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Washington Focus: James Holzer has been appointed executive director of OGIS, succeeding Miriam Nisbet. Holzer comes from the Department of Homeland Security where he served as the Department's FOIA Officer. As the first director, Nisbet established the office after it was created by Congress as part of the 2007 OPEN Government Act amendments. But now that the infrastructure has been created, OGIS's role going forward in the FOIA process still has not been completely fleshed out. Created as an ombudsman for the FOIA process, open government advocates hoped OGIS would become a useful alternative to litigation and help resolve many issues administratively. To that end, Nisbet emphasized mediation as a primary focus for OGIS. While OGIS has moved to implement that goal, it has also begun to review agency regulations and policies in an attempt to establish best practices government-wide. To help solidify OGIS's position in the FOIA process, open government advocates have been pushing legislation in both the House and the Senate that would enhance OGIS's ability to carry out such tasks. Holzer's job will be to build on Nisbet's accomplishments, try to preserve the gains OGIS has made so far, and to move OGIS into the future.

Court Questions Categorical Use Of Exemption 7(A) in Bid for New Trial

Generally, the scope of exemptions tends to expand over time as courts continue to accept the government's arguments over what types of records need protection from potential public disclosure. Perhaps one of the most useful illustrations of this trend has been with Exemption 7, which started out covering law enforcement files. Because of several D.C. Circuit opinions finding the breadth of the exemption's coverage to be much greater than Congress had intended, Exemption 7 was split into six sub-parts as part of the 1974 FOIA amendments, largely to both clarify its intended coverage, but more specifically to restrict a broad interpretation of the exemption that allowed law enforcement agencies to withhold entire files. Since that time, however, the various sub-parts have been subjected to their own interpretive expansion. A recent district court decision involving Exemption 7(A) (interference with ongoing investigation or proceeding) serves to illustrate some of the exemption's

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remaining interpretative tensions.

The case involved a request by Jessica Leigh Johnson, an investigator for the Federal Community Defender Office in Philadelphia. FCDO represented Odell Corley, who had been convicted of capital murder in connection with an August 2002 attempted robbery of the Pines Bank in Indiana. Corley was convicted in U.S. District Court for the Northern District of Indiana in 2004 and was sentenced to death in 2014. His sentence was upheld on appeal. In January 2010, Corley filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. That motion remains active in U.S. District Court for the Northern District of Indiana. Johnson asked the FBI Laboratory Division for any records concerning the FBI's investigation of the attempted robbery of the Pines Bank. The agency told Johnson that any responsive records would be subject to Exemption 7(A). Johnson appealed to OIP, which remanded the case to the FBI for a search. The agency located 5,827 pages. After Johnson committed to paying estimated costs, the FBI located more records comprised of 23 electronic media items. The agency reviewed 856 pages and released 95 pages in part, citing Exemption 7(A) and Exemption 7(E) (investigative methods and techniques). In a second release, the agency reviewed 5,059 pages and released portions of 86 pages, again citing Exemption 7(A) and Exemption 7(E). Johnson appealed once again and OIP upheld the FBI's Exemption 7(A) claim.

Judge Gene Pratter started his examination of the case law by noting that "it is generally insufficient for the agency to simply cite categorical codes in connection with each withheld document, and then provide a generic explanation of what the codes signify." He pointed out that "thus, 'while the use of the categorical method does not *per se* render a *Vaughn* index inadequate, an agency using justification codes must also include specific factual information concerning the documents withheld and correlate the exemption to the withheld documents.'" In a footnote, Pratter indicated the government relied heavily on case law dealing with national security issues and observed that "matters of individual rights in the criminal justice context deserve and demand careful consideration. They are not necessarily cases of equivalencies. This case falls squarely into a criminal justice context rather than a national security context, so the statements of the relevant legal standard from those cited cases involving national security and foreign policy are of somewhat limited applicability."

Whether Exemption 7(A) was applicable at all hinged on whether or not Corley's challenge to his conviction constituted a pending or prospective enforcement proceeding. The FBI argued that Corley could use any information to undercut and interfere with a new trial. As a result, the agency contended that only public sources of information—such as newspaper articles—would be unlikely to interfere with a possible new trial if Corley succeeded with his § 2255 motion. Johnson argued on the other hand that "such a motion is *not* an appeal," that the § 2255 motion was available only after a conviction became final, and that the "they should not be viewed as enforcement proceedings under the FOIA."

