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Washington Focus: The State Department has announced that it will move about 50 employees to temporary positions to help process the emails of former Secretary of State Hillary Clinton. The plan calls for reassignments of 9-12 months. According to Reuters, the agency indicated that "the extra staff would help the department grapple with a surge in FOIA requests more generally related to litigation and a huge backlog of information requests." According to its 2014 annual report, State currently has a backlog of 10,045 FOIA requests. Secretary of State John Kerry announced several days later that he had appointed Janice Jacobs, recently retired as Assistant Secretary for Consular Affairs, to head up efforts to improve transparency at State. Jacobs told the Wall Street Journal that "I think that the announcement lays it out pretty clearly what Secretary Kerry has hired me for an it's not just the Clinton emails, but in general to make sure that the department is as responsive and efficient as it can be in handling the various document requests that come in." Calling Jacobs "exactly the right person for this job," Kerry pointed to her previous experience at helping to fix visa issuance policies and streamline how State shared information with law enforcement and intelligence agencies after 9/11.

Court Approves Most Redactions In Data About Muslim Prisoners

In a ruling that continues a recent trend to expand the meaning of law enforcement records to include records that might affect security, District Court Judge J. Paul Oetken has found that the Department of Justice properly applied Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records) to withhold information that might provide more detailed data on both prisoners accused of terrorism-related crimes and the treatment of American Muslims in prison. Oetken also ruled that a small subset of records was protected by Exemption 3 (other statutes), but allowed the government to redact public references to the statute and to identify it with an *in camera* affidavit.

Human Rights Watch made ten requests to the Bureau of

Prisons and five requests to the National Security Division at DOJ for information about the total number of individuals charged with or convicted of terrorism offenses, their pre- and post-conviction facility placement, and their detention in certain especially restrictive environments. DOJ disclosed more than 600 pages with redactions. Human Rights Watch challenged the agency's response concerning spreadsheets containing information on inmates housed in Communications Management Units at federal prisons in Marion, Illinois, and Terre Haute, Indiana. Two spreadsheets listed inmates at the prisons with an emphasis on ethnic background and offense conduct. Some data elements had been redacted, including an inmate's Security Threat Group assignment and the offense conduct giving rise to the STG assignment. The other spreadsheet listed inmates at the CMUs as of November 25, 2013 and included 20 columns, many of them overlapping with the other two spreadsheets, including "reason for CMU referral." BOP had redacted columns for inmate associations, comments by prison officials, and STG and Case Management Coordinator status, which reflected the prison's decision that an inmate presented special needs for management, such as the need to be separated from a particular group.

Human Rights Watch also challenged redactions in internal memoranda regarding Special Administrative Measures the Attorney General could request to limit inmate communications that might disclose classified information or facilitate acts of terrorism. Another disputed category pertained to requests from inmates to prison staff for Islamic religious accommodations along with staff responses. BOP had redacted such information as inmate job assignments, and inmate cell assignments, as well as BOP staff user IDs. BOP also redacted information from two "Key Indicators" documents, which pertained to CMU capacity. Finally, BOP redacted information it considered non-responsive to Human Rights Watch's requests, including requests from prisoners that did not reflect Islamic religious accommodations. BOP also redacted as non-responsive the total institutional capacity, the special housing unit capacity, and changes in CMU capacity for the two prisons.

