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Washington Focus: Sen. Charles Grassley (R-IA), chair of the Senate Judiciary Committee, has expressed displeasure at an FBI letter sent to Judge Emmet Sullivan indicating that the agency will not confirm the status of its investigation concerning whether any information can be retrieved from a backup thumb drive that contained emails from former Secretary of State Hillary Clinton's private email server. Reacting to the FBI's letter to neither confirm nor deny the existence of an ongoing investigation, Grassley said in a statement provided to Politico that "simply refusing to cooperate with a court-ordered request is not an appropriate course of action." The State Department has been overwhelmed by more than 30 FOIA cases filed concerning various aspects of Clinton's email records. Some judges have prodded State to move more quickly while others have indicated that they will not do anything to force the agency to move more quickly than it is moving currently. Judicial Watch recently announced that it had uncovered a letter from Undersecretary of State for Management Patrick Kennedy asking Clinton's lawyer to destroy certain classified records that were on the backup thumb drive.

Court Finds Requests Fall Victim To Failure to Exhaust Remedies

A recent district court decision from the Northern District of Indiana provides an interesting example of the consequences plaintiffs face when they fail to abide by agency regulations, particularly when it comes to fulfilling a requester's obligations to file an administrative appeal within the time specified by the agency or, in the case of Cheryl Evans, foregoing an appeal altogether. Evans' case also provides an illustration of how such deadlines involving multiple requests on similar topics can easily blur into each other, making it that much more difficult for requesters to keep track of what response is due and when. Although Evans was an attorney, the fact that Judge Robert Miller spent a large part of his decision chiding Evans for trying to evade length limitations through her multiple filings and her focus on filing motions to strike agency affidavits for lack of personal knowledge suggest that she was not an accomplished FOIA litigator.

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Evans made six FOIA requests to the National Park Service for records concerning the government's jurisdiction over the Indiana Dunes National Lakeshore. Some of those requests involved interim responses from the agency, some were filed after she had sued the agency, and for some, Evans failed to file any administrative appeal at all. Although the agency's responses to her six requests came after the statutory deadline had expired, it did respond to all the requests. For some requests, Evans challenged the agency's search, while for others she focused on the agency's exemption claims made under Exemption 5 (privileges) and Exemption 7 (law enforcement records).

Miller addressed Evans' motions to strike first, pointing out that "to hold the government to the page limitations of the Local Rules yet allow Ms. Evans to evade them would be unfair to the government." It would also "waste valuable judicial resources." As a result, Miller noted that "the court will strictly enforce its page limits and will consider arguments raised by Ms. Evans's motions to strike only as they relate to the admissibility issues raised in those motions." Evans attacked an affidavit by Elizabeth McConnell, who was in charge of processing FOIA requests at Lakeshore, arguing that she did not have personal knowledge of the processing of Evans' requests. Miller noted that "Ms. McConnell is competent to testify through personal knowledge regarding what efforts she and her staff undertook in response to Ms. Evans's FOIA requests. That Ms. McConnell didn't specifically name the staff members who helped in the searches doesn't compel a conclusion that she lacked personal knowledge of the searches she oversaw, and Ms. Evans has identified no precedent in support of her argument that vagueness alone renders otherwise competent testimony inadmissible." Evans also attacked NPS Midwest Region FOIA Officer Patricia Rooney's observation about the size of the Region's workload as being irrelevant. Miller pointed out that "the evidence of the Midwest Region's general FOIA workload is relevant, given that Ms. Evans asks the court to find bad faith based on the Park Service's delay in responding to her requests. A large number of FOIA requests doesn't excuse an agency from complying with the statute's deadlines, but it lends some credence to the agency's claim that long delays flow from understaffing, rather than malice."

Miller showed particular annoyance with Evans' attempts to strike the agency's supplemental *Vaughn* index because it did not identify who had prepared it. The agency acknowledged the omission was an oversight and provided information about who prepared it. Miller observed that "once again, these are merit arguments with no clear connection to admissibility; Ms. Evans essentially argues that the index is insufficient to carry the government's burden on summary judgment, that the court should not credit it, and that the government wasn't entitled to withhold the documents identified in it. The issue on a motion to strike is admissibility, and evidence isn't made inadmissible by virtue of being inaccurate, untrustworthy, or noncompliant with a statutory requirement under FOIA."

But Miller found Evans ran aground by failing to file an administrative appeal for three of her requests, waiting until after receiving the agency's tardy response. Citing *Oglesby v. Dept of Army* for the proposition that a requester was required to appeal an agency's response if it came before filing suit, Miller found Evans clearly had not done that. Evans argued that the D.C. Circuit's decision in *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), effectively overturned *Oglesby* on this point. But Miller indicated that *CREW* was limited to its facts, in which CREW argued that the FEC had failed to make a determination that would require CREW to file an administrative appeal before going to court. However, the *CREW* decision says much more than that. The D.C. Circuit resolved the case by explaining the statutory basis for finding that a requester had constructively exhausted his or her administrative remedies—either when the agency misses the 20-day deadline for responding to a request, or when the agency misses the 20-day deadline for responding to an administrative appeal. The D.C. Circuit clearly said that when either of those instances occurs, the requester has constructively exhausted his or her administrative remedies and may go directly to court. Nowhere in *CREW* is there any suggestion that an agency can cure that exhaustion by a tardy response before the requester files suit. While there is a measure of appeal in *Oglesby* to administrative fairness, there is no statutory basis

identified in the decision for requiring such a requirement in the face of statutory language that directly contradicts it.

For another of her requests, Miller pointed out that Evans failed to file an administrative appeal before the expiration of the agency's 30-day time limit for appeals. Evans attacked the fairness of the agency's regulation and noted that because the agency had revised its original final response to include other documents it had made a new determination with a new 30-day time period. Rejecting her argument, Miller noted that "Ms. Evans cites no support for her contention that any later revision of an agency's decision can revive claims that a requester hasn't timely exhausted, and nothing in the statute or the Department of the Interior's implementing regulations suggests that an agency's revisiting of a denied request excuses a requester from the requirements of timely appealing the initial denial."

