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Washington Focus: The Senate has postponed action on the Cybersecurity Information Sharing Act of 2015 (S. 754). The bill would create a new FOIA exemption to protect information shared with or provided to the federal government pursuant to the legislation. Open government advocates complained that the bill, which was crafted by the Senate Select Committee on Intelligence, has not been referred to the Senate Judiciary Committee, which has jurisdiction over FOIA, to give that committee an opportunity to consider its effects on FOIA. The exemption was pulled from the legislation before a planned vote. However, due to other difficulties with the legislation, the Senate did not vote before recessing. The bill is likely to come up again for consideration once the Senate returns to session.

D.C. Circuit Expands Definition Of News Media Fee Category

The D.C. Circuit has cut away much of the undergrowth that has grown up over the years due to willfully misleading interpretations of the fee provisions in FOIA by the Justice Department starting after the provisions were overhauled as part of the 1986 FOIA amendments. As a result, the importance traditionally placed on such factors as ability to disseminate, the methods of dissemination, and the breadth of dissemination, while still important considerations, will now be far more flexible and easier to establish on the part of requesters. While its interpretation of the 1986 amendments was the linchpin of its decision, the D.C. Circuit also took a close look for the first time on the effect of amendments made by the 2007 OPEN Government Act.

The case involved the recently-established conservative group Cause of Action. Because virtually all agencies were pressured by the Justice Department in 1987 to adopt regulations implementing the new fee provisions from the 1986 amendments that reflected DOJ's niggardly interpretation, agency fee determinations often rely on criteria that are at odds with the statutory language and even the statutorily-mandated OMB guidelines. As a result, new organizations like Cause of Action are at a loss to know exactly what elements need to be shown to an agency to qualify for the preferential news media or educational

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institution fee category as well as for a public interest fee waiver. Cause of Action submitted a request to the FTC for records concerning agency guidance on the use of product endorsements in advertising by social media authors. Cause of Action requested a fee waiver, which the agency denied because Cause of Action had not shown how disclosure would contribute to public understanding of the government. Cause of Action then requested inclusion in the news media fee category, which the agency also denied based on its determination that Cause of Action had not shown an ability to disseminate the information. While its administrative appeal was pending, Cause of Action made a second request to the FTC, this time for records concerning prior grants of fee waivers by the agency and the process by which it made those determinations. Cause of Action also requested a fee waiver and inclusion in the news media fee category. The agency again denied the fee requests. The agency placed Cause of Action in the "others" fee category and provided it with 100 free pages. The FTC withheld portions of eight documents and told Cause of Action that it would disclose the remaining documents after the organization paid the assessed fees. Cause of Action appealed the fee denial for its second request and the agency again denied its appeal because it had not provided sufficient information to support its news media status claim. Cause of Action then made a third request in which it asked for all records in the first two requests that were not disclosed as a result of the fee denial. Cause of Action also requested records concerning how the FTC determined it was not entitled to a fee waiver for its first two requests. The agency decided not to respond to those parts of the request that reiterated the first two requests because it constituted a duplicate request. In response to the request concerning how the agency determined Cause of Action was not entitled to a fee waiver, the agency found 96 pages and withheld 16 pages. Because the response to the request was under the 100-page limit, the agency determined that Cause of Action's fee requests were moot. By the time Cause of Action appealed the agency's decision on its third request, it had supplemented the administrative record, submitting a total of seven letters to the agency in support of its fee waiver requests. Cause of Action filed suit in district court challenging only the agency's fee determinations. The district court ruled in favor of the FTC, finding that Cause of Action was not entitled to a fee waiver or inclusion in the news media fee category. The court also agreed with the agency that Cause of Action's requests for fee waivers for the third request were moot. Cause of Action then appealed to the D.C. Circuit.

Addressing the mootness issue first, Chief Circuit Court Judge Merrick Garland, writing for the court, noted that "in fact, the FTC has not—and still has not—produced all of those documents [from the first and second requests] without charge. Indeed, as far as the record before us reflects, it has not produced all of those documents at all—because Action has not paid for them." The court pointed out that "because the FTC has not produced without charge all the non-exempt documents Action sought in its third request, Action's applications for fee waivers are not moot. FOIA requires the district court to review the denial of a fee waiver based on 'the record before the agency.' Because that record encompasses all of Action's submissions, including those in connection with its third request, the district court must review those submissions to determine whether Action qualified for the fee waivers sought. Because that has not yet happened, we will remand the case to give the court an opportunity to conduct the required review."

Garland then began to pick apart the FTC's justification for not granting Cause of Action a fee waiver in the first place. The FTC's regulations required that a requester show that disclosure of records "would increase understanding of the *public at large*." Garland explained that "the FTC regulation cited by the district court does require a requester to show that the information it seeks would increase the understanding of the public 'at large.' But FOIA itself does not. The statute requires only that the disclosure be likely to contribute significantly to 'public' understanding. Nor does the statute require a requester to show an ability to convey the information to a 'broad segment' of the public or to a 'wide audience.' To the contrary, we have held that 'proof of the ability to disseminate the released information to a broad cross-section of the public is not required.'" Garland indicated that "the requirement that disclosure of the requested information be 'likely to contribute *significantly* to public understanding' defies easy explication. Application of this criterion may

well require assessment along two dimensions: the degree to which 'understanding' of government activities will be advanced by seeing the information; and the extent of the 'public' that the information is likely to reach."

Although the district court had found that Cause of Action had not identified a sufficient number of methods by which it intended to disseminate information, Garland pointed out that "there is nothing in the statute that specifies the number of outlets a requester must have, and surely a newspaper is not disqualified if it forsakes newsprint for (or never had anything but) a website." He observed that "whether Action cleared [any concerns about its ability to disseminate] with the substantial additional evidence it submitted with its third request—evidence regarding its newsletter, periodicals, website, social media presence, planned reports, and press released to media contacts—must be addressed on remand."

The FTC and the district court had found that Cause of Action's primary reason for making its second request concerning fee waiver determinations was to further its own case on appeal. But, again, Garland pointed out that was the incorrect standard. He noted that "since the 1986 amendments, it no longer matters whether the information will also (or even primarily) benefit the requester. Nor does it matter whether the requester made the request for the *purpose* of benefiting itself. The statutory criterion focuses only on the likely *effect* of the information disclosure."