Oetken indicated that if BOP's records qualified as law enforcement records Exemption 7(C)'s less-demanding standard applied and Exemption 6 would not have to be considered at all. While there is a considerable amount of case law on what constitutes a law enforcement record, the only case the government cited was *Williams v. FBI*, 730 F.2d 882 (2d Cir. 1984), for the proposition that BOP records are per se compiled for law enforcement purposes. Oetken rejected that broad reading, observing that "to the extent that *Williams* stands for that broad proposition, the Second Circuit has not repeated it in the last thirty years and the Government cites no case from this district applying it." Instead, Oetken seized upon two recent D.C. Circuit decisions—*PEER v. U.S. Section, International Boundary and Water Commission*, 740 F.3d 195 (D.C. Cir. 2014) and *EPIC v. Dept of Homeland Security*, 777 F.3d 518 (D.C. Cir. 2015)—as support for the proposition that law enforcement records could include any records used for security purposes. The most troubling aspect of the *PEER* and *EPIC* decisions, however, is that they are totally based on Justice Samuel Alito's concurrence in *Milner v. Dept of the Navy*, which, legally, represents nothing more than Alito's personal opinion. Calling this interpretation a "broader, commonsense understanding of 'law enforcement purposes,'" Oetken acknowledged that it "need not and does not embrace all BOP records." He added that "to acknowledge that 'law enforcement purpose' defies rigid formulation, then, is not to allow all information about BOP administration and procedure to satisfy the Exemption 7 threshold."

Assessing the Exemption 7(C) balancing test, Oetken gave considerable credence to the mosaic theory. In finding that the inmates had more than a *de minimis* privacy interest in the data redacted by BOP, he pointed out that "anyone who knows that a particular individual is in a CMU—a current or former inmate, a friend or associate, and in some cases members of the public—may be able to identify the inmate's row of the spreadsheet based on the already-released information, like citizenship and sentence. . .[E]ven though the information sought does not identify an inmate by name or number, a reader could put together the mosaic of information about each inmate, identify them, and learn other personal information about them. . ." Human Rights Watch cited *ACLU v. Dept of Homeland Security*, 973 F. Supp. 2d 306 (S.D.N.Y. 2013), in which the

court rejected the agency's attempts to withhold potentially-identifying data about a pool of 22,000 immigration detainees. Oetken pointed out, however, that "here, in contrast, there are roughly 50 people in each of the two CMUs. The concern that someone might review the list of 50 people in a CMU and identify an individual person's row of information is not only plausible, but substantial."

Oetken agreed with Human Rights Watch that the public interest in disclosure of such information was significant. But he pointed out that "this step of the inquiry focuses 'not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld.' Human Rights Watch has not adequately shown that incremental information on STG status, associations, and CMC status is itself significant." He indicated, however, that the "Comments" column "likely contains some nonexempt information segregable from exempt information. . .Presumably, some information in the column falls within the privacy exemptions, but some does not." He ordered the agency to provide an unredacted version of the "Comments" column for *in camera* review.

Oetken then evaluated the SAM memoranda, finding the privacy and public interests similar to those at stake in his assessment of the CMU data. Explaining that the inmates had a privacy interest in the reasons why they were subject to SAMs, Oetken noted that "as with the CMU spreadsheets, the more information particular to a given inmate is released, the likelier it is that the inmate in the memo can be identified and linked to the descriptions and measures in the memo." Oetken recognized that there was a significant public interest as well. He observed that "to be sure, release of that information may help the public better understand the SAM program's operation. But Human Rights Watch has not articulated why the information released is *incrementally* valuable, beyond concerns that the extant information is too vague and a general statement of its use in 'further investigations.'" Oetken found that disclosure of the U.S. Attorney's Office that handled each case was in the public interest. He observed that "Human Rights Watch has described a specific public interest in identifying patterns in the way SAMs are requested by certain U.S. Attorneys' Offices. Release of this information will help the public understand 'what' specific institutions of 'the Government is up to'—specifically, which parts of the Government are seeking SAMs and how often." But Oetken warned that his decision to disclose another data point changed the privacy balance accordingly. He pointed out that "having ordered release of the U.S. Attorney's Office information because of the strong public interest, however, the total mix of public information has changed. The likelihood of identification upon release of crime and sentence information is now greater, because the information could be paired with both the already released information and to-be-released U.S. Attorney's Office information."

While he found some justification for redacting information from the religious accommodations requests under Exemption 6, Oetken agreed with Human Rights Watch that the organization had provided plausible evidence that Muslims are retaliated against in prison. He noted that "the public has a significant interest in investigating those reports. And in light of the higher bar for Exemption 6 redactions, it cannot be said that the invasion of personal privacy would be 'clearly unwarranted.'"

