undermine the careful architecture erected by the FISC and enshrined in its Primary Order." She added that "the materials obtained pursuant to the telephony metadata program may be accessed only in the most limited fashion, and *not* for purposes of the FOIA." (*Agility Public Warehousing Company K.S.C. v. National Security Agency*, Civil Action No. 14-0946 (BAH), U.S. District Court for the District of Columbia, July 10)

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 the trial court erred when it found that the Lake County Board of Commissioners has improperly gone into executive session to discuss its options after the Director of the County Building and Land Use Department confessed to criminal misconduct. The local newspaper, the *Herald Democrat*, requested the audio tape of the executive session. The county board of commissioners denied access, claiming the meeting fell under an exception for day to day oversight of property or supervision of employees by county commissioners. The trial court, however, concluded that the circumstances here did not qualify as day to day supervision. The court of appeals reversed, finding that "the allegations against the Director related to criminal conduct during working hours. . .Although the county has a zero tolerance policy related to the misconduct, the subject of the executive session was to discuss the options available to the Board in implementing that zero tolerance policy under the circumstances presented. The Board was not adopting or amending a policy, but rather discussing the application of an existing policy to the situation presented by the Director's conduct." The appeals court noted that "employee disciplinary matters directed towards an individual employee are precisely the type of day-to-day supervision the statute meant to exempt." The appeals court added that "simply because the employee's conduct may not have been routine did not transform the Board's supervisory role into something extraordinary." (*Arkansas Valley Publishing Company v. Lake County Board of County Commissioners*, No. 14CA0818, Colorado Court of Appeals, Division V, July 16)

Michigan

On remand from the supreme court, a court of appeals has ruled that violations of the Open Meetings Act by the Columbia Township Board of Trustees during its search for and hiring of a new fire chief did not require invalidation of the township's hiring decision. Kenneth Speicher, one of the unsuccessful job applicants, sued the township. The trial court ruled the township had violated the OMA, but that its violation did not require invalidating its hiring decision. The trial court also found Speicher was not entitled to attorney's fees. When the case first went to the court of appeals, the appellate court found Speicher was

ACCESS REPORTS

entitled to fees. The supreme court resolved a conflict in appellate decisions by finding that attorney's fees were only available when a plaintiff received injunctive relief. Back at the appeals court, the court again affirmed the decision not to invalidate the township's decision, but found that Speicher was entitled to attorney's fees. The appeals court noted that "in the present case, plaintiff sought, and obtained, both a declaration that the Board violated the OMA and an order enjoining the Board from further noncompliance with the OMA. Thus, under [the supreme court's ruling], plaintiff sought and obtained injunctive relief, which entitles him to court costs and attorney fees [under the OMA]." (*Kenneth J. Speicher v. Columbia Township Board of Trustees*, No. 313158, Michigan Court of Appeals, July 21)

Missouri

A trial court has ruled that an exemption to the Sunshine Law for information that would identify an execution team for a lethal injection does not include pharmacies or laboratories supplying the drugs used in executions. Christopher McDaniel, the Reporters Committee for Freedom of the Press, and the ACLU all submitted public records requests to the Department of Corrections for records concerning any pharmacies or laboratories that supplied drugs to the state for use in executions. The agency denied the requests based on the exemption protecting the identities of the execution team. The trial court noted that the exemption protecting the identities of the execution team "does not, however, empower the DOC to define the execution team as it wishes, without limitation." The court pointed out that "laboratories and pharmacies are not 'persons who administer lethal gas or chemicals' or 'persons who provide direct support for the administration of lethal gas or chemicals.'" The court added that "unlike those individuals who are present in the execution chamber, pharmacies and laboratories do not participate in the act of 'administering' or dispensing lethal injection drugs to an inmate. Thus, because laboratories and pharmacies do not 'administer lethal gas or chemicals' or 'provide direct support for the administration of lethal gas or chemicals,' they cannot properly be considered members of the 'execution team' for purposes of [the exemption]." (*Reporters Committee for Freedom of the Press, American Civil Liberties Union of Missouri Foundation, and Christopher S. McDaniel v. Missouri Department of Corrections*, No. 14AC-CC00254, Cole County Circuit Court, July 15)

