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Washington Focus: The Supreme Court has voted not to hear New Hampshire Right to Life v. Dept of Health and Human Services, a First Circuit decision in which the court ruled that Exemption 4 protected manuals and other records submitted to HHS by Planned Parenthood as part of its contract to provide family planning services for New Hampshire under Title X. Both Justice Clarence Thomas and Justice Antonin Scalia dissented from the decision not to hear the case, protesting that the First Circuit decision broadened the scope of Exemption 4 by allowing a submitter to withhold records when there was no actual evidence of future competitive harm. . .In a case brought by reporter Jason Leopold, Judge Rudolph Contreras has ordered the State Department to increase its current rate of 700 pages per month to 2,200 pages per month as the agency continues to review emails of former Secretary of State Hillary Clinton.

Court Finds It Has Jurisdiction Then Rules in Favor of Agency

After dealing with some knotty jurisdictional issues, the D.C. Circuit has ruled that the FBI and the CIA properly responded to
Sharif Mobley's FOIA and Privacy Act requests for records pertaining to his detention by the Yemini government as well as records about himself and his wife. The court's decision provides some interesting observations on agencies' obligations to search for records and what does or does not constitute public acknowledgment for purposes of waiving legitimate FOIA exemptions.

Mobley, a U.S. citizen, had lived in Yemen since 2008. In 2010, he contacted U.S. Embassy officials in Yemen to arrange his return to the United States. Several weeks later, however, he was abducted by armed men. While in custody, Mobley claimed he was interrogated by agents from the FBI and other U.S. federal agencies. He is currently being held by the Yemeni government on charges that he shot and killed a hospital guard while trying to escape. Mobley filed FOIA requests with the FBI, the CIA, the Defense Department, and the State Department asking for information about his

abduction, the involvement of the U.S. government in his abduction, and, more broadly, a wider patter of U.S.-sponsored sweeps and proxy detentions in Yemen. More than a year later, Mobley filed two lawsuits, one against the FBI and the Defense Department, and the other against the CIA and the State Department. The FBI released 85 redacted pages to Mobley. While the suit against the CIA and the State Department involved the same types of records requested from the FBI and the Defense Department, it also included a claim against the CIA based on a separate FOIA request for failure to disclose records on Mobley and his wife. The district court did not consolidate the cases, but addressed all the issues in both suits in a single opinion in February 2013. The district court ruled in favor of the FBI, but ordered the CIA to conduct a further search. The district court ruled in favor of the CIA in June 2013, closed the cases, and then four days later consolidated the two lawsuits. Ten days later, Mobley asked the district court to reconsider its rulings in favor of the agencies. Mobley's request for reconsideration was denied in August 2013. Mobley filed an appeal in September 2013.

The government argued Mobley had missed the deadline for appealing the district court's decision and that as a result the D.C. Circuit had no jurisdiction to hear the case. Writing for the court, Circuit Court Judge Judith Rogers noted that court subject matter jurisdiction was determined by Congress. She pointed out that "timing rules are therefore jurisdictional if they implement a statutory time limit, whereas timing rules lacking a statutory basis are 'simple "claim-processing rules"' subject to waiver and forfeiture." She explained that in this case, Mobley's failure to file his appeal within the time limits was excused by the unique circumstances doctrine—which "affords the opportunity, in view of the non-jurisdictional nature of the federal rules at issue, to excuse the tardiness of a late-filed Rule 59(e) motion." Rogers emphasized how closely-related the cases were and noted that the government had consented to Mobley's motion to consolidate them, although the district court rejected the motion at the time because the two cases were in different procedural postures. However, Rogers explained, Mobley had succeeded in getting the district court to stay its order in favor of the FBI until the case against the CIA had been concluded. Rogers pointed out that "a litigant in Mobley's position would reasonably have concluded that he could delay filing a Rule 59(e) motion until after the district court had finally ruled on the motion for summary judgment in the CIA case, closing that case, without jeopardizing his opportunity to appeal the grant of summary judgment in the FBI case. . .Thus, Mobley missed the deadline for filing a Rule 59(e) motion in the FBI case in reliance on a stay order that, in view of his stated reason for seeking a stay, provided specific assurances that he would not need to file post-judgment motions until after the district court lifted the stay."