Noting that "there is very little case law addressing the issue of whether collateral attacks on criminal convictions are themselves 'enforcement proceedings' under the FOIA," Pratter suggested that "the existence of a pending motion under § 2255 makes it reasonably foreseeable that an enforcement proceeding (i.e., a new trial) will take place, leading to the expectation that Exemption 7(A) may apply to protect materials whose release could reasonably be expected to interfere with that new trial. To be sure, proceedings in connection with a § 2255 motion are not, in and of themselves, enforcement proceedings because they are not directly related to prosecuting the defendant. Nonetheless, Exemption 7(A) may apply whenever a specific enforcement proceeding is pending *or prospective*. Where there is a pending § 2255 motion and the movant is seeking a new trial, the new trial constitutes a prospective enforcement proceeding that may implicate Exemption 7(A). Thus, even though the pending proceedings under § 2255 are collateral and deal with the constitutionality of the process used to convict and confine Mr. Corley, the possibility that the court will grant Mr. Corley's motion and the United States will be left to prosecute Mr. Corley again is sufficient for

Exemption 7(A) to possibly apply." In a footnote, Pratter added that "the Court does not mean to suggest that Exemption 7(A) would necessarily bar every prisoner serving a sentence who *may* file a § 2255 motion—even a second or successive § 2255 motion—from successfully securing the disclosure of materials from the investigative file relating to his or her case. Indeed, it may be that the prospect of a new trial is insufficiently 'concrete' to implicate Exemption 7(A) where a FOIA request is made and there is no § 2255 motion pending. . ."

Johnson argued the agency's claims that Corley would misuse the information were "generic and speculative." Relying on the Supreme Court's decision in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), in which the court found witness statements were categorically protected, even though there was no evidence that Robbins Tire would misuse the information, Pratter explained that "here, as in *Robbins Tire*, there is no specific evidence that Mr. Corley or any specific third party is at all likely to commit any of the bad acts conjured up by the FBI, but the disclosure of previously undisclosed information could nevertheless reasonably lead to interference with enforcement proceedings."

Pratter then noted that the agency's categorical claim under Exemption 7(A) applied only to the extent that the withheld information had not been previously disclosed. He explained that "the evidence introduced at Mr. Corley's trial constitutes a specific set of materials, likely present in the investigative file at issue, which was placed in the public record. Ms. Johnson claims that some of the withheld materials were made public at Mr. Corley's criminal trial, but the FBI has failed to identify which documents (or categories of documents) were or were not introduced as evidence in that trial. In light of the fact that the United States has already presented its case once before, and some of the materials in the investigative filed (including the identities of witnesses and the investigative tactics used by government agents) are claimed to be matters of public record, it cannot be that their release could reasonably be expected to result in any of the harms articulated by the FBI."

He pointed out that "in contrast to the categorical assertion of Exemption 7(A) in *Robbins Tire*, where the plaintiff sought advance access to witness statements that were not matters of public record, at least some of the materials in this case are being withheld to protect the identities of witnesses *whose identities may already be matters of public record*. . .Such information likely having been disclosed and made part of the public record, it is impossible to see how its disclosure by way of a FOIA request would have any different effect than did its earlier disclosure during litigation." Ordering the agency to supplement its *Vaughn* index to provide more detail, Pratter observed that "without a detailed description of the materials that are in the investigative file, especially a detailed description of which materials were made part of the public record at trial or produced in discovery, the Court is in no position to find that any of the materials in the investigative file risk interfering with Mr. Corley's possible second trial."

The agency had also made claims under Exemption 3 (other statutes), Exemption 5 (privileges), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(D) (confidential sources), and Exemption 7(E) (investigative methods and techniques). But because of its primary reliance on a categorical application of Exemption 7(A), Pratter told the agency that he had no way to know where information protected by other exemptions might actually appear in the records. He indicated the agency could explain such claims in further detail in its supplemental index addressing the categorical applicability of Exemption 7(A). (*Jessica Leigh Johnson v. Federal Bureau of Investigation*, Civil Action No. 14-1720, U.S. District Court for the Eastern District of Pennsylvania, Aug. 4)