North Carolina

A court of appeals has ruled that the trial court must conduct an *in camera* review of the minutes of a closed session of the Alamance-Burlington Board of Education in which the superintendent abruptly resigned and was given a $200,000 severance payment. After the superintendent's resignation, Time News Publishing requested the minutes of the closed session. The board denied the request, claiming the minutes were personnel records that were exempt under the Public Records Act. The trial court agreed, but based on the supreme court's decision in *News Observer v. Poole*, 412 S.E.2d 7 (N.C. 1992), the appeals court indicated that a trial court was required to conduct an *in camera* review of the minutes to determine if disclosure would frustrate the purpose of exemptions to the Open Meetings Act. The court indicated that "on remand, the trial court should separate core personnel information from other related information that is subject to disclosure, keeping in mind the Supreme Court's admonition in *Poole* that 'courts should ensure that the exception to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and the Open Meetings Act." (*Time News Publishing Company v. Alamance-Burlington Board of Education*, No. COA15-99, North Carolina Court of Appeals, July 21)

Pennsylvania

A court of appeals has ruled that a request from the *Pittsburgh Post-Gazette* to the Department of Education for all emails of Acting Secretary Carolyn Dumaresq pertaining to her performance of her duties as

Acting Secretary spanning nearly a year's time, was overbroad and failed to adequately specify the subject matter of the emails requested. After the agency denied the request, the newspaper complained to the Office of Open Records. OOR found that the agency had not shown that the request was overbroad and had further failed to assert any exemptions it claimed applied to the emails. The Department of Education then filed suit challenging OOR's decision. The appeals court found the request was impermissibly overbroad. Dismissing the case, the court noted that the newspaper argued that "the subject matter of the Request is specific because it only seeks emails 'as they pertain to the performance of her duties as Acting Secretary.'" But the court observed that "this, however, does not provide a context by which the Request can be narrowed; it is, by virtue of the Secretary's position, a request for emails about all of the agency's activity over nearly a year's period. In other words, it is a fishing expedition. Furthermore, the Request's year-long timeframe is not short enough to save what is, because of Requester's failure to identify a subject matter narrower than 'all agency activity,' an otherwise overbroad request." (*Pennsylvania Department of Education v. Pittsburgh Post-Gazette*, No. 2095 C.D. 2014, Pennsylvania Commonwealth Court, July 14)

The Federal Courts…

The D.C. Circuit has dismissed a reverse-FOIA suit brought by Chiquita Brands International arguing that records concerning payments to terrorists made by a Chiquita subsidiary in Colombia are not protected by **Exemption 7(B) (deprivation of fair trial or adjudication)**. Chiquita had already pled guilty to charges brought by both the Department of Justice and the SEC pertaining to the payments, but because it was involved in torts litigation with multiple parties in Florida, the company contended that disclosing more records to the National Security Archive would give the Florida plaintiffs an unfair advantage by obtaining documents before they were available in discovery. When the SEC rejected Chiquita's claim, it filed suit to block disclosure. The district court rejected its argument and the D.C. Circuit agreed. The court noted that "Exemption 7(B) comes into play only when it is probable that the release of law enforcement records will seriously interfere with the fairness of 'that final step, which is called the trial.'" Chiquita argued that allowing disclosure before discovery violated its right to an impartial adjudication. But the D.C. Circuit pointed out that "we think that the phrase 'impartial adjudication' as it appears in the statute refers to determinations made by administrative agencies, not to pretrial decisions issued by a judge." The court observed that "Chiquita is wrong to urge that a slight advantage conferred on a party in a single phase of a case necessarily threatens the fairness of the trial. That position defies the text of Exemption 7(B), which tells us to assess the significance of any alleged unfairness in light of its effect on the trial and thus on the proceedings as a whole." Relying on *Washington Post v. Dept of Justice*, 863 F.2d 96 (D.C. Cir. 1988), the only other D.C. Circuit case to interpret Exemption 7(B), the court indicated that "we construed Exemption 7(B) narrowly and according to its text, the same way the Commission did here, to apply when the release of documents would likely deprive a party of a fair trial, not merely complicate the discovery schedule." (*Chiquita Brands International Inc. v. Securities and Exchange Commission and National Security Archive*, No. 14-5030, U.S. Court of Appeals for the District of Columbia Circuit, July 17)

