Volume 41, Number 20
October 14, 2015

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.
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ISSN 0364-7625.

Washington Focus: Chief Judge Richard Roberts has denied the State Department's request to consolidate all scheduling and record preservation issues in cases involving agency emails before a single judge. Writing in POLITICO, Josh Gerstein indicated Roberts' order rejecting the request noted that "many of the underlying cases have been pending for several years and a significant number of scheduling orders have already been entered. The judges who have been randomly assigned to these cases have been and continue to be committed to informal coordination so as to avoid unnecessary inefficiencies and confusion, and the parties are also urged to meet and confer to assist in coordination." According to Gerstein, the Justice Department had requested the consolidation process on behalf of the State Department, which recently received records from former aides Cheryl Mills, Jacob Sullivan, Huma Abedin, and Philippe Reines in response to the agency's request for any potential federal records in their possession. Gerstein also reported that State had so far hired 22 of an anticipated 50 staffers to work on the agency's FOIA and declassification backlog. The slots are only open for current State employees, retired Foreign Service officers, and State employee family members who have previously worked at the department.

Waiver by Adoption Doctrine Applies to Work-Product Privilege

A federal court in New York has moved the Second Circuit's waiver doctrine one step further by finding that the government can waive the attorney work-product privilege under certain circumstances. Ruling in a case brought by the *New York Times* for various reports and memoranda stemming from multiple investigations by John Durham, who at the time was an Assistant U.S. Attorney for the District of Connecticut, pertaining to investigations he conducted on behalf of the Attorney General concerning the destruction of video tapes of interrogations of detainees by the CIA, as well as the treatment of detainees, Judge Paul Oetken concluded that the government had waived any legal privileges as to at least several of the reports because the Attorney General had publicly accepted Durham's recommendations as the agency's final decision.

Durham was originally appointed in January 2008 by then-Attorney General Michael Mukasey to investigate the destruction of the CIA tapes. Two years later, Durham produced a 1,037-page report, referred to as the Tape Destruction Report, recommending that no one be charged criminally. DOJ announced Durhams's recommendations in a brief press release in November 2010. Durham continued to investigate whether any potential witnesses had lied to him during the investigation. In 2012, Durham sent a memo, referred to as the Obstruction Memo, to the Deputy Attorney General with his recommendations. Those recommendations were never made public. Durham's investigation of whether anyone violated federal law in connection with the overseas CIA interrogation program began in 2009 at the direction of Attorney General Eric Holder. This investigation yielded two interim reports, two supplemental reports, and a Final Recommendation Report, dated May 2011. Durham found that, with the exception of two matters, no criminal investigation should be opened. Holder released a rather substantive statement about this aspect of Durham's investigation in June 2011. The report led to a further investigation of two deaths, also led by Durham. During this investigation, FBI agents prepared FD-302 forms memorializing each witness interview. This investigation resulted in two memoranda, referred to as the Declination Memoranda, recommending no further charges be brought. In August 2012, Holder also released a substantive statement pertaining to the results of this investigation.

New York Times reporter Charlie Savage submitted two FOIA requests, one for any reports to the Attorney General or Deputy Attorney General describing the findings of Durham's investigations, and the other for any FD-302 reports prepared during Durham's investigations. After DOJ failed to respond, the *Times* filed suit. DOJ claimed all the records were protected by Exemption 5 (privileges), while the *Times* argued the FD-302s did not qualify as work product and the agency had waived any privileges by incorporating the reports into its final decision.

The *Times* argued that the FD-302s were "substantially verbatim witness statements" that did not qualify for protection by a legal privilege, while the agency contended the forms were always considered work product because they revealed the attorney's impressions. Oetken pointed out that "the proper rule is that witness statements are sometimes but not always work product. They are work product when they reveal an attorney's strategic impressions and mental processes." Oetken then concluded that the FD-302s constituted work product. He noted that "the mere selection of whom to interview reveals a great deal about Durham's strategy. Similarly, the questions he or his subordinates ask witnesses almost certainly reveal his thinking about the substance of the case. It is impossible for DOJ to disclose the FD-302s without revealing protected information about Durham's case analysis and strategy."

Oetken spent much of his decision explaining the state of Second Circuit case law on waiver of privileges in deciding whether to include the attorney work-product privilege under the waiver umbrella. In its decision in *National Council on La Raza v. Dept of Justice* 411 F.3d 350 (2d Cir. 2005), the Second Circuit found that the Justice Department had expressly adopted the substance of a legal memorandum on jurisdiction over immigration matters through its detailed public statements by then-Attorney General John Ashcroft and other high-ranking officials. In *NLRB v. Sears, Roebuck*, 421 U.S. 132 (1975), the Supreme Court ruled that information was no longer privileged when an agency incorporated the information into its final decision, either expressly or by reference. In *La Raza*, the Second Circuit found DOJ had waived any deliberative process privilege claim by its express references to the immigration memorandum. That case was followed by *Brennan Center for Justice v. Dept of Justice*, 697 F.3d 184 (2d Cir. 2012), in which the Second Circuit found that the attorney-client privilege was also subject to the waiver doctrine.

Oetken explained that "the attorney-client privilege and the work-product doctrine are, if not twins, at least very close siblings. Both privileges exist to protect the public's ability to access legal services." Continuing, he noted that "if publicly adopting a document vitiates the purposes of the attorney-client

privilege, it is hard to see why it ought not to do the same to the work product doctrine. Similarly, if justifying agency action on the basis of a document shielded by the attorney-client privilege is offensive to FOIA, it is hard to see why justifying the same action on the basis of a document shielded by the work-product doctrine is not offensive. The Court concludes, accordingly, that the express adoption doctrine applies to the work-product doctrine." Oetken pointed out that "whatever 'express' means in this context, it does not mean 'express' as that term is ordinarily used. The agency need not even have explicitly mentioned any specific document in a public statement, so long as its conduct, considered as a whole, manifests an express adoption of the documents." Oetken explained further that "to adopt a document, an agency must rely, in a final decision, on both the document's conclusion and its reasoning. . .This coheres with the rationale underlying the express adoption doctrine. The government may not rely on the legitimacy and authority that a document provides while keeping that document secret."