Having clarified its jurisdiction to hear the case, the D.C. Circuit proceeded to rule against Mobley on the remaining handful of FOIA-related issues. More than a year after submitting his request for all records, Mobley's attorney contacted the FBI with instructions to search shared drives, particularly those for FBI headquarters and its New York, New Jersey, Baltimore, and Washington field offices. The FBI searched only its Central Records System and its Electronic Surveillance indices. But based on the FBI's affidavit, the D.C. Circuit found the search was adequate. Mobley argued that the agency was required to follow up on search leads provided by the requester. Rogers, however, noted that "Mobley's demand that the FBI search certain records systems is generally mere fiat. To the extent that it is not, as noted, the [FBI's] affidavit demonstrates the FBI conducted an adequate search. In any event, under Mobley's approach, which would allow a requester to dictate, through search instructions, the scope of an agency's search, the reasonableness test for search adequacy long adhered to in this circuit would be undermined. Although an agency may not ignore a request to search specific record systems when a request reaches the agency before it has completed its search, a search is generally adequate where the agency has sufficiently explained its search process and why the specified record systems are not reasonably likely to contain responsive records."

Mobley attacked the adequacy of the FBI's search because redacted emails from the State Department suggested the FBI had not pursued all relevant leads. Rogers responded that "the FBI has no responsibility to pursue leads that might be contained in documents released by other agencies where it does not become aware

of those documents until after it has completed its search." Addressing the relevance of the emails released by State on the same day the FBI disclosed its documents, Rogers observed that "Mobley provides no evidence that the FBI was aware of those leads in the State Department e-mails before completing its search. Because agencies are not required to perform additional searches once their search is concluded, the court cannot conclude that the FBI failed to conduct an adequate search."

Mobley argued that a document submitted by a third party in a Yemeni court proceeding that contained an FBI interview given to the Yemeni government without restrictions on its use constituted public acknowledgment of the document. Rogers rejected the claim, noting that "even assuming the truth of his claims, the district court did not err in ruling there had been no official acknowledgment of the document. Disclosure by one federal agency does not waive another agency's right to assert a FOIA exemption. By parity of reasoning it follows that a foreign government also cannot waive a federal agency's right to assert a FOIA exemption. It is more difficult still to understand how disclosure by private litigants in a foreign court proceeding could constitute official acknowledgment."

The FBI had denied Mobley's request for access to his records about his interrogation in Yemen under subsection (j)(2) of the Privacy Act. Mobley argued the records did not qualify as law enforcement records but were more akin to consular functions. Rogers noted that "even had Mobley offered a basis for the court to accept his characterization, and he does not, Mobley erroneously assumes that a federal agency is capable of acting in pursuit of only a single objective at a time. Agencies may well—and surely often do—seek to advance a variety of objectives through a single act. Here, for example, the FBI may have wanted to 'ascertain the facts and circumstances' of Mobley's detention in order to protect the interests of U.S. citizens abroad and, at the same time, may have wanted to 'ascertain the facts and circumstances' of Mobley's detention in order to determine whether Mobley or another person had violated federal criminal laws having extraterritorial effect." (*Sharif Mobley v. Central Intelligence Agency, et al.*, No. 13-5286, U.S. Court of Appeals for the District of Columbia Circuit, Nov. 13)

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 CHP 180 forms that are used by the sheriff's department to retrieve ownership information when vehicles are towed because they are parked illegally are exempt from disclosure under both the federal Drivers Privacy Protection Act and the comparable California law restricting disclosure of DMV records identifying individual owners. Cynthia Anderson-Barker had requested the CHP 180 forms from the Los Angeles County Sheriff's Department for use in a case challenging the policy the sheriff's department used for deciding which vehicles to tow. The Sheriff's Office refused to disclose the forms because they contained information retrieved from the DMV concerning the owner of the vehicle. Anderson-Barker filed suit and the trial court ruled in her favor, finding that the provision of the California Public Records Act protecting records whose disclosure was prohibited by state or federal law did not apply here. The County appealed and the appellate court reversed. The court pointed out that "to permit disclosure of personal information encompassed in the CHP 180 forms, without the express consent of the vehicle owner, would ignore the plain language of the DPPA. On the other hand, the State of California DMV is permitted to