Turning to whether the FTC used the wrong criteria in determining that Cause of Action was not entitled to inclusion in the news media fee category, Garland noted that the only previous D.C. Circuit decision addressing the issue, *National Security Archive v. Dept of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), found the Archive "qualified because it also had 'firm' plans 'to publish a number of. . .document sets' concerning United States foreign and national security policy" which would rely on substantial editorial work in using information from FOIA requests. Garland observed that "in this way, we explained, the Archive would 'act, in essence, as a publisher.'" In 2007, Congress included the pertinent language from the *National Security Archives* decision in amendments to the statutory definition of the news media category.

Garland noted that the FTC and the district court had conflated the public interest standard with the standard for qualifying for news media status by requiring "that each FOIA *request* be for information that is of potential interest to a segment of the public." But he emphasized that "such a case-by-case approach is correct for the public-interest waiver test, which requires that the 'disclosure of the [requested] information' be in the public interest. But the news-media waiver, by contrast, focuses on the nature of the *requester*, not the request. The provision requires that the request be 'made by' a representative of the news media. A newspaper reporter, for example, is a representative of the news media regardless of how much interest there is in the story for which he or she is requesting information."

He continued: "So, too, for Action. If it satisfies the five criteria as a general matter, it does not matter whether any of the individual FOIA requests does so. This does not mean that the specific requests are irrelevant. For example, showing that those requests are of potential interest to a segment of the public is one way of showing that the entity satisfies the first two criteria for news-media status. Indeed, it may be the best way to satisfy those criteria for a new entity that lacks a track record or that employs FOIA requests as its principal means of gathering information—both of which appear to describe appellant in this case. But the statute's focus on requesters, rather than requests, does mean that evidence of Action's news-media status is not limited to what it establishes about the three FOIA requests that are the subject of this litigation."

The court then erased the longstanding line in the sand that has separated news-media—someone who takes information and incorporates it into a new work—and a news source—someone who provided

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information or perspective about a news story. While news media typically qualified for the news media fee status, individuals or organizations that were considered news sources did not. Garland pointed out that "a substantive press-release or editorial comment can be a distinct work based on the underlying material, just as a newspaper article about the same documents would be—and its composition can involve 'a significant degree of editorial discretion.'" Garland added that a representative of the news media was not required to use a variety of sources. Instead, he observed, "it requires only that the requester 'gathers information.' As we have explained, nothing in principle prevents a journalist from producing 'distinct work' that is based exclusively on documents obtained through FOIA."

Garland rejected the claim that an entity could not establish its entitlement to the news media fee category without having an existing track record. He noted that "it is true that the statute uses present-tense verbs—'gathers,' 'uses,' and 'distributes'—that characterize a present state of being, not just a set of aspirations. But this does not mean that a new news-media venture cannot qualify as a 'representative of the news media' until it has a track record. Although a bare statement of intent is not enough to qualify, firm plans may be. In *National Security Archive*, for example, we approved the Archive's news-media status based on its 'firm intention,' reflected in a grant proposal and other submissions to the agency, to produce and distribute the document sets it described. The 1987 OMB Guidelines likewise recognized that 'a newly established newspaper' could qualify for news-media status 'by demonstrating that it had held itself out for subscription and had in fact enrolled subscribers.' Against this backdrop, there is no indication that Congress meant to make the lack of a prior publication record disqualifying when it enacted the statutory definition in 2007." The FTC had also rejected Cause of Action's news-media status request because it found the organization was not "organized and operated" around dissemination, a requirement the FTC had adopted from the 1987 OMB Guidelines. Garland, however, noted that when Congress defined the term "news media" in 2007 it did not include the requirement that an organization be "organized and operated" around dissemination.

The court concluded with a further comment about distinguishing a news media requester from one whose primary function was to serve as a source. Garland observed that "it is true that 'middlemen' that merely disseminate the documents they receive to the media (or others) do not qualify. That is because what is distributed must independently qualify as 'distinct work' produced through the exercise of 'editorial skills.' But assuming that these other criteria are satisfied, there is no indication that Congress meant to distinguish between those who reach their ultimate audiences directly and those who partner with others to do so, as some recognized journalistic enterprises do. Indeed, the government now accepts that an entity may 'distribute [its] work' by issuing press releases to media outlets in order to reach the public indirectly." (*Cause of Action v. Federal Trade Commission*, No. 13-5335, U.S. Court of Appeals for the District of Columbia, Aug. 25)

Views from the States…

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

Colorado

In a case of first impression, a court of appeals has ruled that even though the Approved Treatment Provider Review Board, part of the Colorado Department of Corrections, does not normally hold public meetings, because it is a public body it is subject to the remedies of the Open Meetings Act. As a result, its failure to hold a meeting to consider an application by Wisdom Works Counseling Services to become certified as a provider made its denial void. The board argued that through custom and tradition it was not

required to hold meetings unless there was a disagreement on an issue before the board. Because Wisdom Works' application had been unanimously rejected by the staff reviewing it, the board chose not to hold a meeting. While the trial court found the board was subject to the OML, it ruled that Colorado's Administrative Procedure Act did not require the board to provide a remedy. The appeals court ultimately agreed, noting that "we conclude that 'management' encompasses the Board's actions in approving or disapproving treatment providers such as Wisdom Works. As a result, we affirm the portion of the trial court's order holding that [the relevant provision] exempts the denials from APA review." However, because the court found that the board was required to hold a meeting, it remanded the case back to the board for further review. (*Wisdom Works Counseling Services v. Colorado Department of Corrections*, No. 14-CA-0341, Colorado Court of Appeals, Division IV, Aug. 27)

Minnesota

A court of appeals has ruled that video recordings made on Minneapolis Metro Transit buses, portions of which were subsequently used in evaluating whether two bus drivers should be disciplined as a result of separate incidents, are public data and are not transformed into non-public personnel files because of their subsequent use in evaluating the bus drivers' conduct. KSTP-TV requested the portions of bus videos used by the Metropolitan Council in evaluating the bus drivers. The Council denied its request, claiming the videos were personnel records. KSTP-TV filed a complaint with the Office of Administrative Hearings. An administrative judge ruled in favor of the TV station and the Metropolitan Council appealed. The appeals court found the videos were not created because the bus drivers were Metro Transit employees, but for a variety of safety-related reasons. The appeals court noted that "the video recordings' classification as public data is not forfeited because they are maintained in part for personnel purposes. Nor does the presence of a public employee change the classification of a recording of events that occurred in public when the recording was originally maintained by the government entity for many purposes. Accordingly, when KSTP made the data request, the video recordings were public data that KSTP was entitled to access." (*KSTP-TV v. Metro Transit*, No. A14-1957, Minnesota Court of Appeals, Aug. 24)