A federal court in Washington has ruled that the Defense Department properly withheld portions of several records disclosed to Glen Milner pertaining to plans for a second Explosive Handling Wharf at Naval Base Kitsap-Bangor under **Exemption 3 (other statutes)**, but that it has failed to show that its further redactions under **Exemption 5 (deliberative process privilege)** and **Exemption 6 (invasion of privacy)** were appropriate. The court also found the agency's refusal to process records disclosed to Milner in a prior suit he brought against DOD to force it to comply with the National Environmental Policy Act constituted an

ACCESS REPORTS

improper **search**. Milner requested records pertaining to the approval of construction of a second handling wharf. DOD eventually disclosed three redacted documents. Milner appealed, which resulted in some redactions being removed and remand to the agency for a new search. At the time of the agency's final disclosure, it indicated it would not search for records previously released to Milner as part of his NEPA action. The agency withheld some records under 10 U.S.C. § 130e, which allows the agency to withhold DOD critical infrastructure security information where the public interest in disclosure does not outweigh the security interests in non-disclosure. Milner argued that the planning documents did not qualify as critical infrastructure security information. The court rejected his claim, noting that "the fact that a document reflects explosive safety information regarding a planned storage and handling facility may make it less likely that information will actually be exploited, but, if it were exploited, havoc would likely ensue." Milner also pointed to DOD guidance indicating that the agency should provide a requester an opportunity to make a public interest argument for disclosure when the agency invoked § 130e. The court observed, however, that "while the Department's memorandum sets forth a procedure which, if followed, would likely result in a more informed and accurate balancing of the relevant issues, it reflects an internal agency procedure lacking the force of law. Plaintiff has not shown that the guidelines created a right or benefit in his favor or that he otherwise has standing to enforce an internal policy." DOD withheld large portions of two documents containing questions and answers under Exemption 5. While the court agreed that the Q&As were predecisional, it found they were not deliberative. The court pointed out that "the affidavit on which the Department relies does not show that the documents contain policy proposals or analysis, recommendations, critiques, or opinions regarding the logistical data collected. The simple compilation of information necessary to inform a later decisionmaking process can hardly be described as 'deliberative.'" Milner challenged the redaction of personal information because the agency had not shown the rank of individuals whose personal information was protected. The court indicated that it "will not impose a requirement that all redactions under Exemption 6 be accompanied by a statement regarding the individual's rank or grade. The Department must, however, clearly state that only the names and contact information of individuals who are at the military rank of Colonel or below and at a rank of GS-15 or below have been redacted." The court rejected the agency's assertion that it did not have to search the records disclosed to Milner during his NEPA litigation. The court pointed out that "the Department makes no attempt to show that it would be unreasonably difficult to conduct a search of all of the accessible documents and either produce them or identify relevant exemptions. To the extent the Department seeks a blanket exclusion for all publicly-available documents, the argument is rejected: the documents are agency records and must, therefore, be made available absent an applicable exemption." (*Glen Scott Milner v. United States Department of Defense*, Civil Action No. 14-1032RSL, U.S. District Court for the Western District of Washington, July 17)

Wrapping up the issues remaining after the Second Circuit ruled that the government had waived its ability to withhold an Office of Legal Counsel memo containing the legal basis for targeted drone strikes against U.S. citizens through official acknowledgement, Judge Colleen McMahon has ruled that the majority of still-disputed documents were properly withheld from the ACLU by the OLC, the CIA, and the Defense Department under **Exemption 1 (national security)** and **Exemption 5 (privileges)**. McMahon exhibited a great deal of frustration that "the Court of Appeals was not more definitive in its discussion of how closely an official acknowledgment had to track information contained in a document that would otherwise be exempt from disclosure." She observed that "what the Second Circuit did not do in *New York Times* was to explain where the line between 'stringent' and 'overly stringent' [application of the Second Circuit's public acknowledgement precedent] could be found." She noted that "I do not read *Wilson v. CIA*, [586 F.3d 171 (2d Cir. 2009)] as requiring that the withheld information correspond verbatim to information previously released, or that the prior release have been made by the very same official whose statement appears in the withheld document, or by an official in the agency where the discloser works, or even by an official in the branch of Government where the discloser works. The Government is the Government; and if, for example, the