disclose personal information to the Los Angeles County Sheriff's Department as it is a law enforcement agency that is using the information to record and then later notify vehicle owners about their impounded or seized vehicles. The DPPA, like the California Vehicle Code, also provides for disclosure to tow companies in order to notify vehicle owners. We conclude that the CHP 180 forms fall squarely within [the exemption for state or federal laws] as disclosure of any personal information obtained from DMV records, without express consent from the vehicle owner, is prohibited by federal law under the DPPA." (*County of Los Angeles v. Superior Court of Los Angeles County; Cynthia Anderson-Barker, Real Party in Interest*, No. B266037, California Court of Appeals, Second District, Division 5, Nov. 20)

Georgia

A court of appeals has ruled that the trial court erred when it found that the Board of Georgia Perimeter College could invoke the exemption for records of law enforcement agencies in its response to David Schick, editor of the student-run newspaper, The Collegian. After the college announced a $25 million budget deficit that led to the resignation of the college's president and a decision to lay-off 282 GPC employees, Schick made several Open Records Act requests for records concerning the decision. The Board responded by providing a cost estimate of $2,536, which included costs for reviewing requested emails for exemptions. Schick enlisted the help of the national Student Press Law Center and eventually agreed to pay $291 for the records. He received more than 16,000 pages, including 713 pages that were discovered during the course of the litigation. Schick filed suit against the college and the trial court, while finding the college had violated the Open Records Act, ruled that the college could claim the law enforcement agency-created records exemption. The trial court also denied Schick's request for attorney's fees. The court of appeals found the trial court had erred in allowing the college to use the law enforcement agency-created exemption. Although the exemption applies only to "records of law enforcement, prosecution, or regulatory agencies," the college argued the exemption should apply to "documents relating to an ongoing criminal investigation in which the Board is *working in cooperation with a 'law enforcement agency*'" The appeals court disagreed, noting that "there appears to be nothing ambiguous [in the exemption's language], and the Board does not suggest otherwise, about the phrase 'records of' as used in [the exemption]. But the Board's reading of the statute requires us to change the obvious meaning of 'records of' to a more expansive 'records compiled or created in connection with,' or 'records related or pertaining to,' instead of what the statute says." Noting that there was a separate exemption for "records *compiled for law enforcement or prosecution purposes*," the court observed that "it is clear that the legislature intended to provide for two different exemptions related generally to law enforcement or prosecution activities; one that broadly applies to any public agency but limits the exemption to investigative or prosecutorial documents 'to the extent' those documents meet other criteria and one that applies to only specified public agencies but includes a broader category of documents." The appeals court remanded the case back to the trial court with an order for the board to disclose all records it currently claimed were protected by the law enforcement agency-created exemption. Turning to whether Schick deserved attorney's fees, the court indicated that the trial court had not abused its discretion by finding that the board's late discovery of more responsive documents did not qualify for a fee award. However, because the appellate court had ruled against the board on the law enforcement agency-created exemption, it also remanded the issue of attorney's fees back to the trial court for further determination in light of the appellate court's decision. (*David Schick v. Board of Regents of the University System of Georgia*, No. A15A1128, Georgia Court of Appeals, Nov. 12)

Maryland

The Court of Special Appeals has clarified its earlier ruling in a case brought by Henry Immanuel, who locates unclaimed funds and helps individuals reclaim those funds for a fee, indicating that the Comptroller of the Treasury was required to disclose information to Immanuel only to the extent of restrictions set by the

Abandoned Property Act. Because the Comptroller was required to provide information only about claims worth more than $100, Immanuel had initially requested the top 5,000 claims from most to least valuable without any financial information. The Comptroller claimed such a list would violate the Abandoned Property Act, but when the case eventually came before the Court of Special Appeals, the court indicated the Comptroller was required to respond to Immanuel's request consistent with its obligations under the Abandoned Property Act. The Comptroller ultimately disclosed a list of 900,000 claims, covering several years but not including any value data. Sending the case back to the trial court for final determination, the Court of Special Appeals noted that "we agree with the Comptroller that a list of any specific number of claims ranked or identified by value is barred from disclosure by the [Maryland Public Information Act], as limited by the Abandoned Property Act, because releasing such information would reveal the relative value of such claims in comparison with other claims in the Comptroller's possession, which would constitute disclosure of individual financial information." The court observed, however, that "nothing in our decision precludes the Comptroller from releasing information on claims older than 365 days or within a specified time frame." (*Henry Immanuel v. Comptroller of the Treasury*, No. 1520 Sept. Term, 2014, Maryland Court of Special Appeals, Nov. 25)

