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Washington Focus: The fallout concerning former Secretary of State Hillary Clinton's emails continues unabated on several fronts. Judge Richard Leon sharply criticized State for its inability to move more quickly to disclose more of Clinton's emails during a recent court hearing on the Associated Press's FOIA suit against State. The AP's suit involves just over 60 emails and Leon said in court that "now, any person should be able to review that in one day—one day." He added that "even the least ambitious bureaucrat could do this." Acting State FOIA Officer John Hackett told Leon that although he had 60 full-time FOIA staffers, the actual reviews of emails and memos were done by 40 former Foreign Service officers who worked part-time. Leon exploded, saying that "is Congress aware that people who do all [State] FOIA requests are part-timers?" Leon also seemed interested in finding out the names of State staffers who failed to turn over Clinton's emails when Hackett requested them in 2013, indicating that he would consider having them deposed. He also encouraged the AP attorneys to not settle the case and suggested he would order the agency to speed up its disclosures instead. . . Meanwhile, suggestions by the intelligence community's IG and others that Clinton's emails need to be reviewed more closely for possible classified information has incensed members of the open government community who see the suggestion as another way to block disclosure. Steve Aftergood of Secrecy News said that "by adding layers of review, and the corresponding ability to block disclosure, the IG's approach would ensure that the least possible amount of information gets released."

Court Finds Company Names Protected by Exemption 4

In a case brought by EPIC against the Department of Homeland Security for records concerning the privacy implications of its Defense Industrial Base Cyber Pilot program conducted jointly with the Department of Defense and designed to protect U.S. critical infrastructure and provide classified threat and technical information to voluntarily participating companies, Judge Gladys Kessler has ruled in favor of the agency with the exception of its claim that Exemption 7(D) (confidential sources) applied to the names

ACCESS REPORTS

of participating companies. Along the way, Kessler has explored several issues, particularly the authority of classifiers and the commercial status of participating company names, which do not come up very often in litigation.

Based on concerns expressed by the Justice Department that the DIB Cyber Pilot program might run afoul of laws forbidding government surveillance of private Internet traffic, EPIC requested records about the program, including contracts with Lockheed Martin, CSC, SAIC, and Northrop Grumman, contracts or agreements with AT&T, Verizon and CenturyLink regarding the program, and any memoranda of understanding between the National Security Agency and DHS or other government agencies or corporations concerning the program. DHS informed EPIC that its request had been referred to the National Protection and Programs Directorate as the most likely office to have responsive records. EPIC eventually filed suit after the agency failed to respond. The subsequent DHS searches uncovered 16,000 pages of potentially responsive records. An initial review winnowed that number to 10,000 pages and a subsequent line-by-line review produced 1,276 pages. DHS disclosed 117 pages entirely and 1,159 pages with redactions. After EPIC reviewed the documents, it found references to several email attachments that had not been disclosed. DHS conducted another review based on EPIC's list of records that appeared missing and found several records that had not been disclosed. In all, DHS produced 1,386 pages, some of which were redacted, and withheld 362 pages entirely.

EPIC challenged the agency's search primarily because the agency had not re-evaluated its search in light of the allegedly missing attachments. DHS argued that EPIC assumed the missing attachments contained responsive records that had not been disclosed. However, the agency pointed out that many of the attachments contained records that were non-responsive, had already been disclosed or withheld, or were duplicates of other records. Kessler relied on the D.C. Circuit's decision in *Steinberg v. Dept of Justice*, 23 F.3d 548 (D.C. Cir. 1994), where the appellate court ruled that the agency's search was not inadequate just because Steinberg had located references in the disclosed records suggesting the possible existence of other records. Kessler noted that "the Government has shown that the initial search conducted by DHS in response to EPIC's FOIA request was meticulous, organized, and thorough." She added that "EPIC has identified a limited number of potentially responsive documents it believes were overlooked, and DHS has sufficiently accounted for why many (although not all) of the documents flagged by EPIC were properly excluded. FOIA does not require DHS to track down every cross-referenced document."

The agency withheld records under Exemption 1 (national security) and EPIC based its challenge exclusively on whether the agency had shown that David Sherman, Associate Director for Policy and Records at the NSA, had original classification authority. In its second affidavit, DHS indicated that Sherman had Top Secret classification authority. It also provided an affidavit from Sherman from another case explaining his classification authority. Noting that EPIC was not claiming that Sherman did not have original classification authority, Kessler indicated that "as the Court gives a presumption of good faith to the [agency's] affidavit, and because EPIC has provided no support for its allegation that the declarations provided by DHS are insufficient, the Court concludes that the [second DHS affidavit], along with the Sherman declaration from another case, are sufficient to establish that he is an authority on classified materials who properly identified documents to be withheld under the Executive Orders pursuant to Exemption 1." EPIC also argued based on its original classification authority claim under Exemption 1 that one of the statutes DHS cited to withhold information under Exemption 3 was inapplicable. Having rejected the argument under Exemption 1, Kessler likewise dismissed EPIC's Exemption 3 claim.

One of the more puzzling issues Kessler faced was the agency's insistence that the companies' names and other identifying information was commercial information protected by Exemption 4 (confidential business information). Citing *Hodes v. Dept of Housing and Urban Development*, 532 F. Supp. 2d 108

(D.D.C. 2008), EPIC argued that a company could not have a commercial interest in its name. But Kessler agreed with DHS that it was not quite so simple. She pointed out that "while a company may not always have a commercial interest in its name and identity, the Court may also consider the context in which the issue arises. The identities of which companies have participated in the DIB Cyber Pilot, if disclosed, could have a commercial or financial impact on the companies involved. The companies are commercial enterprises doing business with the Government and the reason they seek protection from having their participation disclosed is because of the potential effect that disclosure would have on their businesses."

Because the participating companies did so voluntarily, DHS argued that the confidential status of their identities should be assessed under the voluntary prong of *Critical Mass*. DHS told Kessler that "to encourage participation from companies in the DIB Cyber Pilot and similar programs in the future, the companies need to be assured that their participation will be confidential and not revealed to the public." EPIC argued that "because defense contracting companies have preexisting, publicly known relationships with DHS, and because only defense contracting companies could have participated in the DIB Cyber Pilot, the identities of the participating companies are already publicly known." Rejecting that claim, Kessler pointed out that "if this were true, it is not clear why EPIC is still seeking the information. In any event, in invoking Exemption 4, the identities of which companies participated in this particular program is at issue, not whether the companies are publicly known in other endeavors."

