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Washington Focus: The Senate passed the "Cybersecurity Information Sharing Act" (S. 754) Oct. 27 despite protests by Sen. Patrick Leahy (D-VT) that a provision exempting certain data shared by companies with the government would harm the FOIA. Leahy noted that "for nearly half a century, FOIA has translated our great American values of openness and accountability into practice by guaranteeing access to government information. We should not be passing legislation that weakens this critical law." Leahy added that "instead, those Senators who talk about their pro-transparency records should support my amendment to strike the harmful FOIA provisions in the cybersecurity bill." Criticizing the decision of Senate Majority Leader Sen. Mitch McConnell (R-KY) to cut off debate, Leahy pointed out that "legislation of this importance should not be hastily pushed through the Senate without a full and fair opportunity for Senators to consider the ramifications of this bill. Unfortunately, by moving so quickly to end debate, it appears that the majority leader is trying to do just that."

Court Outlines Elements of Pattern or Practice Claim

The Ninth Circuit has either dismissed or remanded most of the outstanding issues involved in a pattern-and-practice case brought by immigration attorney James Mayock and permanent alien resident Mirsad Hajro. In the district court, Mayock and Hajro won both a permanent injunction against U.S. Citizenship and Immigration Services requiring it to abide by a 1992 settlement agreement between Mayock and USCIS's predecessor agency, the Immigration and Naturalization Service, as well as attorney's fees. The Ninth Circuit, however, concluded the district court did not have jurisdiction to enforce the 1992 settlement agreement and, as a result, Mayock and Hajro were not entitled to attorney's fees at this stage. The Ninth Circuit's decision provides a good illustration of the connection between FOIA and related settlement agreements and the jurisdiction of courts to interpret and enforce such agreements years later. The decision also provides guidance on the elements of a pattern or practice claim and when a requester has standing to allege such a claim, which is different than standing to bring a suit for denial of access to records.

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Mayock first sued the INS in 1989, claiming that its inability to respond to FOIA requests within the statutory time limits constituted a pattern or practice of violating FOIA. The district court largely agreed, but the Ninth Circuit reversed and remanded, finding the district court had overlooked the existence of genuine issues of material fact. On remand to the district court, Mayock and the INS entered into a settlement agreement that required the agency to expedite FOIA requests where the requester showed that an individual's life or personal safety would be jeopardized or where the requester's substantial due process rights would be impaired. The district court dismissed the case with prejudice, but the parties subsequently filed the settlement agreement with the court in 1992. The district court's dismissal order did not expressly retain jurisdiction over the settlement agreement nor did it incorporate its terms into the order. Hajro was a permanent resident of the United States who had applied for naturalization in 2003. In 2007, however, USCIS told Hajro his naturalization application had been denied based on allegedly false testimony about his foreign military service. To support his appeal of the denial, Hajro filed a FOIA request with USCIS for his alien file. The agency failed to respond to Hajro's FOIA request before he was required to submit his appeal of his denial of naturalization. But while the FOIA litigation was pending, Hajro successfully challenged the denial of his denial of citizenship and had since become a naturalized U.S. citizen.

Mayock and Hajro filed their suit against USCIS claiming that the agency's delays violated not only the FOIA, but also the 1992 settlement agreement. To support his pattern or practice claim, Mayock submitted a tardy response to an attorney in his law firm as well as 26 affidavits from other immigration attorneys attesting to delays in their requests to the agency, while Hajro relied on his unresolved FOIA request to support his claim. The district court issued a permanent injunction and later awarded attorney's fees. USCIS appealed the enforceability of the settlement agreement, the pattern or practice claim, and the scope of the permanent injunction.

Writing for the court, Circuit Court Judge Richard Tallman first indicated that USCIS could not challenge the scope of the permanent injunction because it had filed its appeal too early under Federal Rule of Appellate Procedure 4(a)(2). Tallman noted that "the claim USCIS now appeals—the scope of the permanent injunction—would not be immediately appealable because the scope and language of the injunction were not yet final when the government filed the notice of appeal. The issuance of the permanent injunction where the parties continued to debate the language was not merely ministerial."