Miller approved of the agency's exemption claims. Because her requests dealt with jurisdictional issues, many of the exemption claims dealt with the attorney-client privilege. Evans contended that the agency had waived any privilege for a 1973 document discussing jurisdiction because it had been shared with a federal magistrate judge. Miller noted that "even if discussions about a legal position with an officer of the court acting in his official capacity constitute waiver of the attorney-client privilege for FOIA purposes—a proposition that neither party has directly addressed—the court has no basis on which to conclude that such conversations actually occurred. . .As the court reads it, the letter in question says nothing about whether the specific documents at issue were ever shared with [the magistrate judge]; it merely confirms that the Magistrate discussed jurisdictional issues with the Park Service generally." Evans challenged the agency's withholding of a list of roads over which the Park Service may or may not have jurisdiction for traffic control purposes under Exemption 7(E) (investigative methods and techniques), arguing that such a list was not a technique, procedure, or guideline. Miller, however, concluded that the list qualified for protection. He observed that "a confidential, internal police document memorializing these choices and listing which neighborhoods the department is likely to patrol is a classic example of a law enforcement guideline whose dissemination would likely risk circumvention of the law." (*Cheryl Evans v. U.S. Department of Interior and National Park Service*, Civil Action No. 12-466-RLM-APR, U.S. District Court for the Northern District of Indiana, Hammond Division, Sept. 28)

Views from the States…

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

Connecticut

The supreme court has reversed a trial court's finding that medical records of Amy Archer Gilligan, who was confined to a mental institution after her conviction for the arsenic poisoning of a resident at her nursing home and is widely considered to have been the model for the play "Arsenic and Old Lace," were no longer considered confidential because of their age. Rob Robillard requested Gilligan's medical records from 1924-1962. The Department of Mental Health and Addiction Services disclosed some records, but withheld others because they were psychiatric records and fell within the privacy exemption as well. Robillard complained to the FOI Commission, which found that several records were covered by the psychiatric privilege and or the attorney-client privilege, but that most of the other records were medical records that did not qualify under the privileges and because of their age were no longer protected by patient confidentiality

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provisions. The Department appealed and the case was transferred to the supreme court. At the supreme court, the FOI Commission argued the Department did not have standing to challenge the disclosure of Gilligan's records. The court disagreed, noting that "plaintiffs have made a colorable claim that the commission's decision in the present case would have a chilling effect on the statutorily mandated role of providing mental health and addiction services to patients in the state of Connecticut." Turning to the psychiatric privilege, the court observed that the privilege was broad enough to encompass any records that could identify a patient being treated at a psychiatric facility, regardless of whether the care pertained specifically to psychiatric care. The court pointed out that "we agree with the plaintiffs that the legislature's decision to require physical examinations of all patients at inpatient mental health facilities supports our conclusion that such physical examinations and the resulting medical records are part of the patient's mental health record and not subject to disclosure. Furthermore, the legislature's decision to require physical examinations of patients at inpatient mental health facilities also indicates that the legislature understood that mental health conditions are often related to physical disorders and that the proper treatment of mental health involves the treatment of physical issues as well." (*Freedom of Information Officer, Department of Mental and Addiction Services v. Freedom of Information Commission*, No. SC 19371, Connecticut Supreme Court, Sept. 22)

District of Columbia

A court of appeals has upheld the trial court's ruling that data identifying the race, gender, and date of an event that led to disciplinary proceedings against higher-ranking police officers was properly redacted from files pertaining to disciplinary proceedings that had been requested by the Fraternal Order of Police. After the case was remanded for further proceedings, FOP continued to insist that race, gender, and event date data could not be used to identify individuals and, thus, was not protectable by the privacy exemption. But the appeals court agreed with the trial court's ruling that such data could lead to identification. The court noted that "the size and composition of the police force as a whole are irrelevant, because the information that the FOP sought and received was restricted to a small subset of that force, its lieutenants, captains, and other high ranking officers." The appeals court added that "given the particularization of the FOP's individual FOIA requests and with the information disclosed in the files, including the details of the disciplinary infraction, the year (or narrower time frame) in which the infraction occurred, and the various other facts, FOP members interested in identifying the subject of the disciplinary proceedings and familiar with the Police Department would have little difficulty winnowing down the possibilities to only a few candidates." The court indicated that there was a public interest in disclosure of disparate treatment based on race or gender, but explained the FOP was required to show more than a bare suspicion of government misconduct and it had provided no evidence supporting its speculation. (*Fraternal Order of Police v. District of Columbia*, No. 13-CV-1333, District of Columbia Court of Appeals, Sept. 17)

Illinois

A court of appeals has ruled that the Chicago Office of Emergency Management and Communications conducted an adequate search for records concerning a 911 call in August 2000 that was requested by Vernon Tolbert. Tolbert made three requests for the 911 records and was told each time that the OEMC did not retain records after four years and that a search for the 911 records Tolbert requested had found nothing. Tolbert then sued OEMC, arguing that he was entitled to information about witness testimony in the 911 call that was used to convict him. The agency conducted yet another search and came up empty-handed. The trial court found OEMC had conducted an adequate search. On appeal, Tolbert argued that the agency was required to search archived hard-drives and microfilm to locate the call. The court noted that Tolbert's claim was "nothing more than pure speculation. Defendants provided ample evidence that the information plaintiff requested is no longer in existence in accordance with their retention schedules, and there is no evidence that

such information was ever permanently stored on a computer hard drive or microfilm." One justice dissented, showing Tolbert considerably more sympathy. The dissent pointed out that "it is impossible to say that *no* record of those events exist without a query to the hard drive and a search of any microfilm that exists. OEMC at the very least needs to create a more robust check list for its FOIA searches. Microfilm, if it is part of the routine business records system, is clearly a source of information and should routinely be included in any search. Metadata counts as a source of information and should be searched under FOIA requests, even when the requester has not specifically asked for it." (*Vernon Tolbert v. Office of Emergency Management Communications*, No. 1-13-1618, Illinois Appellate Court, First District, Third Division, Sept. 23)

Kentucky

The supreme court has ruled that while the Council on Developmental Disabilities performs an important role in advocating for the disabled as a community human services organization it does not qualify for an exception to confidentiality for records concerning the death of a disabled individual that pertains to social services agencies. The Council made several Open Records requests for records concerning investigations into the deaths of two disabled individuals, one of whom had previously been in the Council's care shortly before his death. In both cases, the Cabinet for Health and Family Services denied the requests under the confidentiality provisions. For its first request, the Council filed a complaint with the Office of the Attorney General, which rejected the Council's claim that it qualified for the social services agency exception. In the second request, the Council filed suit in trial court, which also upheld the agency's denial. The Court of Appeals upheld the trial court in a 2-1 decision. The supreme court upheld the denial as well. The supreme court noted that "as used throughout the statutes, the term 'agency' is applied to a governmental entity charged with carrying out some function on behalf of the executive branch of government, unless specifically stated otherwise. The term embodies the notion that employees performing the tasks are acting in the shoes of the government." The court added that the confidentiality exemption "is designed to give day-to-day information about an individual to those agencies that need the information to do their jobs." The court indicated that "it might be a better policy to require the Cabinet, if it does any kind of investigation, to give the details to any group that wants to know about it. That would certainly comport with the Open Records Act's general policy. But the legislature has opted against such a broad policy and has carved out an exception to the general open-records policy by making the information sought in this case confidential. It is not our role to define that confidentiality away simply because advocacy or watchdog groups serve a valid purpose." (*Council on Developmental Disabilities, Inc. v. Cabinet for Health and Family Services*, No. 2013-SC-000357-DG, Kentucky Supreme Court, Sept. 24)