DHS also claimed that the companies were sources protected under Exemption 7(D). EPIC argued that 7(D) applied only when a source provided information to the agency, not when it received information from the agency. Kessler agreed. She noted that "while the express promise of confidentiality is relevant, DHS has not contended that the companies provided any information pursuant to that promise. Nor has DHS shown that mere participation in the DIB Cyber Pilot program turns each company into a 'source' of information for purposes of Exemption 7(D)." (*Electronic Privacy Information Center v. United States Department of Homeland Security*, Civil Action No. 12-0333 (GK), U.S. District Court for the District of Columbia, Aug. 4)

Views from the States…

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

Florida

A court of appeals has ruled that information revealing the time, date, location and nature of an alleged incident of domestic violence involving a Florida State University football player must be disclosed to Michael Barfield under an exception to the exemption for records pertaining to an ongoing investigation. The general counsel at FSU sent an email to the Tallahassee police department with an attached screen shot from a Facebook page that alleged domestic violence and included photos of bruised body parts. The police initiated an investigation and announced the incident involved an FSU football player and that no details could be disclosed because it was an ongoing investigation. Barfield filed a public records request and then sued the agency. The trial court found the records were protected as part of an ongoing investigation. The appeals court found that time, date, location and nature of the crime information was specifically excluded from the ongoing investigation exemption. The appeals court noted that "here, the Facebook post attached to the general counsel's email reported the date, time, and nature of the crime to TPD within the meaning of [the exception]. TPD then initiated an investigation based on this email. [The] TPD [was required] to disclose at

ACCESS REPORTS

least some of the information included in the email and attachment in response to Mr. Barfield's public records request." (*Michael Barfield v. City of Tallahassee*, No. 1D14-5530, Florida Court of Appeal, First District, Aug. 14)

Michigan

A court of appeals has affirmed a trial court ruling that the public interest in knowing how Michigan State University dealt with incident reports concerning 301 student-athletes outweighs their privacy rights. ESPN had requested the records. Michigan State denied the request, citing the privacy exemption as applying to names o f suspects, victims, and witnesses. ESPN sued and the trial court found the privacy exemption applied to the names of victims and witnesses, but that the public interest outweighed any privacy interest in protecting the names of suspects. Michigan State appealed to the court of appeals. The court of appeals agreed that the names constituted personal information for purposes of the exemption. The appeals court noted that "the disclosure of the names of the student-athletes who were identified as suspects in the reports serves the public understanding of the operation of the University's police department." The court added that "in order to determine whether the student-athletes were treated differently from the general student population or from each other on the basis of the student-athlete's participation in a particular sport or the renown of the student-athlete, it is necessary to know the student-athlete's name and the nature of the allegations involved in the investigations. Only then can ESPN compare and contrast the information within the requested reports to both other incident reports and other cases disclosed via news media." The court concluded that "even if revealing the names of the student-athletes in the context of the reports amounts to the revelation of information of a personal nature, that revelation is not unwarranted." (*ESPN, Inc. v. Michigan State University*, No. 326773, Michigan Court of Appeals, Aug. 18)

New Jersey

A court of appeals has ruled that the notice of agenda requirements in the Open Public Meetings Act requires public bodies to provide nothing more than a list of items to be considered at a meeting and does not require a public body to provide access to attachments and appendices that may be referred to in the published agenda. David Opderbeck, a law professor at Rutgers, sued the Midland Park Board of Education for failing to provide access to attachments and appendices mentioned in meeting agendas until after the meeting had occurred. The trial court ruled in Opderbeck's favor, but acknowledged that its decision was based primarily on the board's inability to explain why supporting documents were not published when the agendas themselves were published on the board's website. But the appeals court, after reviewing the 1975 legislative history of the OPMA, found that the legislature intended that the notice of agenda requirements would be satisfied by publication in two local newspapers and posting of the agenda in a location accessible to the public. Opderbeck had successfully contended that the board was only publishing its agenda in one newspaper, which led the board to begin posting the agenda on its website to ensure adequate notice. That concession, in turn, led Opderbeck to argue the board should post all its agenda-related materials online and the trial court, finding this would promote transparency, found the board had no adequate reason for not doing so. The court of appeals explained that "the provisions in the OPMA that define 'adequate notice' are tethered to a world where daily newspapers were presumed to be the most reliable and efficacious means of providing the public with notice. . .In construing the term 'agenda' in our modern technological age, it is tempting to define' agenda' to include attachments, appendices, and other forms of supplemental material because, practically, it merely requires adding an electronic 'link' to the Board's agenda, which is already posted on its official website. Considering the public policy goals of the statute, it is nearly impossible to imagine this approach would have been rejected by [the legislature] if it had been available in 1975." But the court pointed out that "our role as judges in our tripartite system of government is to construe statutes by using well-settled principles of legislative interpretation, not to amend statutes using our own notion of what is in the public's

best interest." (*David W. Opderbeck v. Midland Park Board of Education*, No. A-0, New Jersey Superior Court, Appellate Division, Aug. 18)

Pennsylvania

A court of appeals has ruled that the Office of Open Records erred when it ordered the Office of the Governor to disclose records concerning the consideration of William Capouillez for the position of executive director of the Pennsylvania Gaming Commission after finding the Governor's Office had failed to show that many of the records were protected by attorney-client privilege or the deliberative process privilege. Although OOR acknowledged that many of the records fell within the attorney-client privilege, it found the Governor's Office had not shown that the privilege was not waived by allowing non-privileged employees to see the records. But the court indicated that "once the Governor's Office establishes the privilege, Requester bears the burden of proving waiver. To the extent OOR concluded any of the records did not qualify as privileged because the *Governor's Office* did not establish waiver, OOR erred." As to the deliberative process privilege, the court noted that "OOR erred to the extent it determined certain records were not protected by this exception based on their origin outside an agency." The court agreed that the Governor's Office had not provided sufficient evidence to support its claims. The court pointed out that "the only evidence the Governor's Office submitted to OOR were the records reviewed *in camera*. There is no dispute the Governor's Office did not submit an affidavit or any other documentary evidence to OOR. Its unsworn position statement does not constitute evidence. Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the *evidentiary* record." The court remanded the case to OOR for further consideration. (*Office of the Governor v. Robert H. Davis, Jr.*, No. 1940 C.D. 2014, Pennsylvania Commonwealth Court, Aug. 12)

The Federal Courts…

While largely agreeing with other courts that have found that redactions made to a DOJ White Paper containing the Justice Department's legal analysis supporting targeted drone killings of U.S. citizens are appropriate under **Exemption 1 (national security)**, Judge Amit Mehta has ruled that the agency improperly limited its search for records concerning the Obama administration by interpreting that phrase as being limited to the White House and not other cabinet offices. Journalist Jason Leopold requested the White Paper and any related records provided to Congress. DOJ provided a copy of the White Paper and a more detailed analysis contained in another leaked memo. Unsatisfied with those disclosures, Leopold filed suit, arguing the agency's **search** was inadequate. Leopold contended that OIP had failed to indicate that someone in the Office of the Attorney General might have responsive records. OIP provided another affidavit correcting the error. But Mehta declined to find that error was evidence of bad faith on the part of the agency. He noted that "although the declaration contained errors, those errors are not indicative of bad faith. Mistakes alone do not imply bad faith. The Supplemental Declaration addresses, to the court's satisfaction, the discrepancies between OIP's internal records and the initial declaration. It acknowledges the errors made, explains why the internal records provide an incomplete picture of OIP's process, and offers additional details regarding the search." In its attempt to narrow the scope of a potential search, OIP interpreted Leopold's reference to the Obama administration as limited to the White House. Leopold argued this interpretation improperly narrowed the appropriate search. Mehta agreed, noting that "the natural meaning of the term 'administration' when referring to a U.S. President's administration, encompasses more than officials in the Executive Office of the President. At a minimum, it includes other high-level cabinet and agency officials." Mehta observed that "DOJ, of course, was not required to search for communications with every conceivable agency and person in