North Carolina

The supreme court has reversed a court of appeals decision finding that a database of court records maintained by the Administrative Office of the Courts is not a separate public record available under the Public Records Act, but, instead, is available only through a separate statute pertaining to public access to court records. LexisNexis sued to obtain an electronic copy of the court database, claiming it was subject to the Public Records Act. The Administrative Office of the Courts argued that while it maintained the records, the content of the database came from court clerks throughout the state and that the AOC had no ability to edit the records in any way, but made them publicly available either at court clerks' offices or through a subscription service allowing for remote access. While the trial court ruled in favor of the AOC, the court of appeals found the records became a new public record when added to the database which was then subject to access under the Public Records Act. The supreme court, however, reversed again. The supreme court noted that "the Public Records Act anticipates that exceptions [to access] may apply. . . and, indeed, the General Assembly has enacted a separate statute applicable to court records." The court added that "while the Public Records Act applies generally to state government records, section 7A-109 is specifically limited to court records. Consistent with [our precedent] we conclude that section 7A-109 controls plaintiffs' request for these records." Turning to whether access to court records was controlled specifically by non-exclusive contracts, the court observed that 'while subsection 7A-109(a) applies to court records in general, later-added subsection (d) focuses narrowly on court records maintained in electronic form. Accordingly, we conclude that the General Assembly intended that the nonexclusive contracts authorized in section 7A-109(d) be the sole means

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of remote electronic access to the [database]." (*LexisNexis Risk Data Management Inc. v. North Carolina Administrative office of the Courts*, No. 101PA14, North Carolina Supreme Court, Aug. 21)

Washington

The supreme court sitting en banc has ruled that text messages sent and received by public employees on their personal cell phones are public records if they concern matters within the scope of the individual's public employment. The case involved a request by Gloria Nissen for text messages sent or received by Pierce County Prosecutor Mark Lindquist on his personal cell phone that related to public business. Lindquist produced a log of his calls and text messages on which he indicated which messages were business-related, but the County refused to disclose any of the text messages, claiming they were not subject to the Public Records Act. While the trial court agreed with the County, the court of appeals reversed and the supreme court agreed to review the case en banc. The court initially noted that "a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record 'prepared, owned, used, or retained by [a] state or local agency.'" The court pointed out that "agencies can act only through their employee-agents. With respect to an agency's obligations under the PRA, the acts of an employee in the scope of employment are necessarily acts of the 'state and local agencies' under the PRA. We therefore reject the County's argument that records related to an employee's private cell phone can never be public records as a matter of law. Instead, records an employee prepares, owns, uses, or retains within the scope of employment are public records if they meet [the PRA's definition of agency records]." Applying the definition here, the court found that the logs of calls and text messages were not public records because "they played no role in County business as records themselves." But as to the text messages, the court explained that there was sufficient evidence that the messages had been prepared and used by Lindquist in the scope of his employment. The court pointed out that the standard for searching for records was based on reasonableness. The court extended that concept to privately-held records where the evidence indicated the record had been created during the course of conducting public business. The court held that "agency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant PRA request. Employees must produce any public records (e-mails, text messages, and any other type of data) to the employer agency. The agency then proceeds just as it would when responding to a request for public records in the agency's possession by reviewing each record, determining if some or all of the record is exempted from production, and disclosing the records to the requester." (*Glenda Nissen v. Pierce County*, No. 90875-3, Washington Supreme Court, Aug. 27)

The Federal Courts…

The Seventh Circuit has ruled that U.S. Citizenship and Immigration Services failed to conduct an **adequate search** when it responded to David Rubman's request for records pertaining to the agency's efforts to comply with the statutory cap on H-1B visas—temporary nonimmigrant visas for workers in "specialty occupations"—from 2009-2012 by providing a statistical table created specifically to respond to Rubman's request. Each year the agency projects the number of employer-sponsored petitions it will need to process to reach the annual 65,000 statutory cap, taking into account historical rates of denials, withdrawals, and revocations. Employers can begin to submit petitions on April 1 of each year and the filing period closes once the agency receives its target number, a process that often takes only a matter of days. If the agency receives more petitions than it thinks it will need, a lottery is held and selected petitions are issued a receipt number while the others are rejected and returned. Petitions with receipts are then processed and visas are awarded. Recipients can then start work on October 1. Rubman, a retired immigration attorney and former adjunct law professor at Northwestern University, sent USCIS a FOIA request for "all documents reflecting statistics about

H-1B visa applications that were assigned a receipt number" for 2009-2012. He specifically requested statistics for the number of approved H-1B visa applications, the number of denied H-1B visa applications, and the number of withdrawn H-1B visa applications to show whether the agency was complying with the statutory cap on H-1B visas each year. When the agency received Rubman's request, it interpreted it as asking for statistics and provided a specially-made table in response. Rubman contacted the agency and told it that he did not want a statistical compilation. The agency apologized and sent him a revised table. Rubman rejected the revised table as well and contacted the agency again clarifying that he wanted "all documents reflecting statistics about H-1B visas that were assigned a receipt number" for each of the four years and describing the records he sought as "weekly and monthly statistical reports as well as emails discussing the calculations of when the cap is reached." The agency responded that the table was "complete and accurate" and that such emails would not provide clarity, but instead would add to the confusion. Rubman appealed, but the agency rejected his appeal on the basis that his request had been granted in full. He then filed suit. The district court judge sided with the agency, concluding that its interpretation of his request as one for statistics was appropriate. The Seventh Circuit reversed. The court agreed with Rubman that the search was inadequate because the agency did not search for the *type* of records Rubman had requested. The court indicated that the standard for appellate review in the Seventh Circuit was whether the agency's exemption claims were clearly erroneous, but then explained that disputes over the adequacy of an agency's search were "manageable in scale, amenable to the adversarial process, and routinely subject to de novo appellate review." The court pointed out that, in conducting a search, "agencies must be attentive not only to the *content* of the records sought by a FOIA request but also to their *form*. Acknowledging that Rubman had not defined the term "document," the court observed that "that's hardly unusual. FOIA requesters often have no way to know exactly what type of records an agency has in its possession. But that doesn't mean Rubman's use of the word 'document' could simply be ignored. A document may convey statistics, but it is not itself a statistic." The court indicated that "we think that a FOIA request for 'documents' is reasonably understood (at least presumptively) as one for preexisting internal agency record." The court added that "a preexisting internal document enjoys marks of authenticity and accuracy that are absent from one generated by a FOIA officer. Genuine agency records also foster transparency by revealing—even if indirectly—something about the *way* the agency operates. The context-free data table of indeterminate origin released to Rubman furthered none of these policy goals." The court indicated that if USCIS believed Rubman's request was too vague it had an obligation to contact him to clarify his request. Acknowledging that the agency had shown a good faith attempt to respond to Rubman in a helpful and efficient way, the court nevertheless pointed out that "when Rubman asked for 'all documents reflecting statistics' and then objected to CIS's decision to respond with a newly generated summary table, the agency was required to search for records in the form specified in the initial request." The appeals court rejected the district court's conclusion that Rubman's letter to the agency complaining about it initial response improperly modified his request. But the appeals court observed that "Rubman's initial request was properly understood to have been for preexisting internal documents. Once he made clear that he was not satisfied with CIS's counteroffer of a statistical table, the agency should have performed a search of its internal documents." (*David Rubman v. United States Citizenship & Immigration Services*, No. 14-3733, U.S. Court of Appeals for the Seventh Circuit, Aug. 31)