Pennsylvania

A court of appeals has ruled that the Office of Open Records properly found that the Bravo Group, a lobbying firm hired by West Chester University to promote legislation allowing WCU to separate from the State System of Higher Education, has not shown that its contract with WCU is proprietary and exempt from disclosure. In response to several requests from *Pittsburgh Post-Gazette* reporter Bill Schackner for records pertaining to WCU's lobbying efforts, WCU argued that the records were not agency records and Bravo Group argued the records were proprietary. OOR found that WCU had hired Bravo Group on the recommendation of its board of trustees, making the records related to the contract agency records. While Bravo Group participated in the proceeding before OOR, OOR argued in court that Bravo Group did not have standing to appeal its decision because only a requester or an agency could challenge a determination by OOR. But the court noted that Bravo Group could have standing to challenge OOR's decision if it had an independent legal interest in non-disclosure. The court, however, observed that "Bravo does not have an interest in claiming that [the contract] cannot be disclosed unless it can be shown that it was a trade secret or

confidential proprietary information." WCU challenged OOR's decision that headers on emails had to be disclosed to the extent that they identified public employees. WCU argued that the headers did not exist at the time the request was made, but instead contained the names of the individuals who printed the emails in processing the requests. The court agreed with WCU that "the Right to Know Law does not require WCU to format a record in the manner that a requester wants it and there is no requirement that the agency identify who printed a particular document." (*West Chester University of Pennsylvania v. Bill Schackner and the Pittsburgh Post Gazette*, No. 248 C.D. 2015, No. 250 C.D. 2015, and No. 251 C.D. 2015, Pennsylvania Commonwealth Court, Sept. 17)

Virginia

The supreme court has ruled that trial courts must defer to the reasonable exemption claims of a public body and that if records fall within an exemption an agency has no obligation to review the records further for redaction and release of non-exempt portions. In a case involving Scott Surovell's request to the Virginia Department of Corrections for records concerning procedures for conducting executions, the trial court agreed with VDOC, after hearing expert testimony, that many of the records could be withheld under the security exemption, but ruled further that information from the manual of the manufacturer of the electric chair used in executions did not relate to security concerns and that VDOC was required to release those portions of the manual. VDOC appealed and the supreme court reversed. In assessing the degree to which the agency had to prove that disclosure "would jeopardize" security, the supreme court observed that "to the extent that releasing documents would expose a governmental facility to danger, the standard is met." The court added that "a [trial court] must take into account that any agency statement of threatened harm to security will always be speculative to some extent, in the sense that it describes a potential future harm rather than an actual harm. The question placed before the court is only whether the potential danger is a reasonable expectation." Recognizing that the trial court was required to review VFOIA cases *de novo*, the supreme court went on to indicate that the such a balance was skewed in favor of the agency. The court noted that "the [trial] court must make a de novo determination of the propriety of withholding the documents at issue, but in doing so, the [trial] court must accord 'substantial weight' to VDOC's determination. Once satisfied that proper procedures have been followed and that the information logically falls within the exemption clause, courts need go no further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." The supreme court then rejected the trial court's requirement that VDOC redact the manual and disclose those portions that did not qualify for protection under the exemption. Instead, the supreme court pointed out that "the wording of the statute applies the exclusion to the entire drawing, manual, minutes or record and makes it disclosable only at the discretion of the custodian. Nothing in this section speaks to redaction except for a general reference to the option of disclosure at the discretion of the custodian. This language creates no requirement of partial disclosure or redaction." Two justices dissented on that issue. The dissent noted that "VFOIA requires public bodies to determine whether an exemption applies to an entire record or only to specific information contained therein. If an exemption applies only to specific information contained therein, then the public body must release the requested record, and it may redact the exempt information in its discretion. In the present case, [the security exemption] does not categorically exempt the requested records from VFOIA's mandatory disclosure requirements. Therefore, VDOC must determine whether the requested records contain any non-exempt information and release such information." (*Virginia Department of Corrections v. Scott A. Surovell*, No. 141780, Virginia Supreme Court, Sept. 17)

The Federal Courts…

A federal court in New York has ruled that the U.S. Trade Representative properly withheld records concerning the U.S. negotiating position during the Trans-Pacific Partnership free-trade agreement recently

negotiated between 11 Asia-Pacific countries and the United States from Intellectual Property Watch under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**, but that the agency has not supported its claims under **Exemption 4 (confidential business information)** and **Exemption 5 (deliberative process privilege)**. After rejecting most of Intellectual Property Watch's request, IPW agreed to narrow its request to the negotiating positions for the United States. Most of those records were either withheld or redacted under Exemption 1 and Exemption 3, citing the Trade Act of 1974. The negotiating countries agreed to abide by a New Zealand-originated confidentiality agreement that prohibited disclosure of negotiation-related materials until an agreement was reached without the permission of all the countries. Judge Edgardo Ramos explained that "such a requirement explicitly contemplates a foreign nation's objecting to the U.S.'s unilaterally release of U.S. proposals; the agreement takes aim at precisely this kind of negotiating in public. . .While violation of a confidentiality agreement does not *per se* satisfy the government's burden under Exemption 1, the existence of a specific confidentiality agreement in the context of specific negotiations is undoubtedly relevant." Ramos found the agency had made a sufficient case for its conclusion that disclosure of the records could harm national security. He noted that "it is both logical and plausible that unilateral disclosure of Draft Chapters, in explicit violation of the very first term of the TPP confidentiality agreement, would harm foreign relations, especially prior to consummation of the final agreement. . .[D]isclosure in this case might establish a precedent that all draft text in all future trade negotiations involving the U.S. would be subject to FOIA disclosure. Absent any such limiting principle, formal confidentiality agreements would be rendered futile, and the Court accepts as reasonable the government's argument that such agreements are critical preconditions to successful multilateral trade negotiations." IPW argued that 19 U.S.C. § 2155(g) of the Trade Act did not qualify as an Exemption 3 statute because its amended language did not prohibit public disclosure. But Ramos noted the provisions established "particular criteria for withholding" or referred "to particular types of matters to be withheld" as required under Exemption 3. Ramos observed that "it is commonsense that [the provisions]. . .instruct[] the agency to withhold confidential information and advice from the public, and permitting only limited disclosure to certain key Executive and Congressional officials involved in trade negotiations. Although these provisions do not explicitly direct USTR to withhold confidential matters from the public, such a directive is nonetheless the most reasonable reading and is consistent with the rest of the statute and its legislative history." The agency claimed that its ability to obtain confidential business information in the future would be impaired if certain confidential business information was disclosed. Ramos agreed with IPW that the agency had not shown that the records were treated as confidential. As a result, he ordered the agency to provide further support for its Exemption 4 claims, as wells as its § 2155(g) Exemption 3 claims pertaining the alleged confidential business information. The agency argued that some records qualified for protection under Exemption 5. But Ramos noted that the agency's claims were contrary to the Supreme Court's holding in *Klamath* because the parties clearly had adverse interests. Rejecting the agency's argument that the records fell within the consultant corollary, Ramos pointed out that "the upshot is that USTR asks this Court to apply an expansive interpretation of the consultant corollary that the U.S. Supreme Court has described as beyond 'typical' and the Second Circuit has never expressly adopted." (*Intellectual Property Watch and William New v. United States Trade Representative*, Civil Action No. 13-8955 (ER), U.S. District Court for the Southern District of New York, Sept. 25)