the 'Obama administration' in order to sufficiently respond to Plaintiff's request. It was reasonable for the agency to use email domains to narrow the number of possible recipients of relevant communications. But the narrowing of possible recipients should have taken into account the subject matter and the executive branch stakeholders who were likely involved." He added that "further, if DOJ was at all uncertain about the scope of Plaintiff's request, it could have asked him what he meant by 'Obama administration,' which it did not do." Noting the existence of other decisions pertaining to the White Paper, Mehta pointed out that "this court has an independent obligation to conduct its own *de novo* review of the agency's decision to withhold information, taking into account Plaintiff's specific claims and the record before the court. To that end, the court ordered DOJ to produce an unredacted version of the White Paper for *in camera* review." After reviewing the White Paper *in camera*, Mehta agreed that the government's claims under Exemption 1 and Exemption 3 (other statutes) were appropriate. (*Jason Leopold v. Department of Justice*, Civil Action No. 14-00168 (APM), U.S. District Court for the District of Columbia, Aug. 12)

Judge Beryl Howell has ruled that time records of a DOJ attorney assigned to the investigation of whether the IRS improperly targeted conservative groups applying for tax-exempt status are protected by **Exemption 5 (attorney work-product privilege)**. After DOJ identified Barbara Bosserman, a senior legal counsel in the Civil Rights Division, to Congress as one of the attorneys assigned to the IRS investigation, Judicial Watch filed a request for Bosserman's time records. After the agency failed to respond within the statutory time limit, Judicial Watch filed suit. DOJ initially told Judicial Watch that the records were protected by **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, but indicated in its summary judgment motion that the records were also protected by Exemption 5 under the attorney work-product privilege and the deliberative process privilege. Howell found the records were completely covered by the attorney work-product privilege. She acknowledged that the attorney work-product privilege was generally limited to records created in anticipation of litigation, but pointed out that "although the DOJ's investigation into various IRS employees has yet to proceed to litigation, an investigation may suffice for purposes of the requirement that the legal work be done in anticipation of litigation." Howell found that "the clear weight of authority—including prior decisions by judges on this Court—holds that attorney time records while not *per se* protected by the work product privilege, may nonetheless contain protected work product." But, citing the Supreme Court's decision in *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983), Howell observed that "it makes little difference whether a privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to 'routine' disclosure." DOJ described Bosserman's time records as containing "accounts of the tasks as she performed them including notes about locations visited, persons consulted, staff briefings, and other case developments. This material was prepared in contemplation of an ongoing criminal investigation and provided to supervisors to assist them in overseeing the investigation and potential prosecution of certain IRS employees." Howell concluded that "consistent with the great weight of authority at both the federal and state level, the portions of Ms. Bosserman's time records detailing the locations visited, persons contacted, staff briefings, and other case developments are protected from disclosure as attorney work product. . .Accordingly, the defendant need not produce the requested time records even though the plaintiff seeks only the number of hours worked by Ms. Bosserman and not information relating to the activities performed." (*Judicial Watch, Inc. v. United States Department of Justice*, Civil Action No. 14-1024 (BAH), U.S. District Court for the District of Columbia, July 31)

Judge Royce Lamberth has ruled that the CIA must search for records of a CIA operation to help Colombia track and capture drug king pin Pablo Escobar because the agency admitted the operation was a special activity that falls within an exception to the CIA Information Act. Relying on the Los Pepes Panel

report, Lamberth noted that "unredacted portions of the Los Pepes Panel documents describe an operation that began with 'the establishment of a U.S. Embassy Joint Task Force and the concurrent establishment of a Colombian Task Force, all designed to assist in the apprehension of Escobar and other members of the Medellin cartel' and ended, presumably, with 'the shoot-out with Escobar and his body guard which resulted in Escobar's death.'" Lamberth observed that "it is true that no one line in the unredacted portions of the documents independently affirms the existence of declassified CIA special activities connected to Los Pepes or Escobar. Nevertheless, the evidence in the record supports the Court's conclusion that such activities (1) did exist, (2) were CIA-linked, and (3) have been declassified." Lamberth pointed that the agency's *Vaughn* index specifically indicated that records were redacted to protect special activities. The agency asserted that the reference to special activities only recited the relevant portion of the E.O. on classification, but Lamberth indicated that "the relevant Vaughn Indices state that defendant redacted material in order to protect, among other things, one of those categories [mentioned in the E.O]—'special activities.' Defendant offers literally no evidence that the Vaughn Indices mean anything other than what they so plainly mean." Lamberth went on to find that the special activities were linked to the CIA. He noted that "the House Permanent Select Committee on Intelligence was briefed on the matter by CIA staff, and the National Security Council and Senate Select Committee on Intelligence were briefed by Directorate of Operations officers, including the chief of the CIA's independent investigation unit. The only rational explanation the Court can muster for the CIA's extensive involvement in explaining this matter to oversight entities—given that defendant offered no alternative—is that the CIA was responsible for the intelligence activities (including special activities) at issue in the report." Lamberth found evidence that the CIA had declassified the existence of the special activity. He observed that "the CIA-authored Vaughn Indices attached to the [agency's declaration] explicitly acknowledge the existence of special activity that is linked to Los Pepes and Escobar. The court therefore concludes that defendant has declassified the existence of the relevant special activity." (*Institute for Policy Studies v. United States Central Intelligence Agency*, Civil Action No. 06-960 (RCL), U.S. District Court for the District of Columbia, Aug. 19)

In a case that hinged upon whether documents that qualified as deliberative were also truly predecisional, Judge John Bates has ruled that U.S. Citizenship and Immigration Services has satisfactorily explained that the disputed records were created before the agency's decision to grant asylum to Nelson Jose Mezerhane Gosen, his daughter Maria Andrea Mezerhane de Schnapp and their families. From the beginning of the litigation, the agency had insisted that its decision to grant asylum had not been made until November 2013 when the Mezerhane family received the official letter granting asylum. But because the Mezerhanes produced evidence that they were told by USCIS staff on several occasions that they had been granted asylum in 2010, Bates found the agency had not shown that the disputed documents were actually predecisional. This time, however, the agency provided Bates with an explanation that accounted for the difference in times. Bates noted that "it is clear that much of the process required to grant asylum—not just a letter of notification—was not yet complete in September 2010. The vetting and security check process had yet to run its course. And many of the documents at issue—which the Court has reviewed *in camera*—confirm that the internal vetting process was ongoing between 2010 and 2013. This vetting, a prerequisite for Headquarters review, was incomplete in 2010; the government, then, could not have made a truly final decision to grant the Mezerhanes asylum at that time." The agency concluded that the 2010 dates in several databases were the result of clerical error. Bates accepted that explanation, pointing out that "although this Court does not know for certain whether the database was a simple clerical error or a misguided employee decision, it is confident, given [the agency's supplemental declarations] that the 2010 entry did not reflect the final outcome of the official deliberative process required to grant asylum. Since that process was not completed until November 2013, when final Headquarters approval of asylum occurred, the documents are predecisional and protected under Exemption 5." Having reviewed the records *in camera*, Bates found that there was some factual