Virginia

A trial court has ruled that a database maintained by the Department of Criminal Justice Services for storing training records for law enforcement officers throughout the state does not qualify for the personnel records exemption and that the Department of Criminal Justice Services has custody and control of the database. The database was requested by *Virginian-Pilot* reporter Gary Harki. Through negotiation between the newspaper and the department, the department proposed to release the database with restrictions on its use beyond identifying specific law enforcement officers. The department, however, then decided to deny Harki's request entirely, citing the personnel records exemption. In court, the department argued that since the database contained information about officers at a number of different agencies across the state, those agencies should be brought in as intervenors. The court rejected the department's claim that it was not the custodian of the records, pointing out that "individual agencies did not transfer entire files/records of their employees, but just that information required by Virginia law to be maintained by the Department. Therefore, this Court finds that the Department is in fact the custodian of the unique records sought in this FOIA request." The court added that "the unique records held by the Department and the authority vested with the Department to negotiate the release of redacted information from those records are subject to [FOIA] and the Department clearly failed to timely identify, in writing, an exemption for withholding said records." (*Gary Harki and the Virginian-Pilot Media Companies v. Department of Criminal Justice Services*. No. CL15-10637, Fourth Judicial Circuit of Virginia, Circuit Court for the City of Norfolk, Nov. 18)

Wyoming

The supreme court has ruled that JonMichael Guy, a state prisoner, does not have a right under the Wyoming Public Records Act to request that the warden at his prison be disciplined for failing to provide him with access to the Department of Correction's Policy and Procedure Code of Ethics. Guy requested permission to review the Code of Ethics and the prison warden denied his request because the book had not been preapproved for inmate review. Guy then made a request under the Public Records Act to the head of Department of Corrections. After reviewing the book, the Department agreed to allow Guy access to it. Dissatisfied that the warden had not been disciplined for his decision to deny Guy access to the book, Guy eventually filed suit under the Public Records Act demanding the warden be disciplined. His suit was dismissed for failure to state a claim. When it arrived at the supreme court that court agreed. The supreme court noted that "a review of the statute makes clear that WPRA does not authorize the district court to order

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the DOC to revise its policies or require its staff to be trained on the application of the WPRA, nor does it authorize the imposition of monetary sanctions through a private suit. This Court will not read remedies into a statute that were not put there by the legislature. Because Guy was ultimately, albeit belatedly, granted access to the record, the WPRA does not afford him any remedies." (*JonMichael Guy v. Robert Lampert, Wyoming Department of Corrections Director*, No. S-15-0106, Wyoming Supreme Court, Nov. 23)