The government had redacted the identity of a statute, which it identified for Oetken in an *in camera* affidavit, under Exemption 3. Oetken indicated that "the Court takens seriously Human Rights Watch's concern that the Government did not disclose even the predicate statutory provision it invokes to justify the exemption, preventing Human Rights Watch from challenging that invocation." After reviewing the *in camera* affidavit, he noted that "the Court also agrees with the Government that redaction of the statute requiring the withholding is justified."

Finally, Oetken agreed with the government that portions of records pertaining to requests for accommodations other than for Islamic religious purposes were non-responsive and could be withheld. He

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disagreed, however, with BOP's redactions of "total institution capacity" and "special housing unit capacity," indicating that "the redacted information 'reflects the inmate capacity' [of the prisons] and falls within the FOIA request." (*Human Rights Watch v. Department of Justice Federal Bureau of Prisons*, Civil Action No. 13-7360 (JPO), U.S. District Court for the Southern District of New York, Sept. 16)

Views from the States…

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

California

A court of appeals has ruled that a report prepared by the Office of Independent Review Group, an independent consultant retained by the Pasadena Police Department to review its policies and practices in light of a police-officer shooting of an unarmed black teenager is a public record that must be disclosed to the *Los Angeles Times* and while some of the report contains protected police personnel records, the trial court redacted some material that was not covered by the police personnel exemption. The Pasadena Police Department conducted both criminal and internal affairs investigations of the police officers' conduct and concluded that because the 911 call that initiated the incident had described an individual being robbed at gunpoint, the police had acted within department policy in shooting the fleeing suspect. The police department then hired OIR to review the evidence and evaluate the department's policies. After the OIR report was completed, the police department indicated it would disclose the report with redactions. The Pasadena Police Officers Association filed suit to block disclosure of the report, arguing that the entire report predominantly contained protected police personnel records. The teenager's family also filed suit in federal court and the police officers provided unsealed testimony in that case. The trial court ultimately ruled on Police Officers Association suit as if deciding a Public Records Act case. The trial court found the report was a public record and that portions of it should be redacted because they were protected by the police personnel records exemption. At the appellate court, the appeals court largely agreed with the trial court, although it found its redactions under the police personnel records exemption were overbroad. The *Times* argued that the police personnel records exemption was waived when the police officers testified in court. The appeals court disagreed, noting that "absent an express waiver of the privilege with respect to the confidential, personnel information found in the Report, the officers retain the protections as to that information, even if the information is the same as or similar to information available elsewhere in the public domain." The court observed that the redactions accepted by the trial court went too far. The court noted that "no protections attach to material in the Report derived primarily from non-confidential records not intended to be part of the officers' personnel matters or to be used in connection with officer advancement, appraisal or disciplinary proceedings. A number of redactions proposed by the City and largely adopted by the trial court protected not privileged information relating to the officers, but information or findings critiquing conduct by or the policies and practices of the PPD itself." (*Pasadena Police Officers Association v. Superior Court of Los Angeles County*, No. B260332, California Court of Appeal, Second District, Division 1, Sept 10)

Pennsylvania

A court of appeals has ruled that the Pennsylvania Department of State properly withheld records concerning its investigation of two doctors pursuant to complaints filed by Alan Brown because they constituted non-criminal investigation files. After losing his appeal to the Office of Open Records, Brown filed suit. He argued the agency had not provided sufficient justification that the records were exempt. But he

court noted that "these records are by the very terms of Brown's request, exempt from disclosure under the [law enforcement investigation exemption], which exempts records that would reveal the results of an agency's noncriminal investigation. . .The [agency's] affidavit also explains *how* the requested records are exempt under the [Right to Know Law], rather than merely presuppose the exemption in a conclusory statement." (*Alan D. Brown v. Pennsylvania Department of State*, No. 2221 C.D. 2014, Pennsylvania Commonwealth Court, Sept. 2)