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Views from the States…

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

California

A court of appeals has ruled that the inadvertent disclosure of privileged documents under the Public Records Act does not constitute a waiver of any applicable privilege and that the public body has the right to recover the documents if possible in much the same way an inadvertent disclosure of records in discovery would allow the party making the inadvertent disclosure to recover the documents. The case involved a request by a citizens group in Newark for records about the resignation of the previous school superintendant. The Newark Unified School District gathered responsive records and provided them electronically to the requesters. However, the interim school superintendant realized later that day that many of the documents were potentially subject to legal privileges and asked the requesters to return the documents for review. The requesters refused, citing Section 6254.5, which provides that disclosure waives any privilege. The trial court agreed with the plaintiffs and the school district appealed. After considering the matter, the court of appeals ruled that an inadvertent disclosure did not constitute a waiver and that such an interpretation of the PRA would make it irreconcilable with the Evidence Code, which requires parties in litigation to return records that were inadvertently disclosed. The court noted that "while "disclosure' could refer to any action by which documents are communicated as [the plaintiffs argue], it is also both reasonable and plausible to restrict the use of the term to intended communications, thereby excluding the type of inadvertent release that occurred here." Reviewing the legislative history, the court explained that the intent of the waiver provision was to ensure that public bodies did not treat requesters differently. The court observed that "an inadvertent release does not involve an attempt to assert the exemptions as to some, but not all, members of the public, the problem Section 6254.5 was intended to address." The court rejected the plaintiffs' argument that a constitutional amendment recognizing the importance of access to government information required the court to narrowly construe provisions that restricted disclosure. Instead, the court indicated that reconciling the PRA provision with the Evidence Code was more important under these circumstances. The court pointed out that "reasonably reconciling the Legislature's enactments on the scope of privilege waiver is the most appropriate means to giving effect to its judgment in these circumstances." (*Newark Unified School District v. Superior Court of Alameda County; Elizabeth Brazil, Real Party in Interest*. No. A142969, California Court of Appeal, First District, Division I, July 31)

Colorado

A court of appeals has ruled that the Department of Public Health and Environment properly withheld the software and data files for its Computerized Online Breath Archive because its licensing agreement with CMI, Inc. prohibited its disclosure. Vincent Todd, a paralegal who worked primarily on DUI cases, requested records pertaining to the Intoxilyzer 9000, an in-field breathalyzer that was linked to the agency's database. The department claimed the software was proprietary and that disclosure of the Structured Query Language files in which the data was maintained would be tantamount to disclosing the software. The department offered to provide the data in a Comma-Separated Values format, but Todd rejected its offer and sued instead. Todd argued that the proprietary nature of the software had to be based on the contract itself. The court, however, noted that "no contractual agreement is necessary to create or protect a trade secret. Provided the requirements of the Uniform Trade Secrets Act are met, a trade secret is subject to protection under Colorado Law. Todd cites no authority to the contrary and we are aware of none that would support the proposition that a court may look only to the contract to determine whether information is within [the Colorado Open Records

Act's] trade secret exception." The court then indicated that the names of breathalyzer operators were protected from disclosure. The court pointed out that "the Department and the State of Colorado have substantial legitimate interests in preventing such a breach of security of the DUI enforcement system." The agency had also withheld the names of individuals who had been given breathalyzer tests. The court remanded the issue back to the trial court after finding the agency had failed to provide evidence that it had considered the expectation of personal privacy by individuals. (*Vincent C. Todd v. Ann Hause, Director of Legal and Regulatory Compliance for the Colorado Department of Public Health and Environment*, No. 14CA1219, Colorado Court of Appeals, Division 1, July 30)

Pennsylvania

A court of appeals has ruled that the Department of Corrections was collaterally estopped from arguing to the Office of Open Records that a health services contract with Wexford Health Sources could be redacted when requested by an inmate because the same issues had been decided against the department in previous litigation. When Vernon Maulsby requested the contract, the department provided it with redactions. Maulsby then complained to OOR, claiming that the department had already litigated the same issue in *Gerber v. Pennsylvania Department of Corrections* and had lost when it appealed to the court of appeals. Although the only issue litigated in that case had to do with whether the appeal was proper, OOR found that because the department could have raised any other issue pertaining to whether the contract should be disclosed it was now estopped from litigating the case again. The court of appeals agreed, noting that "contrary to the Department's assertion, it did have a full and fair opportunity to litigate the merits of its asserted exemptions concerning the Wexford contract in the *Gerber* case." But the court then pointed out that "the OOR's application of collateral estoppel does not mandate disclosure of a complete, unredacted copy of the Wexford contract in this case, especially in light of the Department's failure to follow the OOR's procedural mandate requiring notification to third parties if the requested records contain confidential proprietary, or trademarked records of a business entity." Noting that it had required an opportunity for affected parties to intervene in previous cases dealing with third-party privacy or security matters, the court indicated that Wexford should be given an opportunity to intervene in the OOR proceedings to protect its confidentiality interests. (*Department of Corrections v. Vernon Maulsby*, No. 1222 C.D. 2014, Pennsylvania Commonwealth Court, July 23)