Judge Amy Berman Jackson has ruled the IRS conducted an **adequate search** for some of the records requested by Cause of Action, but has so far failed to justify its search for other categories of records. She also upheld the agency's claims under **Exemption 5 (privileges)** and **Exemption 3 (other statutes)**, but found that some records the agency had characterized as return information did not necessarily meet the statutory definition. Cause of Action submitted a multi-part request for records concerning disclosure of tax return information under various exceptions to Section 6103's rule of non-disclosure within the government. Cause of Action's request focused particularly on Section 6103(g), which allows disclosure of tax return information

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with permission of the taxpayer to the Executive Office of the President to be used as part of the evaluation process for executive appointments. One item requested by Cause of Action was for any records pertaining to requests or lawsuits relating to Section 6103(g). The agency found the only request it had received pertaining to 6103(g) was a request by Cause of Action in 2012 which resulted in subsequent FOIA litigation. The agency located 790 pages, made redactions to 289 pages, and withheld six pages entirely, primarily under Exemption 5. Cause of Action argued the agency's search for those records was inadequate. Jackson observed that "the agency's declaration devotes five pages to describing a comprehensive search for records responsive to items one and two, including the specific terms [the staffer] used to search [the agency database], the review of responsive records, and the process of identifying and issuing search memoranda to individuals and offices that were likely to possess additional records. The Court finds that the description provided in the declaration is sufficient to indicate 'what records were searched, by whom and through what processes' with respect to items one and two of the request." Jackson found the agency's redactions under Exemption 5 were appropriate. Describing some of the records, she noted that "the redacted portions of these records precede agency decisions about litigation strategy, including what recommendations the IRS would make to its attorneys in the Department of Justice Tax Division, who had not yet taken action in the case at the time." However, Jackson found the agency's explanation of its search for records pertaining to requests by EOP for return information was not sufficient. Here, she pointed out that "this portion of the FOIA request sought a broad range of records—those related to requests for 'taxpayer or return information' by the Executive Office of the President that were *not* made pursuant to section 6103(g)—and [the agency's] failure to identify any key words or search terms that were used, or to describe the types of searches that were performed in any detail, undermines any claim that the search was 'reasonably calculated to uncover all relevant documents.'" Jackson agreed with the agency that "tax checks"—requests for return information on individuals being considered for employment by EOP—were protected by Exemption 3. She noted that "it is undisputed that any personally identifying information contained in the records related to 'tax checks' would constitute 'return information' within the plain language of section 6103." She rejected the agency's claim that any EOP request that related to tax return information would be exempt under section 6103. Instead, she indicated that Section 6103 was created in response to political abuses of tax return information and she pointed out that "the Court is unwilling to stretch the statute so far, and it cannot conclude that section 6103 may be used to shield the very misconduct it was enacted to prohibit." (*Cause of Action v. Internal Revenue Service*, Civil Action No. 13-0920 (ABJ), U.S. District Court for the District of Columbia, Aug. 28)

A federal court in New Hampshire has ruled that while the IRS properly withheld 51 pages from Citizens for a Strong New Hampshire under **Exemption 3 (other statutes)**, it has not yet adequately explained its **search** for records concerning communications between two New Hampshire congressional members and high-ranking IRS officials. After the IRS was accused of treating applications for tax-exempt status from conservative political groups more stringently than other groups, the House of Representatives conducted an investigation. Various grass-roots conservative groups, like Citizens for a Strong New Hampshire, also filed FOIA requests for records concerning various aspects of the scandal. Citizens made its request in June 2014 asking for correspondence between Sen. Jeanne Shaheen (D-NH) and Rep. Ann McLane Kuster (D-NH) and the IRS and emphasizing that it needed the records in time to use them during the 2014 elections. The agency initially told Citizens it would be unable to meet the statutory deadline for responding. The IRS searched its Office of Legislative Affairs for relevant congressional correspondence and located 96 pages. The agency responded to Citizens' request on November 26, 2014, disclosing 41 pages in full and four pages with redactions. The agency withheld 51 pages under § 6103 after concluding that they involved return information of individual taxpayers. Citizens challenged the agency's first affidavit as inadequate and the IRS submitted a second affidavit describing a second search it conducted of records compiled during the congressional investigation. The second search found no records that were not already located by the first search. The court agreed with Citizens that the agency had not shown that its first search was adequate. The court noted that

"even if read together. . .[the agency's] two declarations do not satisfy [the First Circuit's] deferential and undemanding standard." The court pointed out that the agency's first affidavit "does not fully describe the breadth of the correspondence that [the searched database] contains," nor does [the affidavit] "describe the search [conducted] in any detail." The court observed that "the second declaration only describes the second search; it does not shed further light on the first search, nor does the second declaration provide assurances that the two searches were likely to uncover all responsive documents." The court rejected Citizens' claim that failure to respond in time was grounds for automatically granting its summary judgment motion. The court pointed out that "by equating the agency's failure [to respond on time] with the requester's exhaustion of his administrative remedies, Congress evidenced an intent to entitle the requester to seek a remedy in the form of judicial relief. Such entitlement, however, cannot be read to automatically merit the entry of summary judgment in the requester's favor. Indeed, such a reading would effectuate an additional remedy beyond that which Congress expressly created." The court had agreed to review the 51 withheld documents *in camera*. After conducting such a review, the court agreed with the agency that all the withheld records contained tax return information protected under § 6103. After finding that neither party had made its case, the court observed that the existing situation led to "the potential for a most unusual occurrence: a FOIA **trial**." The court explained that it would "schedule a conference with the parties in order to discuss next steps. The parties should be prepared to discuss, among other topics, the scope and logistics of a trial, the need for discovery, and the prospects of settlement." (*Citizens for a Strong New Hampshire, Inc. v. Internal Revenue Service*, Civil Action No. 14-487-LM, U.S. District Court for the District of New Hampshire, Aug. 31)