ACCESS REPORTS

material that could be disclosed. But he pointed out that "although the Court has highlighted several areas where there may be reasonably segregable material, it also recognizes that courts should give 'considerable deference' to an agency's judgment as to what constitutes" the agency's deliberative give and take. As a result, Bates indicated that "the Court will require the government to re-assess the remaining pages in dispute and disclose all reasonably segregable portions of non-exempt material." (*Nelson Jose Mezerhane Gosen and Maria Andrea Mezerhane de Schnapp v. United States Citizenship and Immigration Services*, Civil Action No. 13-1091 (JDB) and No. 13-1461 (JDB), U.S. District Court for the District of Columbia, July 30)

The Sixth Circuit has reluctantly upheld its 1996 decision in *Detroit Free Press v. Dept of Justice*, 73 F. 3d 93 (1996), in which the majority ruled that mug shots were public once an individual had appeared in open court. In a per curiam decision finding that the U.S. Marshals Service was required to disclose mug shots of several Detroit-area police officers indicted on federal charges, the court pointed out that both the Tenth and Eleventh Circuits had recently issued decisions finding mug shots were protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Nevertheless, the court noted that mug shots were disclosable in the Sixth Circuit and ordered the Marshals Service to disclose the requested photos. Articulating a privacy interest based solely on embarrassment, the court observed that "booking photographs convey the sort of potentially embarrassing or harmful information protected by the exemption; they capture how an individual appeared at a particularly humiliating moment immediately after being taken into federal custody. Such images convey an 'unmistakable badge of criminality' and, therefore, provide more information to the public than a person's mere appearance." The court pointed out that "a criminal defendant's privacy interest in his booking photographs persists even if the public can access other information pertaining to his arrest and prosecution. Individuals do not forfeit their interest in maintaining control over information that has been made public in some form." The court added that "criminal defendants do not forfeit their interest in controlling private information while their cases remain pending. Even if an individual possesses a *heightened* interest in controlling information about his past entanglements with the criminal justice system, it does not follow that he has *zero* interest in controlling what information becomes public during ongoing proceedings. Moreover, booking photographs often remain publicly available on the Internet long after a case ends, undermining the temporal limitations presumed by *Free Press I*." (*Detroit Free Press, Inc. v. United States Department of Justice*, No. 14-1670, U.S. Court of Appeals for the Sixth Circuit, Aug. 12)

Editor's Note: The interpretation of Exemption 7(C) on this issue has changed dramatically since the original *Free Press* decision in 1996. As a result, it seems likely that the Sixth Circuit will eventually reverse its original decision. But it remains extremely puzzling to assume that individuals have a privacy right to control embarrassing information about themselves when that information is a matter of public record. To take this argument to its extreme, perhaps individuals who are indicted should be able to have all information about their cases kept under wraps because it is personally embarrassing. People do things that are embarrassing every day, but that does not somehow equate into an enforceable expectation of privacy that trumps access statutes.

Judge Randolph Moss has ruled that the State Department may supplement its affidavits to support its interpretation that 8 U.S.C. § 1202(f) of the Immigration and Nationality Act prohibits disclosure of records concerning revocation of visas as well as denials of visas. The case involved State's decision to deny a non-immigrant visa to Colombian citizen Mauricio Rojas Soto because the agency believed Soto was involved in illicit drug trafficking. As a result of that finding, State denied the visa applications for Soto's wife and daughter and revoked the student visa of another daughter on the ground that no family member was eligible for admission to the U.S. if the head of the household is ineligible. The Sotos brought suit to obtain records

about their applications and any other records about themselves. The agency found 132 records. It released three records in full, 14 records with redactions, and withheld 115 records in full. The agency claimed all the records withheld were covered by **Exemption 3 (other statutes)**. The Sotos challenged the agency's **search**, arguing that it should have found records related to why the agency had concluded Mauricio was involved in drug trafficking. Moss noted, however, that "Plaintiffs' dissatisfaction with the Department's search, moreover, seems to turn on the proposition that the Department must have some records that relate to why it believed that Mauricio Rojas Soto was involved in drug trafficking." He observed that "FOIA merely requires an agency to describe what it did to search for records in response to a FOIA request—not to describe how it originally located records relied upon in making an administrative decision. . .[T]o the extent the Plaintiffs seek documents maintained in the files of other agencies, an agency does not have a duty to release records or documents that are not under *its* control or possession." The Sotos argued that § 1202(f), which pertains "to the issuance or refusal of visas or permits to enter the United States" did not apply to the revocation of their daughter's student visa. While several courts have ruled that § 1202(f) does not apply to revocations of existing visas, Moss explained that he "is not yet convinced that visa revocations fall beyond the reach of section 1202(f)." He noted that Section 1202 "established the procedures that effectuate the authorities granted in section 1201. The provisions, accordingly, appear to work together in a manner that might well contemplate the application of the confidentiality provisions of section 1202(f) to the entire grouping of proceedings." But Moss indicated that here the State Department's problem was that it had not provided sufficient information about the revocation of the daughter's student visa and how it related to the denial of a visa to Mauricio Soto. He noted that "the Department needs to be more specific about what it is withholding and on what basis. Its supporting declaration and *Vaughn* index, for example, should distinguish between the different terms and concepts that form possible bases for withholding. Only after the Department provides that information can the Court address whether the Department's refusal of issuance and revocation decisions were 'inextricably intertwined' in this case." The Sotos also questioned whether the agency had disclosed all non-exempt materials. With the exception of the dispute over their daughter's student visa, Moss found the agency had appropriately considered whether any non-exempt material could be separated and disclosed. He observed that "this is thus not a case where the Agency has withheld large reports or documents containing merely passing references to particular visa applications; rather, Plaintiffs' visa applications were the primary subject of, or reason for the existence of, each document withheld." (*Mauricio Rojas Soto, et al. v. U.S. Department of State*, Civil Action No. 14-00604 (RDM), U.S. District Court for the District of Columbia, Aug. 6)