Attorney General makes a factual assertion about the Defense Department, then that fact has been 'officially acknowledged' by the Government for purposes of the *Wilson* rule—but only to the extent of the specificity of the public statement." The exception to that rule, McMahon pointed out, was that official acknowledgement of classified CIA information could not be based on a release of information from Congress or another agency. Drawing a line between what had been officially acknowledged and what had not, McMahon explained that "acknowledgement of operational *involvement*, in other words, does not eviscerate the privilege for operational *details*." She then rejected the ACLU's claim that the ability of the government to withhold seven categories of information had been waived by official acknowledgement, indicating instead that the information went beyond what had been made public. She then told OLC, the CIA, and DOD that they must revisit their original segregability claims and provide more information about whether further portions of records could be disclosed. She indicated that where necessary she would examine such explanations *in camera*. She also found that the CIA could continue to use a *Glomar* response for some documents. (*American Civil Liberties Union v. Department of Justice*, Civil Action No. 12-794 (CM), U.S. District Court for the Southern District of New York, July 16)

Judge Royce Lamberth has ruled that the attorneys representing Roger Hall and Accuracy in Media are entitled to more than $400,000 in interim **attorney's fees** for their 11-year FOIA suit against the CIA for records concerning POW/MIAs in Southeast Asia. While agreeing that the plaintiffs were entitled to a fee award, the agency suggested capping any award at $75,000, arguing that the plaintiffs had not succeeded on a number of issues. Lamberth noted that "the Court finds it troubling that the CIA did not even attempt to analyze how many hours related to such [unsuccessful] motions. . .The CIA opted out of providing a quantitative measure of which hours were 'reasonable' and which were not—providing no basis from which to determine how much of a reduction would be appropriate and leaving such calculations to the Court." The agency argued that the released information did not significantly contribute to public understanding, citing one incident in which a soldier presumed to be dead was found to still be alive in 1968. Lamberth remarked that "while the CIA apparently believes that this information is of interest only to his wife and does not improve the public's knowledge of the functioning of the government, the Court vehemently disagrees." The agency claimed that many of the records were already publicly available from the National Archives. Lamberth indicated that "the relevant time period is whether they were available when plaintiff *requested* the documents. The CIA fails to bear its burden of establishing the fact that the documents were already publicly available when *requested*. The CIA is not entitled to drag its feet on a FOIA request until the records sought are publicly available, and then deny plaintiffs their fees because the documents are *now* publicly available." Settling on the USAO *Laffey* matrix as the appropriate way to calculate fees, Lamberth awarded Hall's attorney $294,296 in fees and the attorney for Accuracy in Media $120,182. (*Roger Hall, et al. v. Central Intelligence Agency*, Civil Action No. 04-814 (RCL), U.S. District Court for the District of Columbia, July 14)

A federal court in California has ruled that the National Marine Fisheries Service has displayed a **pattern and practice** of ignoring FOIA's deadlines by excessively delaying processing requests submitted by Our Children's Earth Foundation concerning the effect of the Searsville Dam and Lake Water System, owned and operated by Stanford University, on the habitat of the Central California Coast Steelhead. Although Our Children's Earth Foundation asked the court to find that both the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service were equally guilty of willfully delaying responses, the court concluded that the two agencies had only been the recipients of referrals from NMFS and had not shown a continuing pattern and practice of delay. The court agreed with NMFS that the Foundation continually inundated the agency with complex requests that frequently were submitted just as the agency was getting a handle on processing previous requests. But the court noted that "here, both the statutory deadlines and their violation are clear, and