Oetken pointed out that "adoption, then, hinges on the extent to which an agency relies on the document's reasoning to justify its actions. This consideration is more important than the specificity with which a particular document is referenced. The touchstone of the express adoption inquiry is whether the agency uses the reasoning contained in a document, and the authority provided by the document, to 'justify' its actions to the public." He then found that the Final Recommendation Report and the Declination Memoranda had been adopted as the agency's final decision through the explication provided in Holder's statements. As to the Final Recommendation Report, Oetken pointed out that "the Attorney General did not have to invoke Durham's legal analysis 'to justify and explain the Department's policy,' nor did he have to frame Durham's recommendation 'as a *basis* for his decision." He added that "Exemption Five does not apply when an agency refers to a privileged document, and borrows that document's legitimacy, to rationalize its public decisions." As to the Declination Memoranda, he noted that "because DOJ relied on Durham's reasoning in explaining its decision not to prosecute, the Court concludes that the Declination Memoranda were 'expressly adopted' and are therefore subject to disclosure under FOIA." However, Oetken cautioned that any waiver applied only so far. He observed that "DOJ should not be required to disclose those portions of the memorandum that do not support the reasoning on which the Attorney General publicly relied." (*New York Times Company and Charlie Savage v. United States Department of Justice*, Civil Action No. 14-3777 (JPO), U.S. District Court for the Southern District of New York, Sept. 30)

Court Rules FBI Must Conduct Search Without Privacy Act Waiver

Judge Amit Mehta has ruled that the FBI did not conduct an adequate search for records concerning its investigation of allegations that James Jett, a Florida candidate for the U.S. House of Representatives, was approached by intermediaries of his incumbent opponent and offered future employment and reimbursement of campaign expenditures if he agreed to drop out of the race. Jett reported these offers to the FBI, whose Jacksonville field office began an investigation. Jacksonville field office agents asked Jett to record any subsequent phone calls with intermediaries and Jett agreed to do. Based on those recordings, the field office requested permission from the Public Corruption Unit to have Jett wear a wire during a meeting with his opponent, the intermediaries, and a high-ranking member of the House. The Public Corruption Unit, however, turned down the field office's request, advising Jett that before he would be authorized to wear a wire he would have to record another conversation with the intermediaries and unequivocally declare that he was unwilling to drop out of the race.

Jett did not record another call. Instead, he met with his opponent and the intermediaries, although the high-ranking member of the House was not present, and told them he had been approached by the FBI about whether he had received any offer to drop out of the race. He also told his opponent that he would not drop

out of the race. His opponent denied making such an offer and asked Jett if he was wearing a wire. The meeting ended abruptly and weeks later Jett publicly accused his opponent of trying to bribe him. Based on Jett's actions, the FBI closed its investigation.

Jett made a FOIA request to the FBI for records about the investigation, including copies of any telephone tape recordings that were made. The FBI told Jett that it would search its Central Records System for records linked to his name, but would not search for records on identified third parties without a Privacy Act waiver. Jett argued that a Privacy Act waiver was unnecessary because of the public interest in disclosure. After searching under Jett's name, the agency located an FBI Jacksonville main file and two sub-files containing 66 pages. The agency disclosed one page in full, 59 pages with redactions, three pages were withheld entirely, and three pages were withheld as being duplicative. The agency claimed Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement record), and Exemption 7(E) (investigative methods and techniques) as the basis for its redactions.

Jett claimed the agency's search was inadequate because it failed to search for records of third parties and because it did not search its electronic surveillance indices. Mehta agreed with Jett on both counts. He pointed out that "Jett's failure to produce a Privacy Act waiver did not, in this case, justify the FBI's refusal to *search* for documents by running the names of other pertinent players through the CRS database. Whether such searches would return *producible* documents is a separate question." He explained that "in deciding whether the FBI's categorical refusal to run names of other than Jett's in CRS was warranted, the question is not whether Jett obtained third-party waivers, but rather whether *all* responsive documents resulting from such searches would be exempt from disclosure under FOIA."

Mehta cited *Reporters Committee* and *CREW v. Dept of Justice*, 746 F.3d 1082 (D.C. Cir. 2014) to support his decision. He observed that *Reporters Committee* indicated the privacy balance was weakest when disclosure of records would shed light on government activities. As to *CREW*, in which the D.C. Circuit ruled that the FBI could not invoke a *Glomar* response neither confirming nor denying the existence of records concerning its corruption investigation of former House Majority Leader Tom Delay because of the high level of public interest in the investigation, Mehta noted that "the FBI here could not categorically decline to run searches using the names of those people identified by Jett as being involved in the public corruption investigation. . .[T]he public surely has an interest here in knowing why the FBI and DOJ conducted a public investigation involving an elected federal official and—especially in light of Jett's public accusation that the investigation ended prematurely to protect the high-ranking House Member—why they ultimately decided not to pursue it further. . .Simply put, like *CREW*. . .this is not a case in which the public-private balance 'characteristically tips in one direction' and thus would warrant a refusal to search based on the failure to obtain a Privacy Act waiver."