A federal court in Ohio has ruled that the U.S. Army Corps of Engineers properly withheld 200 pages of records pertaining to discussions between the agency's Huntington office and the State of Ohio's Muskingum Watershed Conservancy District concerning potential consequences of hydrofracking on dam and levee safety under **Exemption 5 (deliberative process privilege)**. Leatra Harper, representing a local coalition called Southeast Ohio Alliance to Save Our Water, requested records concerning the decision that a full 216 study was not required as the result of proposed water withdrawals from the MWCD as a result of potential hydrofracking activities. When the Corps of Engineers withheld many of the records under Exemption 5, the coalition filed suit. The coalition argued that because MWCD might take an adversarial position to that of the Corps of Engineers the records did not qualify as privileged. But the court concluded the federal and state agencies' interests were aligned for the purposes of claiming the deliberative process privilege. The court noted that "the USACE and the MWCD are jointly responsible for the administration of the Muskingum Watershed. The USACE, the federal agency charged with formulating national policy regarding the impact of hydrofracking on dam and levee safety, has consulted with MWCD in connection with terms governing oil and gas exploration leases on land deeded to MWCD and, as part of the process of formulating that national policy, the federal agency relies on information generated by MWCD in connection with its leases." The coalition argued that granting oil and gas exploration leases might cause the land to revert back to the United States. The court pointed out that "plaintiff's contentions with regard to the 'reverter clause' are insufficient to establish that the USACE and MWCD occupy adversarial positions such as to foreclose invocation of the inter- or intra-agency exemption under FOIA. Although a truly adversarial relationship may render the exemption inapplicable, plaintiff has offered no evidence that the United States has ever sought to invoke the 'reverter clause' or has otherwise expressed any opinion that the activities of MWCD over the years have been inconsistent with the purposes for which property was deeded to MWCD." The court then found the records were both predecisional and deliberative. The court observed that the agency's "assertions are sufficient to establish that the withheld documents relate to the USACE's formulation of national policy pertaining to the effect of hydrofracking on dam safety, a process that remaining on-going." (*Leatra Harper v. Department of the Army Huntington District, Corps of Engineers*, Civil Action No. 14-986, U.S. District Court for the Southern District of Ohio, Sept. 1)

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A federal court in California has ruled that the FBI conducted an **adequate search** for records concerning attorneys Caitlin Kelly Henry and Jesse Stout, both of whom specialized in criminal justice reform. Henry and Stout made separate requests to the FBI and the EOUSA for records about themselves. Both components conducted database searches using variations of their names and found no records. Henry and Stout then filed suit, arguing the agency should have used several other databases that were more likely to contain responsive records, particularly Sentinel, the Investigative Data Warehouse, and Data Integration and Visualization System. The FBI searched its Central Records System and found no records. It also searched its ELSUR electronic surveillance database and subsequently agreed to search Sentinel as well. But after finding no records pertaining to either Henry or Stout during those searches, the agency concluded any further searches would be fruitless. The agency argued that any further details about DIVS searches would reveal information protected by **Exemption 7(E) (investigative methods and techniques)**. As a result, the agency submitted an *in camera* affidavit. After reviewing the *in camera* affidavit, the court concluded that "Defendant has established that the information contained in the declarations is protected from disclosure pursuant to the law enforcement privilege" and added that "it would be unreasonably burdensome for the FBI to search DIVS for responsive records in response to Plaintiffs' FOIA requests." Henry and Stout argued the agency's search was inadequate because it had decided not to use multiple key words in its search that pertained to various entities that Henry and Stout had included in their requests. The court observed that "here, the FBI's multiple searches used variations on Plaintiffs' names and other identifying information. These searches did not yield a single responsive record, nor did they uncover any information suggesting the existence of responsive records. Plaintiffs' proposed key words are untethered from dates or events that are likely associated with Plaintiffs. Under these circumstances, the court finds that the FBI's decision not to use Plaintiffs' proposed search terms was reasonable." EOUSA had limited its search to districts where Henry and Stout may have been involved in cases. Henry and Stout faulted the agency for not searching its headquarter records, but the court agreed with the agency that any records pertaining to Henry and Stout would have been located in those districts where they had been involved in cases. (*Caitlin Kelly Henry, et al. v. Department of Justice*, Civil Action No. 13-05924-DMR, U.S. District Court for the Northern District of California, Sept. 1)

Judge Rosemary Collyer has ruled that the IRS properly withheld 40 pages of documents it located in response to a request from Judicial Watch for records pertaining to communications between the IRS and the Freedom From Religion Foundation after Judicial Watch stipulated that it was not requesting records that qualified as return information under Section 6103. In response to Judicial Watch's request, the agency found 40 potentially responsive records. But after Judicial Watch indicated it was not asking for return information as defined by Section 6103, the agency concluded the records were no longer responsive. Judicial Watch argued the agency's affidavit was not sufficient to support its conclusion. Collyer agreed to review the records *in camera*, but after reviewing the agency's *in camera* supplemental affidavit, Collyer indicated it was sufficient for her to rule in favor of the agency. She noted that "because of the constraints on IRS's release of 'return information,' it was proper for IRS to submit the [second affidavit] for *ex parte*, *in camera* review in lieu of a *Vaughn* index. Furthermore, because Judicial Watch stipulated that it did not seek such information, the Court concludes that the 40 pages of records are non-responsive to Judicial Watch's FOIA request." (*Judicial Watch, Inc. v. Internal Revenue Service*, Civil Action No. 14-1872 (RMC), U.S. District Court for the District of Columbia, Aug. 24)

After reviewing the documents *in camera*, Judge Christopher Cooper has ruled that ten documents the Small Business Administration had claimed were protected by **Exemption 5 (deliberative process privilege)** fall within the privilege while another email exchange, while pertaining to the subject matter of the request is not substantive enough to qualify as responsive. The case involved a request by the Environmental Integrity