South Carolina

A court of appeals has ruled that home addresses, personal telephone numbers, and personal email addresses of applicants for the position of city manager for the City of Columbia are protected by the privacy exemption and that the trial court erred when it concluded that the public interest in disclosure outweighed the individuals' privacy interest in protecting the information. George Glassmeyer requested all information on the final three applicants for the position of city manager. The City provided him most of the information except for personal details like home addresses and personal contact information. The trial court agreed with Glassmeyer that the privacy interest was slight and was outweighed by the public interest in knowing more about the final applicants. Relying on decisions by the U.S. Supreme Court and the Michigan Supreme Court finding such records could be protected under the privacy exemption, the court of appeals ruled in favor of the city. The court noted that "we find the home addresses, personal telephone numbers, and email addresses of the applicants are information in which the applicants have a privacy interest." The court added that 'we find the trial court was mistaken in stating the public's interest would be served by disclosure of the applicants' home addresses because 'the public has a right to know whether the applicants live in the city of Columbia, the area over which the city manager has authority.' The City only redacted the street name and number of the applicants' home addresses. It provided Glassmeyer with the city name and zip code. Thus, the public could determine the city in which the applicants lived through the materials the City provided. The trial court did not declare any interest served by revealing the personal phone numbers or email addresses of the applicants." Glassmeyer argued that disclosure of all the information would allow the public to assess the veracity of the applications. But the court pointed out that "other than the home addresses, telephone numbers, and email addresses, the City has disclosed the applicants' entire applications, including their educational backgrounds and employment histories. We fail to see how disclosure of the limited information the City seeks to protect would serve to establish the veracity of the applicants more than the information already provided." The trial court had awarded Glassmeyer $11,000 in attorney's fees. The City challenged that award since Glassmeyer had lost on appeal. But the court upheld the award, noting that "although we find Glassmeyer was not entitled to the applicants' home addresses, phone numbers, and email addresses, Glassmeyer prevailed on significant issues in the action entitling him to attorney's fees." (*George S. Glassmeyer v. City of Columbia*, No. 2013-001880, South Carolina Court of Appeals, Sept. 2)

The Federal Courts…

Judge Amy Berman Jackson has ruled that PETA is entitled to **attorney's fees** for its litigation against NIH concerning records about the investigation of animal researchers at Auburn University, but because the relief the organization was granted on appeal to the D.C. Circuit was so narrow that only ten percent of its fee request should be granted. PETA had submitted complaints to both NIH and the Department of Agriculture based on its own undercover investigation of research using animals at Auburn University. PETA then made several FOIA requests to NIH for records concerning any investigations the agency took against two researchers at Auburn University whose research was funded by NIH as well as a colleague. PETA learned as

