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Washington Focus: Speaking at an ABA conference on national security law, CIA General Counsel Caroline Krass told the audience that concerns about legal opinions being made public under FOIA has led some agencies to stop asking for written advice from the Justice Department's Office of Legal Counsel. Krass noted that "I think that has served as a deterrent to some in terms of coming to the office for a formal opinion." She added that "I do think one reason is a focus the office has gotten over the past 10 years or so in the public which has now led to Freedom of Information Act requests pretty much anytime the administration adopts a position in the context of domestic law or national security that could be [or] seems a bit edgy or slightly controversial, immediately the request for the OLC opinion comes." According to Josh Gerstein of POLITICO, Karl Thompson, the acting head of OLC who was on the same panel with Krass, confirmed that the number of agency requests for formal OLC opinions is way down. But he observed that "there are a lot of different ways in which OLC gives advice. A very small piece of that is writing formal opinions. The vast majority of our advice is provided informally—is delivered orally or in emails. That is still authoritative. It is still binding by custom and practice in the executive branch. It's the official view of the office. People are supposed to and do follow it."

Court Rules Privacy Waived For Publicly-Identified Individuals

Occasionally, FOIA plays an ancillary role in a highly publicized incident that evolved outside the universe of access to government information. Such an incident drove FOIA litigation filed by Gawker Media when the controversy over an attempt to extort celebrity Hulk Hogan, whose real name is Terry Bollea, for a sex tape involving him and Heather Clem, the then-wife of radio personality Bubba the Love Sponge Clem, resulted in an FBI investigation of the extortion attempt. While the whole incident resulted in several defamation and invasion of privacy suits, Gawker Media found itself in a dispute with the FBI and the Executive Office for U.S. Attorneys over disclosure of records concerning the agency's investigation, which resulted in a decision not to charge anyone.

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Gawker filed a request with the FBI in November 2013 for records of the agency's investigation into the source and distribution of the sex tape. The FBI told Gawker that it would need to obtain authorizations from Bollea and his attorney David Houston. Bollea and Houston initially refused to provide waivers, but ultimately signed authorizations for release of records. Heather Clem also provided an authorization. Gawker then submitted the same FOIA request to the FBI and EOUSA. The FBI told Gawker it had located 1,168 pages of responsive records and two CDs with responsive video material. However, after Gawker agreed to pay duplication costs, the FBI denied Gawker's request under Exemption 7(A) (interference with ongoing investigation or proceeding). Gawker appealed the decision, which was upheld. Gawker then filed suit against the FBI and EOUSA.

Judge Susan Bucklew ordered the agencies to disclose all non-exempt information to Gawker and to file a *Vaughn* index justifying its claims under Exemption 7(A). Shortly after, the agencies filed their *Vaughn* indexes. But because the investigation had ended, the FBI no longer claimed Exemption 7(A). Instead, it claimed that certain portions of the records were protected by Exemption 3 (other statutes), Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), and Exemption 7(E) (investigative methods and techniques). EOUSA submitted its own *Vaughn* index covering 18 documents, portions of which it claimed were protected by Exemption 5 or Exemption 7(C). Bucklew reviewed the *Vaughn* indexes and concluded that she "could not make meaningful rulings on all of the claimed exemptions based on the *Vaughn* Indexes and supporting declarations alone because they lacked specificity and contained insufficient information to allow for a meaningful ruling." She ordered the agencies to turn over the withheld documents for *in camera* review. She indicated, however, that she had not yet received documents the FBI claimed were protected by grand jury secrecy and several other documents withheld by EOUSA. Nevertheless, she went ahead and ruled on most of the agencies' claims, particularly the privacy claims.

Gawker objected to the way in which the FBI had routinely redacted names of individuals whose identities were publicly known because of extensive media coverage. Bucklew indicated that "this case is unique in that the events surrounding the release of the Bollea sex tape, including the names and roles of those involved, have been heavily documented in the media and in court filings in this Court, in the Florida state court, and in the California state court since October 2012. With this in mind, the Court notes that FOIA 'does not categorically exempt individuals' identities, though, because the privacy interest at stake may vary depending on the context in which it is asserted.' The Court will address whether the identity of certain individuals identified by Gawker in their objections and supporting declaration may remain private, or whether they enjoy no such privacy right. The FBI and EOUSA do not address each individual, but continue to assert that all names (with the exception of Terry Bollea, Heather Clem and David Houston) in the law enforcement files—whether publicly available or not—should remain private. The Court notes that if it orders the FBI and EOUSA to unredact an individual's name in the documents, any addresses, birth dates, social security numbers, telephone numbers, and other such private identifiers shall remain redacted and are not subject to disclosure."