Mehta agreed with Jett that the agency should have searched its electronic surveillance indices. He pointed out that "here, the need to search the ELSUR system was plain on the face of Jett's FOIA request" because Jett had asked for tape recordings of phone calls. Mehta observed that "when his request sought information that plainly was not contained within CRS, *i.e.*, recorded telephone conversations, the FBI could not put its head in the sand and ignore an obvious source for the requested material." Mehta conducted an *in camera* review of the records.

He found that Jett's reliance on *CREW* as evidence that the FBI had withheld too many records under Exemption 7(C) was misplaced. He explained that in *CREW* the D.C. Circuit found the FBI could not categorically refuse to search for and process responsive records on the basis of Exemption 7(C). He observed that "the FBI in this case did not categorically withhold all responsive records; rather, it conducted a line-by-

line review of the records and invoked Exemption 7(C). . .only to redact names and other identifying information of third parties. That approach is consistent with *CREW* [and other D.C. Circuit case law]."

Turning to Exemption 7(E), Mehta noted that the agency's affidavit "fails to meet even the relatively low bar required to justify withholding under Exemption 7(E)." But after reviewing the records *in camera*, Mehta agreed with the agency that the information was protected. Redacting more than 20 lines of text in his opinion to protect the substance of the techniques, Mehta observed that "the redactions here do not concern the methods or techniques of surreptitious recording; rather, they relate to how the FBI directed the investigation and why it instructed Jett not to wear a wire. Because the disclosure of that information poses a risk to future law enforcement activities, it was properly withheld under Exemption 7(E)." (*James B. Jett v. Federal Bureau of Investigation*, Civil Action No. 14-00276 (APM), U.S. District Court for the District of Columbia, Sept. 30)

The Federal Courts…

Judge Beryl Howell has ruled that the Treasury Department has so far failed to show that many of the records requested by the Center for Auto Safety pertaining to the 2009 restructuring of Chrysler and GM as part of the Troubled Asset Relief Program are protected by **Exemption 4 (confidential business information)**, in part because the agency's *Vaughn* indices relied heavily on claims submitted by Chrysler and GM. CAS requested email correspondence from January-June 2009 concerning the Chrysler and GM bankruptcies and the government's role in and deliberation concerning the bankruptcies. Nearly two years later, Treasury had identified 170,000 potentially responsive documents. Treasury subsequently agreed to waive fees and to expand the period covered through August 2009. Howell noted that Treasury had already released over 65,000 pages to CAS, but continued to withhold 452 documents in whole and 90 documents in part at the request of GM, and 284 documents in whole or in part at the request of Chrysler. Treasury had provided two separate *Vaughn* indices—one covering the GM documents and the other covering the Chrysler documents—"each of which was initially created by GM and Chrysler, respectively, at Treasury's request." CAS challenged the indices as inadequate and argued that Treasury had failed to show that many of the records were actually obtained from the companies rather than having originated with the agency. CAS also contended the agency had failed to show that disclosure of many of the records would either impair the agency's ability to obtain such records in the future or cause substantial competitive harm to either company. Howell agreed with most of CAS's claims. Howell was highly critical of the agency's *Vaughn* indices, pointing out that "the deficiencies in the *Vaughn* indices submitted in this case permeate even the purportedly undisputed records and preclude summary judgment determinations except in narrow circumstances. For this reason, to the extent they continue to withhold any documents, the defendants are instructed to submit a revised, *combined Vaughn* index for both GM and Chrysler, with numbered entries for all remaining disputed documents." Addressing CAS's claim that the agency had failed to show that records were obtained by from a person, Howell indicated that "for many of the disputed documents, without more information about the authors, the Court cannot determine whether the documents contain information 'obtained from a person' rather than information generated within Treasury." Howell agreed with CAS that Treasury had failed to show that it had reviewed records to determine if non-exempt information that had been generated by the agency had been separated from emails obtained from either GM or Chrysler. She pointed out that a new *Vaughn* index should provide explanations of "how the information has been segregated and released to enable a ruling on whether each specific contested piece of information was 'obtained from a person.'" Howell rejected the agency's argument that disclosure would harm its ability to get such information in the future. She noted that "it strains credulity to believe that the specter of potential disclosure under the FOIA of certain information required to be submitted to Treasury to obtain a company-saving loan would lead a company to

choose instead to go out of business. There is abundant evidence in the record that GM and Chrysler had to take the government's bailout or go bankrupt." CAS argued the agency could not support its competitive harm claim by suggesting harm could flow from non-direct competition. Howell observed that the D.C. Circuit "has recognized that the use of information by consumers, suppliers, labor unions, and other entities, even if those entities are not direct competitors may be detrimental to a company's competitive position." But she added that "that said, the defendants' bald assertions that entities other than direct competitors could use the disputed information, if disclosed, to their own competitive advantage—without any explanation of *how* such entities could use the information, is insufficient and unconvincing." One problem in assessing competitive harm was the fact that the restructuring of both companies had transformed them from the old GM and Chrysler to new versions of GM and Chrysler, making it difficult to distinguish between information that had become stale and information that could be considered proprietary going forward. Howell noted that "the Court cannot discern from many entries how the release of old information could possibly be used by competitors affirmatively to harm the companies today at all, let alone substantially." She observed that "the defendants' concern about documents regarding certain assets, particularly, for example, about intellectual property or research and development may be warranted. . . [But] to enable sufficient review, the defendants must articulate whether withheld documents contain information about assets purchased, specifying the type of assets and whether the assets belong with the new as opposed to the old companies . . .Information about assets belonging to the old companies must be segregated and released." CAS also pointed to Steven Rattner's memoir of the restructuring as evidence of the public availability of the government negotiating positions. The agency argued Rattner's book did not establish that the records were in the public domain. But Howell explained that CAS's argument was that "the availability of similar information belies the defendants' assertion about the risk of substantial competitive injury from the release of the documents." She indicated that 'to the extent that the same negotiation and business strategies which the defendants seek to protect have been revealed already to the public, release of the information would not cause GM or Chrysler substantial competitive harm." (*Center for Auto Safety v. U.S. Department of Treasury*, Civil Action No. 11-1048 (BAH), U.S. District Court for the District of Columbia, Sept. 30)