But far more important jurisdictionally was Tallman's conclusion that the district court did not have jurisdiction to enforce the 1992 settlement agreement, in part because there was not sufficient evidence that Congress had waived sovereign immunity. Tallman indicated that the Supreme Court's decision in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), applied here. He explained that under *Kokkonen* "a district court does not have the inherent power to enforce the terms of a settlement agreement under the doctrine of ancillary jurisdiction. If a district court wishes to retain jurisdiction to later enforce the terms of a settlement agreement, the order dismissing a case with prejudice must incorporate the terms of the settlement agreement or expressly retain jurisdiction. Here, the parties do not dispute that the district court's 1992 order did neither." He added that "where a Supreme Court decision affects our jurisdiction to hear certain claims, the jurisdictional ruling has retroactive effect."

Mayock argued that he had a contract claim against the agency for violating the settlement agreement. Tallman pointed out, however, that "plaintiffs' cause of action (a contract claim) is not 'unequivocally expressed' in the statute. Mayock is not seeking to enforce the statutory mandate to provide timely FOIA disclosures itself, rather he seeks enforcement of his own private agreement with a federal agency related to FOIA requests." He observed that "strictly construing the waiver of sovereign immunity in favor of the sovereign, we find no waiver of sovereign immunity to enforce the terms of the Settlement Agreement under a theory of supplemental jurisdiction."

Tallman then examined whether Mayock and Hajro had standing to bring their pattern or practice claim. He explained that "where a plaintiff alleges a pattern or practice of FOIA violations and seeks declaratory or injunctive relief, regardless of whether his specific FOIA requests have been mooted, the plaintiff has shown injury in fact if he demonstrates the three following prongs: (1) the agency's FOIA violation was not merely an isolated incident, (2) plaintiff was personally harmed by the alleged policy, and (3) the plaintiff himself has a sufficient likelihood of future harm by the policy or practice."

Tallman found both Mayock and Hajro had shown that the violation they asserted was not an isolated event. He noted that "both Plaintiffs expressly allege in their complaint 'that Defendants have a pattern or practice of failing to comply with the time requirement' set forth in [FOIA]. To support their allegation, Plaintiffs then provided twenty-six declarations by immigration attorneys detailing USCIS's delayed FOIA responses and attached an immigrant client's FOIA request as proof." Tallman next found that Mayock, as "a practicing immigration attorney who routinely files FOIA requests is a requester under FOIA." Tallman agreed with the district court that "for an immigration attorney such as Mayock, delayed FOIA requests inhibit his ability to build a theory of the case or put forth a defense, and may even expose Mayock to legal malpractice claims and loss of reputation." But Tallman observed that "USCIS's delays produce a concrete and particularized injury for Mayock as it prejudices Mayock's ability to effectively represent his clients' interests. But Mayock's single FOIA request addressed to another attorney at his firm is insufficient to prove his harm was 'actual or imminent.'" The additional 26 affidavits from other immigration attorneys "do not help Mayock establish his personal claim." Tallman noted that "Mayock's legal practice requires him to file FOIA requests more than once; and the nature of his harm—potential ineffective legal representation and loss of reputation—requires more than one delayed FOIA request to establish the more attenuated personal harm that may accrue to an immigration lawyer." Tallman pointed out that on remand Mayock might easily satisfy the personal harm test. However, he explained that "where the plaintiff alleges he has been subject to a pattern or practice of FOIA violations on multiple occasions, he must provide sufficient evidence of this to the court." Turning to Hajro's standing, Tallman indicated that once his naturalization application was resolved his case became moot since there was insufficient evidence that Hajro himself would routinely file FOIA requests in the future. (*Mirsad Hajro; James R. Mayock v. United States Citizenship and Immigration Services*, No. 11-17948 and No. 12-17765, U.S. Court of Appeals for the Ninth Circuit, Oct. 23)