Tennessee

A court of appeals has ruled that the City of Memphis willfully denied access to records requested by Andrew Clarke by declining to process his request and suggesting instead that he use the discovery process to obtain the records. Clarke, an attorney, was representing a client in litigation against the City. He made a request under the Tennessee Public Records Act and when the City finally responded, it told Clarke that the records he requested were part of the litigation against the City and that he should use the discovery process to obtain them. The trial court ruled in favor of Clarke and awarded him $3,500 in attorney's fees. On appeal, the appellate court noted that a primary factor in awarding attorney's fees was whether the public body's response willfully ignored the law. In this instance, the court pointed out that "The City's initial objection in this case to Mr. Clarke's records request supports a finding that it acted willfully." The court observed that "here, the City's response does not articulate a valid legal reason as to why Mr. Clarke's records request cannot be entertained. We know of nothing in the rules of discovery or the TPRA that would deny a citizen the right to make a public records request *simply* because that citizen is an attorney involved in litigation with the municipality." The court added that "in this case, the City failed to provide a specific legal reason as to why Mr. Clarke should be denied records, but instead relied upon a hypothesized general barrier to access." Clarke had requested $11,685 in fees, $9,345 of which was for his own work on the case. Noting that

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"although Mr. Clarke is entitled to recover attorneys' fees he actually incurred as a cost, he is not entitled to recover attorneys' fees he billed while working on his own case. His rights to the public records under the TPRA are as a citizen; his status as an attorney does not automatically afford him rights superior to that of any other citizen under the Act." Clarke's fee request also included $2,340 in fees for another attorney. The appeals court observed that "although the trial court had discretion to award attorneys' fees of up to $2,340, a cost corresponding to services [the attorney] performed on behalf of Mr. Clarke, it did not have the authority to make an award of attorneys' fees in the amount of $3,500." To correct the error, the appellate court changed the amount of Clarke's attorneys' fees award from $3,500 to $2,340. (*Andrew C. Clarke v. City of Memphis*, No. W02014-00602-COA-R3-CV, Tennessee Court of Appeals, July 23)

Virginia

Edwin Roessler, Chief of Police for Fairfax County, has denied Barrie Masters' VFOIA request on the basis that charges stemming from the shooting death of his son David in 2009 by a Fairfax County police officer could be brought some time in the future. In his letter to Masters, Roessler noted that "although the Office of the Commonwealth Attorney has ruled that there was no basis for criminal liability by former Officer Ziants for his deployment of deadly force and the United States Department of Justice has declined to proceed with the matter, under the Code of Virginia there is no provision which sets forth a statute of limitation for a charge of murder or manslaughter. Therefore, since the criminal investigation can be re-opened at any time, I have determined [the records] are exempt from mandatory disclosure [under VFOIA]." While the Fairfax County police department's adamant refusal to disclose any records on such closed investigation was raised the ire of open government advocates as well as citizens like Masters, there has been no indication that the department is likely to soften its position. In an email response to Roessler, Masters pointed out the department's use of the criminal investigative files exemption is something "you and your associates have hidden behind for almost six years now, and, of course, you well know that the current law does not say the information request is *exempt* from release only that *it can be released at the discretion of the custodian.* Your own [review subcommittee] has recommended you end the blanket approach to suppressing information under the excuse of your own interpretation [of the exemption] and move toward the timely release of all criminal investigative information."