The D.C. Circuit has concluded the 30-year old litigation brought by Carl Oglesby against a number of agencies pertaining to the role former Nazi General Reinhard Gehlen played as an intelligence asset for the U.S. after World War II. Oglesby made his original request in 1985 and his case went to the D.C. Circuit twice, resulting in several important procedural decisions. Oglesby died in 2011 and his daughter, Aron DiBacco, and her domestic partner, Barbara Webster, were substituted as plaintiffs. Writing for the court, Circuit Court Judge Patricia Millett explained the lengthy odyssey of the case, noting that after the D.C. Circuit's second decision, the legal landscape affecting the processing of Oglesby's request was changed significantly by the 1998 Nazi War Crimes Disclosure Act, which required agencies to locate any remaining classified records pertaining to war crimes committed by Nazi Germany and its allies and make them publicly available through the National Archives. This prompted the CIA to publicly acknowledge its relationship with Gehlen. The agency indicated it had located more than 25,000 pages of potentially responsive records which would be made available through NARA. After that, however, the case languished for more than a decade and after Oglesby's death, DiBacco and Webster were substituted as plaintiffs in Oglesby's stead. The district court ruled in favor of both the CIA and the Army and DiBacco appealed. DiBacco argued that the Army had transferred its records to NARA to avoid having to conduct a search itself. The final review of Army records

ACCESS REPORTS

was conducted by NARA, but Millett agreed with the agency that its transfer of records to NARA as the result of the Nazi Disclosure At was far more comprehensive than anything Oglesby might have received originally under FOIA. Millett pointed out that "those searches have looked further and wider than FOIA requires. The declarations from the Army and the National Archives describe searches of Army records reasonably calculated to discover all documents responsive to Oglesby's request. That additional Army documents were found at the National Archives through those efforts further substantiates the search's adequacy." DiBacco claimed the Army had evaded its FOIA responsibilities by turning over its records to NARA. But Millett noted that "the Army, by complying with the Disclosure Act, already had to declassify and disclose most of the records that DiBacco seeks. Unlike FOIA, the Disclosure Act mandated wholesale disclosure by the agency itself, with no general exemption for classified information and without any request having to be filed or potentially limiting the scope of disclosure." However, Millett agreed that some remaining Army records had not yet been reviewed for disclosure and that those records needed to be processed for disclosure. Millett rejected DiBacco's claims against the CIA and found the agency's search and exemption claims were appropriate. DiBacco argued that the CIA Director no longer had the authority to classify information without a direct delegation from the Director of National Intelligence. Millett, however, observed that "we would require far more explicit statutory direction before concluding that Congress meant to saddle the highest-level official in the intelligence community (other than the President) with such micromanagement, or meant to ossify the ability of the intelligence community to protect its most vital intelligence information." (*Aron DiBacco v. United States Army, et al.*, No. 13-2014, U.S. Court of Appeals for the District of Columbia Circuit, July 31)

The Ninth Circuit has ruled that the FBI and the State Department conducted **adequate searches** for records concerning federal investigations of Naji Hamdan, a U.S. citizen born in Lebanon who moved to the United Arab Emirates in 2006 and was subsequently deported by U.A.E. to Lebanon in 2009, that the FBI and the DIA properly withheld records under **Exemption 1 (national security)**, **Exemption 3 (other statutes)**, and **Exemption 7(E) (investigative methods and techniques)**, but that the DIA has not yet shown that it disclosed all **segregable portions** of the records. Hamdan and his brother Hossam Hemdan had been questioned by the FBI beginning in 1999 about their mosque in Hawthorne, CA, and possible terrorist connections. Hamdan moved to the U.A.E. in 2006 to start a business there and moved his family there in 2007. In 2008 Hamdan met with three FBI agents at the U.S. Embassy in Abu Dhabi to discuss a 2008 incident in which he was detained and abused by Lebanese intelligence officials while visiting his family there. A month later, he was detained by U.A.E. state security, where he was allegedly tortured. Hamdan's family contacted the FBI and then filed a habeas corpus petition in U.S. District Court for the District of Columbia claiming the U.S. government was complicit in Hamdan's detention. He was released a week later, transferred to a prison for criminal suspects, tried and convicted on terrorism-related charges, and deported to Lebanon. Hamdan and his family filed a FOIA request in 2010 for information concerning U.S. complicity in his arrest and torture. The State Department located 1177 pages, disclosing 533 pages in full and 258 pages in part. The FBI located 771 pages and disclosed 521 pages in full or in part. The DIA located 27 records and withheld them entirely. Hamdan, joined by the ACLU of Southern California, sued and the trial court ruled in favor of the agencies. Hamdan then appealed. The court found that the State Department and the FBI had conducted adequate searches. Hamdan claimed State's search was inadequate because it failed to search its Bureau of Political-Military Affairs. The Ninth Circuit noted that "the State Department did search the records of the U.S. Embassy in Abu Dhabi, which would likely have uncovered any communications with 'Abu Dhabi Pol/Mil.'" Hamdan also argued the FBI limited its database search and did not follow up on leads that developed during the processing of the request. The court pointed out, however, that "Plaintiffs have made no showing that by the close of the FBI's search, leads had emerged suggesting a need to search other databases. That records identified by the State Department's search months later indicated that a few documents may not have been located by the FBI is not enough for us to call the FBI's search unreasonable or

inadequate." Hamdan challenged the agencies' Exemption 1 claims, arguing that the DIA's affidavits were considerably less detailed than those of the State Department. The Ninth Circuit observed that "FOIA only requires reasonably specific justifications to enable a meaningful adversarial process and review by the courts. The fact that the State Department can divulge more details justifying its withholdings than the DIA is unsurprising: the DIA's entire public mission is to provide intelligence collection and analysis for the Defense Department. That may require more secrecy for its records than many State Department documents need." Hamdan argued that the FBI had improperly claimed Exemption 7(E) to withhold investigative techniques that were publicly known. The court noted that "it is true that credit searches and surveillance are publicly known law enforcement techniques. But the affidavits say that the records reveal techniques that, if known, could enable criminals to educate themselves about law enforcement methods used to locate and apprehend persons. This implies a specific *means* of conducting surveillance and credit searches rather than an application." While affirming the segregability analysis conducted by State and the FBI, the court found DIA's analysis was largely non-existent. The court observed that "the DIA claims [the release of withheld records] would 'reveal intelligence sources and methods' without providing any detail about whether or not the DIA considered releasing reasonably segregable information. Nor does the DIA provide us with any evidence of its good faith. All of the DIA's documents are completely withheld, so the district court did not have the opportunity to observe the DIA's approach to redaction." (*Naji-Jawdat Hamdan, et al. v. United States Department of Justice, et al.*, No. 13-55172, U.S. Court of Appeals for the Ninth Circuit, Aug. 14)