Project and the Sierra Club for records concerning the review of EPA's guidelines that limit what toxins can be discharged from coal-fired power plants by OMB and SBA. Cooper had earlier found that records claimed as deliberative by OMB were properly exempt, but that SBA's descriptions were too vague to support its claim. But after reviewing the records *in camera*, Cooper was convinced that the 11 documents had been properly withheld. He noted that nine of the documents "are classic examples of the types of communications that the deliberative process privilege is designed to protect. These documents reflect SBA's comments related to EPA's methodology, timing, and additional factors for EPA to consider; requests for clarification of draft calculations; analysis of EPA's exemptions and calculations; discussion of commenters' critiques and questions; and suggestions for improving the draft regulations. While finding another email did not fit into this mold, Cooper still found it qualified for the privilege. He pointed out that "releasing this document would, however, likely expose aspects of SBA's decisionmaking process. It discusses the format in which SBA sought various EPA data and indicates how SBA was going about the process of developing its comments." Although the caption of the last email suggested it was related, after reviewing its contents Cooper observed that "its content can best be described as friendly banter. It has nothing to do with the subject matter of Plaintiffs' FOIA request." He concluded that "while SBA may not rely on Exemption 5 to withhold what [the staffer] wrote in his email, as part of the document, SBA may withhold [the staffer's] writing on the grounds that it is non-responsive to Plaintiffs' request." (*Environmental Integrity Project v. Small Business Administration*, Civil Action No. 13-01962-CRC, U.S. District Court for the District of Columbia, Aug. 28)

A federal court in Alaska has ruled that the EPA conducted an **adequate search** for records concerning the development of a large mining project known as the Pebble Project, that the agency's **Exemption 5 (privileges)** claims will be reviewed by the court *in camera*, and that the court's ruling on privilege claims will be dispositive for purposes of discovery in a companion case alleging the agency violated the Federal Advisory Committee Act. Pebble Limited Partnership brought the FACA case against the agency and followed it up with litigation concerning its FOIA request. Pebble argued the agency's search was inadequate, in part because it had not located any emails sent by EPA officials on personal accounts. The court, however, noted that "if [the two agency officials] used personal facilities to send email or other communications to an EPA account, those communications would have been captured by the EPA's search. On the other hand, if [the two agency officials] employed personal email accounts to communicate with someone else's personal email account about the Pebble project, the EPA search would not have captured such communications. Such communications, existing exclusively on private servers, are not within the EPA's possession, and the EPA cannot be said to have withheld documents not within its possession." The court agreed to review 118 documents the agency had identified in relation to the FACA case *in camera* and indicated that it would consider the possibility of reviewing a representative sampling instead. The court observed that its rulings on privilege claims would then be used as the basis for resolving discovery motions in the FACA case. (*Pebble Limited Partnership v. United States Environmental Protection Agency*, Civil Action No. 14-0199-HRH, U.S. District Court for the District of Alaska, Aug. 24)

Judge Colleen Kollar-Kotelly has ruled that the FBI conducted an **adequate search** for records concerning Guy Westmoreland and that it properly withheld records under **Exemption 3 (other statutes), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods and techniques)**. Westmoreland started filing FOIA requests in 1999 for records related to an interview of Westmoreland conducted in January 1998 by FBI special agent Kale Jackson. Westmoreland submitted several more requests over the next decade and filed suit in 2013. The FBI ultimately reviewed 558 pages and disclosed 475 pages to Westmoreland,

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claiming various exemptions. While Westmoreland was dissatisfied with the fact that the agency had not produced records on his interview, Kollar-Kotelly noted that "the adequacy of an agency's search is not determined by its results of the requester's level of satisfaction with its results." The FBI had withheld records under Exemption 3, citing Federal Rule of Procedure 6(e) on grand jury secrecy as encompassing grand jury subpoenas. Kollar-Kotelly observed that "neither plaintiff's opposition nor his supplemental memorandum mentions Exemption 3. It is clear that information of this nature falls within the scope of Exemption 3, and the FBI's determination is proper." Kollar-Kotelly approved the agency's claim of Exemption 7(D), pointing out that Westmoreland's conviction included charges of illicit drug trafficking and murder, providing a clear basis for implying assurances of confidentiality to witnesses. She affirmed the agency's use of Exemption 7(E) as well, noting that "the FBI adequately justifies its decision to redact the rating information as set forth in Form FD-515, as well as information derived from non-public law enforcement databases." (*Guy J. Westmoreland v. Federal Bureau of Investigation*, Civil Action No. 13-2058 (CKK), U.S. District Court for the District of Columbia, Aug. 25)

Judge Tanya Chutkan has ruled that the DEA properly invoked a *Glomar* response neither confirming nor denying the existence of records on an alleged informant in the State of Illinois's case against Abdul Love on drug charges and has accepted the agency's claims under **Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods and techniques)**. Love claimed he had been set up by an informant named Silas Peppel, who allegedly was implicated in a counterfeiting scheme. The agency disclosed 41 pages with redactions and withheld 34 pages completely. Love was satisfied with the search, but argued that the agency' *Glomar* response was inappropriate because Peppel had been identified as a source during Love's state trial. Chutkan rejected Love's claim, noting that "plaintiff has supplied court documents, including a ruling by the state criminal court, that belie his public domain theory, since they establish that a subpoena issued for Peppel was quashed and related evidence was sealed. Consequently, the Court finds that plaintiff has not made the requisite showing of prior disclosure to defeat summary judgment on DEA's Glomar response. . ." Love contended that the records showed misconduct on the part of the Illinois State Attorney's Office, but Chutkan pointed that was irrelevant to the public interest analysis. She explained that "even if true, the misconduct of Illinois officials is irrelevant to FOIA's central purpose of exposing to public scrutiny the performance of federal agencies in carrying out their statutory duties." Turning to Exemption 7(D), Chutkan observed that "the outcome of plaintiff's criminal case leaves little doubt that a source's confidentiality, if not expressed, was reasonably implied." She agreed with the agency's withholdings under Exemption 7(E) as well. She noted that "plaintiff has not seriously contested DEA's reliance on exemption 7(E), and the redaction of such codes and numbers [as redacted by the agency here] has been routinely upheld for the very reasons asserted here." (*Abdul Love v. U.S. Department of Justice*, Civil Action No. 13-1303 (TSC), U.S. District Court for the District of Columbia, Aug. 26)