A federal court in California has ruled that a **pattern and practice** suit brought against U.S. Customs and Border Protection by five immigration attorneys alleging that the agency's routine failure to respond to FOIA requests within the statutory time limits violate FOIA may continue. Judge James Donato noted that "the government says that the case should be dismissed because an agency's failure to meet the response deadline is not an actionable violation of FOIA. That argument is wholly at odds with the statute and cases construing it." The agency relied primarily on *CREW v. FEC*, 711 F.3d 180 (D.C. Cir.2013), for the proposition that an agency's failure to meet FOIA's deadlines has no legal consequences aside from

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prohibiting an agency from claiming the requester must file an administrative appeal. But Donato observed that "this holding is not remotely germane to the government's argument here that plaintiffs cannot plead a FOIA violation based on delay. . .The lack of any argument about exhaustion severs any possible connection to *CREW*. If anything, the tea leaves the government strains to read in *CREW* suggest an untimely response is a breach of FOIA's requirements." Donato also rejected the agency's argument that *Payne Enterprises v. USA*, 837 F.2d 494 (D.C. Cir. 1988), in which the D.C. Circuit found that Payne Enterprises had an equitable claim against the Air Force for its routine refusal to disclose non-exempt documents until Payne had gone through a lengthy appeals process, only applied to claims of future harm. Donato pointed out that "even if allegations of future harm were required, plaintiffs have stated enough facts to infer it here. Plaintiffs include several immigration attorneys, some of whom have practiced for decades, who 'regularly file' FOIA requests on behalf of their clients. It is more than plausible to infer that they will continue to make regular FOIA requests for the CBP documents that are critical for their work, and continue to experience improper delays." (*Meredith R. Brown, et al. v. U.S. Customs and Border Protection*, Civil Action No. 15-01181-JD, U.S. District Court for the Northern District of California, Sept. 17)

Judge John Bates has ruled that the Bureau of Land Management has so far failed to show that it conducted an **adequate search** for records concerning filmmaker James Kleinert and that its redactions made under **Exemption 5 (deliberative process privilege), Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** are insufficient. Kleinert, a documentary filmmaker whose work focused on American wild horses, came to believe that BLM was retaliating against him because of his criticism of the agency. He made a FOIA request for records about himself. Nearly a year later, the agency responded by disclosing 168 heavily redacted pages, although Kleinert apparently did not receive the response. He then filed suit. Bates noted that BLM originally argued Kleinert had **failed to exhaust his administrative remedies**, but had since dropped that argument. However, Bates observed that "the agency presumably recognizes that because Kleinert did not *receive* the agency's response within the relevant statutory time period and before filing suit (even if BLM did *send* it), Kleinert constructively exhausted his administrative remedies." Bates found the agency's description of its search lacking, but indicated that "it is possible that BLM in fact conducted an adequate search and has simply failed to describe it with sufficient detail and clarity. The Court will therefore permit BLM to provide a supplemental description of its search to rectify these shortcomings." He found the agency's affidavits supporting its Exemption 5 claim similarly lacking. He noted that "BLM's counsel all but conceded that the agency's affidavits and *Vaughn* index said nothing to justify these applications of Exemption 5. She suggested, however, that one might be able to infer from the nature of the documents themselves that the deliberative process privilege applies. But given the extent of the agency's redactions, that is simply impossible. In most instances, the Court can infer little more than that the redacted documents are emails. From whom to whom, about what—that the Court cannot tell, and should not be forced to guess." The rest of the redactions had been made under Exemption 6 and Exemption 7(C). Bates pointed out that the agency had failed to show how the records were compiled for law enforcement purposes. He indicated that "the Court can at present identify with confidence only one [document] that was compiled for law enforcement purposes: the 41-page investigation report [of Kleinert's alleged filming on federal land without permission]. For all other disputed records, BLM has not yet met its burden with respect to [showing the records were compiled for law enforcement purpose]." Bates disagreed with the agency's categorical redaction of names of employees, noting that "they are BLM employees who signed non-confidential official documents that happened to be reviewed and summarized years later by investigators examining tangentially related events. The risk of harassment, embarrassment, or reputational damage here—if not absent entirely—seems about as close to nil as it could get." Kleinert successfully argued that redactions made to two affidavits filed in another federal lawsuit related to Kleinert's 2011 filming were improper because the records were in the public domain. Bates observed that "Kleinert has thus shown that 'the specific information sought [has] already been disclosed and preserved in a permanent

public record.' BLM, by contrast, has offered no explanation as to why these redactions are justified despite the ready public availability of the underlying declarations." The agency had redacted other personally identifying information under Exemption 6. Bates posited that the agency apparently thought such information was routinely protected by the exemption, but he pointed out that "there is no such per se rule." In response to the agency's categorical redaction of personal information, Bates explained that "the problem for BLM, however, is that it has wholly failed to explain why disclosure of the redacted information would subject the relevant individuals to any harm. BLM's affidavits and *Vaughn* index say nothing about embarrassment, harassment, or retaliation, and the Court will not accept the agency's conclusory, mid-litigation say-so." (*James Kleinert v. Bureau of Land Management*, Civil Action No. 14-1506 (JDB), U.S. District Court for the District of Columbia, Sept. 25)

Judge Ketanji Brown Jackson has ruled that the State Department properly invoked **Exemption 1 (national security)** to withhold a diplomatic cable sent from the U.S. Embassy in London reporting on the United Kingdom's plans concerning the British Indian Ocean Territory. The UNROW Human Rights Impact Litigation Clinic at American University Law School represented the Chagossians, a group of displaced indigenous people from the Chagos Archipelago in the British Indian Ocean Territory. UNROW had requested and received records in the past from the State Department and the Defense Intelligence Agency about the Chagossians. While one of its requests was still pending at State in 2010, *The Guardian* published the 2009 cable, part of the Wikileak disclosures. In 2013, UNROW sent FOIA requests to State and DIA for copies of the 2009 cable referred to in *The Guardian* article. DIA acknowledged UNROW's request and explained that since the cable likely originated with State, it would refer any records it found to State for final determination. DIA found a 7-page record that it referred to State. State found the same document and in its response letter to UNROW indicated that "record searches by the Department of State and by the Defense Intelligence Agency each resulted in the retrieval of one identical document responsive to [UNROW's] requests," and that State had determined to withhold the document under Exemption 1. UNROW filed suit, arguing that the cable was already in the public domain and that the State Department had officially acknowledged its existence. UNROW also urged Jackson to review the document *in camera*. Further, UNROW argued that DIA had improperly delegated its obligation to make a determination on the disclosability of the document by allowing State to make the sole determination. Jackson found the cable satisfied several of the categories of the executive order on classification for purposes of finding disclosure would harm national security. She pointed out that State's affidavits "specifically identify the origin of the information and articulate the damage its disclosure would do to relations with the United Kingdom and the chilling effect it would have on U.S. relations with countries and other sources of sensitive information. This argument is perfectly plausible; indeed, courts in this circuit have long recognized the legitimacy of this species of national security harm in the FOIA context." UNROW's primary argument that the government had waived the exemption through official acknowledgement was that the State Department's letter said that documents found by both State and DIA were "identical," which UNROW interpreted as meaning identical to the document that appeared in *The Guardian*. Jackson found this interpretation defied common sense and noted that the State Department's explanation of the word "identical" was far more convincing. She pointed out that "the plain and unambiguous role of the adjective 'identical' in the sentence is to make clear that State and DIA each turned up *the same* document; without that crucial modifier, the sentence would suggest that the Departments turned up two different documents, each of which was responsive to UNROW's requests. Surely, if State had intended to convey that the responsive document was identical to UNROW's attached copy of *The Guardian* document, it could have done so more clearly." She observed that "in the final analysis, then, UNROW finds itself in an unfortunate Catch-22: everything it asserts about the content of the withheld document is based on *The Guardian* document, but *The Guardian* document has never been officially acknowledged and thus cannot form the basis of a valid waiver claim." Jackson rejected UNROW's request