Washington

A court of appeals has ruled that the statute implementing the Washington constitution's requirement for ballot secrecy qualifies as a prohibitory statute for purposes of the Public Records Act. Timothy White requested electronic copies of ballots from a number of counties. All the counties declined, citing the ballot secrecy provision as the basis for denying access. White appealed, arguing that ballots could be disclosed without identifying the voter. The court rejected that notion, noting that "we conclude that in Washington, all 'ballots,' including copies, are exempt from production under the Public Records Act. . .The exemption is necessary to protect the 'vital governmental function' of secret ballot elections." The court added that "redaction will not eliminate the risk that disclosing copies of ballots will reveal the identity of individual voters. Ballots are exempt in their entirety." (*Timothy White v. Skagit County*, No.72028-7-I, Washington Court of Appeals, Division 1, July 13)

Wisconsin

A court of appeals has ruled that Vilas County District Attorney Albert Moustakis does not have standing to challenge the disclosure of complaints filed against him. After the Department of Justice informed Moustakis that it intended to disclose the complaint records in response to a request by the Lakeland Times, Moustakis indicated that he would file suit to block disclosure, a remedy that is available to some categories of

public employees, such as school teachers. But the court agreed with DOJ that Moustakis was not entitled to sue because he did not qualify as an "employee" under the law. Instead, the court pointed out that "an 'employee' is 'any individual who is employed by an authority other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority.'"The court concluded that "Moustakis is not an 'employee' within the meaning of the [public records act]. This means the records requested by the Lakeland Times do not 'relate' to Moustakis as 'an employee.' . . .Because the records do not fall within this narrow exception to the general rule that a 'record subject' is not entitled to advance notice or judicial review of the release of records pertaining to that record subject, Moustakis lacks standing to bring this action. . ." (*Albert D. Moustakis v. State of Wisconsin Department of Justice*, No. 2014AP1853, Wisconsin Court of Appeals, July 31)

The Federal Courts…

A federal court in West Virginia has ruled that Marshall Justice failed to show that the Mine Safety and Health Administration is required to respond to FOIA requests within 20 days. The court also found that the agency has not substantiated redactions made under **Exemption 5 (privileges)**. Marshall Justice, a coal miner and miner's representative at Gateway Eagle Coal Company, filed an administrative complaint with the MSHA alleging that Gateway officials insulted him, disparaged his religion, and prevented him from speaking to two MSHA inspectors who were conducting on site safety checks. The agency investigated Justice's complaint and found Gateway had not violated the Mine Act. Justice then appealed to the Federal Mine Safety and Health Review Commission. In preparation for his case, Justice made a FOIA request to MSHA for non-privileged portions of the completed investigation. After the agency failed to respond within 20 days, Justice filed suit. Besides claiming the agency had failed to disclose responsive records he also requested a declaratory judgment to force the agency to respond to such requests within the statutory time limit. Of the 112-page investigative file, the agency released 45 pages in full, 26 pages with redactions, and withheld 41 pages. The agency subsequently disclosed another six pages in full and five pages with redactions. The agency moved to dismiss Justice's claim for declaratory judgment as being too broad and Justice filed a motion to amend the count to request the court to order MSHA to respond to miners' requests within 20 days. The court rejected Justice's motion, noting that "agencies are still obligated under FOIA to produce the requested documents 'promptly' after making a determination about the appropriate scope of the response. But nothing in FOIA absolutely requires an agency to 'provide all documents and materials relevant to a' request 'at most within' 20 days, and there is, as a result, no basis in that statute to declare that MSHA is required to do so." Only four pages containing memoranda of interviews of MSHA inspectors remained in dispute under Exemption 5. The agency claimed they included the inspectors' opinions, but Justice argued that such memoranda of interviews often contained nothing but factual material. Justice pointed to interviews of several Gateway officials the agency had disclosed as an indication of the factual narrative content of such records. The court agreed, but noted that "of course, it's possible that the MOIs of the MSHA inspectors are different—but apart from the vague suggestion that inspector testimony 'often includes personal opinions,' the agency's index and declaration do not assert that *these* MOIs contain opinion testimony about MSHA's investigation." Acknowledging that the interviews might still qualify as deliberative even if they were largely factual if the presentation of facts revealed the inspectors' deliberations, the court observed that "to reach that conclusion here, the index would need to permit the court to conclude that the MOIs of the MSHA inspectors contain something other than an objective recitation of the factual matter contained in the interviewees' statements about the argument between Justice and Gateway officials on October 24, 2013. As it stands, the agency's materials do not permit that conclusion." The agency had withheld personal information under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Rejecting the agency's

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contention that the individuals' privacy interests outweighed any public interest in disclosure, the court indicated that "personal information concerning the identities of the inspectors falls within the ambit of Exemption 7(C) and may be redacted, but MSHA has not shown that it is entitled to categorically withhold the MOIs of the MSHA inspectors under that Exemption." The court order the agency to provide further substantiation of its exemption claims and noted that it would consider reviewing the records *in camera* if it still was not satisfied with the agency's further explanation. (*Marshall Justice v. Mine Safety and Health Administration*, Civil Action No. 14-14438, U.S. District Court for the Southern District of West Virginia, July 31)