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a result of a request made under the Alabama Open Records Act concerning the three Auburn researchers that Auburn has signed a confidentiality agreement with NIH that prohibited the university from disclosing information. PETA made two further requests to NIH for records concerning the researchers and the confidentiality agreement. NIH invoked a *Glomar* response neither confirming nor denying the existence of records. Jackson upheld the agency's *Glomar* response and PETA appealed to the D.C. Circuit. The D.C. Circuit upheld the *Glomar* response to the extent that it pertained to the three researchers, but indicated that because PETA's request could be read to request records on investigations the agency undertook of Auburn University, the *Glomar* response did not cover such records and the agency was obligated to search for them. The agency subsequently conducted a search and concluded that it had never received PETA's complaint letter and had never conducted an investigation of Auburn or the researchers. PETA then filed a motion for $227,000 in attorney's fees, arguing that the D.C. Circuit's ruling that the *Glomar* response was overbroad entitled them to fees. NIH argued that PETA was not the prevailing party because the relief it was granted was not substantial enough. But Jackson noted that "while the Court agrees that the sum total of plaintiff's victory in this case was small, the test is not merely the size of the relief obtained but whether plaintiff obtained some judicial relief on the merits that resulted in a 'change in the legal relationship' between the parties. Indeed, the degree of plaintiff's success is relevant to the size of reasonable fees, not to its eligibility for a fee award." Jackson found that the fact that the agency did not have any responsive records was not dispositive either. She pointed out that "if the agency had responsive documents that fell within the broader request, it would have been required to release them to PETA. The fact that it did not have responsive documents does not negate the fact that the D.C. Circuit's ruling 'changed the legal relationship' between PETA and NIH." Jackson indicated that the public interest factor did not weigh in favor of either party. She noted that "no documents were produced and the litigation did not in fact generate any information about how NIH responds to animal welfare complaints or the way it processes FOIA requests. Since nothing was produced and no information was gleaned, there was nothing 'to add to the fund of information that citizens many use in making vital political choices.'" By contrast, however, Jackson observed that the information requested was potentially valuable to the public interest. She pointed out that "if on remand defendant had produced 'documents showing that, in response to complaints filed against the named researchers, the agency conducted an investigation other than one targeting the researchers,' then the litigation could potentially have shed light on both of those practices." She then found that NIH's position was reasonable. She noted that "the D.C. Circuit found the Court's reading of the request to be 'understandable,' and it held that the *Glomar* response 'would be fully warranted' if PETA's request was interpreted to be confined to records revealing the existence of an investigation of the three researchers." Jackson concluded that PETA was entitled to ten percent of its fee request. She observed that "it prevailed only to the extent the request could be broadly read to seek other documents. And even with respect to that category of documents, it turned out there were no responsive documents. Given the narrow slice of relief that PETA obtained, the Court finds that a reasonable fee award is ten percent of PETA's claimed amount, or $22,724." (*People for the Ethical Treatment of Animals v. National Institutes of Health, Department of Health and Human Services*, Civil Action No. 10-1818 (ABJ), U.S. District Court for the District of Columbia, Sept. 11)

Judge Reggie Walton has ruled that the Department of State conducted an **adequate search** for records concerning a 2011 human rights report about Cameroon and properly withheld most of the records under **Exemption 5 (deliberative process privilege)** and **Exemption 6 (invasion of privacy)**. David Cleveland requested the report and two years later the State Department processed 56 documents, withholding 37 documents in full. To locate the documents it found, the agency conducted searches that included the Bureau of Democracy, Human Rights, and Labor, the Bureau of African Affairs, and the U.S. Embassy in Cameroon. Walton indicated that the agency's affidavit "demonstrates the State Department's thorough and methodological approach in responding to each component of the plaintiff's FOIA request. . .[I]n processing each element of the plaintiff's request, the State Department considered 'which offices, overseas posts, or

other records systems. . .[would] reasonably be expected to contain the records requested,' and subsequently searched these entities using search terms and discrete time periods. Moreover, based on the specificity of the plaintiff's request, the State Department explicitly searched the Central Foreign Policy Records despite its prior conclusion that it was unlikely that this repository contained responsive records. Thus, based upon the search described [in the agency's affidavit], the Court finds that the State Department's declaration provides sufficient factual detail of the methods utilized in conducting searches for responsive documents . . ." Cleveland challenged the adequacy of the search, arguing that the agency had not provided any of the records he specifically requested and that there was no evidence State consulted any outside groups in assessing the human rights situation in Cameroon. Walton rejected the claims, noting that "the fact that the State Department's searches did not produce the specific documents the plaintiff sought does not render the search inadequate." Cleveland also argued the agency should have located at least as many documents as had been involved in another similar suit in New York in 2012. In a footnote, Walton sharply criticized State for not addressing Cleveland's claim in this regard, indicating that "if the plaintiff's assertion regarding the inadequacy of the State Department's searches [in the other case] was legally supported, the Court would normally deem this argument conceded by the State Department. However, because the plaintiff's position is not legally supported, and is, in fact, the proverbial comparison between apples and oranges, the Court cannot deem it conceded. There is simply no basis for the argument that because one FOIA request pertaining to the Human Rights Report of county X yielded a specific number of documents while a similar request of the Human Rights Reports of County Y yielded fewer documents, the person requesting documents pertaining to Country Y is entitled to the same number of documents as produced regarding Country X." Walton said he had expected the agency to address this issue in its brief, and observed that "it was certainly not the Court's expectation that the State Department would simply recycle its original opposition, adding only a Response to the Plaintiff's Statement of Material Facts, and fashion it as a reply." Cleveland had conceded that the records probably qualified for the deliberative process privilege and Walton agreed the documents were covered. Walton also concluded that the agency had conducted a proper **segregability** analysis and had shown that no further information could be disclosed. (*David L. Cleveland v. United States Department of State*, Civil Action No. 13-1627 (RBW), U.S. District Court for the District of Columbia, Sept. 11)