that she review the document *in camera* "to determine whether any portion of the document falls outside of State's expressed confidentiality concern such that it may be released." But she noted that "the agency explained that the *entire* document contains sensitive content, such that even a partial disclosure would break a promise of confidentiality and chill relations with a foreign government. . ." Jackson found DIA had not violated FOIA by referring the document it found to State as the originator of the document for a disclosure determination. She observed that "the record is unambiguous that DIA possessed a copy of a seemingly responsive document that originated with State, and DIA believed State to be the proper authority to make the determination about responsiveness and disclosure." (*UNROW Human Rights Impact Litigation Clinic v. U.S. Department of State*, Civil Action No. 13-1573 (KBJ), U.S. District Court for the District of Columbia, Sept. 29)

Magistrate Judge G. Michael Harvey has recommended that the court rule that Southern Command conducted an **adequate search** for records concerning a 2009 coup in Honduras and that it properly withheld records under **Exemption 1 (national security)**. Freelance journalist Jeremy Bigwood filed two FOIA requests with Southern Command and worked with them on suggesting appropriate search terms. After several searches, Southern Command located 272 pages. In response to Bigwood's concerns about the adequacy of the search, Southern Command conducted a second search, locating an additional 784 pages. Bigwood also complained the agency had withheld too much information under Exemption 1. Harvey indicated he was satisfied with the agency's explanation of its searches, noting that "Southcom's willingness to conduct a second search for documents responsive to plaintiff's FOIA requests to address certain of his concerns, and to send personnel to Honduras to assist in the search for documents responsive to his requests, would substantially under any suggestion of bad faith." Bigwood complained the agency had failed to explain its search terms, did not use Boolean connectors in its searches, failed to describe the personnel and technologies used in conducting the searches, and failed to locate records Bigwood thought should exist. Harvey rejected the claims. Addressing the terms used by the agency, he pointed out that "after comparing those terms with plaintiff's two FOIA requests—one seeking information about the removal of Honduran President Zelaya and the other seeking information about Honduran General Velasquez—it certainly appears more than likely that the terms utilized would identify responsive documents." Bigwood argued that several decisions from the Southern District of New York found that agencies were required to use Boolean connectors in their electronic searches. But Harvey noted that the law in the D.C. Circuit was that an 'agency's search description [was] sufficient despite the absence of information concerning any Boolean operators or connectors used to facilitate an electronic search." He added that "because Southcom's descriptions of its search include the basic information required—what records were searched, by whom, and in what manner—they are sufficient." Harvey indicated that identifying the names of personnel conducting a search was not required in the D.C. Circuit. He observed that "reasonableness remains the crux of the Court's inquiry. This Circuit does not require a federal agency to provide the exacting level of detail about its search methodology that plaintiff demands." As to the alleged missing records, Harvey noted that "Southcom's searches were, on their face, reasonable. The fact that they did not ultimately result in the identification of some of the documents plaintiff hoped to recover does not undermine the reasonableness of its searches on his behalf." Bigwood claimed the agency's exemption claims were too vague. Finding that the agency's supplemental *Vaughn* index satisfied the requirements for specificity, Harvey explained that "while the original *Vaughn* index provides, as plaintiff correctly observes, a 'scant basis' for assessing the validity of Southcom's withholdings, the supplemental *Vaughn* index provides considerable detail concerning the basis for withholding the material at issue pursuant to Exemption 1." (*Jeremy Bigwood v. United States Department of Defense and Central Intelligence Agency*, Civil Action No. 11-602 (KBJ/GMH), U.S. District Court for the District of Columbia, Sept. 25)

Judge Amit Mehta has ruled that the DEA did not conduct an adequate **search** for records concerning the proposed reclassification of carisoprodol as well as the rescheduling of hydrocodone because it failed to search the office of the Deputy Assistant Administrator of the Office of Diversion Control once it uncovered a document indicating that the office probably had responsive records. John Coleman, who had served as DEA Assistant Administrator for Operations before he retired and now headed Drug Watch International, an organization dedicated to drug abuse prevention and education, made the FOIA request. He asked for a fee waiver, which was denied. Coleman appealed to OIP, which remanded the decision back to DEA for reconsideration. DEA once again denied Coleman's request for a fee waiver, but once it finally started processing his request, it decided it could not charge fees because it had missed the statutory deadline for responding. As a result, the agency disclosed 1,906 pages and an additional 79 pages several weeks later without charging any fees. Coleman challenged the adequacy of the agency's search. He also argued that the agency had a policy and practice of denying him fee waivers. DEA searched only two offices and Mehta found the agency's explanation for its search was sufficient. But he agreed with Coleman that letters sent by the Deputy Assistant Administrator in 1996 and 2004 to the Department of Health and Human Services appointing the Deputy Assistant Administrator as a liaison with HHS for information exchanges about the two drugs constituted clear leads as to potentially responsive records that the agency could not ignore. He noted that "the Deputy Assistant Administrator, therefore, at some point, likely came into possession of material responsive to Plaintiff's FOIA request. As a result, the DEA simply could not ignore that office, absent a specific reason not to conduct a search there. The DEA presented no such reason on this record." He added that "even though the DEA's original assumption about where documents might be found was reasonable, once it located the 1996 and 2004 Letters, it had an obligation to follow the lead that the Letters presented and search the Deputy Assistant Administrator's office. . ." Mehta rejected Coleman's contention that the search was inadequate because so few emails had been found. He observed that "plaintiff's experience at the DEA and his expectation that his request would produce emails, standing alone, cannot overcome the 'presumption of good faith' that must be accorded the agency's declarations." Mehta found Coleman had not shown that he faced any future injury as a result of the agency's failure to grant him a fee waiver in this case. He pointed out that "plaintiff undoubtedly suffered injury caused by the DEA's refusal to grant him a fee waiver—the denial resulted in a substantial delay in his receipt of responsive material. That injury, however, occurred in the past. And past injury does not automatically portend *future* injury and confer standing to seek injunctive relief." (*John J. Coleman v. Drug Enforcement Administration*, Civil Action No. 14-00315 (APM), U.S. District Court for the District of Columbia, Sept. 29)