The Federal Courts…

Apparently wrapping up the last of the suits brought by four different plaintiffs, all of whom were convicted of drug-related charges in the Western District of Pennsylvania, Judge James Boasberg has ruled that the Justice Department's Criminal Division conducted an **adequate search** for wiretap authorization memos requested by Brandon Thompson and that the agency properly invoked **Exemption 5 (attorney work product privilege)** in withholding all responsive records. While Judge Richard Leon roundly criticized DOJ in his ruling in *Gilliam v. Dept of Justice* for failing to recognize the similarities in the cases, Boasberg chided the agency further. Brandon Thompson requested wiretap authorization records pertaining to his conviction on drug charges. The agency searched its Office of Enforcement database and relevant email archives, found responsive records, but then denied them all under Exemption 5, **Exemption 6 (invasion of privacy)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and subsection (j)(2) of the **Privacy Act.** As in the other three cases, Thompson argued the agency should have searched more than the database and the archived emails. But Boasberg pointed out that "because Plaintiff offers no evidence indicating that another record system or search term might have yielded additional responsive materials, he has proffered no basis on which to challenge the reasonableness or thoroughness of this search." While he found that the OEO database qualified for exemption under (j)(2) of the Privacy Act, Boasberg indicated that the email archives were not an exempt system of records. Instead, he noted that "the agency's email archive is not a 'system of records' subject to the access provisions of the Privacy Act, so a statutory exemption is not required." He then pointed out that all the wiretap authorization memos "are classic attorney work product, the disclosure of which would risk putting DOJ lawyers' thought processes and strategy on public display." Recognizing that some of the records served quasi-administrative purposes, he observed that "because these quasi-administrative records were compiled in anticipation of a specific criminal prosecution and are not generic agency records maintained for some conceivable future litigation, this Court joins several other courts in this District that have held that the work-product privilege protects them." Boasberg rejected Thompson's argument that the agency had not reviewed the records for non-exempt materials. He indicated that "a **segregability** analysis is not required in this case, where the Court has deemed all responsive materials properly exempt from FOIA's disclosure requirements under the attorney-work-product protection prescribed by Exemption 5." Boasberg ended by sharply criticizing DOJ's litigation behavior in these related cases. He noted that "as the government is the Defendant in each [of these cases], and as each case was filed in this district, it seems rather surprising that the government never brought these strikingly similar cases to the Court's attention." Boasberg observed, however, that DOJ had cut and pasted 15 pages from its motion into its reply brief. Emphasizing that he expected more from the government, he indicated that "the Court trusts that Defendants—who are repeat players in these types of FOIA matters—will endeavor to present it with more useful submissions in the future." (*Brandon Thompson v. United States Department of Justice, Criminal Division*, Civil Action No. 14-1786 (JEB), U.S. District Court for the District of Columbia, Nov. 19)

A federal court in Virginia has ruled that while the FBI properly invoked **Exemption 5 (deliberative process privilege)** and **Exemption 7(E) (investigative methods and techniques)** to withhold many of the records responsive to a request by *Virginia-Pilot* reporter Scott Daugherty for records about an incident in

which two FBI agents were killed in Virginia Beach during a training exercise involving a special technique called fast roping, because the agency did not process the bulk of the responsive records until after the newspaper filed suit the paper has substantially prevailed and is entitled to **attorney's fees**. A year after Daugherty made his request, the FBI responded that it had located a 29-page report that it was withholding in full under Exemption 5. To avoid prolonged litigation, the agency agreed to do another search with a cut-off on the date the newspaper filed its complaint. This search yielded 890 pages, including a redacted version of the 29-page report. In all, the agency disclosed 10 pages in full, 83 pages in part, and withheld 796 pages. The newspaper argued that the FBI's failure to respond in a reasonable amount of time was a violation of FOIA. The newspaper challenged the exemptions as well. The court noted that "defendant failed to respond or provide written notice of an extension within the 20-day period mandated by FOIA. Defendant did not respond to Plaintiffs' FOIA request until over a year later and never communicated the need for additional information or unusual circumstances involving the request." Most damning perhaps was the agency's admission that it knew that there were more records than the 29-page report when it first responded. The court observed that "defendant admits to knowledge of the existence of these documents and their failure to disclose or review for disclosure these additional documents until after this lawsuit was initiated. However, Defendant provides an inadequate explanation for the untimely disclosure of a substantial amount of additional responsive documents six months after this suit commenced despite being aware of their existence at the time of the initial search two years prior." The court then found the agency had properly invoked both Exemption 5 and Exemption 7(E) and had provided sufficient explanations of why the withheld records fell within those exemptions. Curiously, the FBI also claimed records were protected under **Exemption 7(F) (harm to an individual)**, but those claims as explained by the court seemed to refer solely to 7(E) rather than 7(F). In the discussion of the applicability of Exemption 7(F), the court noted the newspaper claimed information about fast roping was already in the public domain and should not be considered a technique unknown to the public. The court's rejoinder was that "defendant asserts that contrary to commonly known procedures such as ballistics tests, fingerprinting, and well-known scientific tests, specific details about fast roping are not publicly available and are exempt from disclosure to protect the interests of the United States." That explanation refers to protecting the techniques, not the individuals using those techniques. The court indicated the newspaper was entitled to attorney's fees. The court noted that "the Court has found that Defendant failed to comply with the statutory response time and reasonable search requirements of FOIA. Defendant did not properly respond until after this suit was commenced—nearly two years after Plaintiffs' initial FOIA request. This suit caused Defendant to conduct an adequate search and disclose all responsive documents, which Defendant failed to do in response to Plaintiffs' initial FOIA request. Therefore, the Court finds that Plaintiffs are the prevailing party as a matter of law." (*Virginia-Pilot Media Companies, LLC and Scott Daugherty v. Department of Justice*, Civil Action No. 14-577, U.S. District Court for the Eastern District of Virginia, Norfolk Division, Nov. 25)