In the first substantive ruling on **(Exemption 9 (data about wells)** ever to be decided in the D.C. Circuit, Judge Ketanji Brown Jackson has ruled that the exemption applies to both water and oil wells and that the names and addresses of various participants in water transfer program or real water determinations are not protected by **Exemption 6 (invasion of privacy)**. The case involved a request by AquAlliance to the Bureau of Land Reclamation for records concerning permits for water transfers in the state of California in 2013 and 2014. The agency redacted data relating to well completion, well construction, and the physical location of wells under both Exemption 4 (confidential business information) and Exemption 9. It also redacted identifying information about participants in water transfers or real water determinations. AquAlliance contended that Exemption 9 did not apply to information about water wells, but only to information about oil wells, as seemed to be suggested by the exemption's scant legislative history. Jackson found the legislative history did not help much. She pointed out that "the text is plain and unambiguous; on its face, no distinction is drawn among types of wells, and the text provides no reason to think that *water* wells would be excluded from the exemption's purview. What is more, although few courts have had occasion to interpret or apply Exemption 9, not a single court has ever read the statute to include the construction that Plaintiff urges." Jackson noted that "the legislative history that AquAlliance points to falls short of the organization's intended goal, insofar as it does not establish that oil and gas wells were Congress's sole concern in adopting Exemption 9. To be sure, the contemporaneous witnesses referenced in the House Report had oil and gas—and the problem of improper speculation—on their minds when Exemption 9 was added, but as other courts have noted in this context, 'water [too] is a precious, limited resource,' and one of increasing scarcity and significance in the twenty-first century. Thus, the expressed purpose of including a FOIA exemption to prevent a windfall for speculators also applies in the context of water wells, and this Court sees no reason that

the House Report compels a strained reading of Exemption 9." AquAlliance argued the exemption only applied to proprietary or technical or scientific secrets. Jackson rejected that restriction, noting that "the plain language of Exemption 9 permits the Bureau to redact maps and construction details that reveal geological and geophysical information about the wells, and this Court finds that, even when one draws all factual inferences in favor of the Plaintiff, the Bureau has carried its burden of demonstrating that it has fully discharged its FOIA obligations with regard to this information under the circumstances presented here." Finding that the privacy interest in being part of a water transfer program was *de minimis* and AquAlliance had shown that disclosure would shed light on government activities, Jackson rejected the agency's exemption 6 claim. (*AquAlliance v. United States Bureau of Reclamation*, Civil Action No. 14-1018 (KBJ), U.S. District Court for the District of Columbia, Oct. 14)

Judge Randolph Moss has ruled that the State Department properly withheld records concerning Presidential Study Directive 11, a 2010 memo from the President to senior foreign policy advisors discussing national security topics related to the Middle East and North Africa, as well as records pertaining to the Muslim Brotherhood under **Exemption 1 (national security)** and **Exemption 5 (deliberative process privilege)** in response to a request by George Canning. Moss found that records referred to the CIA had been properly withheld under Exemption 1 and that redactions made under **Exemption 6 (invasion of privacy)** to records referred to USAID were also appropriate. However, Moss found that State had not provided sufficient justification for classifying two email attachments after receiving Canning's FOIA request and instructed the agency to justify its delegation of authority. Canning argued that PSD-11 and related records were not properly classified because PSD-11 had been discussed with the media. Unconvinced, Moss noted that "unquestionably, some information about the Administration's foreign policies in the Middle East and North Africa was not classified, and there is no indication that the cited discussions went beyond such information." He added that "there is no indication here that the government has officially disclosed or acknowledged PSD-11's contents. Even assuming that government officials discussed the policies resulting from PSD-11 with the media, an official disclosure of information 'similar' to the exempted information is not enough." Because the agency had upgraded the classification of two email attachments while responding to Canning's request, Moss agreed that the agency was required to follow § 1.7(d) of Executive Order 13526, which required that such decisions be made on a "document-by-document basis with the personal participation or under the direction of" the Under Secretary of State for Management. Canning challenged whether that decision could be delegated. While Moss found the delegation was appropriate, he pointed out that the agency had failed to show that the Under Secretary was involved in the review process. He noted that "although the Under Secretary 'directed' that [a deputy assistant secretary] act as the classifying official, the declarations do not indicate whether the Under Secretary was 'apprised of actions taken under [that] authority; so that he could exercise oversight of those actions. Absent some opportunity for actual oversight by the Under Secretary, the Court concludes that there would be no meaningful difference between acting at the Under Secretary's *direction* and acting pursuant to a *delegation* of his authority" Moss ordered the agency to explain that the provisions of § 1.7(d) had been properly complied with. Canning argued that State's affidavits could not serve as a basis for why records were withheld by the CIA and USAID. But Moss noted that "to be sure, agencies must provide the reviewing court with sufficient information to justify their withholding decisions. In some situations, that may require additional declarations from other agencies. But Plaintiffs do not identify any information essential to the Court's review that can only be obtained from CIA or USAID officials. [State's affidavit], moreover, did not merely relay withholding determinations made by another agency without providing an explanation for those determinations." USAID had withheld identifying information about local organizations that had received U.S. support under Exemption 6. Moss questioned whether the information qualified as "similar" under the exemption. However, he concluded the exemption applied, noting that "the Department and USAID are far better positioned than Plaintiffs or the Court to determine whether, on these