Having set out those guidelines, Bucklew proceeded to find that nearly all of the individuals whose identities had been redacted by the FBI no longer had any privacy interest because their identities had been made public. First up was Keith Davidson, a California attorney who had admitted to trying to sell the sex tape. Bucklew noted that "in this case, the government has filed documents that identify Mr. Davidson as the target of the FBI's investigation." She added that "news reports have also identified Mr. Davidson as having been the target of an FBI investigation into an extortion attempt against Bollea in connection with the sex tapes." She observed that "based on this uncontroverted evidence, the Court finds that Keith Davidson's name shall be unredacted because Mr. Davidson does not have a privacy interest where Mr. Davidson himself has voluntarily disclosed his role in this investigation, the government has identified Mr. Davidson in public

filings in this case, and Mr. Davidson has been identified in the medias as being involved in the Bollea sex tape investigation." Bucklew next found that Bubba Clem had also waived any privacy interest in his identity. She pointed out that "Bubba has discussed his role in the sex tape controversy at length on his own nationally syndicated radio show, as well as on Howard Stern's radio and television shows." Turning next to the attorneys who represented Bubba and Heather Clem, Bucklew observed that "an attorney does not have a privacy interest in his identity remaining private if that attorney openly represents their client in a court proceeding."

Piercing DOJ's nearly sacrosanct policy of not identifying its own employees, no matter how public their participation may have been, Bucklew agreed with Gawker that the public roles played by an FBI agent and two Assistant U.S. Attorneys in the investigation and litigation waived their privacy interests as well. Bucklew noted that "the very important general principles of privacy have less force when the information—namely, the fact that there was an investigation into Davidson's possible extortion of Bollea—is already a matter of public record. Here, the FBI and the EOUSA has made no showing that unredacting the names of government officials, who have been previously identified in public filings in this case, would result in harassment, intimidation, or physical harm other than stating as much."

Bucklew found that Howard Stern and other media personalities had no privacy interests. She noted that "the names of TMZ personnel and Howard Stern are redacted despite the fact that they appear on a public platform (radio, television, internet) as their occupation." She also found that David Houston, by signing a privacy waiver, had also waived the privacy of his assistant. Bucklew observed that 'because Ms. Rosser acted on Houston's behalf, and Houston signed a records authorization, the Court finds that Ms. Rosser does not have a right to privacy here." But Bucklew found that Bollea's children had not waived their privacy interests, even though Gawker argued they were readily identifiable in context. She explained that "Gawker has not shown how the public's need-to-know regarding the identities of Bollea's family members outweighs their privacy interests."

Bucklew approved the withholdings the FBI had made under Exemption 5 and Exemption 7(E). She ordered the agency to provide her the grand jury records it had withheld for *in camera* review, noting that "Gawker challenges whether a grand jury was even actually convened such that the exemption would apply," although the FBI insisted that "one or more federal grand juries were empanelled in relation to the investigations at issue in the records here." (*Gawker Media, LLC and Gregg D. Thomas v. Federal Bureau of Investigation and the Executive Office of United States Attorneys*, Civil Action No. 15-1202-T-24EAJ, U.S. District Court for the Middle District of Florida, Nov. 4)

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 Pacific Merchant Shipping Association is entitled to $260,000 in attorney's fees for its California Public Records Act litigation against the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun in which the court found that the Pilot Agent was a public officer subject to the CPRA. When PMSA asked for pilot logs, the Board argued the Port Agent was not a

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public officer subject to the access statute. But both the trial court and the appellate court ruled the Board was judicially estopped from making such a claim because it had argued the Port Agent was a public officer in a separate federal case. Although the court also found the pilot logs were not used in the performance of public duties, the Port Agent subsequently made a voluminous voluntary disclosure of records about pilot scheduling that satisfied the Association's request. The Association then asked for attorney's fees as the prevailing party. The trial court granted $260,000 in fees and the Port Agent and the Board appealed. The Port Agent argued the Association had not been successful in its CPRA litigation because the court had ruled on the basis of judicial estoppel rather than on the merits of the Association's CPRA suit. The appeals court disagreed, noting that "this circumstance does not change the fact that PMSA"s CPRA litigation *resulted in* a holding that required the Port Agent to comply with the CPRA when performing his public duties, a result PMSA had sought from the outset." The Port Agent also argued that it had disclosed records voluntarily, not by court order. But the appellate court observed that "the Port Agent disclosed significant documents postlitigation that he had refused to produce prelitigation." (*Pacific Merchant Shipping Association v. Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun*, No. A142634, California Court of Appeal, First District, Division 5, Nov. 6)