Judge Paul Friedman has unsurprisingly ruled that the NSA is not required to disclose records concerning the extraordinary rendition program carried out in other countries at the behest of the United States and certain terrorist suspects detained by the United States because it either pertains to human intelligence, a data source not collected by the NSA, or, in the case of records about terrorists detained by the U.S., it is subject to a *Glomar* response neither confirming nor denying the existence of records based on both **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Friedman found that the NSA was not required to disclosure records in respond to any of the 43 requests from the United Kingdom's All Party Parliamentary Group on Extraordinary Rendition. The plaintiffs argued the NSA's functions were broader than just collecting data through sophisticated surveillance technologies, suggesting the NSA must have access to human intelligence from other intelligence agencies. But Friedman noted that "although plaintiffs' claims may be plausible, the NSA's declaration, filed under pain of perjury, is accorded a presumption of good faith and 'cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.'" Friedman rejected the Group's contention that much of the information about the detention of terrorists had been made public by the press. Friedman observed that "leaked information and documents, like those identified by plaintiffs, do not constitute official acknowledgement. Moreover, the declassified

documents identified by plaintiffs are limited, describe the NSA's activities in general terms, and do not concern specific activities, investigation, and detentions detailed in plaintiffs' FOIA requests." While a decision like Friedman's seems inevitable on the merits, this case was originally litigated on the issue of whether the Parliamentary Group was a foreign intelligence agency, which, thanks to a poorly-crafted FOIA amendment early on in Bush's war on terrorism, was prohibited from making a FOIA request for such records. While a district court found the Parliamentary Group was an intelligence agency for purposes of the amendment, that decision was reversed by the D.C. Circuit. (*All Party Parliamentary Group on Extraordinary Rendition v. U.S. Department of Defense*, Civil Action No. 09-2375 (PLF), U.S. District Court for the District of Columbia, Sept. 29)

After agreeing to reconsider his earlier decision, Judge James Boasberg has ruled that a radar plot Boasberg had earlier ordered the FAA to release to David Elkins after finding it was not protected by **Exemption 7(E) (investigative methods and techniques)** is covered by the exemption. Supplying an *in camera* affidavit to justify its claim, the government argued that the radar plot revealed details about a law enforcement flight that was part of a pending law enforcement investigation. Boasberg faulted the FAA for its misleading interpretation of the holding in *Juarez v. Dept of Justice*, 518 F.3d 54 (D.C. Cir. 2008), to mean that any record related to a prospective law enforcement proceeding could be withheld. The agency also suggested that the recent *PEER* decision holding that records qualified as law enforcement records if they pertained to security concerns provided a basis for withholding the radar plot. But Boasberg indicated that he was more comfortable relying on a Supreme Court decision the agency did not cite—*FBI v. Abramson*, 456 U.S. 615 (1982)—for the proposition that records created for law enforcement purposes did not lose their status as law enforcement records even if they were used by another agency for non-law enforcement purposes. Applying *Abramson*, Boasberg noted that "since the law-enforcement agency operating the aircraft was compiling data on its own flight track, that data did not lose its protection when forwarded to the FAA. That the forwarding may have been occurring simultaneously—*i.e.*, as the flight was tracked—should not change the result." Finding that the FAA had now substantiated its original 7(E) claim, Boasberg pointed out that "the declarations demonstrate that the specific details of the government agency's techniques are not well known and that, if they were, criminal targets could act in such a manner as to impinge on the effectiveness of the surveillance." (*David Elkins v. Federal Aviation Administration*, Civil Action No 14-1791 (JEB), U.S. District Court for the District of Columbia, Sept. 21)

A federal court in Massachusetts has ruled that the Defense Department's affidavits describing its **searches** for records responsive to Thomas Stalcup's FOIA requests regarding the possibility that missile testing off the East Coast was responsible for the crash of TWA 800 in 1996 are still inadequate for summary judgment purposes. Three of Stalcup's requests to DOD were at issue – two to the Missile Defense Agency and one to the Office of the Secretary –and the agency had provided three affidavits describing the searches. The court found the agency's descriptions of its searches of MDA were adequate. The court noted that "in an attempt to rebut the presumption [of good faith], Stalcup points to evidence that missile or rocket firings occurred off the East Coast in 1996 and 1997 and, from there, he theorizes that documents must have been created by or provided to the MDA regarding those firings, and must have been retained by the MDA, such that they are still in the agency's possession. Such speculation is not sufficient to rebut the presumption of good faith and defeat summary judgment. . .Here, the MDA adequately explained its search process and established that the methods used could be reasonably expected to produce the information requested. Thus, the MDA has satisfied its obligations under FOIA." But as to the OSD searches, the court agreed with Stalcup that the current descriptions were insufficient. The court observed that "the affidavits nowhere describe in detail the scope and method by which the search was conducted of the structure of OSD's file system which makes further search difficult. The affidavits do not offer any explanation of why the two offices searched

would be the only offices within the OSD reasonably likely to contain responsive documents, nor do they state whether there are any legacy filing systems that might retain responsive documents." (*Thomas Stalcup v. Department of Defense*, Civil Action No. 13-11967-LTS, U.S. District Court for the District of Massachusetts, Sept 18)

Judge Paul Friedman has ruled that while an Assistant U.S. Attorney and a counsel for the Department of Veterans Affairs should not be sanctioned for failing to provide CREW with two affidavits of VA employees until four months after CREW had deposed one of the employees as a result of Friedman's concerns about the agency's behavior, the agency is required to pay CREW's **attorney fees and costs**. After receiving explanations from the AUSA and the VA attorney, Friedman found that their behavior had not been meant to obstruct the litigation. Friedman observed that "the Court finds that the delay in providing the [two affidavits] were not a litigation tactic designed for purposes of delay or worse. Nevertheless, once the Court had ordered that the deposition of [one of the VA employees] proceed on July 16, 2010, over the government's objection, the wiser course would have been to provide counsel for CREW with [the earlier affidavits] *before* that deposition took place. On the basis of the facts and the case law, however, the Court cannot conclude that [the AUSA] acted in bad faith or even recklessly in the decisions she made with respect to those disclosures. Accordingly, there is no basis to require her personally to pay attorneys' fees and costs as a sanction." Indicating he was troubled by the effects of the government's litigation tactics, Friedman pointed out that the government's behavior reflected "a misguided litigation strategy—not one *designed* to delay or impede the proceedings or to conceal relevant facts, or executed in bad faith—but a strategy so focused on preparing and then filing a new motion for summary judgment with supporting and (finally) completely accurate declarations, that the importance to CREW of the deposition was put to one side, perhaps viewed by the government as a mere distraction from its ongoing internal efforts, designed finally to set the record straight later." He indicated that "unfortunately, the unintended effect of the VA's decisions was the multiplication of briefings and depositions. For this, CREW is entitled to attorneys' fees, costs, and expenses, but no to sanctions." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Veterans Affairs*, Civil Action No. 08-1481 (PLF), U.S. District Court for the District of Columbia, Sept. 22)