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facts, disclosure would lead to the identification of particular individuals in those countries." (*George Canning and Jeffrey Steinberg v. United States Department of State*, Civil Action No. 13-831 (RDM), U.S. District Court for the District of Columbia, Sept. 30)

Judge Tanya Chutkan has ruled that the Department of Justice properly withheld various records requested by Jeffrey Stein in six different FOIA requests, but that the FBI has not justified its invocation of **Exemption 7(D) (confidential sources)** to withhold records found in journalist Christopher Hitchens' FBI file pertaining to a background check of Hitchens for a White House press pass. Although the subject matter of the requests was not related, Stein brought suit challenging various exemption claims related to all six requests. Stein requested work processing unit case evaluation forms relating to FBI FOIA processors, manuals and reference materials for the FBI's Automated Case Support and FOIA Document Processing System, three legal monographs from the Civil Division related to litigating specific topics, the USABook FOIA Topic Page, FBI records on Hitchens, and records related to an incident in Australia involving a visit to Gwyneth Todd by an undercover FBI agent; Stein requested records on the Todd incident jointly with Todd and provided the appropriate Privacy Act waiver. By the time Stein consolidated the actions, he no longer challenged the search for any of the requested records, but contended that various exemption claims were improper. The FBI withheld its WPU Case Evaluation Forms under **Exemption 2 (internal processes and procedures)**, indicating that they were personnel records kept in the personnel files of FBI FOIA processors and were used to evaluate and correct their performance. While Stein argued the forms reflected on the process in which the FBI's FOIA operations were conducted, Chutkan agreed the records were personnel records under *Milner*. She noted that "there is no evidence. . .that the WPU Case Evaluation Forms are used as some kind of broad 'quality assurance measure'. . .as opposed to simply being used for evaluating the performance of individual employees. Indeed, the forms themselves suggest that they are not used to improve the FBI's FOIA process, generally, but are instead employee-specific." The FBI withheld portions of its ACS manual under **Exemption 7(E) (investigative methods and techniques)**. Stein argued the withheld portions of the manual on ACS, which is the search engine used by the FBI to search its Central Records System, did not qualify as law enforcement methods or techniques. Chutkan pointed out that "the ACS Basic Reference Guide need not provide step-by-step instructions for potential law-breakers in order to fall within the scope of the exemption; it is enough that it provides 'information that could increase the risks that a law will be violated or that past violators will escape legal consequences.' The FBI has demonstrated how the release of the ACS Basic Reference Guide might create a risk of circumvention of law. . ." Chutkan found the three Civil Division legal monographs were protected by **Exemption 5 (attorney work-product privilege)**. She indicated that "if not for their potential to be useful to government attorneys in anticipated, foreseeable future litigation, these monographs—none of which have been 'disclosed outside the federal executive branch'—would have no practical reason for existing." EOUSA had responded to Stein's request for the USABook FOIA Topic Page by providing him a redacted list of 23 links to non-public sites. Stein argued EOUSA had interpreted his request too narrowly and that what he really wanted was a copy of the FOIA Topic Page itself. Chutkan agreed with Stein. She observed that "if there is no practical reason to distinguish between [internal and public] classes of documents from a user's point of view, there should be no practical reason to distinguish between them from a FOIA requester's point of view." The FBI withheld a number of pages from Hitchens' file under **Exemption 7(D) (confidential sources)**. Stein argued the information from the sources, which had been supplied by a foreign government pertaining to a prior national security investigation involving Hitchens, did not qualify for protection once it was incorporated into the background investigation. Relying on the Supreme Court's ruling in *FBI v. Abramson*, 456 U.S. 615 (1982), in which the Court found that records created for law enforcement purposes did not lose their law enforcement status when subsequently incorporated in non-law enforcement files, Chutkan noted that "because the FBI has demonstrated that the 29 pages of records over which it asserts exemption (b)(7)(D) were originally compiled for law enforcement purposes, those records remain protected by the exemption even if the background checks for which they were

re-compiled do not constitute 'law enforcement purposes'. . ." But she found the FBI had not justified its claim that the records were provided with an implicit assurance of confidentiality. She indicated that "while the court is mindful that there may be circumstance in which an implied assurance of confidentiality can be inferred from the context and surroundings in which the information was imparted, the FBI has not provided the court with enough evidence to permit it to draw such an inference here." Stein had requested a fee waiver for the records he had requested jointly with Todd. The agency denied the fee waiver and told Stein he would need to pay $72.00 in advance before the agency would proceed. Stein refused to pay and the agency closed the request. Chutkan found Stein had not shown a sufficient public interest in the records to overcome the agency's decision to deny his fee waiver request. (*Jeffrey Stein v. U.S. Department of Justice*, Civil Action No. 13-0571 (TSC), U.S. District Court for the District of Columbia, Sept. 30)