Connecticut

A trial court has ruled that a list of names and addresses of Trumbull wastewater customers does not qualify as a trade secret and must be disclosed to the Water Pollution Control Authority of Bridgeport. WPCA provided wastewater to Trumbull, but the town handled its own billing. WPCA decided to renegotiate the agreement and requested Trumbull's customer list. When Trumbull refused to comply, WPCA complained to the FOI Commission, which found that the customer list did not qualify as a trade secret. The trial court found the FOI Commission had used too narrow a definition of trade secrets and remanded the case for further proceedings. This time around, the FOI Commission concluded that because all the data used to construct the electronic customer list was public it did not qualify as a trade secret. This time the trial court agreed. Noting that the Connecticut Supreme Court had found in *Director, Dept of Information Technology v. FOI Commission*, 874 A.2d 785 (2005), that a GIS system compiled from public sources by the Town of Greenwich did not qualify as a trade secret, the trial court pointed out that "although there was testimony that compiling the database [from public sources] would be laborious, it does not appear any more so than recreating the GIS database of numerous maps and aerial photographs in *Director*, which the Court nonetheless found to be generally ascertainable to the public. The key criteria appears to be that all of the underlying information or data—the names and address of each customer—is available to the public." Trumbull argued that a more recent Supreme Court decision, *University of Connecticut v. FOI Commission*, 36 A.3d 663 (2012), limited *Director* to its facts by finding that a public body could maintain a protected customer list. Rejecting that claim, the trial court noted that "it is entirely possible that the underlying data of a public agency customer list could consist of preliminary drafts, notes, or other items exempt from disclosure under the act. In that event *University of Connecticut* would not affect *Director* but rather would stand solely for the proposition that a public agency can have trade secrets based on customer lists under the act." The trial court concluded that "in the present case, however, there is no information sought that is truly 'secret.' [WPCA] seeks only the names and addresses of customers, information that is ultimately in the public domain." (*First Selectman, Town of Trumbull v. Freedom of Information Commission*, No. HHB CV15-6027970S, Connecticut Superior Court, Judicial District of New Britain, Nov. 9)

Florida

A court of appeals has ruled that the trial court erred when it concluded that the Economic Development Commission of Florida's Space Coast, a private organization that contracts with municipalities to provide economic development services, was so clearly performing a government function that no further

legal analysis was needed to conclude that it was a public body subject to the Public Records Act. Scott Ellis, the Brevard County Court Clerk sent several requests to EDC for records about a vendor the county had previously used. EDC declined to respond, claiming it was not a public body subject to the Public Records Act. The trial court ruled EDC was performing a government function and ordered it to respond to Ellis' requests. But the appeals court found EDC's public agency status was not so clear. Sending the case back to the trial court for further determination, the appeals court noted that "here EDC did not take over the county's role or completely assume the county's provision of economic development services. EDC provided services to, not in place of, the county. Although local governments may engage in a variety of economic development activities, those services in our opinion are not traditional governmental obligations or functions. . ." (*Economic Development Commission v. Scott Ellis*, No. 5D14-1356, Florida Court of Appeal, Fifth District, Oct. 30)

Kansas

A court of appeals has ruled that Hunter Health Clinic, a non-profit organization chaired by employees of Wichita State University, does not have standing under the Kansas Open Records Act to bring suit to block disclosure of emails from the WSU employees concerning Hunter. When a reporter for the *Wichita Eagle* requested the emails from WSU, the university agreed to disclose them and noted that they did not pertain to WSU operations. Hunter then filed suit under KORA and the common law to prevent disclosure of the records. The trial court granted Hunter an injunction and the *Eagle* appealed. The appeals court found the purpose of KORA was to grant access to public records and that suit could be brought to enforce that right of access. The court noted that "to use a clichéd formulation, KORA is a sword to obtain access to public records, not a shield to prohibit access to [allegedly] private records. Hunter asked the district court to do the latter. Since Hunter did not have the right under KORA to make such a legal claim or to seek judicial enforcement of such a duty or right, it lacked the requisite statutory standing." The court added that "since Hunter did not have a cause of action under KORA, it lacked standing to obtain an injunction enforcing KORA. For the same reason, Hunter lacked standing to obtain a decision on the predicate question of whether the emails were part of the public record." (*Hunter Health Clinic v. Wichita State University*, No. 111,586, Kansas Court of Appeals , Nov. 6)