Judge Tanya Chutkan has ruled that the U.S. Agency for International Development and the Army have not shown that they conducted **adequate searches** for records concerning the murder of USAID nurse Marilyn Allan by U.S. Army Captain Larry Peters in Vietnam in 1967. Gregory Conway, Allan's nephew, sent FOIA requests to both USAID and the Army for records pertaining to Allan's murder. After conducting searches, both agencies responded that they found no records. The Army searched four databases for any investigation report filed by military police pertaining to the August 16, 1967 murder and found nothing. USAID initially contacted the USAID Mission in Bangkok, which oversaw the Vietnam Mission, which had closed after the Vietnam War ended. The Vietnam Mission indicated that any records would have been transferred back to USAID headquarters after the Vietnam War. USAID also conducted a search of its Bureau of Legislative and Public Affairs and the Office of Human Capital and Talent Management because those components were responsible for the USAID Memorial Wall honoring USAID employees who lost their lives in the line of duty, including Allan. USAID later also searched for Allan's personnel file from the National Personnel Records Center in St. Louis. That search revealed that Allan's death certificate listed her employer as the U.S. Public Health Service, rather than USAID. USAID also conducted a further electronic and paper search of Vietnam Mission records but found nothing. Chutkan agreed that the Army's search was inadequate. She noted that "the Army's declarant states only that she searched four particular databases—*not* that she searched the only four databases in existence or likely to contain responsive records. This evidentiary gap precludes summary judgment." Further, it was unclear what keywords the Army used, or omitted, in its database searches. Chutkan then found that USAID had not explained whether it had searched the National Archives for responsive records. She observed that "it remains unclear where USAID stores its records, how many locations and/or records were searched, whether records were permanently transferred to the National Archives, and in whose custody any records may reside. Until USAID provides clarity on those issues, summary judgment is inappropriate." (*Gregory James Conway v. United States Agency for International Development*, Civil Action No. 14-1792 (TSC), U.S. District Court for the District of Columbia, Aug. 17)

Judge James Boasberg has ruled that the Justice Department's Office of Professional Responsibility properly withheld records about Assistant U.S. Attorney Clay Wheeler under **Exemption 7(C) (invasion of**

ACCESS REPORTS

privacy concerning law enforcement records) and **Exemption 5 (privileges)** from Gregory Bartko, who was convicted of securities fraud. Bartko sued the Justice Department trying to show prosecutorial misconduct on the part of Wheeler. Boasberg here considered only OPR's motion for summary judgment and began by explaining that there was a dispute about the universe of records covered by OPR's processing of Bartko's requests. Boasberg noted that one category included 114 pages of records reviewed by OPR, another category included 302 pages referred by OPR to EOUSA in one request, and a third category included 610 pages referred by OPR to EOUSA in another separate request. Boasberg found that only the 114 pages processed directly by OPR were in dispute in this case. After reviewing the 114 pages *in camera*, Boasberg agreed that Exemption 7(C) and Exemption 5 applied to all of them. Boasberg indicated that as a public official, Wheeler's privacy was slightly diminished. But he noted that "on the Goliath-sized totem pole of government bureaucracy, AUSA Wheeler falls between a staff-level career civil servant and a political appointee or senior manager. As Chief of the Economic Crimes Division of the USAO for the Eastern District of North Carolina, he presumably exercised some degree of supervisory authority greater than the ordinary line prosecutor. This authority, nonetheless, does not approach that exercised by political appointees or senior managers. To the extent that Wheeler *generally possessed* some degree of supervisory authority, moreover, his actions of issue were primarily taken in the capacity of a line prosecutor who tried Bartko's case. Choosing between the two ends of the supervisory spectrum, then, his job position is thus best classified—for purposes of his privacy interests—as a staff attorney. Having not been publicly charged with any crime, therefore, Wheeler maintains a significant privacy interest in not having the contents of an OPR investigation divulged to the public." After reviewing the records *in camera*, Boasberg observed that "the records contain absolutely no information [about prosecutorial misconduct], but rather pertain to OPR's evaluation of AUSA Wheeler's conduct, its handling of the Wheeler investigation, the sources of information it relied upon in conducting the investigation, and potential consequences of the investigation. None of these specific records would reveal much, if anything, about systemic prosecutorial misconduct such that any public interest in release would outweigh AUSA Wheeler's substantial privacy interests." Boasberg found OPR had properly invoked both the deliberative process privilege and the attorney work-product privilege to withhold records. Bartko argued the government misconduct exception applied, but Boasberg pointed out that "*in camera* review of the documents reveals that they 'do not reflect any governmental impropriety, but rather are part of the legitimate governmental process [conducted by OPR] intended to be protected by Exemption 5.'" (*Gregory Bartko v. United States Department of Justice*, Civil Action No. 13-1135 (JEB), U.S. District Court for the District of Columbia, Aug. 18)

Although she expressed doubt that the agencies would find anything more, Judge Tanya Chutkan has ordered the NSA and the Justice Department's Office of Legal Counsel to conduct further searches for records concerning surveillance of federal or state judges. Journalist Jason Leopold sent similar requests to both the NSA and OLC. In his request to the NSA, Leopold asked for policies, memoranda, training materials and guidance concerning the propriety of surveilling judges. In his request to OLC, Leopold asked for "any and all memoranda and legal opinions" about the propriety of surveilling judges. Both agencies said they could find no records. The NSA searched its Office of General Counsel and its Signals Intelligence Office of Policy and Corporate Issues. Leopold argued the agency should have searched for emails because he had requested such a search. But Chutkan pointed out that "it was reasonable for NSA to determine that an email search was unlikely to uncover responsive records, especially given that other databases were available that specifically compiled policies, memoranda, training materials and guidance." He also contended that the agency should have searched another database as well, particularly since it had located a directive of interest that came from that database. Siding with Leopold, Chutkan noted that "given that NSA itself identified a directive 'of interest' but failed to explain why it did not search for other directives, and because Leopold has identified a particular source of records which may hold responsive documents, NSA is ordered to conduct a search of the United State Intelligence Directive System and disclose responsive documents, if any, or claim an exemption."

Turning to OLC's claims, Chutkan observed that Leopold had asked for all memoranda and OLC had only searched final legal opinions and memoranda. She indicated that "the court is persuaded that 'any and all memoranda and legal opinions' means exactly what it says—any and all, meaning drafts and final product. OLC has not provided any persuasive justification regarding why it did not search for drafts, and is therefore ordered to reprocess Leopold's request and conduct a search for draft memoranda and legal opinions." But Leopold's description worked against him when he claimed OLC should have searched for letters and other records. This time Chutkan explained that "once again, the court is persuaded that 'any and all memoranda and legal opinions,' the terms Leopold chose to use in his request, mean exactly what they say—memoranda and legal opinions, and not any other types of records." Leopold contended OLC should be required to indicate how many non-responsive records it found in its search. Chutkan observed that "while FOIA cases are not typically concerned with non-responsive documents, here, because Leopold's request is narrow and he has identified a specific document that would likely have been captured by the search terms, the court will require OLC to indicate whether it located no records at all, or located some records that were deemed non-responsive." Chutkan indicated, however, that "OLC is under no obligation to produce non-responsive documents if any exist. But on the particular facts of this case, it will be helpful to know whether any records were found or not." (*Jason Leopold v. National Security Agency, et al.*, Civil Action No. 14-805 (TSC), U.S. District Court for the District of Columbia, July 31)