Judge Christopher Cooper has ruled that the FBI properly withheld records concerning its use of polygraphs under **Exemption 2 (internal practices and procedures), Exemption 5 (deliberative process privilege)**, and **Exemption 7(E) (investigative methods and techniques)** from researcher Kathryn Sack. Resolving the remaining exemption claims in Sack's case against Justice, Cooper first agreed that information about the selection process for FBI polygraph examiners was personnel information protected by Exemption 2. In a somewhat literal reading of the Supreme Court's decision in *Milner v. Dept of Navy*, 562 U.S. 562 (2011) in which the Court found that Exemption 2 applied only to personnel-related records and did not cover non-personnel records where disclosure risked circumvention of law or regulation, Cooper pointed out that "under *Milner*'s logic, documents concerning the use of certain technologies, such as polygraph techniques, *by* personnel would not be covered by this exemption, as this Court concluded in its previous Order. But documents relating to 'the selection' or 'placement' of employees—even those whose job descriptions require that they use those technologies later on—would be covered by Exemption (b)(2)." The problem with this interpretation, however, is that while *Milner* purposely reined in the vast over-reach of the so-called "high-2" prong protecting records where disclosure could risk circumvention of law or regulation, it did so by indicating that the exemption's application reached only traditional personnel-related records. But the exemption has always been thought to cover only mundane administrative matters which are of no public interest. The criteria used for selecting polygraph examiners would certainly seem to be of sufficient public interest to pass that threshold. Sack argued that an internal departmental recommendation concerning the feasibility of hiring non-agent polygraph examiners represented the final agency decision and, thus, was not predecisional under Exemption 5. Cooper disagreed, noting that "because the withheld paragraph was generated by an agency department 'before agency policy was adopted' by the FBI Director, and because it reflects the exchange of ideas within the agency, in that its recommendation was not adopted, the FBI was justified in withholding this paragraph under Exemption (b)(5)." Cooper found information about how FBI agents conduct polygraph examinations was protected by Exemption 7(E). He indicated that 'disclosing the procedures and techniques the FBI uses to conduct polygraph examinations would weaken their effectiveness at tracking and interpreting responses to questioning during such examinations, which would thereby weaken the effectiveness of polygraph examinations as a law enforcement tool." (*Kathryn Sack v. Department of Justice*, Civil Action No. 12-01755 (CRC), U.S. District Court for the District of Columbia, Oct. 14)

Judge Tanya Chutkan has ruled that U.S. Citizenship and Immigration Services conducted an **adequate search** for records requested by the ACLU of Southern California concerning policies for the identification, vetting and adjudication of immigration benefits applications with national security concerns and statistical data related to the processing of benefits applications, but, while finding some of the agency's **Exemption 7(E) (investigative methods and techniques)** proper, continued to question other redactions made under 7(E). The ACLU indicated that underlying its request was a concern that certain immigrants—

particularly Muslim, Arab, Middle Eastern and South Asian immigrants—were treated differently, largely because of the Controlled Application Review and Resolution Program. USCIS originally located 389 responsive pages, but after a series of further searches, the agency processed or reprocessed 1,503 pages over the course of a year. The remaining issues before Chutkan were the application of Exemption 7(E) and the adequacy of the agency's search, including determinations that some records were outside the scope of the request. The ACLU claimed that USCIS, as a mixed-function agency, had failed to show that the disputed records had been compiled for law enforcement purposes. Chutkan explained that "while USCIS as a whole may primarily engage in civil administration and not law enforcement based on the agency's declarations, it appears that in this particular context national security concerns play an important role in the agency's policies and procedures. This Circuit has held that national security is within the realm of law enforcement purposes sufficient to justify withholding based on Exemption 7." The ACLU also argued that *Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982) required an agency to tie withheld records to a law enforcement investigation of a particular incident or individual. Chutkan noted, however, that "the D.C. Circuit later explained that an amendment to the language of Exemption 7 expanded its scope beyond investigatory records" and pointed out that "in *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), the court explained that *Pratt* is still applicable in cases where the records are tied to a particular investigation, but that is no longer a threshold requirement for Exemption 7. Therefore, the fact that some or all of USCIS's withholdings are not tied to a particular investigation is not dispositive here." Chutkan indicated that "while USCIS has adequately described the substance of the records in question, it has offered in many instances, vague and conclusory explanations why those records should be withheld pursuant to Exemption 7(E)." She was puzzled by the fact that for some 7(E) claims the agency's explanations were perfectly sufficient while in others they were too vague. Going forward, she noted, that "USCIS is not required to adhere to a rigid formula to satisfy its burden, but for the withholdings that remain outstanding, it must provide the court with additional explanation justifying its invocation of Exemption 7(E)." Finding the agency's search was ultimately adequate, Chutkan observed that part of the problem was that the monthly reports requested by the ACLU were not generated systematically. She pointed out that "USCIS explained that it searched for whatever reports existed, and to the extent a particular month or quarter is not represented, a report may not have ever been made for that time period or USCIS may no longer have a copy of it. This is enough to demonstrate the reasonableness of USCIS's search, and ACLU's assertion that some reports remain missing is not enough to overcome the good faith presumption afforded to USCIS." Chutkan agreed with the agency's determinations that portions of some records were outside the scope of the ACLU's request. But she failed to see any reasonable distinction for finding that records concerning the Terrorist-Related Inadmissibility Grounds process were not responsive. She noted that "it strains credulity to assert that 'Terrorism-Related Inadmissibility Grounds' are unrelated to national security concerns." (*American Civil Liberties Union of Southern California v. United States Citizenship and Immigration Services*, Civil Action No. 13-861 (TSC), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in South Dakota has ruled that food stamp redemption data showing the yearly redemption amounts paid to each participating store is not protected by either **Exemption 4 (confidential business information)** or **Exemption 6 (invasion of privacy)**. In a case that was remanded by the Eighth Circuit after the appeals court found that a provision of the statute implementing the food stamp program did not qualify as an Exemption 3 statute, rather than disclose the data to the Argus Leader Media, the Food and Nutrition Service published a request in the Federal Register asking food stamp retailers whether they thought redemption data should be disclosed. Of the potential 321,988 retailers contacted, only 323 responded. Of those responding, 73 percent opposed disclosure of the data. Based on the results, FNS followed up with fifteen food stamp retailers who provided affidavits stating that disclosure could cause competitive harm. The agency then claimed the data was protected by Exemption 4 and Exemption 6. The court noted that in *Madel v. Dept of Justice*, 784 F.3d 448 (8th Cir. 2015), the most recent Eighth Circuit ruling involving Exemption 4,