ACCESS REPORTS

the repeated, routine violations of these deadlines by agencies has been a continual source of concern for Congress. . .Although the Court and many others have recognized that agencies' resources are heavily taxed by the quantity and depth of FOIA requests. . .that does not grant the agency carte blanche to repeatedly violate congressionally mandated deadlines." The agency argued that the holding in *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), concluded that the only remedy for agency delay was to allow a requester to go to court. The court found the agency's reliance on *CREW* was misplaced, pointing out that *CREW* was considering whether administrative remedies had been exhausted and thus the case could continue, rather than whether declaratory or injunctive relief should issue." The court found the Corps of Engineers and the Fish and Wildlife Service had not shown a pattern and practice of delay similar to that of the NMFS. The court indicated that the statute required an agency to respond to a referral with "all practicable speed," but that it also required a notice stemming from a claim of unusual circumstances "shall specify a date that would result in an extension for more than ten working days." Because the court found the two agencies had not shown the disregard for FOIA's time limits exhibited by NMFS, it declined to decide which of those time limits might apply to referrals. The Foundation had also asked the court to consolidate the current cases with a third case involving similar FOIA requests. Permitting the consolidation, the court observed that "a case that presents another potential violation or—as the Federal Defendant suggests, proof of compliance undermining thus pattern and practice alleged by Plaintiffs—should be evaluated in the same light as the other cases involving substantially the same agency responding to the same FOIA requestors seeking information about substantially the same matter." (*Our Children's Earth Foundation v. National Marine Fisheries Service*, Civil Action No.14-4365 SC and No. 14-1130 SC, U.S. District Court for the Northern District of California, July 20)

Resolving the remaining issues in a case brought by the ACLU of Northern California against the Justice Department for records concerning the use of mobile tracking technology known as a cell site simulator, a federal magistrate judge in California has ruled that an email from a DOJ attorney to another DOJ attorney concerning the use of agency equipment to obtain location information for a particular wireless device is not protected by **Exemption 5 (privileges)**. Magistrate Judge Maria-Elena James first found the email did not qualify as attorney work product. She noted that "while it does very briefly describe what type of legal process might be necessary to use the technology at issue, the description does not rise to the level of revealing any mental impressions, conclusions, or theories related to a litigation purpose. As such, the Court cannot find that a litigation purpose permeates these documents." James rejected the agency's assertion of attorney-client privilege as well. She pointed out that "it is not clear how this document qualifies as legal advice. The email appears to merely contain two excerpts from other documents, without any indication about why the author of the email compiled the excerpts together and for what purpose. Neither the Court's *in camera* review nor the Government's supporting declarations demonstrate that this email was communicated between lawyer and client or that it contains legal advice." James had previously found that Exemption 5 applied to templates used in asking for search warrants. After reconsidering parts of that ruling, she found that forms used to identify an unknown phone number before a search warrant was requested were too far removed from the attorney work product to be considered subject to the privilege. (*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, July 13)

Judge Tanya Chutkan has ruled that the FBI conducted an **adequate search** for records pertaining to Cina A. Ryan. Ryan believed he had been under government surveillance since 911. He requested records about himself from the FBI. The FBI's first response was that it found no arrest records. Ryan then sent another request, emphasizing that he wanted his complete file. This time the FBI said it found no responsive records and to the extent that Ryan was asking for confirmation as to whether he was on a watch list the agency would neither confirm nor deny the existence of such records. Ryan then filed suit challenging the