Missouri

The supreme court has ruled that Robinwood West Community Improvement District knowingly violated the Sunshine Law when it refused to disclose a settlement agreement because it contained a confidentiality clause, even though the Sunshine Law requires that settlement agreements are public unless specifically sealed by court order. John Strake, a resident of Robinwood, requested the settlement agreement. After consulting with its attorney, Robinwood declined to disclose the settlement agreement because it might expose it to liability for breach of contract. Strake filed suit and the trial court ruled in his favor but decided that because Robinwood faced two conflicting obligations it had not acted knowingly. The supreme court reversed. The court noted that "even if disclosing the documents to Mr. Strake would have exposed Robinwood to the 'two mutually conflicting obligations' of the Sunshine Law and the confidentiality clause, Robinwood's knowledge of its Sunshine Law obligations is not negated by its contractual obligations." The court added that "Robinwood's decision to withhold the requested documents to avoid potential contractual liability amounts to 'purposely' violating the Sunshine Law as part of a 'conscious design, intent, or plan' to violate the law. . . 'with awareness of the probable consequences.'" (*John P. Strake v. Robinwood West Community Improvement District*, No. SC 94842, Missouri Supreme Court, Nov. 10)

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New York

A court of appeals has ruled that the State Education Department properly withheld records concerning audit guidelines for auditing costs of special education preschool programs for New York City and its surrounding counties. The appeals court noted that "these audits [of special education program costs] resulted in criminal investigations and the referral of 'numerous' certified public accountants to the Department for disciplinary proceedings, and there is no reason to doubt that audits conducted under the guidance of the Department are also aimed at uncovering financial malfeasance. As such, while the guidelines and related documents did not arise from a specific law enforcement investigation, they were nevertheless compiled with law enforcement purposes in mind, and are exempt from disclosure if their release would enable individuals to 'frustrate pending or prospective investigations or to use that information to impede a prosecution.'" (*In the Matter of Pamela A. Madeiros v. New York State Education Department*, No. 520536, New York Supreme Court, Appellate Division, Third Judicial Department, Nov. 5)

A court of appeals has ruled that Issa Kohler-Hausmann is entitled to attorney's fees for representing herself in a suit against the New York City Police Department. While the plaintiff acknowledged that the merits of her case became moot once the Department voluntarily disclosed records, her request for attorney's fees remained unresolved. The court noted that "the attorney petitioner's self-representation does not preclude an award of attorney's fees. Other similarly worded statutes have been interpreted to authorize an award of attorneys' fees to a prevailing litigant who represented himself or herself or had the benefit of free legal services." Sending the case back to the trial court for a determination on attorney's fees, the appeals court observed that "petitioner meets the statutory requirements for seeking 'other litigation costs reasonably incurred' by her, since she 'has substantially prevailed' and NYPD 'failed to respond to her request within the statutory time. . ." (*In re Issa Kohler-Hausmann v. New York City Police Department*, No. 100759/13, New York Supreme Court, Appellate Division, First Department, Nov. 10)

Oregon

A court of appeals has ruled that the Lane County Board of Commissioners has not shown that former Lane County Commissioner Rob Handy's suit alleging violations of the Public Meetings Law should be dismissed because of the state's anti-SLAPP statute, designed to prohibit suits brought solely to chill public participation. During his campaign for reelection to the Board, Handy approached a potential donor with the suggestion that if the individual contributed $3,000 to Handy's campaign, Handy would use the money to pay part of an outstanding $20,000 loan Handy had from the county. The donor told the district attorney about the solicitation. The next day the solicited individual's attorney sent a letter to Handy accusing him of violating government ethics and campaign laws. The letter was also sent to the district attorney, who forwarded it to the county administrator. The county administrator conferred with three members of the five-member board and through a series of emails within hours agreed to call an emergency meeting at which they decided to disclose the letter in response to several public records requests. Handy then brought suit against the board, accusing it of violating the Public Meetings Law by deliberating before holding the emergency meeting. The board defended itself by asking the court to dismiss Handy's suit because of the anti-SLAPP statute. The trial court agreed with the board and dismissed Handy's suit. It later awarded the board attorney's fees. Handy then appealed. The court of appeals first indicated that to determine whether Handy's suit should be dismissed under the anti-SLAPP statute, it would need to determine what restrictions the Public Meetings Law placed on public bodies through the law's restrictions on board deliberations outside a scheduled meeting. The court found that "the legislature drafted [an amendment] to broaden the scope of the Public Meetings Law to ensure that the law would regulate conduct by public officials outside the context of formal meetings. . .[We conclude] that a violation of the [Public Meetings Law] depends not on the method by which communications take place, but, rather, on the purpose and content of those communications." The majority found that