Views from the States…

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

California

A court of appeals has ruled that the League of California Cities, an association of California cities and their public officials that advocates for more local control, has a right to intervene in a California Public Records Act suit brought against San Diego by San Diegans for Open Government for emails sent from the League to City Attorney Jan Goldsmith and that although none of the emails appeared to qualify for a legal privilege, the trial court erred in rejecting the League's request for an *in camera* review to determine if they were protected by attorney-client privilege. After SDOG filed suit against the City, the trial court found the City had not shown the emails were privileged and ordered them disclosed. The League then filed independently for a writ of mandamus to block disclosure. SDOG argued the League did not have standing to intervene because it was not a "party in interest" under the Public Records Act because it was not a party to

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the litigation. The appellate court noted that "it has long been established that the right to seek writ review under general statutes is not limited to the actual parties in the action, but extends to anyone with a beneficial interest in the action." The League argued its emails to Goldsmith were not public records, but, rather, were sent to him in his role as a member of the League. The court disagreed, pointing out that "although the e-mails were sent to Goldsmith's personal account, Goldsmith deemed them as pertaining to his work as the City Attorney and as city business by forwarding them to his city account. . .Presumably, any action Goldsmith took regarding the e-mails was based on his role as the City attorney to further not only the League's interests, but also the City's interests." Turning to the emails themselves, the court observed that "although the League argued the attorney-client privilege attached to these e-mails, it failed to explain who was the attorney and who was the client in these communications. Although the League argued that the communications were intended to be confidential, there is absolutely no evidence these e-mails constituted confidential communications between an attorney and a client." Indicating that a party could request the trial court to conduct an *in camera* inspection of allegedly privileged records, the appeals court noted that "where threshold factual questions exist [as to disputed records] and the holder of the asserted attorney-client privilege requests an in camera review, we conclude the trial court erred in not conducting the in camera review before ordering disclosure of the emails." (*League of California Cities v. Superior Court of San Diego County; San Diegans for Open Government, et al., Real Parties in Interest*, No. D067969, California Court of Appeals, Fourth District, Division I, Oct. 28)

Massachusetts

The supreme judicial court has ruled settlement agreements between the Weston Public Schools and disabled students containing the costs of individualized educational programs are exempt under both the federal Family Education Rights and Privacy Act and the Massachusetts Student Record Regulations, but that to the extent that identifying information can be redacted from the settlement agreements the information can then be disclosed. Michael Champa requested the records from the Weston Public Schools. The school district denied the request and Weston appealed to the supervisor for public records, who affirmed the school district's decision. Champa then filed suit in trial court, where the court concluded the records were public records subject to disclosure rather than educational records, but that identifying information should be redacted. The school district filed an appeal to the court of appeals, which was transferred to the supreme judicial court. Agreeing that the cited statutes and regulations required that such records be treated as confidential, the supreme judicial court noted that "nothing in these statutes suggests that records relating to students are confidential once all personally identifiable information is removed. Rather, what is confidential is certain information, again indicating that redaction of such information may render the particular document a public record that must be disclosed on request under the public records law." The court observed that "the agreements here, although they contain identifying information, also include information that does not appear to invade the reasonable privacy interests of students or their families. Notably, once personally identifiable information is redacted, the financial terms of such agreements, which necessarily reflect the use of public monies, partially or fully, to pay for out-of-district placements, do not constitute an unwarranted invasion of personal privacy; indeed, the public has a right to know the financial terms of these agreements." (*Michael Champa v. Weston Public Schools*, No. SJC-11838, Massachusetts Supreme Judicial Court, Oct. 23)