In his continuing efforts to wade through the multiple issues remaining from a series of requests made by prisoner Jeremy Pinson, Judge Rudolph Contreras has ruled that the Criminal Division of the Department of Justice has adequately explained why Pinson's request for all settlement agreements stemming from litigation challenging conditions at the federal prison in Florence, Colorado is **unduly burdensome**. Pinson limited the agency to the statutory two hours of search time for his request. The agency said its case database was not configured for such a search and estimated that a search would take 44,886 hours at $1,256,808. Pinson argued the search could easily be narrowed by contacting the U.S. attorneys in Colorado who worked on such cases. This time, the Criminal Division estimated the time at 1,300 hours at a cost of $36,000. Contreras accepted the revised estimate as accurate. He noted that "although Mr. Pinson argues that contacting U.S. Attorneys could reduce the scope of the search, he has provided no authority to suggest that the Civil Division bears the burden under FOIA of soliciting information from other DOJ components in an effort to narrow an otherwise unduly burdensome search. Moreover, it is highly unlikely that even the type of search that Mr. Pinson suggests could be accomplished within the two-hour limit he imposed." (*Jeremy Pinson v. United States Department of State, et al.*, Civil Action No. 12-01872 (RC), U.S. District Court for the District of Columbia, Aug. 17)

Judge Christopher Cooper has ruled that Ricky Lynn Cole failed to show that there was a public interest in disclosing records from FBI Special Agent Derek Stone's personnel file that outweighed Stone's privacy interest in non-disclosure. Cole was convicted of 107 counts of interstate transportation of child pornography. He filed a habeas petition with the trial court alleging that Stone had threatened to charge Tina Cox with perjury if she testified that she was responsible for the crime rather than Cole. The trial court dismissed Cole's allegations as frivolous. Cole then filed a FOIA request for Stone's disciplinary records. The agency issued a *Glomar* response neither confirming nor denying the existence of records and OIP affirmed the agency's decision. Cooper found that he did not need to balance the public interest in disclosure against Stone's privacy interest because Cole had not submitted sufficient evidence to show that any public interest existed. Cooper noted that the trial court concluded that "both Agent Stone and the trial judge advised [Tina] Cox of the repercussions of perjury and witness tampering and noted that doing so did not constitute substantial interference with a defense witness." Cooper noted that he found "the decision of the habeas court

ACCESS REPORTS

persuasive and Cole presents no new evidence of government misconduct here. After reviewing all the submissions, the Court cannot identify sufficient evidence to support a reasonable belief that Agent Stone improperly interfered with Ms. Cox's potential testimony." (*Ricky Lynn Cole v. Federal Bureau of Investigation*, Civil Action No. 13-01205 (CRC), U.S. District Court for the District of Columbia, July 31)

Judge Reggie Walton has ruled that the Justice Department conducted an **adequate search** for wiretap authorization memos pertaining to Lamont Wright's investigation and conviction and properly withheld the records under **Exemption 3 (other statutes)** and **Exemption 5 (privileges)**. The Criminal Division searched its Office of Enforcement Operations database and archived emails of Criminal Division employees who were involved in requesting the wiretaps in Wright's case. Wright argued the search was inadequate because the databases the agency searched were ones that were not typically searched in response to FOIA requests. Rejecting Wright's claim, Walton pointed out that "the plaintiff provides no evidence to support this assertion or explain why it would be inappropriate for the defendants to rely upon the identified systems in conducting its searches in light of the subject matter of the plaintiff's FOIA request." Wright challenged the application of Title III as an Exemption 3 statute. But Walton noted that "the defendants identified Title III as a relevant statute, and properly described documents that are covered by the statute, such as the Authorization Memoranda." Wright also argued the wiretaps were public because they were introduced at his trial. Walton disagreed, observing that the transcripts of Wright's trial did not indicate what wiretaps had been played. He added that "the plaintiff has not identified an instance of disclosure of the subject records outside the discovery process and thus has failed to show that the withheld records exist in the public domain." Walton also agreed with the agency that most of the records were protected by the attorney work-product privilege. As a result, he rejected Wright's claim that the agency had failed to conduct a **segregability** analysis, indicating that the attorney work-product privilege covered both fact and opinion material, meaning that no assessment of segregability was required. (*Lamont Wright v. United States Department of Justice*, Civil Action No. 14-272 (RBW), U.S. District Court for the District of Columbia, Aug. 17)

Judge Tanya Chutkan has ruled that Kimberly Tracy may not withdraw her suit against the FBI without prejudice because the FBI had already responded to her request. Tracy requested records about herself from the FBI. She filed suit after the agency failed to respond within the statutory time limit. However, the agency located eight pages and disclosed redacted portions of the records. Tracy then filed a motion contending the agency had violated FOIA by its failure to respond on time. But Chutkan told Tracy that such a motion could be interpreted as meaning that Tracy accepted the agency's redactions. Rather than challenge the agency's redactions, Tracy asked Chutkan to dismiss the case without prejudice. Chutkan found instead that the FBI was entitled to summary judgment. She noted that "although she was given two opportunities to challenge the adequacy of the search or the FBI's justifications for withholding some of the information found in these records, Plaintiff failed to do so." She pointed out that "dismissal of this action without prejudice is not appropriate. . .Plaintiff has not come forward with any arguments that might refute the FBI's position that it properly withheld information under FOIA exemptions. . .and that the agency disclosed all non-exempt information. Thus, Plaintiff is not entitled to have this action dismissed without prejudice." Chutkan added that "Plaintiff is not entitled to relief simply because the FBI disclosures were made more than 20 days after Plaintiff submitted her FOIA request" because once the agency responded the issue became moot. (*Kimberly F. Tracy v. U.S. Department of Justice*, Civil Action No. 15-403 (TSC), U.S. District Court for the District of Columbia, July 31)

A federal court in Missouri has ruled that the Consumers Council of Missouri did not substantially prevail in its suit against the Centers for Medicare & Medicaid Services and is not entitled to **attorney's fees**.

Consumers Council requested the 2015 insurers' filing rates for Missouri in August 2014. The agency told Consumers Council that it was working on the request but could not respond within 20 days. Consumer Council filed suit in September 2014. The agency disclosed some of the records responsive to Consumers Council's request on its website in November 2014. Consumers Council then filed its motion for summary judgment asking the court to order the agency to disclose the remainder of the records immediately. CMS disclosed the rest of the records responsive to Consumer Council's request in March 2015. The court then denied Consumers Council's motion for summary judgment as moot. Consumers Council filed a motion for attorney's fees, asking for $139,852. Denying the motion, the court noted that "the record reveals Defendant did not voluntarily or unilaterally change its position in response to this lawsuit. Instead, CMS initiated its pre-disclosure notification process for information in Part I of the 2015 [rate filings] and simultaneously began developing a new website to publicly post the information in Parts I and II that were determined to be made public, in May, 2014—months before Plaintiff submitted its FOIA request. While CMS did not initiate the pre-disclosure notification process with respect to Part III information until November 7, 2014, there is no indication that it did so in response to Plaintiff's lawsuit, rather than as part of its consistent action to comply with its own regulations." Consumers Council contended that the agency had changed its position by agreeing to post all non-confidential rate filings by the tenth business day after May 15. But the court pointed out that "Defendant presents evidence, however, that CMS set the uniform [rate filing] submission and public posting deadlines for policy reasons unrelated to this litigation." (*Consumers Council of Missouri v. Department of Health and Human Services*, Civil Action No. 14-1682 JCH, U.S. District Court for the Eastern District of Missouri, Aug. 14)