Handy's allegations "support an inference—at this nascent state of the litigation—that the three commissioners at least 'deliberated,' in a series of telephone calls and emails over the course of several hours, towards the final 'decision' to release the letter, and perhaps even made that decision. If those discussions had that purpose, it is not material that some of the discussions occurred electronically or through [the county administrator] as an intermediary." (*Rob Handy v. Lane County*, No. 161213687 and No. A153507, Oregon Court of Appeals, Nov. 4)

Washington

A court of appeals has ruled that Benton County is not obligated under the Public Records Act to provide Donna Zink with electronic copies of special sex offender sentencing alternative forms as well as victim impact statements because it would require the county to store redacted versions of the records and that the county may charge Zink the cost of using a vendor to make the electronic copies. After getting into a dispute with Zink over the records, the county filed suit for a declaratory judgment asking the court to find that it had responded properly to Zink's request. The trial court ruled in favor of the county. The appellate court affirmed that ruling. The court noted that "in this situation, scanning a redacted paper copy of a record into electronic format on an agency's server *creates* a new public record. . .[A]n agency is not required to *create* new public records by scanning properly redacted paper copies of records into an agency's server." The court agreed that the county could assess Zink the costs of using a vendor to scan the records. The court indicated that "Benton County was under no obligation to create electronic records for Ms. Zink, but decided to accommodate her by having an outside vendor create the electronic copies on its own server for 25 cents per page. This was the actual cost Benton County incurred based on the lowest of three quotes from outside vendors. The PRA allows Benton County to charge Ms. Zink the actual costs it incurs for such a service." (*Benton County v. Donna Zink*, N0. 32912-7-III, Washington Court of Appeals, Division 3, Nov. 10)

The Federal Courts…

Judge Rosemary Collyer has ruled that a Foreign Intelligence Surveillance Court opinion whose existence was revealed in another FISC opinion that was made public in 2013 is classified and that the Department of Justice properly withheld the opinion under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. EFF requested several FISC opinions from the National Security Division of the Department of Justice but eventually focused only on a FISC opinion dealing with Section 1809, holding that U.S.C. § 1809(a)(2) precluded the FISC from approving the government's proposed use of certain data acquired from the NSA without statutory authority through "Upstream" collection, which refers to the acquisition of Internet communications as they transit the "internet backbone," the principal data routes via internet cables and switches of U.S. media service providers. EFF had obtained the 2011 FISC opinion which referred to the Section 1809 opinion through previous FOIA litigation. In that case, Judge Amy Berman Jackson ruled DOJ had properly withheld the citation to the Section 1809 opinion because it was classified. Because of the previous litigation, DOJ initially argued that EFF was collaterally estopped from litigating the case. But Collyer noted that "in this case, EFF seeks the release of the Section 1809 Opinion itself. Because the issue of DOJ's withholding the Section 1809 Opinion has not been actually litigated and necessarily decided, collateral estoppel does not apply." The NSA had provided an affidavit explaining that the Section 1809 opinion was withheld "because the release of any portion of that document would tend to reveal information that is currently and properly classified at the Top Secret level, specifically, an intelligence method." Collyer indicated that "through the [NSA affidavit], DOJ has sustained its burden of showing that the Section 1809 Opinion is classified and that it properly withheld the document under FOIA Exemption 1." EFF argued the

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Section 1809 opinion had been officially acknowledged and described in the publicly released 2011 FISC opinion. Collyer pointed out that for information to be in the public domain because of official acknowledgement, the information had to be as specific as that already in the public domain. She noted that "because the specific content of the Section 1809 Opinion has not been officially and publicly disclosed, the Opinion may be properly withheld under Exemption 1." EFF argued that the substance of the opinion could be disclosed without "implicating any legitimately withheld information." Collyer observed that "EFF's argument is substantially undermined by the reality that legal analysis is meaningless without facts. Legal analysis *necessarily* includes facts, and in this case those facts are classified." (*Electronic Frontier Foundation v. Department of Justice*, Civil Action No. 14-760 (RMC), U.S. District Court for the District of Columbia, Oct. 30)