New York

A court of appeals has ruled that the State Police may not withhold records concerning an investigation of misconduct by State Police Officer Brian Beardsley that were created after Beardsley resigned. Beardsley was involved in a hit-and-run incident while he was off duty. Reporter Brendon Lyons requested information about the investigation of Beardsley, which the State Police denied under Civil Rights Law § 50-a(1), which exempts the personnel records of police officers that are used to evaluate their performance. The court noted

that the personnel records exemption no longer applied to records created after Beardsley resigned. The court pointed out that "the plain meaning of the word personnel identifies individuals with some current employment relationship with an organization. . .Accordingly, [the trial court] erred in finding that [the State Police] met its burden of establishing that the materials resulting from its investigation after Beardsley had resigned were for the purpose of assessing his continued employment or promotion. . ." The court observed that "we are unable to determine whether withheld materials fall within the scope of asserted [FOIL] exemptions given that those materials are not within the record for our in camera review." The appeals court sent the case back to the trial court for a determination of whether any exemptions applied. (*In the Matter of Hearst Corporation v. New York State Police*, No. 520623, New York Supreme Court, Appellate Division, Third Department, Oct. 22)

A trial court has ruled that the New York State Liquor Authority failed to show that a series of emails pertaining to an administrative action the Liquor Authority took against Empire Wine & Spirits for allegedly shipping wine to customers in 16 different states may be withheld. Empire Wine & Spirits made two FOIL requests for related records. The agency provided some records and withheld others, claiming the records were either privileged or pertained to an ongoing law enforcement investigation. The court found that several emails between the Liquor Authority and UPS concerning the production of documents did not qualify for the attorney work product privilege, while disclosure of other documents would potentially interfere with law enforcement proceedings. The agency had also withheld emails with the Illinois Liquor Control Commission under the deliberative process privilege. The court found the Illinois Liquor Control Commission did not qualify as a state agency for purposes of FOIL. Finally, the court concluded that Empire Wine & Spirits was not entitled to attorney's fees. (*In the Matter of the Application of Empire Wine & Spirits v. New York State Liquor Authority*, No. 3565-15, New York Supreme Court, County of Albany, Oct. 28)

Pennsylvania

The supreme court has ruled that since rates paid by managed care organizations under Medicaid are financial records, they fall within an exception to the confidential business information exemption in the Right to Know Law. Further, the rates are not protected independently by the Uniform Trade Secrets Act. Reversing a holding by the court of appeals in a case brought by public interest attorney James Eiseman to obtain more specifics about rates under Medicaid after the passage of the federal Affordable Care Act that such rates were protected by the Trade Secrets Act, the supreme court largely upheld the ruling of the Office of Open Records finding that the rates were financial records specifically excepted from the confidential business information exemption. The Department of Public Welfare had argued that it did not have custody or control of records reflecting the Medicaid rates. The supreme court pointed out that "it is undisputed that managed care organizations are required to submit subcontracts delegating their healthcare-related responsibilities to DPW for the agency's advance written approval, per the Department's standard written contract." The court noted that "not all private-contractor documents must be submitted to a government agency for approval." The court observed that "nevertheless, in the absence of any legislative evaluation, we are unable to conclude that records which must be submitted to a government agency for approval, and which embody a delegation (albeit a downstream delegation) of a governmental function of the agency, are not records 'dealing with' the agency's monetary disbursements and services acquisitions." The supreme court rejected the Trade Secrets Act claim. The court indicated that "it seems unlikely that the Legislature would have specifically withheld trade-secrets protection relative to financial records within the four corners of the Law on the theory that such protection persists under another statutory regime. Rather, if the General Assembly wished for dissemination to be withheld, it would have been a straightforward matter to provide for redaction of trade-secrets information in [the exemption section] of the Law, as was done in relation to eight of the other openness exceptions which are otherwise withheld from financial records." (*Department of Public*

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Welfare v. James Eiseman, Jr., No. 45 EAP 2014, No. 46 EAP 2014, and No. 47 EAP 2014, Pennsylvania Supreme Court, Oct. 27)