the court made clear that an Exemption 4 claim required an agency to "provide affidavits which justify the claimed exclusion of each document by correlating the purpose of the exemption with the actual portion of the document which is alleged to be exempt." The court found FNS had not done so here. The court pointed out that "because USDA received a small percentage of responses from [food stamp] retailers, there is evidence that supports the inference that the majority of retailers are not concerned about any competitive harm that might stem from the disclosure of individual store data." Turning to the privacy exemption claim, the court observed that "disclosure of individual store redemption data does not disclose individual finances because the data would not disclose what percentage of the retailer's sales are credited to [food stamps] or how much the retailer profits after deducting expenses. Additionally, a reasonable fact-finder could conclude that there is no threat of competitive harm with the disclosure of individual store data." (*Argus Leader Media v. United States Department of Agriculture*, Civil Action No. 11-04121-KES, U.S. District Court for the District of South Dakota, Southern Division, Sept. 30)

Judge Ketanji Brown Jackson has ruled that the Federal Housing Finance Agency, which oversees Fannie Mae, Freddie Mac, the Federal Home Loan Banks, and other components of the secondary mortgage market, does not exercise custody or control of Fannie Mae's records for purposes of FOIA disclosure. As a result, Jackson found FHFA had conducted an **adequate search** for records requested by Michael and Carmen Francis pertaining to their home mortgage in Indianapolis. FHFA searched its records and found nothing pertaining to the Francis' mortgage. It asked a vendor who controlled records collected during litigation to conduct a second search, which also came up empty. The Francises claimed the agency's search was inadequate because they had located responsive records on Fannie Mae's website and had learned of the existence of other responsive records through calls to Fannie Mae's Resource Center. After finding that FHFA's description of its search of its own records was sufficient, Jackson explained that the D.C. Circuit had already ruled in *Judicial Watch v. FHFA*, 646 F.3d 924 (D.C. Cir. 2011), that the agency did not have control of Fannie Mae's records for FOIA purposes. Jackson pointed out that "the facts of the instant case compel the same conclusion: there is no genuine dispute regarding whether FHFA personnel have ever read or relied on Fannie Mae's documents, nor have Fannie Mae's records been integrated into FHFA's files, as the sworn testimony of an FHFA official establishes." (*Michael and Carmen Francis v. Federal Housing Finance Agency*, Civil Action No. 14-1628 (KBJ), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in Colorado has ruled that the U.S. Forest Service did not conduct an **adequate search** for records concerning the Wolf Creek Access Project that were requested by Rocky Mountain Wild and that it has failed to justify its claims under **Exemption 5 (privileges)**. Rocky Mountain Wild requested records concerning contacts with outside entities relating to the project. The agency initially disclosed 6,684 pages. The agency released another120 pages, but withheld 1,684 pages in full under Exemption 5. The court found the agency's search was inadequate, noting that "although the two searches performed by the Forest Service resulted in the disclosure, either in part or in full, of thousands of pages of information, limiting the search to [two offices of the Divide Ranger District of the Rio Grande National Forest] could not be expected to result in a reasonable search of requested documents under the actual FOIA request. In this case, the Forest Service failed to conduct a reasonable search for the information requested by Plaintiff in the FOIA request, including a failure to include the suggested entities in the search that would likely have responsive records." The court found the agency had not contacted several employees who had participated in the Wolf Creek project. The court noted that the agency "did [not] make the proper effort to determine whether personnel in its various offices participated in the agency's decision making regarding the Wolf Creek Project, or whether they may have had responsive records in their control or possession." The court rejected the agency's claim that the attorney-client privilege applied to 1,684 pages described as subject to a "legal sufficiency review." The court

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indicated that "this broad justification is not sufficiently clear, specific, or detailed to permit a court to determine whether a sufficient factual basis exists to support the agency's refusal to disclose the information." While the court agreed that the records were predecisional, it found the agency had failed to establish that they were deliberative as well. The court indicated that the agency's explanation "merely recites part of the legal standard for the privilege under exemption 5, and is insufficient as stated to warrant withholding all or parts of the responsive documents." (*Rocky Mountain Wild, Inc. v. United States Forest Service*, Civil Action No. 14-2496-WYD-KMT, U.S. District Court for the District of Colorado, Sept. 30)

A federal court in Michigan has ruled that the law firm of Hertz Schram is not entitled to **attorneys fees** for its FOIA litigation on behalf of the "Juggalos," a group that had allegedly been improperly classified as a gang by the FBI, because it did not substantially prevail in the litigation. The agency argued that Hertz Schram's FOIA suit was filed prematurely before the expiration of the 20-day statutory time limit. The court agreed with Hertz Schram that the 20-day response period began when an agency received a request, not when it acknowledged receipt. The court observed that "plaintiff's FOIA request was submitted by email on August 24, 2012, making it received by the agency on the same date. According to the Court's calculations, 20 days from August 24, 2012, excluding weekends and legal holidays, expired at the close of business on September 21, 2012. Therefore, it appears that Plaintiff's suit, filed on September 25, 2012, was not premature." But the court proceeded to note that there was no reason to conclude that Hertz Schram's lawsuit was necessary to force the agency to respond. Rather, the court agreed that the agency had begun processing the request before the lawsuit was filed. The court observed that 'the lag in the FBI's response time appears to be the product of administrative delay that is routinely associated with bureaucratic processes and procedures; there is no suggestion that the FBI was intentionally resisting or obstructing Plaintiff's request." Hertz Schram argued that its representation of the Juggalos was solely for purposes of seeking injunctive relief, not damages. But the court pointed out that "that fact does not change the underlying commercial nature of Plaintiff's relationship with those litigants. Notably, Plaintiff has not indicated that it is representing its clients *pro bono*; therefore Plaintiff is presumably being compensated for its services in the underlying litigation, and to the extent the request was made in furtherance of that litigation, Plaintiff has a pecuniary interest in obtaining the documents." (*Hertz Schram PC v. Federal Bureau of Investigation*, Civil Action No. 12-14234, U.S. District Court for the Eastern District of Michigan, Southern Division, Sept. 30)