` A federal court in California has ruled that the CIA conducted an **adequate search** for records concerning John Roselli's alleged involvement in the assassination of President John F. Kennedy when it stopped its search after a query of its relevant databases found no records. Anthony Bothwell had requested records pertaining to certain individuals who were part of the Church Committee's investigation of Kennedy's assassination. The court previously found the CIA was obligated to search further for records about Roselli because such records qualified for an exception in the CIA Information Act requiring the agency to search for operational files when subjects were referred to during the Church Committee's investigation. This time, however, the court concluded the agency's search was adequate after its query of relevant databases yielded no results. The agency explained its search methodology as starting with a keyword search and then following up with a search of archived paper records if the database queries yielded any results. The court indicated that "individuals who are experts in [these] databases conducted the search of the three databases, which did not suggest the existence of any paper files pertaining to Roselli, so the staff did not pull any archived files to conduct a further search of paper records." Bothwell argued that the agency's affidavit was insufficient because it should still have searched its records pertaining to the Church Committee even when its database search produced no results. The court disagreed, noting that "Plaintiff's FOIA request did not request Church Committee documents in particular, but rather documents about Roselli. Thus, if the CIA had limited its search to Church Committee documents, that would not have been reasonable. And the CIA's database searches would *include* documents that mention Roselli in conjunction with the Church Committee investigation, since it used Roselli's name as a search term. In other words, any documents relating to both Roselli *and* the Church Committee would fall within the scope of the search, and any documents solely about the Church Committee but not mentioning Roselli would not be responsive to Bothwell's request." The court added that "Bothwell's argument relies on the unsupported assertion that the CIA maintains particular paper files dedicated solely to the Church Committee's investigation. Bothwell's speculation that separate, stand-alone Church Committee files exist is not enough to overcome the presumption of good faith entitled to the [CIA's affidavit] and thus that CIA's search would have uncovered responsive operational files regarding Roselli. And if there are no such stand-alone files, the CIA is not required to reorganize its files to compile Church Committee-specific files." Bothwell argued the public interest outweighed any burden on the CIA to conduct a manual search. However, the court observed that "even if that were the case, the relevant legal standards regarding the adequacy of a FOIA search do not take into account the importance of the subject matter of a FOIA request. . .[W]hile Bothwell may have preferred that the CIA engage in a manual paper files search, the CIA's decision to not comb through all paper files given the lack of responsive hits from its database search using variants of Roselli's name as a keyword is adequate to discharge its duties under the FOIA." (*Anthony P.X. Bothwell v. John O. Brennan*, Civil Action No. 13-05439-JSC, U.S. District Court for the Northern District of California, Nov. 3)

The Ninth Circuit has ruled that an amendment to the Naval Vessel Transfer Act of 2013 clarified Congress' intent to recognize the Export Administration Act as an **Exemption 3** statute and, as a result, has sent the 2013 decision by a district court finding that because the EAA had expired it did not qualify as a (b)(3) statute back to the district court for further proceedings. The court noted that "a statute with retroactive effect enacted during the pendency of an appeal applies to a FOIA request. Commerce urges that Congress intended Section 209 to be retroactive; EFF contends that no retroactive effect was intended. In light of the parties' arguments, and because the district court did not have the benefit of [the 2013 amendment] when it considered the parties' claims, we vacate the judgment and remand for further consideration." (*Electronic Frontier Foundation v. United States Department of Commerce*, No. 13-16480, U.S. Court of Appeals for the Ninth Circuit, Nov. 6)

A federal court in Louisiana has ruled that U.S. Customs and Immigration Services has not yet shown that its *Vaughn* index is sufficient to support its exemption claims for a request made by immigration attorney Michael Gahagan. Gahagan had challenged the *Vaughn* index provided by U.S. Immigration and Customs Enforcement to justify its redactions made to records referred to ICE by USCIS. The court began its discussion by noting that "there are three indispensable elements of a *Vaughn* Index: (1) it must be contained in one complete document; (2) it must adequately describe each redaction of each withheld document; and (3) it must identify the claimed exemption and explain its relevance." The court found the *Vaughn* index submitted by USCIS along with an affidavit from Fernando Pineiro, the Deputy FOIA officer at ICE, adequately provided most of the required information, but indicated that it was troubled that the agency had not explained its continued reference to subsection (k)(2) of the Privacy Act as a basis for withholding personally-identifying information of ICE employees, while citing only Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records) as the applicable exemptions. The court pointed out that the index "clearly indicates that particular names, signatures, and initials of ICE attorneys and legal assistants are redacted pursuant to exemptions (b)(6) and (b)(7). Further, the document adequately explains the relevance of those exemptions to the redacted materials. However, the initial paragraph in that column also explains that the entire document is potentially exempt from release pursuant to exemption (k)(2) as investigatory material compiled for law enforcement purposes. What remains unclear is whether any other information was actually redacted pursuant to (k)(2). If so, USCIS would need to describe that information in more detail in the [index], rather than simply saying that 'all information contained within this system of records is exempt from release.' If no other information was redacted pursuant to (k)(2), then it should not be listed as one of the applied exemptions." Gahagan challenged Pineiro's affidavit on the basis that he did not have personal knowledge of the processing of the request. The court agreed with the agency that "numerous federal courts have found that FOIA declarants may incude information obtained in the course of their official duties within their affidavit." The court added that "moreover, the individual coordinating a search for records is not only a permissible individual to complete the affidavit, but is the 'most *appropriate* person to provide a comprehensive affidavit.'" (*Michael W. Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 15-796, U.S. District Court for the Eastern District of Louisiana, Nov. 4)