In a companion case, the supreme court has ruled that the Department of Public Welfare does not have control of records reflecting rates for dental coverage for Medicaid patients provided by a subcontractor of the managed care organization holding the primary contract. When the DPW denied James Eiseman access to the dental rates, he filed a complaint with the Office of Open Records. OOR found that since the agency had ready access to the contract it was obligated to provide the dental care rates. The court of appeals reversed, finding that "the requirement for there to be a contractual relationship between a government agency and the third party whose records are in question simply was not met." The supreme court agreed, noting that "the incorporated definition of a 'record' does encompass the notion of a 'transaction or activity of an agency' to which the intermediate court majority has rightfully afforded meaning. While in light of the policy of liberal construction of the instant remedial statute these terms should be constructed broadly, they simply cannot be ignored, since, at bottom, our present task is one of statutory construction, not independent judicial policymaking." (*Dental Benefit Providers, Inc. v. James Eiseman, Jr.*, No. 48 EAP 2014, No. 49 EAP 2014, and No. 50 EAP 2014, Pennsylvania Supreme Court, Oct. 27)

The Federal Courts...

The Second Circuit has resolved several issues remaining in a case brought by the *New York Times* and the ACLU that resulted in the disclosure of large portions of the legal analysis supporting the government's targeted killing program because they had been publicly acknowledged by President Barack Obama and other high-ranking officials. The district court originally ruled in favor of the government, but the Second Circuit reversed, leaving the district court several issues with which to dispense on remand. After the district court ruled that 11 documents from the Justice Department's Office of Legal Counsel should be withheld, that decision was appealed once again to the Second Circuit. The district court ruled that some legal analysis contained in one of the OLC documents dealt with an issue that had not been publicly acknowledged. Writing for the court, Circuit Court Judge Jon Newman agreed, noting that "with respect to [this document], there is no statement of a Government official that even arguably supports waiver of protection, and the earliest dates of subsequent statements that even arguably support waiver were made eight years after the date of [the disputed document]." Newman observed that "we do not mean to imply that a Government official's public statement made after preparation of a legal opinion can never result in waiver of protection for that opinion . . .However, the passage of a significant interval of time between a protected document and a Government official's subsequent statement discussing the same or a similar topic considered in the document inevitably raises a concern that the context in which the official spoke might be significantly different from the context in which the earlier document was prepared." The district court judge had redacted portions of her decision and had indicated that if her decision was upheld that three paragraphs she had redacted in an abundance of caution could be released. The government protested, arguing that disclosure of the three paragraphs could allow a sophisticated reader to discern the name of a potential target. Newman disagreed, pointing out that "the flaw in the Government's argument is that a reader of the District Court's redacted opinion, with the three paragraphs restored, could not identify the name or nationality of the potential target. Indeed, the District Court's opinion redacts the entire discussion of the document that mentions that target's name, and that document remains undisclosed." Newman chided the government for redacting the identity of CIA personnel who attended a closed court hearing. But he noted that "not having previously established ground rules concerning disclosure of the identities of those attending the closed hearing, we think it would be unfair to disclose the two names that the Government has redacted. However, if the need for a closed *ex parte* hearing should arise in the future, the Government should either not bring personnel whose identities may not be

disclosed, or present, prior to the hearing, a substantial justification for including such personnel." (*New York Times Company, et al. v. United States Department of Justice*, No. 14-4432 and No. 14-4764, U.S. Court of Appeals for the Second Circuit, Oct. 22)