Judge Richard Leon has ruled that Freedom Watch **failed to exhaust its administrative remedies** when it did not file an administrative appeal with the NSA pertaining to its request for records about the crash of a military helicopter in Afghanistan. Freedom Watch argued that it did not have to appeal the denial because to do so would be futile. But Leon observed that "unfortunately for plaintiff, there is no futility exception to the exhaustion requirement in FOIA cases." He noted that "even assuming, *arguendo*, that the FOIA exhaustion requirement were subject to a futility exception, Freedom Watch fails to demonstrate the futility of appealing the NSA's decision." He added that "an adverse decision may be 'certain' where, for example, 'an administrative agency lacks, or believes itself to lack, jurisdiction to act upon the dispute.' Here, Freedom Watch does not come close to supporting its contention that an adverse decision by the NSA was certain." (*Freedom Watch v. National Security Agency*, Civil Action No. 14-1431 (RJL), U.S. District Court for the District of Columbia, Sept. 30)

Judge Ellen Segal Huvelle has ruled that the DEA conducted an **adequate search** for four administrative subpoenas issued in the agency's investigation of Stephen Aguiar and that generic software used to read GPS data is not an **agency record**. Aguiar requested records pertaining to the agency's investigation of him by agents from its Burlington, Vermont office. While the agency located records

pertaining to Aguiar, it failed to find any of the administrative subpoenas. Finding the agency's search adequate, Huvelle noted that "defendant's two declarations are sufficient to establish the adequacy of the DEA's search for the four administrative subpoenas. Although the failure to discover documents that are 'known to exist,' may, under certain circumstances, raise questions as to the adequacy of a search, the DEA's failure to locate four administrative subpoenas, without more, is not enough to call into question the adequacy of its search." The agency's search for a CD containing the GPS data had initially led to the agency telling Aguiar that he would have to pay $608 in fees for video images. However, after reviewing the contents of the CD, the agency found it contained spreadsheets, which it printed out and disclosed to Aguiar. Unsatisfied with that result, Aguiar argued the agency was required to provide the software for interpreting the data on the CD. Huvelle found that "the mapping software used by the DEA to create images from the GPS tracking data at plaintiff's trial was a generic, prefabricated software program. . .and thus, not an 'agency record.'" (*Stephen Aguiar v. Drug Enforcement Administration*, Civil Action No. 14-0240 (ESH), U.S. District Court for the District of Columbia, Sept. 30)

Magistrate Judge Alan Kay has ruled that Harriett Ames may not continue her deposition of Department of Homeland Security Investigating Senior Special Agent Kyong Yi as part of her **Privacy Act** suit against the agency alleging that Yi improperly disclosed information about an investigation of Ames to the National Geospatial-Intelligence Agency because information about a prior investigation of misconduct on Yi's part is not relevant to the allegations in Ames' suit. Ames, who was then Acting Branch Chief of the Personnel Security Branch at FEMA, was interviewed by Yi in August 2011 in conjunction with an investigation of Burt Thomas, Chief Security Officer of FEMA for conflict of interest. The investigation found that Thomas had provided false statements to the DHS Office of Inspector General about two vendors' criminal histories. Yi then started an investigation of Ames for making false statements. That investigation concluded that Ames may have provided false information or been less than candid with investigators. A report of the DHS investigation was issued in May 2012. By that time, Ames had taken a new job as Division Chief of Personnel Security at NGA. In July 2012, Yi contacted NGA and verbally disclosed the contents of the reports. He also said DHS would provide a copy of the report on receipt of a formal request. NGA requested the report and began its own investigation of Ames. In August 2012, Yi sent the report to NGA in a series of four emails. Ames was subsequently terminated by NGA. She then filed a Privacy Act suit alleging that Yi had improperly disclosed her records. During a deposition of Yi, he admitted being placed on administrative leave for nine months in 2013 because of allegations of misconduct; he was ultimately reinstated. When Ames' counsel inquired into the alleged misconduct, Yi's counsel asserted the law enforcement privilege because the investigation had not yet been concluded. Ames then asked the court to compel Yi to respond more fully about the previous investigation, arguing that it was relevant to Yi's credibility. Kay observed that in order to prove damages under the Privacy Act, Ames was required to show that Yi's disclosures were willful or intentional. But he pointed out that "Agent Yi was the lead investigator of Plaintiff's misconduct investigation; that is, there is no argument that Agent Yi improperly accessed Plaintiff Ames' information without authorization." By contrast, Kay noted, "the Enforcement Data System allegation dealt with an allegation that Agent Yi improperly accessed information from an internal database without authorization. There were no allegations that Agent Yi improperly disclosed such information. Thus, the EDS allegation is not a Privacy Act claim or a potential Privacy Act claim because it only dealt with an allegation of improper access to information." Noting that Yi had been cleared of the charges, Kay added that "a further deposition of Agent Yi, inquiring into an unsubstantiated allegation about how he may have improperly *accessed*

information in an internal database, is not reasonably calculated to lead to information about how Agent Yi 'willfully and intentionally' *disclosed* the Report to NGA." (*Harriett A. Ames v. United States Department of Homeland Security*, Civil Action No. 13-629 (ESH-AK), U.S. District Court for the District of Columbia, Oct. 5)

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