Judge Randolph Moss has ruled that prisoner Edward Harvey's FOIA suit against the Bureau of Prisons became **moot** once the agency responded to his request. Harvey complained about misconduct at his facility in Loretto, Pennsylvania. He subsequently made a FOIA request for the investigation report of the misconduct. After waiting 36 days, Harvey appealed to OIP, which told him that it did not consider appeals unless the agency had made an adverse determination. Harvey then filed suit. The agency responded nine days later by disclosing ten pages of documents with minor redactions. Harvey was apparently satisfied by the response, but argued the agency had violated FOIA by failing to respond within the statutory time limits. Finding that BOP's response put an end to the controversy, Moss noted that "there is nothing of the underlying FOIA dispute left for the Court to adjudicate. The fact that Plaintiff seeks an order declaring that BOP violated the law by failing to process his FOIA request in a timely manner does not change this result. BOP

has already produced what it can; no court order can change the fact that BOP took over three months to produce the requested records; and Plaintiff does not suggest, and could not plausibly suggest, that he is entitled to damages under FOIA." Moss rejected any notion that BOP had shown a pattern and practice of violating FOIA. He pointed out that "what Plaintiff alleges is a discrete wrong that came to an end when BOP produced the records. This is not to say that the Court is convinced that BOP will never again fail to produce records in a timely manner. It is simply to say that Plaintiff's case is not about a general practice but about how the agency treated Plaintiff in one instance." Moss agreed that Harvey's request for costs remained. But because Harvey had not brought the issue up until his reply brief, Moss ordered Harvey to submit a motion for costs and to allow BOP an opportunity to respond to his motion. (*Edward Harvey v. Loretta E. Lynch*, Civil Action No. 14-00784 (RDM), U.S. District Court for the District of Columbia, Aug. 21)

Judge Amit Mehta has ruled that the Justice Department properly withheld records concerning wiretap authorizations for phones used by Randee Gilliam under **Exemption 3 (other statutes)**. Mehta noted that Gilliam's case was the third in a series of nearly-identical cases of individuals involved in a drug conspiracy case in the Western District of Pennsylvania. With the two prior cases already resolved by Judge James Boasberg and Judge Reggie Walton, Mehta found that the Justice Department had responded properly in Gilliam's case as well. Like the two prisoners before him, Gilliam argued that the wiretap authorizations became public during his trial. But Mehta noted that "the transcripts provided by Plaintiff do not show public disclosure of the Title III applications, orders, and authorization memoranda. Further, Plaintiff's receipt of some of those records through discovery in his criminal case did not place them into the public domain for purposes of FOIA Exemption 3." Gilliam challenged the agency's Exemption 5 claims, arguing the agency had improperly engaged in racial discrimination in seeking the wiretaps. But Mehta observed that "Plaintiff has not offered compelling evidence of wrongdoing to vitiate the privilege invoked by DOJ." Gilliam had asked to amend his complaint to add four new counts pertaining to related FOIA requests. Mehta granted his amendment request, noting that "each of them relates to a FOIA request either finally denied by DOJ or made by Plaintiff in December 2013 or thereafter, while Plaintiff moved to amend ten months later in October 2014. Nor will permitting Plaintiff to amend cause Defendant to suffer any discernible prejudice." However, Mehta rejected Gilliam's attempt to make other amendments concerning constitutional tort claims. (*Gilliam v. U.S. Department of Justice*, Civil Action No. 14-00036 (APM), U.S. District Court for the District of Columbia, Sept. 1)

A federal court in Wisconsin has ruled that Christian Ibeagwa is not entitled to recover **costs** because his request to the IRS was to provide information in support of his tax dispute. Ibeagwa argued that the agency had disclosed his 2011 tax form after he filed suit. The IRS argued that Ibeagwa's receipt of the tax form was "insubstantial" for purposes of a fee award. But the court pointed out that "most courts construing the term 'insubstantial' in this provision have held that it relates to the merit of the plaintiff's claim not the number or percentage of documents that the agency chose to release voluntarily." The court agreed with Ibeagwa that the agency's failure to disclose the tax form until after he filed suit was evidence that its legal position was unreasonable. But the other three factors courts consider in assessing whether a plaintiff is entitled to fees weighed against Ibeagwa, particularly the fact that his request was largely for his personal interest. The court observed that "plaintiff has shown no benefit to the public provided by his FOIA request [and] he was seeking records for a private financial interest, namely, to assist him in a tax dispute with defendant. Under these circumstances, I conclude that an award of costs is not appropriate even if plaintiff was entitled to the document." (*Christian Ibeagwa v. Internal Revenue Service*, Civil Action No. 14-369, U.S. District Court for the Western District of Wisconsin, Aug. 26)

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Judge Christopher Cooper has ruled that Kathryn Sack missed her deadline for filing an appeal in her FOIA case against the CIA. Sack argued that the time for filing an appeal should be extended in this case because the parties were in the middle of negotiations on the issue of attorney's fees when the deadline expired. But, Cooper noted, while Sack had filed a motion for an extension of time, she had not filed a motion for attorney's fees, a prerequisite for granting an extension under Rule 58(e) of the Federal Rules of Civil Procedure. He observed that "neither her request for an extension nor the parties' settlement of attorneys' fees can be treated as a motion for attorneys' fees. The Federal Rules contain no ambiguity warranting such a magical transformation, and Sack's argument that policy considerations favor settlement cannot trump the mandatory, and jurisdictional, rules that apply to appeal deadlines." Sack argued that Rule 58(e) allowed courts of appeal to hear all issues involved in a suit. Cooper indicated, however, that "these are policy arguments for rewriting the Federal Rules, something the Court is in no position to do." (*Kathryn Sack v. Central Intelligence Agency*, Civil Action No. 12-00537 (CRC), U.S. District Court for the District of Columbia, Aug. 26)

Judge Colleen Kollar-Kotelly has ruled that Ann Maria Agolli's FOIA suit regarding a request she made to the Office of the Inspector General in 2006 is barred by the six-year statute of limitations and that the Office of Information Policy conducted an **adequate search** for records concerning her 2014 FOIA request to OIP. Agolli requested records from OIG concerning a complaint she had made to the Office. After searching, OIG concluded that the only responsive record other than those submitted originally by Agolli was a complaint form. The agency disclosed the form. Agolli appealed to OIP, which instructed OIG to disclose those records submitted by Agolli. OIG disclosed those records. Agolli filed a third administrative appeal in November 2007. She subsequently submitted a FOIA request in 2014 to OIP for records of her administrative appeal. The agency located four appeals files, all of which had been destroyed pursuant to the agency's records retention schedule. Because Agolli indicated that she had corresponded by email with a former OIP attorney, his archived emails were searched and OIP located 37 pages which it disclosed in full. Agolli filed suit in June 2014 challenging the entirety of her requests. Kollar-Kotelly agreed with the agency that the court did not have jurisdiction over her 2006 request because she had filed her suit after the expiration of the general six-year statute of limitations. Agolli argued that the date for purposes of calculating whether the statute of limitations applied was May 2009 when she had sent a letter to the agency regarding her request. But Kollar-Kotelly noted that "Plaintiff's argument is contrary to established precedent. Plaintiff constructively exhausted her administrative remedies no later than 20 business days after her final administrative appeal, which was filed on November 5, 2007. The Court agrees with Defendant's calculation that the date of accrual was December 5, 2007. Accordingly, as a result of the six-year statute of limitations for FOIA claims, this Court has no jurisdiction over any claims filed after December 5, 2013." Kollar-Kotelly found OIP's search pertaining to Agolli's 2014 FOIA request was proper. She pointed out that "Plaintiff does nothing to rebut the agency's claim—supported by an affidavit—that email archives are not official records systems for maintaining correspondence regarding appeals. Therefore, it was not necessary to search the email archives of [other] employees that Plaintiff only identifies in her opposition to Defendant's motion. With respect to the appeal archives, Plaintiff does not contest the agency's representation that those archives were destroyed, and the agency cannot be commanded to produce what no longer exists." (*Anna Maria Agolli v. Office of Inspector General, U.S. Department of Justice*, Civil Action No. 14-961 (CKK), U.S. District Court for the District of Columbia, Aug. 31)