Judge Amy Berman Jackson has ruled that U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement properly withheld records under **Exemption 5 (privileges)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods and techniques)** from Dany Rojas-Vega's alien file. Rojas-Vega, a Costa Rican citizen, pled guilty to a drug offense in California in 1995 with the understanding that the U.S. government would not use his plea deal as a basis to deport him. In 2001, however, the government began the process of deporting him. He requested records from USCIS that would show the "change of plea and sentencing proceedings" pertaining to his drug conviction. USCIS located his alien file and released more than 2100 pages with redactions. USCIS also referred 388 pages to ICE for direct response. ICE disclosed most of those pages, but withheld 56 pages in full. Rojas-Vega argued that the records concerning his plea bargain dealt with a contractual relationship with the government and were not privileged. Jackson disagreed, noting that "it is true that the declaration and Vaughn Index merely hint at any connection between the information withheld and a particular agency decision. But even if the deliberative process privilege does not apply, it is apparent that the same information is protected under the attorney work product privilege. For example, the events giving rise to certain inter-agency communications pertained to the government's positions with regard to plaintiff's immigration proceedings and his habeas petition. . .The information described in ICE's supporting declaration and Vaughn Index is precisely the sort of information Exemption 5 is designed to protect." Jackson found that because the records pertained to the detention and removal of criminal aliens they qualified as law enforcement records for purposes of Exemption 7. Jackson concluded that both USCIS and ICE had

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shown that the redactions made under Exemption 7(C) and Exemption 7(E) were appropriate and that because Rojas-Vega had only challenged whether such records qualified as law enforcement records he had conceded the government's exemption claims. (*Dany Rojas-Vega v. United States Citizenship & Immigration Service, et al.*, Civil Action No. 13-1540 (ABJ), U.S. District Court for the District of Columbia, Sept. 23)

Judge Rudolph Contreras has wrapped up several issues remaining in prisoner Sean Fowlkes' FOIA suit against BATF by finding that the agency properly withheld records about gun traces under **Exemption 3 (other statutes)**, but that EOUSA had not shown that the name of the judge presiding over a grand jury was protected under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. As one way to stymie liability litigation by cities against gun manufacturers, Congress passed a funding restriction prohibiting BATF from using any funds to respond to FOIA requests for gun trace information. While the provision has been recognized by courts as the equivalent of an Exemption 3 statute, Contreras had originally questioned BATF's application of an earlier version of the appropriations provision because it did not specifically identify the provision as applicable to FOIA, required by an amendment to Exemption 3 in the OPEN FOIA Act. This time BATF cited to a more recent version of the appropriations provision, telling Contreras that "the funding restrictions 'remain active and enforceable [and] are subject to [Exemption 3]." This time Contreras agreed and indicated that "BATFE's decision to withhold the Trace Report in full is proper." Contreras rejected EOUSA's attempt to withhold the judge's name under Exemption 7(C). He indicated that "the Court does not discount the potential risk and exposure a judge faces, yet finds the protection afforded by Exemption 7(C) is not so broad as to protect his or her name." He added that "furthermore, EOUSA cites to no case in which the name of a judge who convened a grand jury has been withheld on this basis." (*Sean Darnell Fowlkes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, Civil Action No. 13-0122 (RC), U.S. District Court for the District of Columbia, Sept. 21)

Judge Richard Leon has explained the recent spate of cases requesting wiretap authorization memos from the Criminal Division at the Department of Justice and like the four judges before him has ruled that the Justice Department conducted an **adequate search** for records and properly withheld the memos under **Exemption 5 (privileges)**. Leon explained that the plaintiffs in all five cases were prisoners at the Northeast Ohio Correctional Center in Youngstown, and that three of them were involved in the same drug case from the Western District of Pennsylvania. In this case, Eric Campbell had requested wiretap authorizations for a phone number used in his prosecution. The Criminal Division initially responded that it would not search for the records because they were considered exempt under **Exemption 3 (other statutes)** because they were confidential under Title III. OIP affirmed the Criminal Division's refusal to search, but once Campbell filed suit, the agency searched for and located responsive records in its Title III tracking database and in archived emails, all of which were withheld under Exemption 5. Leon agreed with the agency's exemption claim, noting that "most of the documents—including substantive records like recommendation memoranda, affidavits, and approval letters—clearly qualify as attorney work-product because they were prepared for criminal prosecutions. . .[E]ven those documents that appear more administrative in nature—for example, email messages confirming receipt or logging notes—also fall within Exemption 5. These records were created in anticipation of a specific criminal prosecution and would not have been created in the absence of it." Like his fellow plaintiffs' previous cases, Campbell argued that the records were required to be released under the **Privacy Act**. Leon indicated that the Title III tracking database was an exempt law enforcement system of records under subsection (j)(2), but noted that the archived emails were not in an exempt system. But he pointed out that "the documents identified in the email archive were properly withheld as this database is not a 'system of records' within the meaning of the Privacy Act and is therefore not subject to the disclosure provision therein." (*Eric Campbell v. United States Department of Justice*, Civil Action No. 14-1350 (RJL), U.S. District Court for the District of Columbia, Sept. 28)

In another case not mentioned by Leon dealing with memos written seeking authorization for wiretapping individuals, Judge Rosemary Collyer has ruled that records responsive to Keontae Spears' request

for wiretap memos used in his prosecution are protected by **Exemption 3 (other statues)**, **Exemption 5 (privileges)**, **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The Justice Department's Criminal Division responded to Spears, as it had to all the other prisoner requests for such records, that because wiretap-related records were protected by Title III the agency would not conduct a search. The Criminal Division's response was upheld by OIP. But invariably once such suits get into litigation, the agencies do search for records, sometimes releasing large numbers of responsive records. In Spears' case, the agency's search located records, which it then withheld primarily under Title III and Exemption 5. After finding the agency's search was adequate, Collyer noted that "wiretapped recordings obtained pursuant to Title III ordinarily are exempt from disclosure under exemption 3, unless they have entered the public domain." Spears argued the content of the wiretaps had been discussed during his trial, but Collyer indicated that was insufficient to show the recordings themselves were in the public domain. She pointed out that "even if true, this is of no material consequence because the Criminal Division's description of the withheld material does not include the intercepted content." The agency withheld communications between Electronic Surveillance Unit attorneys and prosecuting attorneys under both the attorney work-product privilege and the deliberative process privilege. Collyer agreed that the agency had properly applied both privileges. (*Keontae Spears v. United States Department of Justice*, Civil Action No. 14-1387 (RMC), U.S. District Court for the District of Columbia, Sept 29)

Judge James Boasberg has ruled that the FBI provided sufficient justification for its **search** for notebooks that were seized during the investigation of Guillermo Casas and which Adolfo Correa Coss, who was convicted of drug charges based on Casas' testimony, believed contained information that would exonerate him of the charges. Coss, a permanent U.S. resident, was convicted in 1991, served his sentence in the U.S., and then was deported to Mexico. While he had always believed he was wrongfully accused based on false claims made by a confidential source, Coss did not learn Casas' identity until later. He then made several FOIA requests to the FBI and EOUSA for Casas' notebooks. Boasberg previously found that EOUSA had justified its no records search, but that the FBI's explanation was insufficient. This time around, Boasberg found the FBI too had shown that its search, which also turned up no records, was sufficient. Coss seemed to accept that the FBI did not have the notebooks, but he argued the agency was obligated to provide a chain-of-custody document for the notebooks. Boasberg disagreed, noting that "prosecutors and court-evidence clerks are not employees of the FBI. Under FOIA, the Court only has 'jurisdiction to enjoin the agency from withholding *agency* records and to order the production of any *agency* records improperly withheld from the complainant.' The Court cannot require the FBI to track down records or people outside its domain." (*Adolfo Correa Coss v. United States Department of Justice*, Civil Action No. 14-1326 (JEB), U.S. District Court for the District of Columbia, Sept. 28)