Judge Christopher Cooper has ruled that civil rights attorney Susan Tipograph does not have **standing** to pursue her **pattern or practice** claim against the FBI because she has not shown that she is likely to make FOIA requests to the agency in the near future. Tipograph had made a request to the FBI for records about her client Marie Mason, an environmental activist currently serving a lengthy federal prison term for arson and other acts of property destruction. The agency withheld everything but public source information under **Exemption 7(A) (ongoing investigation or proceeding)**. Tipograph filed suit challenging the agency's denial, but also what she characterized as the agency's improper routine policy of invoking 7(A) at the file level rather than at the record level. Judge Robert Wilkins, who previously was assigned Tipograph's case, ruled against her on both counts. Tipograph moved for reconsideration and Cooper agreed to review the pattern or practice claim more closely. The government initially claimed Tipograph's challenge was **moot** because she had received all non-exempt records. But Cooper noted that "because Tipograph alleges that a

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policy or practice of the FBI will impact her lawful access to information in the future, her claim for prospective declaratory and injunctive relief is not moot simply because the FBI has now provided her with the records to which she is entitled." However, Cooper found the government's standing argument more persuasive. He pointed out that "at present, Tipograph's claim of future injury remains just that—speculative." He added that "Article III [of the Constitution outlining the jurisdiction of federal courts] requires Tipograph to provide more than generalized plans to file unspecified requests for information at some uncertain point in the future." He indicated that "when it is similarly clear that a plaintiff will continue filing FOIA requests that are likely to be subjected to the agency's policy or practice, a court should find that the plaintiff has satisfied the injury requirement. But when a plaintiff's very business does not depend on filing FOIA requests, the inquiry can be more difficult. In these situations, it is incumbent upon plaintiffs to present concrete plans showing their intent to file those requests." Cooper observed that "it is certainly plausible that Tipograph will file FOIA requests in the future that could implicate the alleged policy or practice that she challenges here." But he noted that Tipograph had not submitted another FOIA request to the FBI since this one in 2012 and that her only previous FOIA requests to the FBI were in 1999 and 1988. He concluded that "Tipograph has no consistent history of filing these types of requests and the Court has before it no indication when she might file her next one. On this record, 'the Court cannot say that [her] alleged future injury is either real or imminent.'" (*Susan Tipograph v. Department of Justice*, Civil Action No. 13-00239 (CRC), U.S. District Court for the District of Columbia, Nov. 24)

A federal court in California has ruled that the FBI failed to show that Human Source Advisory Notices and FAQs for Threat Assessment prepared and disseminated as part of a program to keep tabs on Muslims and other ethnic groups are protected by **Exemption 5 (privileges)**. The court had ruled previously that the records did not qualify for protection under **Exemption 7 (law enforcement records)** because the agency had not shown a nexus between the records and a legitimate law enforcement activity. Having lost on Exemption 7, the agency attempted to withhold the disputed records under Exemption 5. The court noted that neither the Human Source Advisory Notices nor the FAQs were protected by the attorney-client privilege. The court pointed out that "the notice section of the Advisory Notices contains a short description of a situation agents may encounter in the field. The descriptions are general and lack any specific information." The court added that "the FBI has not submitted evidence that substantiates its claim that the communications were confidential in fact. Indeed, the wide distribution of the Advisory Notices to all administrative and investigative personnel implies the contrary." The agency argued that certain FAQs were deliberative because they dealt with how to express a policy. But the court observed that "nothing in the FBI's evidence suggests that advice about whether a comma should be inserted, word choice, or phrasing would discourage members of the Bureau from providing candid advice about the pros and cons of adopting a policy or practice. Thus, the FBI has all but admitted that the document reflects a policy it has adopted, and therefore constitutes the FBI's 'working law.' 'Working law' is not exempt from disclosure." (*American Civil Liberties Union of Northern California, et al. v. Federal Bureau of Investigation*, Civil Action No. 10-03759-RS, U.S. District Court for the Northern District of California, Nov. 17)