A federal court in California has ruled that the National Marine Fisheries Service has finally shown that it conducted an **adequate search** for records requested by Our Children's Earth Foundation, properly withheld a document under **Exemption 5 (deliberative process privilege)**, and sufficiently justified its **segregability analysis**. Further, while the court admonished the agency for its constant lengthy delays in processing FOIA requests, it concluded that the agency's performance in this case had improved sufficiently enough to show that it no longer had a **pattern or practice** of violating FOIA through delay. The Foundation challenged the search primarily on the basis that the agency's affidavits constituted hearsay because they were not based on personal knowledge. But Judge Samuel Conti noted that "the Court finds that the affidavits submitted are from the supervisor in charge of coordinating the search efforts or person responsible for 'portions of' the search, and thus overrules the objection." Conti agreed with the agency that a draft chart was protected by the deliberative process privilege. He pointed out that "while perhaps not *directly* meant to assist decisionmakers to arrive at a decision, it is clear the author meant to educate a more senior member of the office on whether and why to request a (perhaps higher-up) decisionmaker to arrive at a specific decision." The Foundation argued that while the document might be predecisional, it was not deliberative. But Conti observed that "the Fisheries Service makes clear that exposure of the remainder of the document in question would provide nothing more than the personal opinions of a single, lower-level worker (opinions based in part on materials later deemed factually erroneous) who was trying to have a frank and open dialogue with a senior employee on whether and how to make a recommendation to a decisionmaker." Conti relied on the Ninth Circuit's recent decision in *Hamdan v. Dept of Justice*, 797 F.3d 779 (9th Cir. 2015), in which the appellate court found that the FBI and the Department of State had provided adequate explanations of their segregability review, while the DIA's explanation was virtually non-existent. Comparing the appellate court's findings to those of the NMFS, Conti indicated that "on the whole, this case seems most analogous to the submission by the FBI, where the declarations are not ideal but the disclosures and cited exceptions show enough good faith that the Court should accept the agency's explanations at face value." Conti noted that "several pieces of information suggest that insofar as there may have been a pattern-and-practice [of delay], it is being corrected," including quicker processing times. Conti observed that "the evidence is clear as to whether a pattern-and-practice existed in the past. Moreover, Plaintiffs provide the Court a reasonable basis to believe that these infractions will be ongoing." Rather than sanction the agency, Conti ordered it to complete any outstanding requests by the Foundation. He pointed out that "while the Court cannot accept good faith as a shield to fully protect Defendants from rebuke, the ongoing efforts of the Fisheries Service to improve suggested that intervention by the Court may not be necessary to fix ongoing violations. The Court stands by its earlier reasoning, and its belief that some leniency in the exercise of its discretion may be merited. However, the Court cannot turn a blind eye to the evidence put forth by Plaintiffs." (*Our Children's Earth Foundation v. National Marine Fisheries Service*, Civil Action No. 14-4365, No. 14-1130, and No. 15-2558, U.S. District Court for the Northern District of California, Oct. 21)

A federal court in Oregon has ruled that the Department of Transportation is not required to honor Mark Mann's **choice of format** request to convert its records into XML files because it is too burdensome. Mann, who provided engineering services to general contractors on highway and airport projects, requested records pertaining to the Tiller Trail Highway Project. DOT sent him 21 files in the format in which the agency maintained them and told Mann converting the files to XML format was too burdensome. Mann then filed another FOIA request for records in the XML format, which the agency again denied. The agency

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argued the files were not "readily reproducible" and the court agreed. The court explained that "DOT does not possess or maintain an XML or XSR file for the Tiller Trail Highway Project. DOT designers do not create XML or XSR files with horizontal alignment, vertical alignment, final design surface, and existing ground surface; XML and XSR are not standard files created by DOT designers and are not normally used at any stage of the design process. Further, DOT does not provide data in XML and XSR files to contractors that are constructing highway projects." The agency argued that to convert the files to XML format would be a multi-step process that would require 24-40 hours to ensure that the data was reformatted accurately. The court found it was too burdensome to require the agency to reformat the data. The court noted that "given the time, effort, and resources required to convert the data plaintiff seeks into several XML and/or XSR files, I find that XML and XSR files are not readily reproducible and that their creation would place an undue burden on DOT." The agency indicated it had provided Mann with the underlying data he needed to create his own XML file. The court observed that "under the circumstances, it is not the DOT's duty to shoulder the burden of converting data into specific file formats to further plaintiff's business interests, particularly at the unnecessary expense of government resources." DOT told the court that it could produce the information Mann requested in CVS file format, which is the format in which DOT provides final decision surfaces to its contractors. The court noted that "according to DOT, the CSV file can be read, used, and manipulated by any person and allows others to segregate and/or parse the data for import into other applications. I therefore find that DOT has complied with its duty to maintain information in an accessible and readily reproducible format." (*Mark A. Mann v. United States of America*, Civil Action No. 14-01774-AA, U.S. District Court for the District of Oregon, Oct. 14)