Judge Christopher Cooper has ruled that OMB has shown that records it withheld from the Environmental Integrity Project are protected by **Exemption 5 (deliberative process privilege)**, but that the Small Business Administration has not yet substantiated that its records dealing with the same topic were protected by the exemption as well. A coalition of environmental groups filed FOIA requests with OMB and the SBA for records concerning OMB's review of an EPA proposed update to Effluent Limitation Guidelines limiting toxins that may be discharged from coal-fired plants. Both agencies provided a number of records but withheld others under Exemption 5. The Environmental Integrity Project challenged the withholdings, arguing in part that the 1993 E.O. 12866, directing OMB's Office of Information and Regulatory Affairs to disclose all documents exchanged with an agency during the regulatory review process, required disclosure even if the records could be considered deliberative. Cooper found the SBA's affidavits insufficient, noting that "SBA's declarations and *Vaughn* index recite the general elements of the deliberative process privilege without explaining in relative detail how they apply to the documents in question." He added that "such conclusory statements that 'parrot' the case law do not support withholding." Rather than send the case back to the agency for further explanation, Cooper pointed out that "given the small number of withheld documents, however, the Court will attempt to expedite matters by directing SBA to submit the eleven withheld for *in camera* review." Cooper rejected EIP's argument that E.O. 12866 required OMB to disclose its records. Instead, he observed that the agency's "expectation of confidentiality grows from its long-standing position that E.O. 12866's disclosure requirement applies only to exchanges made by OIRA personnel at the branch-chief level and above. Indeed, Plaintiffs do not contest that OMB has consistently treated staff-level communications with agencies as falling outside the scope of the Order. In light of this policy, the Court has little trouble concluding that the OMB staffers who engaged in the withheld communications here did so with the settled expectation that their communications with agency staff would not be made public." Reviewing the index for a 100-page sample selected by the plaintiffs, Cooper observed that "the listed descriptions confirm that the records reflect candid discussions leading up to the agency's recommendations on the proposed rule." (*Environmental Integrity Project v. Small Business Administration, et al.*, Civil Action No. 13-01962-CRC, U.S. District Court for the District of Columbia, Aug. 5)

Judge Colleen Kollar-Kotelly has ruled that the Justice Department conducted an **adequate search** for records approving wiretaps for phones of several individuals involved in an investigation of Juan Gordon for drug-related charges. Gordon made a FOIA request to DOJ's Criminal Division for memoranda pertaining to the approval of the wiretaps. The Criminal Division initially invoked **Exemption 3 (other statutes)**, citing the wiretap provisions of Title III. Gordon appealed the decision to OIP, which upheld the denial, but cited **Exemption 5 (privileges)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** instead. Gordon filed suit and the agency conducted several database searches—a database used to track federal prosecutors' requests for permission to apply for wiretaps and the archived email system of the Criminal Division's Information Technology department—releasing 420 pages and withholding 900 pages. Gordon challenged the agency's search, claiming the agency should have searched the databases before he filed suit. Kollar-Kotelly noted that "while Plaintiff is correct that the agency violated FOIA by failing to

conduct a search until after the suit was filed, that result has no legal consequences in this case. . .While the delay means that the agency may not raise an exhaustion defense, the agency has not done so here." Gordon argued the agency should have searched databases maintained by the FBI and EOUSA. But Kollar-Kotelly pointed out that "Plaintiff, however, submitted his original FOIA request only to the Criminal Division—and not to the FBI or EOUSA. . .Accordingly, because the above databases are not within the Criminal Division's control, Plaintiff may not seek relief regarding searches—or the lack therefore—of those other databases in this action." The agency had claimed most of the withheld records fell under the attorney work-product privilege. Kollar-Kotelly agreed, observing that "these types of documents constitute attorney work-product, and their disclosure would risk putting DOJ's lawyers' thought processes and strategy on public display. Indeed, other courts in this district have concluded that wiretap memoranda and other intra-agency discussions regarding wiretapping were protected as attorney work-product. The Court notes that, while the second and third categories of documents—electronic notices confirming receipt of the Title III application—may appear to have a quasi-administrative character, they are still records compiled in anticipation of a specific criminal prosecution, and courts in this District have held that the work product exemption protects such records." As to the redactions made under Exemption 7(C), Kollar-Kotelly indicated that "plaintiff is correct, however, that Exemption 7(C) would likely only apply to the names and personal information of the government employees." Considering the **segregability** of claimed personal information, she noted that "because the Court finds that all of the records at issue were properly withheld as work product pursuant to Exemption 5, no further segregability analysis is necessary, and the Court concludes that the agency fulfilled its segregability obligations." Gordon argued the agency had failed to consider the disclosability of the records in light of his **Privacy Act** request. Kollar-Kotelly observed that "while Defendants state in their brief that the email archive is a system of records, nothing in [its] affidavit or elsewhere in the record suggests that the email archive is, in fact, a system of records subject to the disclosure provisions of the Privacy Act. Moreover, courts within this District have consistently held that similar email archives are not 'systems of records' under the Privacy Act because they are not indexed by personal identifier." (*Juan Gordon v. Kenneth Courter*, Civil Action No. 14-1382 (CKK), U.S. District Court for the District of Columbia, July 31)