A federal court in California has ruled that Public.Resource.org, a non-profit organization whose mission includes facilitating greater public access to government records and information, is entitled to $238,000 in **attorney's fees** for its litigation against the IRS to force the agency to disclose Form 990s for tax-exempt organizations in Modernized E-File format rather than the PDF format currently used by the agency. In ruling in favor of PRO on the merits, Judge William Orrick found the agency had failed to show that, although it received Form 990s in MeF format, disclosing them in the same format was too burdensome. After the PRO decision, the IRS announced it would introduce new technology in 2016 allowing for disclosure of Form 990s in MeF format. The IRS downplayed the public interest in PRO's suit by arguing that it was of a

limited nature. But Orrick noted that "this argument unduly minimizes the demonstrated benefits of MeF over the electronic formats previously employed by the IRS, as well as the agency's current plan to begin disclosing Form 990s in machine-readable format as a rule." The IRS argued PRO would reap a commercial benefit from the litigation. Orrick pointed out that "the government's apparent position—i.e., that a nonprofit organization's interest in enhancing its ability to analyze government information constitutes a commercial purpose that weighs against attorney's fees—would have the ironic effect of discouraging awards in cases where the plaintiff is motivated by FOIA's central purpose" of ensuring government accountability. Defending the reasonableness of its legal position, the IRS noted that FOIA's choice of format provision had not been litigated very often. Orrick observed that an agency may not "arbitrarily refuse to comply with a specific format request not to its liking. Here, despite the fact that Form 990s are electronically-filed and maintained by the IRS in MeF format, the IRS continued to rely on the same method of disclosing Form 990s that has been in place for nearly 20 years." Orrick then rejected the agency's contention that PRO's fee calculation should be based on the *Laffey* matrix commonly used in FOIA fee litigation in the D.C. Circuit. Indicating that the Ninth Circuit had questioned the applicability of the *Laffey* matrix to litigation in those states covered by the Ninth Circuit, Orrick pointed out that "absent some showing that the rates stated in the matrix are in line with those prevailing in this community—a showing the IRS has not event attempted to make—I agree with PRO that the matrix is not persuasive evidence of the reasonableness of its requested rates." Orrick found that hours spent on preparing for litigation qualified for compensation, but concluded that PRO had claimed too many hours spent for preparing its attorney's fees motion and that there was no evidence that the award should be enhanced. (*Public.Resource.org v. United States Internal Revenue Service*, Civil Action No. 13-02789-WHO, U.S. District Court for the Northern District of California, Nov. 20)

Judge Amit Mehta has ruled that the FBI **conducted an adequate search** when it searched two databases for records concerning socialist writer Martin Droll, who committed suicide in May 2014. Austin Nolen sent a detailed request to the agency for any records pertaining to Droll. The agency did a keyword search of its Central Records System using its Universal Index application and also searched the indices of its Electronic Surveillance records system. Those searches turned up no records on Droll. After Nolen filed suit, the agency searched the two databases again, this time including Droll's alias, "Marty Rifles," which Nolen had identified for the first time in his complaint. Those searches also yielded no records. Nolen argued the agency's search was not adequate because it did not search for records on Droll's known associates and affiliated organizations, did not search the Electronic Case file, a separate index that can be used to conduct text-based searches of FBI records, and did not search certain field offices. Mehta found the agency had no obligation to search files of known associates or affiliated organizations. He noted that "reference to those organizations is found nowhere in the 'four corners of [Plaintiff's] request.' Plaintiff failed to ask for—or even include mention of—information regarding these organizations in his FOIA request. Even though the FBI searched for Droll's alias, 'Marty Rifles,' which was identified for the first time in the Complaint, this additional search that the FBI *voluntarily* undertook does not compel the FBI, without more, to run searches as to every new piece of information contained in a complaint." Nolen identified Shane Madonna as an associate of Droll's and argued the agency should have searched for records on Madonna as well. But Mehta pointed out that "a cross-reference search of CRS for Droll (or variations of his name) would have revealed if Droll was referenced in any other FBI files, including a file on Madonna, if such a file existed. Because the FBI found no cross-references to Droll in other files, it was reasonable for the FBI to decline to search its files on Madonna in its attempts to find information on Droll." Mehta observed that once the FBI had conducted a reasonable search, it was up to the plaintiff to show why other files should have been searched as well. He indicated that "mere speculation that additional documents *might* be found in another database is not enough to render an agency's search inadequate." He added that "the fact that the subject's name is uncommon or that the search in question—according to Plaintiff—would not be burdensome does not answer the controlling