Judge John Bates has awarded **attorney's fees** to CREW for its litigation against the Justice Department for records concerning the agency's decision not to prosecute former Sen. John Ensign (R-NV) on criminal charges, but, sharply criticizing CREW for its timekeeping practices, has substantially reduced the organization's fee request, awarding it $32,865. Ensign resigned rather than face a Senate ethics investigation. However, charges of payments made to keep an affair from becoming public were referred to the Justice Department for investigation. The Justice Department declined to file charges against Ensign. CREW then requested records about the FBI's investigation of Ensign, including the reasons why the agency decided not to prosecute him. DOJ declined to confirm or deny the existence of records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. CREW then filed suit and Bates initially ruled that the agency's *Glomar* response was inappropriate because the public interest in disclosure outweighed Ensign's privacy interests. DOJ then asked Bates to allow it to prepare a *Vaughn* index containing a one percent sample of the potentially responsive records. Characterizing the request as one for an advisory opinion, Bates rejected the agency's offer and told DOJ to provide a *Vaughn* index identifying all responsive records. The agency processed the records and disclosed them with redactions. CREW did not challenge any of the withholdings, but then filed a motion for attorney's fees. DOJ argued that it had acted reasonably in the processing of CREW's request. Bates noted that "in constructing its litigating position, the government had the benefit of other recent cases finding categorical withholding inappropriate where the FOIA requester sought information about a publicly acknowledged investigation of a public figure. The government is certainly free to disagree with a court's analysis—but simply stating that two courts in this district got it wrong is not the stuff of a reasonable litigating position." He indicated that 'investigations into potential violations of lobbying law are matters of public interest whether or not surrounding circumstances are more salacious than usual." He added that "given the similarity of these cases, then, the Court finds it difficult to say that the government's desire to categorically withhold all responsive documents has a reasonable basis in law." Having found CREW was entitled to fees, Bates criticized both the organization's timekeeping records and CREW's attempts to establish that experienced FOIA litigators should be compensated at the top rate for D.C. area attorneys specializing in federal administrative litigation. Bates' primary concern was that timekeeping records submitted by CREW did not adequately justify the hours spent on the litigation. He observed that "the

very ambiguity in [CREW's affidavit] demonstrates that [CREW] has not fully met [its] burden. The problem could be ameliorated, of course, by a clearer explanation of how the daily time sheets work, and whether they are indeed a contemporaneous record—no large burden on the affiant. But [the affidavit's] silence on these topics does not carry that burden." Pointing to several errors in CREW's calculations of its hours spent on the litigation, Bates indicated that "the fact of the errors—mens rea aside—exemplifies the importance of providing contemporaneous time-keeping records: it allows the opposing party, and the court, to double-check the accuracy of the proposed billing summary. And that check is needed here." Bates agreed with CREW that time spent reviewing DOJ's *Vaughn* index qualified as a litigation cost. He noted that "there may be a difference, however, between reviewing the documents produced (after the material sought has been obtained) and reviewing a *Vaughn* index to determine whether any further challenges to withholding are warranted. Time and context will matter. In this case, [CREW] conducted [its] review of the *Vaughn* indices containing the explanations for withholdings while litigation was still ongoing. Thus, the Court considers [CREW's] review of the *Vaughn* indices to be a reasonable 'litigation cost' that merits recovery." CREW urged Bates to use the Legal Services Index matrix as the basis for calculating hourly amounts, which suggested an hourly rate of more than $750 for attorneys with more than 20 years experience, while DOJ preferred the USAO *Laffey* Matrix, which yielded an hourly rate of $520 for attorneys with 20 years experience. Bates found CREW had not shown why it deserved fees on the high end of the scale, but he agreed that the LSI Matrix was probably most reflective of costs in the D.C. area. But he noted that "in the absence of evidence from CREW satisfying its burden to establish that the LSI Matrix represents the prevailing rate in the relevant market, the USAO Matrix will be used. Using the $520 per hour rate, Bates observed that "given the deficiencies in both the LSI and USAO matrices for such inflation-based updating, this might be an appropriate time for an up-to-date, comprehensive, *Laffey*-inspired survey of the local legal market, one that presumably would not ignore size of firm as a relevant factor. Until that happens, however, the best available approach is to employ the original *Laffey* Matrix updated for inflation—and based on the record here, that means applying the USAO Matrix, not the LSI Matrix." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 12-1491 (JDB), U.S. District Court for the District of Columbia, Oct. 27)