Judge Amy Berman Jackson has ruled that the Treasury Inspector General for Tax Administration conducted an **adequate search** for records pertaining to investigations into the unauthorized disclosure of tax return information to the Executive Office of the President, particularly after Cause of Action clarified that its request sought only investigations of actual unauthorized disclosures and did not include investigations of allegations of unauthorized disclosures. The agency initially issued a *Glomar* response neither confirming nor denying the existence of records. Jackson ruled that the *Glomar* response was inappropriate and ordered the agency to search for responsive records. Two searches located 2,509 pages of potentially responsive records. But Cause of Action indicated that it was seeking only records of actual investigations and that its request did not include investigations pertaining to allegations of unauthorized disclosures. With this distinction, the agency reviewed the records and concluded they all pertained to allegations and not actual investigations and, thus, were not responsive. Jackson agreed. She noted that two agency staffers "coordinated a wide-ranging search for records in numerous components of TIGTA, instructing the searchers to look for records in both electronic and hard-copy file systems, and, in some cases, requiring searchers to double-check their work. Moreover, the narrow specificity of plaintiff's request—even as construed more broadly by the defendant—coupled with the averments made in the defendant's *in camera* filings—make defendant's failure to identify specific keywords less troubling in this particular case." She observed that "in light of plaintiff's clarification of the scope of its request, and upon review of the record, including the materials filed *in camera*, the Court concludes that none of the records identified by defendant are responsive to plaintiff's request." (*Cause of Action v. Treasury Inspector General for Tax Administration*, Civil Action No. 13-1225 (ABJ), U.S. District Court for the District of Columbia, Sept. 16)

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A federal court in Louisiana has ruled that USCIS conducted an **adequate search** for records concerning a client of immigration attorney Michael Gahagan and that ICE provided a sufficiently detailed description of records it withheld pursuant to a referral from USCIS. On remand from the Fifth Circuit to allow the agencies to provide a better explanation of their actions in processing Gahagan's request, Gahagan argued that USCIS FOIA Officer Jill Eggleston failed to show she had personal knowledge of the processing of his request, that UCIS had not adequately justified its search, and that ICE was required to provide a *Vaughn* index for the records it processed on referral from USCIS. Acknowledging that the Fifth Circuit had not ruled on what constituted personal knowledge for purposes of FOIA litigation, the court found decisions from other courts supported the agency's claim. The court noted that both agency declarations "are proper FOIA declarations. Both state that they are based on the declarant's personal knowledge, review of documents kept by USCIS in the ordinary course of business, and information provided to the declarant by other USCIS employees in the course of official duties." Approving the description of search under Fifth Circuit precedent, the court pointed out that "considering the declarations as a whole, USCIS described its search process, including specifics about the places searched, the persons conducting the searches, and the search terms employed. This is sufficient to meet the standard articulated [by the Fifth Circuit], which considered an explanation of the places searched to be sufficient." The court determined that ICE had already provided a description of the redactions to records it disclosed to Gahagan pursuant to a referral from USCIS. The court pointed out that ICE had supplemented the record with a declaration from ICE's deputy FOIA officer. The court indicated that "the declaration included a chart listing the record page number, record date, a description of the records and redacted information, and the exemptions applied to each. The declaration and attached exhibits constitute an adequate *Vaughn* Index because they contain detailed justifications for each redaction." (*Michael Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 14-1268, U.S. District Court for the Eastern District of Louisiana, Sept. 11)