Judge Randolph Moss has ruled that the Bureau of Prisons has so far failed to justify its responses to FOIA and Privacy Act requests made by Kamal Patel, a citizen of the United Kingdom and a legal permanent resident of the United States who sued the Bureau of Prisons for allegedly subjecting Patel to unfair treatment because he was a non-citizen. Patel's suit focused primarily on constitutional violations and violations of the Religious Freedom Restoration Act, but he also claimed the agency improperly responded to his FOIA requests and his Privacy Act request to amend his records. Patel had made requests to BOP and the Office of the Inspector General. Finding that BOP had not shown that it conducted an adequate search, Moss noted that "although BOP's declaration states that Plaintiff received documents in response to Plaintiff's 2005 requests, it contains no information whatsoever about what record systems the agency searched, what search criteria it used, or whether the agency reviewed the potentially responsive documents Plaintiff cites. Although it may be the case that BOP has, in fact, produced all documents in its possession that are responsive to Plaintiff's 2005 requests, BOP has not carried its burden on summary judgment to prove that it has done so." Moss found the agency's **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** insufficient. He pointed out that "it may be that the redaction of the names of witnesses and other persons mentioned in the statements is sufficient to guarantee the anonymity of these individuals—if so, then there is no apparent privacy interest protected by withholding the substance of the statements. If, on the other hand, the subject matter of the statements is such that its disclosure would facilitate the identification of witnesses or others even if their names were redacted, it is more likely that BOP will be entitled to a finding that exemptions 6 of 7(C) apply. To prevail on summary judgment, therefore, BOP needs to provide some evidence that the subject matter of the redacted statements itself is sufficient to identify particular individuals who have a privacy interest in remaining anonymous. BOP has not met that burden at this juncture." Questioning BOP's **segregability** analysis, Moss observed that "BOP relies either largely or exclusively on the personal privacy exemptions (b)(6) and (b)(7)(C)—exemptions that under some circumstances might require only that identified individuals' names or other identifying information be redacted. This circumstance makes it particularly important, in this case, for BOP to provide some level of specific explanation why further segregation is not possible." BOP argued that Patel's **Privacy Act** request

ACCESS REPORTS

for amendment of his records was barred by res judicata. But Moss pointed out that while a U.S. District Court in Oklahoma had dismissed his Privacy Act claim previously it had done so without prejudice and his claim had never been adjudicated. Moss rejected the agency's claim that Patel knew about the allegedly inaccurate records in 2006 and did not request an amendment until 2009. Moss, noting that the agency denied Patel's amendment request later in 2009, explained that "this denial triggered his right to bring suit. BOP has identified no case law or other authority for the counterintuitive proposition that a Privacy Act plaintiff's 'cause of action arises' before the plaintiff can bring a suit." (*Kamal Patel v. Bureau of Prisons*, Civil Action No. 09-200 (RDM), U.S. District Court for the District of Columbia, Aug. 21)

Judge Ellen Segal Huvelle has ruled that EOUSA has now shown that it conducted an **adequate search** for a surveillance tape of a specified date requested by Henry Richardson as well as explained why it could not provide any non-exempt information from two documents it had previously withheld entirely from Richardson. Richardson had asked for still photos taken from a February 14, 2006 surveillance tape. In her earlier decision, Huvelle had found that because EOUSA admitted it had disclosed some still photos, it had not adequately explained why it could not locate other photos. In conducting a further search, the agency located another 80 pages of records containing photos that it disclosed to Richardson. It also found several DVDs containing surveillance tapes but found that none of them contained surveillance of the date requested by Richardson. Huvelle noted that "now, however, defendant has provided the explanation that was previously lacking, explaining that the still photos that EOUSA found and released were not from the surveillance tape. Thus, there is no obvious 'gap' in the records that were located and produced. . .[T]he EOUSA has conducted a second search of plaintiff's file for 'anything related to a surveillance video.' That search located 4 DVDs, which defendant established do not contain the February 14, 2006 surveillance videotape sought by plaintiff." Huvelle found that the agency had also provided a much more detailed explanation of the contents of the two records withheld entirely. She noted that "having reviewed these descriptions and the supplemental declaration, the Court is satisfied that there is no reasonably segregable non-exempt information in these documents that the EOUSA should have released." (*Henry Paul Richardson v. United States of America*, Civil Action No. 13-1203 (ESH), U.S. District Court for the District of Columbia, Aug. 4)

A federal court in Illinois has ruled that the FBI conducted an **adequate search** for records requested by James Skrzypek. Skrzypek requested records bearing the signature of John Burke that were signed at Skrzypek's house in July 1997. The agency disclosed one redacted page. Skrzypek then resubmitted his request with Burke's privacy waiver. After Skrzypek filed suit, the agency found a file under his name and released 338 pages in whole or in part. Unsatisfied, Skrzypek asked the agency to continue its search. It did a further hand search of the remainder of Skrzypek's file but found no more records pertaining to Burke's signature. Although Skrzypek challenged the agency's search, the court concluded the agency's search was adequate. The court noted that "the record specifically describes the manner of search conducted including the indices and search terms used. . .When Skrzypek requested additional searches, the FBI searched the related file and sub-file. This Court believes, and Skrzypek presents no evidence to refute, that the search undertaken by the FBI was reasonably calculated to uncover all relevant documents." (*James R. Skrzypek v. Federal Bureau of Investigation*, Civil Action No. 13-08986, U.S. District Court for the Northern District of Illinois, July 23)

A federal court in Ohio has ruled that Stephen Jarrell filed his **Privacy Act** suit after the two-year statute of limitations had expired and thus may not sue the Department of Veterans Affairs because he knew of the existence of allegedly inaccurate information in his records in 2011. The court noted that "Jarrell frames his complaint as if he had just learned about the faulty record, pleading in his claim that the Records

Management Center in St. Louis sent him on May 5, 2015, what was stated to be 'the entire packet (105) pages of records' the VA said they used in their Determination. However, on December 9, 2011, Jarrell filed suit in this Court against the National Personnel Records Center claiming that the records they maintained of this military service 'are incomplete and or inaccurate.' In that case Jarrell filed a motion for summary judgment supported by numerous excerpts from his military records." The court pointed out that "plainly, Jarrell knew of the claimed errors in his military personnel file many years ago, certainly more than two years before filing this case on May 22, 2015. Statutes of limitations on actions against the United States, because they condition the sovereign's consent to suit, are jurisdictional. This Court has expressly found that the limitations period in the Privacy Act is jurisdictional in an action against the Department of Veterans Affairs." (*Stephen Paul Jarrell v. Robert McDonald*, Civil Action No. 15-187, U.S. District Court for the Southern District of Ohio, Aug. 7)