After previously finding the FBI and the DEA had not justified their **search** or exemption claims, Judge Richard Leon has ruled that the agencies had provided sufficient explanation for withholding records from Edgar Mosquera Gamboa under **Exemption 7(D) (confidential sources)** and **Exemption 7(F) (harm to**

any person). Gamboa's request had included two laboratory reports associated with his case. Although the paucity of information in his request made it difficult to search for the lab reports, the agency conducted a search of its database and ultimately found the reports. Gamboa argued that the government had seized a large amount of property from him and that it was required to explain what happened to the seized property. Leon agreed with the FBI's claims under Exemption 7(D). He approved of the withholding of an administrative subpoena issued to a service provider, agreeing with the agency's characterization that "after considering the need for the subpoena and the source's entitlement to compensation for having produced the information, the FBI deemed it 'reasonable to infer that these sources provided the information with the expectation of confidentiality.'" Based on the nature of the crimes, Leon agreed that 7(F) was also appropriate. He observed that "aside from his broad, and unsupported, assertions that defendants' FOIA withholdings were inappropriate, plaintiff fails to show that defendants' reliance on Exemption 7(F) is improper. Nor, for that matter, does plaintiff rebut defendants' credible assertion that release of the requested information could pose a substantial safety risk to the individuals involved." (*Edgar Mosquera Gamboa v. Executive Office for United States Attorneys, et al.*, Civil Action No. 12-1220 (RJL), U.S. District Court for the District of Columbia, Aug. 31)

Judge Randolph Moss has ruled that EOUSA has failed to show that it conducted an **adequate search** for three requests submitted by Christian Borda for records about grand juries that were convened in the District Court for the District of Columbia. Borda, a federal prisoner, filed suit alleging the EOUSA had not responded to his requests. The agency filed a motion for summary judgment and Borda responded by trying to amend his complaint. After Moss told Borda that he could not amend his complaint without first filing a motion to amend, Borda did so. Borda failed to respond to the agency's summary judgment motion and the agency failed to respond to Borda's motion to amend. Moss initially granted Borda's motion to amend, noting that "Plaintiff's apparent and reasonable belief that he was entitled to amendment as of right may constitute grounds for excusing Plaintiff's failure timely to file an opposition." Moss then went on to explain that EOUSA's motion for summary judgment was so far completely inadequate. The initial agency affidavit showed only that EOUSA had received one of Borda's requests. A supplemental affidavit from a paralegal in the U.S. Attorney's Office for the District of Columbia indicated that the grand juries Borda was asking about were convened by the Criminal Division and that EOUSA did not have any records. Moss pointed out that "without an additional declaration demonstrating that a search was conducted of records maintained by the Criminal Division, there is no evidentiary basis for the Court to conclude that EOUSA has searched 'all files likely to contain responsive records.' Because the EOUSA's evidence—even taken as undisputed—does not establish that it conducted a search that was reasonably calculated to discover the documents Plaintiff requested [in one of his request], EOUSA is not entitled to summary judgment as to that request." (*Christian Borda v. Executive Office for the United States Attorney*, Civil Action No. 14-229-RDM, U.S. District Court for the District of Columbia, Aug. 28)

A federal court in Indiana has ruled that Cheryl Evans is not entitled to **discovery** in her FOIA suit against the National Park Service because she failed to show how discovery would aid her in opposing the agency's summary judgment motion. The court noted that to the extent the agency failed to justify the way in which it responded to Evans' requests, its summary judgment motion would likely be denied and Evans had provided no reason why she needed to conduct discovery in response to the agency's summary judgment motion. The court observed that "the court understands that Ms. Evans would like to ask the government many more questions; that's the nature of FOIA claims. But a motion to defer consideration of a summary judgment motion so the opposing party may take discovery isn't designed to allow the opposing party to pursue any and all discovery. The discovery sought should be limited to what is needed to oppose the

summary judgment motion." (*Cheryl Evans v. U.S. Department of the Interior*, Civil Action No. 12-466-RLM-APR, U.S. District Court for the Northern District of Indiana, Aug. 20)

A federal court in California has ruled that Exxon Mobil failed to show that permits to drill for oil or to modify existing permits are not public under provisions of the Outer Continental Shelf Lands Act and has rejected the company's attempt to block disclosure of the permit application records in the course of litigation brought by the Environmental Defense Center against the Bureau of Safety and Environmental Enforcement claiming violations of the National Environmental Policy Act. Exxon Mobil had been granted most of the permits in dispute and the court allowed the company to intervene. Exxon Mobil argued that because the records fell within the parameters of **Exemption 4 (confidential business information)** and the Trade Secrets Act they were exempt from disclosure. But the court agreed that was not sufficient to show the records were protected. The court noted that "it is not persuaded that because the regulations [implementing OCSLA] provide that in submitting APDs and APMs, an applicant must submit a public copy of the documents and an original version, with the public copy excluding information exempt from public disclosure 'under law or regulation' means that documents exempt from disclosure under FOIA or the Trade Secrets Act may never be disclosed. . .OCSLA explicitly provides that proprietary and privileged information must be protected, but also mandates that the Secretary promulgate regulations dictating the length and the manner that such information will be protected." Rejecting Exxon Mobil's request for a protective order, the court observed that "there is a strong presumption in favor of public access to documents and before preventing public access to information, [the court] must identify compelling reasons to do so." (*Environmental Defense Center v. Bureau of Safety and Environmental Enforcement*, Civil Action No. 14-9281 PSG (FFMx), U.S. District Court for the Central District of California, Aug. 14)