A federal court in Louisiana has ruled that U.S. Customs and Border Protection did not properly respond to immigration attorney Michael Gahagan's FOIA request for records concerning his client Theodore Weegar. The agency originally told Gahagan that it did not have a Form I-826 Notice to Appear for Weegar because such a form was issued only when an individual was arrested or detained by CBP and Weegar was neither arrested nor detained by the agency. The agency initially refused to provide a blank Form I-826, although it later provided a redacted version. The court noted that "defendants have not provided any support for their argument that a document may be withheld because it was not served upon Mr. Weegar." The court added that "defendants have not met their burden of establishing that CBP's decision to withhold Form I-826 on the grounds that it was non-responsive to Plaintiff's request was valid. Therefore, the Court finds that the withheld document, Form I-826, was responsive to Plaintiff's FOIA request." Addressing the redacted form the agency disclosed later, the court pointed out that "they have not provided any justification for the withholding of this information in either their opposition or in any affidavit." After reviewing the documents *in camera*, the court indicated that the redactions were similar to those the agency withheld from another form under **Exemption 7 (law enforcement records)**. However, the court observed that "in redacting the I-826, Defendants rely solely upon the argument that the document itself was non-responsive to Plaintiff's request. They make no argument regarding what exemption justifies the redactions that have been made to the I-826. Accordingly, the Court orders CBP to produce any reasonably segregable portion of the I-826." (*Michael Gahagan v. United States Customs and Border Protection*, Civil Action No. 14-2619, U.S. District Curt for the Eastern District of Louisiana, Oct. 20)

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A federal court in Virginia has ruled that the U.S. Patent and Trademark Office conducted an **adequate search** for records concerning its investigation of Louis Piccone, a member of the patent bar from Pennsylvania who was accused of unauthorized practice of law for representing individuals in custody matters in jurisdictions where he was not admitted to practice. The agency conducted an investigation of Piccone and he filed a FOIA request for records concerning the investigation. The agency initially withheld most records under **Exemption 7(A) (ongoing investigation or proceeding)**, but after concluding the investigation, the agency disclosed more than 2,000 pages. Piccone argued the search was inadequate because it was limited to the two individuals at the agency who were responsible for the investigation of Piccone. The court found that "while this search was 'limited to only those individuals involved in the investigation into Mr. Piccone's misconduct,' it was also 'expansive enough to encompass *all* of the individuals most likely to contain responsive information.'" Piccone challenged the search's failure to find emails from several state bar associations contacted by the agency. But the court observed that "defendants more than adequately explain this apparent discrepancy however, by pointing out that the documents Plaintiff points to themselves reference 'email and *phone*' communications. While there were records of the email communications with the Massachusetts Board of Bar Examiners which could be discovered and disclosed, there were no records of phone conversations with the Pennsylvania Board of Bar Examiners." Piccone argued the agency should have turned over records of phone calls related to the investigation. The agency replied that "no telephone records specific to his investigation—or even [similar] investigations generally—exist." The court agreed, noting that "the USPTO has no way of knowing which phone calls in their call logs were related to Plaintiff's case. It is therefore reasonable not to include call logs in their response to Plaintiff's FOIA request." (*Louis A. Piccone v. United States Patent and Trademark Office*, Civil Action No. 15-536 (JCC/TCB), U.S. District Court for the Eastern District of Virginia, Alexandria Division, Oct. 27)