A federal court in California has ruled that the Forest Service properly responded to several requests from Sierra Access Coalition for records concerning decisions to prohibit motorized travel on routes in the Plumas National Forest. The Coalition contended that the Forest Service had failed to respond to its requests and had shown a **pattern and practice** of delay. The court initially pointed out that "even if Defendants had not provided the responsive, nonexempt material until filing the pending [summary judgment motion], the belated production moots Plaintiffs' FOIA claim." But after examining the evidence, the court observed that the FOIA Coordinator at Plumas had produced several emails the Coalition sent the agency shortly after receipt of the Coalition's requests thanking them for their quick response. Finding the evidence supported the agency's claim, the court noted that "even if Defendants did not comply with the September 2, 2011 FOIA request—a claim Defendants dispute—a single FOIA violation is, by definition, insufficient to establish a 'recurring pattern of FOIA violations.'" The court added that "upon reviewing extrinsic evidence, it appears that Defendants complied with the FOIA requests shortly after receiving them, and, thus, the egregious delay exception is not applicable." (*Amy Granat v. United States Department of Agriculture*, Civil Action No. 15-00605-MCE-DAD, U.S. District Court for the Eastern District of California, July 29)

A federal court in California has ruled that Smart-Tek Service Corporation may proceed with its FOIA suit against the IRS even though as a dissolved company under Florida law its ability to bring suit is limited to issues involved in winding up its affairs. Smart-Tek Service made a request to the IRS for its tax records. When the IRS failed to respond, Smart-Tek Service filed suit. The agency contended that since Smart-Tek

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Service was a dissolved company, it did not standing to bring a FOIA suit. The court disagreed, noting that "Plaintiff's FOIA suit falls within the realm of statutorily permitted acts for dissolved Florida corporations because it seeks documents that may be necessary for determining and settling Plaintiff's tax liabilities in the course of winding up. By attempting to obtain such tax-related agency records, Plaintiff is not conducting new business prohibited by [the Florida statute]. Instead, Plaintiff is taking steps that are a part of a corporation's winding up process after dissolution." (*Smart-Tek Service Corporation v. United States Internal Revenue Service*, Civil Action No. 15-00452 BTM (JMA), U.S. District Court for the Southern District of California, July 27)

A federal court in Pennsylvania has ruled that Troy Beam **failed to exhaust his administrative remedies** for his request for records concerning the IRS's criminal investigation of him. Beam submitted a request in October 2013 for records pertaining to the agency's investigation. The agency responded in March 2014 by disclosing 21 pages of records and withholding other records. In June 2014, Beam submitted a second FOIA request, admitting that the requests were identical but characterizing the second request as an appeal of his first request. The agency declined to process the second request because it had already provided Beam with all responsive records. Beam then filed suit. The IRS argued that Beam's June 2014 request was merely an untimely attempt to appeal the denial of his original request. The court agreed, noting that "Beam conceded in his June 4, 2014 petition that his requests were indistinguishable and that, due to changed circumstances, he 'wished to appeal the IRS's decision regarding' the records he sought in his October 10, 2013 request. It is abundantly clear that Beam's second submission (1) failed to comply with the thirty-five day time limit for appeals established by IRS regulations, and (2) did not constitute a separate and distinct FOIA request." (*Troy Beam v. Internal Revenue Service*, Civil Action No. 14-1706, U.S. District Court for the Middle District of Pennsylvania, July 24)