Judge Amy Berman Jackson has resolved issues remaining in David Barouch's FOIA and Privacy Act suit against BATF by ruling that the agency properly withheld 97 pages of records under **Exemption 3 (other statutes)** and that a voice recording located during a search for records on Barouch was not subject to disclosure under the Privacy Act. BATF had previously withheld the 97 pages under Rule 6(e) pertaining to grand jury secrecy, an explanation Jackson found insufficient. Jackson now found the agency's supplemental affidavits provided justification for withholding all the records. She agreed that the records pertained to a grand jury subpoena and the records provided to the grand jury as a result of that subpoena. Jackson previously rejected the agency's claim that the voice recording was not subject to the Privacy Act, again because the agency had not provided sufficient detail for supporting such a claim. This time Jackson observed that "defendants located this record not by conducting a name search or using some other identifying number or symbol, but only after an employee diligently searching for records responsive to plaintiff's request 'reached out to [plaintiff's] former case agent,' and the agent retrieved the records from his personal files. There is no indication that the personal files of this agent were structured in a way to permit the types of

retrievals that characterize a 'system of records' under the Privacy Act." (*David Jack Barouch v. United States Department of Justice*, Civil Action No. 14-0552 (ABJ), U.S. District Court for the District of Columbia, Sept. 18)

Judge Reggie Walton has ruled that the Bureau of Prisons and EOUSA properly responded to Virgil Hall's FOIA requests by disclosing the two records he requested. Walton also ruled that Hall could not amend his BOP records because they were contained in a system of records exempt from the provisions of the **Privacy Act**. Hall requested his certified judgment and return with a legible signature by a U.S. Marshal's deputy. BOP provided a copy of the record, but construed Hall's request as one to amend the record to include a legible deputy's signature. Hall also requested a copy of signed original indictment from the District of Utah where he was tried and convicted. EOUSA located the indictment and disclosed it to Hall with the grand jury foreman's signature redacted under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Hall argued the agencies failed to identify who had signed the indictment and had failed to authenticate the judgment and return document. Walton noted, however, that "an agency is not obligated under FOIA to provide answers to a requester's questions. Nor must an agency offer explanations of responsive records, and an agency's response need not comport with criminal statutes, rules or procedures. Here, the defendants responded to the plaintiff's FOIA requests by producing copies of the two documents he requested, and they were under no obligation to explain or verify the content of the documents." As to Hall's Privacy Act claim, Walton pointed out that "the plaintiff's Inmate Central File, including his J&C, is maintained in a system of records that is exempt from the amendment, accuracy, and civil remedy provisions of the Privacy Act." (*Virgil Hall v. Federal Bureau of Prisons*, Civil Action No. 14-1082 (RBW), U.S. District Court for the District of Columbia, Sept. 25)

Judge Reggie Walton has ruled that EOUSA conducted an adequate **search** for records pertaining to Torenda Whitmore's conviction for kidnapping. Since Whitmore had been tried in the Southern District of Mississippi, EOUSA referred the request to that office, which produced responsive records. Because her file had been purged of unnecessary and redundant records, most of the specific records she requested no longer existed in the file. EOUSA released the file with redactions of personal information under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Whitmore challenged the adequacy of the search, arguing that if records had been purged from the EOUSA files the agency should have searched for records at agencies involved in the investigation of the charges against her. Walton pointed out that "the EOUSA limited its search to the Southern District of Mississippi 'because that was the district identified by Plaintiff in her FOIA request letter.' And the plaintiff identified her criminal case by number and by court—the United States District Court for the Southern District of Mississippi. Based on this information, the EOUSA's decisions to refer the matter to the United States Attorney's Office for the Southern District of Mississippi, and to limit its searches to records maintained by this office, were reasonable. Furthermore, the EOUSA's obligation was to search for records it maintained at the time it received the plaintiff's FOIA request. Thus, it was not required to search for records maintained by other federal government agencies and therefore its failure to forward the plaintiff's request to the FBI or the BATFE does not render the searches inadequate." (*Torenda Whitmore v. U.S. Department of Justice*, Civil Action No. 14-986 (RBW), U.S. District Court for the District of Columbia, Sept. 25)

Judge Emmet Sullivan has ruled that the DEA properly withheld portions of records concerning the investigation and arrest of Dracy McKneely on drug charges under several subparts of **Exemption 7 (law enforcement records)**. McKneely argued that most of the records did not qualify as law enforcement records because they were tangential to the agency's law enforcement activities. But Sullivan noted that "what plaintiff fails to grasp is that the threshold law enforcement purpose is satisfied irrespective of who was the target of the investigation if, as here, the responsive information is contained in records that were compiled for that purpose." Finding that the agency had conducted an adequate **segregability** analysis, Sullivan indicated

that "the records withheld in their entirety consist mostly of forms, wherein any nonexempt information is so intertwined with the exempt information as to render the release of any nonexempt portions meaningless." (*Dracy McKneely v. United States Department of Justice*, Civil Action No. 13-1097 (EGS), U.S.District Court for the District of Columbia, Sept. 25)

Judge Christopher Cooper has ruled that EOUSA properly withheld records pertaining to Harry Lee Riddick's conviction on drug charges under **Exemption 5 (privileges)** as well as because Riddick refused to **commit to paying fees**. Riddick filed three FOIA requests for records concerning his conviction. The agency indicated that he was required to pay $784 in fees for his first request and $56 in fees for his third request. The agency informed Riddick that his requests would be closed if he did not commit to pay or appeal the agency's decision within 30 days. After Riddick failed to respond, the agency closed his requests. The agency told Cooper that during its review of Riddick's files it located a number of documents subject to the deliberative process privilege or the attorney work-product privilege. Approving of those withholdings, Cooper noted that "because [the agency's] declaration outlines a methodical and systematic search procedure and provided a logical explanation for the withholding of some documents in their entirety and other documents in part, and because there is no information in the record to rebut or contradict the agency's account of its search procedure, the Court will credit the agency's explanation and conclude that it properly withheld whole documents and portions of other documents under exemption (b)(5)." Cooper added that "the government's second explanation—that any other documents Riddick requested but did not receive had simply not yet been located because of his failure to pay the required fees—is self-supporting. . .Riddick has not responded to, or addressed in his motion papers, any of the government's notifications that the payment of fees was required before the agency could continue to process his requests." (*Harry Lee Riddick v. J.C. Holland, et al.*, Civil Action No. 13-1512 (CRC), U.S. District Court for the District of Columbia, Sept. 29)

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