Judge Amit Mehta has ruled that the DEA conducted an **adequate search** in its attempts to locate a cooperative agreement between the agency and Jesse Dean. Dean had requested records about his relationship with the agency as a confidential source. The agency originally issued a *Glomar* response, but Mehta found Dean had proven the existence of a confidential source relationship and the agency would have to search for the records. However, after a comprehensive search, the agency found no record. Dean challenged the adequacy of the search, arguing that the agency should have contacted various federal agents that Dean had

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worked with. Mehta noted that "with respect to the non-DEA personnel, the DEA 'had no responsibility under FOIA to make inquiries of other law enforcement agencies, such as the Justice Department, for documents no longer within its control or possession.' Thus, the DEA's failure to contact them does not render its search inadequate." Nevertheless, the agency told Mehta it had tried to locate the former employees Dean had listed and found none of them still worked for the federal government. Mehta observed that "the DEA is not required to undertake 'fruitless' inquiries, such as when personnel are no longer employed by the agency and thus are highly unlikely to possess or control the missing record." (*Jesse J. Dean, Jr. v. United States Department of Justice*, Civil Action No. 14-0715 (APM), U.S. District Court for the District of Columbia, Oct. 30)

Judge Rudolph Contreras has resolved another batch of the multiple FOIA claims filed against the Justice Department by prisoner Jeremy Pinson. This opinion dealt with requests Pinson made to EOUSA for a variety of records pertaining to a various of named cases. Pinson also contended he had filed another 21 requests to which the agency had never responded. EOUSA argued that Pinson had **failed to exhaust his administrative remedies** for several of his requests, including one in which he filed an amended complaint before appealing the agency's denial. Contreras noted that "Mr. Pinson does point out—correctly—that the EOUSA failed to *initially* respond to his requests 'within the statutory time frames.' The agency did not respond to these requests until September 25, 2013—over sixteen months after the EOUSA acknowledged receipt of those requests on May 23, 2012. Moreover, on November 14, 2012, and during those intervening months, Mr. Pinson filed his initial complaint specifically listing [several requests] and sought an injunction. . ." He added that "but because Mr. Pinson's initial complaint challenged the agency's failure to respond to these requests, it is the initial complaint, not the Second Amended Complaint, that governs the constructive exhaustion inquiry. Where, as here, the agency belatedly responds only *after* the plaintiff has filed suit, the plaintiff is nevertheless considered to have constructively exhausted his administrative remedies." Pinson argued that his failure to appeal one request was because BOP personnel intercepted his mail and never delivered it to him. BOP subsequently provided an affidavit claiming Pinson had been restrained and his property temporarily removed from his cell, but that everything had been returned. Contreras observed that "notwithstanding this lack of clarity, the law remains clear. If there is a genuine dispute of material fact regarding the exhaustion issue, a court may refuse to grant summary judgment to the agency. . .As a result the Court must accept as true Mr. Pinson's declaration that, through no fault of his own, he never received the EOUSA's response to his requests. If it turns out that Mr. Pinson did not receive the documents, then Pinson 'cannot "be deemed to have exhausted his administrative remedies" because he was denied the opportunity to file a timely appeal.'" Contreras found that EOUSA's *Vaughn* index lacked the specificity necessary to carry the government's burden of proof. He indicated that "although the declaration states that Mr. Pinson's request letters were forwarded to 'FOIA Contacts,' it fails to state with any particularity which files were searched at each location. Furthermore, the Declarant's claim that each U.S. Attorney's Office conducted a 'systematic search for records' is merely conclusory and fails to clearly define any iteration of the search methods used, or the search terms employed, to locate responsive documents." Contreras dismissed Pinson's claims about the 21 unacknowledged requests. He pointed out that "in order to create an issue of material fact, a plaintiff must offer evidence that the requests were received by the agency, rather than merely assert that the requests were placed in the mail. Here, not only does Mr. Pinson fail to provide any evidence that the EOUSA received these requests, his opposition to DOJ's motion makes no mention of these requests at all." (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, Nov. 10)