agency's search. The FBI searched both its Central Records System and its Electronic Surveillance indices using a variety of spellings as well as a phonetic breakdown. After Ryan filed suit, the agency conducted a second search, which also came up empty. Pointing to a provision from the OPEN Government Act requiring agencies to search records maintained by records management contractors, Ryan claimed the agency's search was not inclusive enough. Chutkan pointed out that "this provision primarily addresses the availability of physical documents committed to the custody of a third-party for storage, and does not necessarily impose an affirmative obligation to search for and produce documents in the possession of third party contractors. Nothing in the record suggests that the FBI has transferred any of its records to a government contractor for records management, or that any documents so transferred would not have been found in the searches described above." Ryan claimed the FBI was required to search for records held by other agencies involved in any alleged surveillance of him. Chutkan noted that "FOIA, however, requires only that the agency search for and produce documents in its possession, not search for records across the entire federal government." Ryan attacked the agency's search by pointing to instances indicating the agency had various storage drives that it did not search regularly and another instance in which the agency had misled a district court judge about the existence of records. Chutkan rejected these claims, observing that there was no indication that these practices were ongoing or that the agency's search for records on Ryan was conducted in bad faith. Finally, Chutkan indicated that the FBI's explanation of its CRS search included the use of phonetic terms, but that its ELSUR search did not. She told the agency to supplement its affidavit to explain whether the ELSUR search had also included a phonetic search as well. (*Cina A. Ryan v. Federal Bureau of Investigation*, Civil Action No. 14-1422 (TSC), U.S. District Court for the District of Columbia, July 10)

A federal court in Ohio has ruled that the IRS properly withheld records from B & P Company pertaining to its investigation of whether James Wright has a substantial ownership interest in the company and should be investigated for tax evasion under **Exemption 5 (deliberative process privilege)** and **Exemption 7(A) (ongoing investigation or proceedings)**. The court also found the agency had conducted an **adequate search** for records requested by Wright pertaining to a 1999 judgment against him. When B & P Company and Wright received notice from the IRS that Wright owed $505,000 in restitution in connection with a 1999 judgment against him for tax evasion, both Wright and the company filed FOIA requests with the IRS for relevant documents. The only document responsive to B & P's request was a 41-page draft Revenue Agent Report. The agency withheld the report under Exemption 5 and Exemption 7(A). B & P conceded that the document was both predecisional and deliberative, but argued that since it did not pertain to Wright's criminal investigation its disclosure would not harm the agency. The court rejected the argument, noting that the agency's affidavit explained that "a freeze hold had been placed on B & P's audit 'because James L. Wright is under criminal investigation and *he has an ownership interest, either direct or indirect, in B & P*.'" Turning to the Exemption 7(A) claim, the court indicated that "the IRS has satisfied its burden of proving that disclosure of the draft RAR, which was compiled *solely* for law enforcement purposes, could interfere with enforcement proceedings, and would seriously impair Federal tax administration." After conducting a search for records pertaining to the 1999 judgment against Wright in several offices that were most likely to have the records, the IRS concluded that the records had been destroyed pursuant to the agency's ten-year retention policy. The IRS produced a 2004 probation officer's report on Wright that indicated that he still owed $501,000 in July 2004. The court pointed out that "this report corroborates the IRS's position that the amount of restitution owed by Wright was calculated prior to July of 2004, and explains why document responsive to Wright's FOIA requests no longer exist." (*B & P Company, Inc. v. Internal Revenue Service*, Civil Action No. 14-232, U.S. District Court for the Southern District of Ohio, Western Division, July 20)

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A federal court in Minnesota has accepted the magistrate judge's recommendation that Rhonda Fleming's FOIA suit against FOIA officers at various agencies be transferred to the District Columbia as the appropriate jurisdiction for **venue** purposes. The magistrate judge found that the records were not physically located in Minnesota and that Fleming's incarceration in Minnesota does not make her a resident for purposes of FOIA. Fleming argued that because the records were electronically available they were accessible in Minnesota, providing a basis for venue. But the court noted that "Fleming fails to provide factual support or legal authority for this proposition, however, and the court finds none. Further, the record supports the conclusion that the documents at issue are physically located outside this district." The court agreed with the magistrate judge that Fleming was not a Minnesota resident. The court pointed out that "as stated in the [magistrate judge's report], involuntary and temporary detention is insufficient to establish residence in the district of incarceration." (*Rhonda Fleming v. Medicare Freedom of Information Group*, Civil Action No. 15-594 (DSD/HB), U.S. District Court for the District of Minnesota, July 13)