A federal court in Louisiana has again ruled that immigration attorney Michael Gahagan is not entitled to **attorney's fees** because he did not substantially prevail in his litigation against U.S. Citizenship and

Immigration Services. After the agency failed to respond within the 20-day time limit, Gahagan filed suit. About a month later, USCIS disclosed 344 pages, withheld 59 pages and referred 33 pages to U.S. Immigration and Customs Enforcement. The district court ruled in favor of the agency and Gahagan appealed to the Fifth Circuit, arguing that ICE had improperly withheld the 33 pages referred to it. At the Fifth Circuit, USCIS supplemented the record to show that ICE had disclosed the 33 pages with minor redactions. Gahagan argued the redactions were improper and that ICE had not provided a *Vaughn* index explaining its exemption claims. The Fifth Circuit sent the base back to the district court for further proceedings. Gahagan argued in district court that the *Vaughn* index was inadequate. The court again ruled in favor of the agency and, subsequently denied Gahagan's motion for attorney's fees. Gahagan then filed a second motion. Quoting extensively from his earlier decision denying Gahagan attorney's fees, the court observed that "this Court finds that Plaintiff is still not entitled to attorneys' fees and costs. USCIS did not provide Plaintiff with any new documents following the appeal. ICE released the thirty-three pages referred to it on November 24, 2014, but Plaintiff cannot show that this release was the result of his appeal. Rather, the delay can be easily attributed to the referral from USCIS, which was in turn delayed because of an administrative backlog." Gahagan argued that he had to file further motions after the appeal to get the agency to provide a *Vaughn* index. The court noted that "this is patently untrue. This Court previously found that ICE released a proper *Vaughn* Index when it provided responsive documents to Plaintiff in November 2014. Thus, the filing of those motions did not trigger the release of the *Vaughn* Index because ICE had already provided an index." (*Michael Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 14-1268, U.S. District Court for the Eastern District of Louisiana, Nov. 4)

A federal court in Idaho has ruled that the U.S. Marshals Service properly responded to James Allison's request for records concerning himself and that the agency is not obligated to search for records allegedly forwarded to it by the Post Falls City Police. Allison made a request to the Marshals Service for records relating to an ICE investigation of himself as well as all USMS records. He also made a request to USMS for records concerning a 2007 incident involving him because the Post Fall City Police had erroneously told him the custodian of the record was USMS. USMS conducted a search and disclosed 214 pages. The court noted that "the production of these records moots any claims regarding the 214 pages of USMS-created records." The court found Allison did not have a cause of action to obtain the police report. The court pointed out that "the USMS does not have either the police report or dispatch logs in its possession. The USMS can neither produce nor withhold what it does not have. Given these facts, there is no evidence that the USMS has acted improperly in not producing the police report and dispatch log." (*James Bruce Allison v. United States Marshals Service*, Civil Action No. 14-00332-BLW, U.S. District Court for the District of Idaho, Nov. 10)

A federal court in Montana has dismissed David Steven Braun's **Privacy Act** suit against the NSA for failure to state a claim. Braun sued the NSA for $750,000, claiming it had failed to disclose an extensive investigation into Braun's daily life. A magistrate judge recommended the case be dismissed because the NSA had not waived sovereign immunity and the court agreed. The court noted that "NSA's sovereign immunity has not been waived. Braun brings his claim under the Privacy Act, which provides for limited remedies. . .The Privacy Act waives immunity only to the extent of the expressly allowed damages; sovereign immunity is not waived as to Braun's claim for $750,000 in damages. Braun's objection requesting further time to seek waiver cannot succeed where the statute unequivocally states the extent of waiver." The court added that "NSA's invocation of exemptions expressly provided under § 552a(b) and (k) of the Privacy Act cannot give rise to a cause of action under subjection (g) of the same act. Braun's objection does not cure his

initial failure to state a claim upon which relief may be granted because he has not asserted any basis in law or fact for an argument against application of the statutory exemptions." (*David Steven Braun v. National Security Agency*, Civil Action No. 15-18-H-DLC-JTJ, U.S. District Court for the District of Montana, Oct. 30)