Judge Royce Lamberth has ruled that the DEA properly refused to confirm or deny the existence of records pertaining to Lamont Lee, a government informant that Devaughn Smith alleged had publicly testified at his murder-for-hire trial in Louisiana. Smith sent a request to the DEA that was addressed to the FBI. He asked for records about himself as well as the cooperation agreement with Lee. The DEA processed his request and told Smith that it could find no records about him and that it would not confirm or deny the existence of records about Lee. Smith then requested the cooperation agreement with Lee, saying that Lee's status as an informant was public because he had testified at Smith's trial. The DEA argued that any cooperation agreement with Lee would have been handled by the U.S. Attorney's Office, not DEA. As a result, DEA would not have such a record. Lamberth agreed, noting that "the Court has sifted through plaintiff's proffered documents and finds that none establishes the existence of a written cooperation agreement between Lee and *DEA*." (*Devaughn Smith v. U.S. Department of Justice*, Civil Action No. 14-1853 (RCL), U.S. District Court for the District of Columbia, July 20)

Judge James Boasberg has ruled that the U.S. National Control Bureau conducted an **adequate search** for records pertaining to Jason Cavezza and his extradition from Mexico on drug charges and that the agency properly redacted parts of records under **Exemption 6 (invasion of privacy)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(D) (confidential sources)**, Cavezza brought suit against a number of components of the Department of Justice pertaining to his extradition. Dealing solely with USNCB's motion for summary judgment, Boasberg pointed out that Cavezza had largely conceded that the agency properly responded to his request. Boasberg noted that Cavezza's "only argument [pertaining to the search] is that if certain materials were not located, their non-existence demonstrates the illegality of his extradition. A FOIA suit, of course is not the vehicle to assert such a challenge, and this Court offers no opinion on the merits of Cavezza's extradition." As to the exemption claims and the agency's contention that any records that might be subject to the Privacy Act would be contained in exempt law enforcement systems of records, Boasberg once again found Cavezza had conceded the agency's position. Boasberg dismissed Cavezza's attempt to amend his complaint to ask for damages, noting that "as FOIA does not permit monetary damages, amending Cavezza's Complaint as he desires would be futile." (*Jason Cavezza v. U.S. Department of Justice*, Civil Action No. 15-182 (JEB), U.S. District Court for the District of Columbia, July 9)

Judge Amy Berman Jackson has quashed a subpoena requesting that Department of Homeland Security Secretary Jeh Johnson be deposed in a **Privacy Act** suit brought by Jill Kelley alleging that government officials leaked information to the press about her and her husband Scott. The Kelleys were part

of a social circle in Tampa that included frequent social interactions with high-ranking military officials, including former Gen. David Petraeus and Gen. John Allen. Jill Kelley received an anonymous threatening email that she reported to the local FBI office. The Kelleys gave the government permission to access their email accounts for purposes of identifying the sender of the email, subsequently identified as Paula Broadwell, who was writing a biography on Petreaus. During the investigation, information about the Kelleys also appeared in the press. Kelley ultimately sued the government for several violations of the Privacy Act. Jackson previously had dismissed all her claims except for that involving improper disclosure of personal information to the press. Kelley then tried to subpoena Johnson, who at the time had served as General Counsel at the Defense Department, alleging that, based on several later newspaper articles, he had personal knowledge regarding the sources of the leaks. Jackson noted that "the mere fact that Johnson, who by that time was the former General Counsel of the [Defense] Department, responded to questions on the record in connection with the Tampa Tribune article does not give rise to any reason to believe that he was the source of the previous unauthorized and unattributed leaks." But Jackson acknowledged that "even if he does not have any knowledge of or involvement in the disclosures to the media, he may have some relevant knowledge about the receipt and dissemination of the emails by the FBI. Based on all of these circumstances, the record supports a finding that Secretary Johnson has some personal knowledge about the matter." Having found that Johnson might have personal knowledge, Jackson indicated that Kelley initially needed to subpoena reporters who covered the story to see if they identified Johnson as a source of the leak. After having pursued that route she still could not obtain the information needed, Jackson observed that she could renew her request to subpoena Johnson. (*Gilberte Jill Kelley v. Federal Bureau of Investigation*, Civil Action No. 13-0825 (ABJ), U.S. District Court for the District of Columbia, July 16)

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