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question, which is whether the ECF is reasonably likely to contain responsive documents." Dismissing Nolen's claim that the FBI should have searched field offices in Ohio and Pennsylvania, Mehta noted that "Plaintiff has offered no 'red flags' other than the fact of Droll's birth and death—which are not flags of any color—to support his assertion that records likely could be found in the FBI's field offices." (*Austin Nolen v. Department of Justice*, Civil Action No. 14-01590 (APM), U.S. District Court for the District of Columbia, Nov. 19)

A federal court in Pennsylvania has ruled that online journalist Dustin Slaughter lacks **standing** to challenge the denial by the NSA and CIA for records about the agencies' possible surveillance of activists involved in the Occupy Philadelphia movement because the requests were made by Slaughter's attorney, Paul Hetznecker and did not mention Slaughter. The NSA issued a *Glomar* response neither confirming nor denying the existence of records because any such records would be classified. The CIA declined to process the request because it was not involved in domestic surveillance. The agency suggested Hetznecker submit the request to the FBI instead. Hertznecker appealed both decisions. The NSA did not respond and the CIA affirmed its original refusal to process his request. Slaughter then filed suit in his own name and the government argued he lacked standing. The court agreed, noting that "Slaughter must show that he made a FOIA request and that the agency denied that request. Slaughter, however, never submitted the underlying FOIA requests. Rather, Hetznecker submitted these requests, in his own name, without mentioning Slaughter or explaining that he was submitting these requests on Slaughter's behalf. Because Hetznecker's requests cannot be attributed to Slaughter, Slaughter did not suffer a legally cognizable injury when Defendants denied Hetznecker's FOIA request. Therefore, Slaughter lacks standing to bring this claim and his claims are dismissed." Slaughter argued that he should be allowed to amend his complaint to substitute Hetznecker as the plaintiff. But the court pointed out that "courts have found in FOIA cases that a plaintiff without standing cannot amend the complaint to substitute his attorney when the attorney filed the FOIA claim in his own name." (*Dustin Slaughter v. National Security Agency and Central Intelligence Agency*, Civil Action No. 15-5047, U.S. District Court for the Eastern District of Pennsylvania, Nov. 16)

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The Sixth Circuit has agreed to rehear its recent panel decision in *Detroit Free Press v. Dept of Justice* en banc. The decision upheld a 1996 Sixth Circuit ruling in which a split panel found that mug shots of federal defendants who have appeared in open court are not protected under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Since that 1996 decision, all other courts that have considered whether the U.S. Marshals Service is required to disclose mug shots have ruled in favor of allowing the agency to withhold them on the basis of Exemption 7(C). Both the Tenth and Eleventh Circuits have ruled in favor of the government and a district court in the Fifth Circuit has also ruled in favor of the government. The Sixth Circuit ruling has created an anomaly within those states in the Sixth Circuit, resulting in a very reluctantly-observed policy on the part of the agency to disclose mug shots when requested by someone in the Sixth Circuit's coverage, but withholding them from anyone else. The willingness of the Sixth Circuit to rehear the case almost certainly means the full court intends to overturn the current Sixth Circuit interpretation. The Sixth Circuit interpretation has irritated the government enough that a mug shot case would likely go to the Supreme Court if the Sixth Circuit did not move to reconsider it. (*Detroit Free Press, Inc. v. United States Department of Justice*, No. 14-1670, U.S. Court of Appeals for the Sixth Circuit, Nov. 20)

The Sixth Circuit has ruled that the IRS conducted an **adequate search** for records concerning the estate of William Rueben Meadors in response to a request by Jacqueline Kohake, who alleged that she was an heir to Meadors' estate. The first IRS search located two files on the Meadors estate, but the staffer who

conducted the search could not locate the necessary accession number to locate the records. Although Kohake indicated the agency had responded to other FOIA requests more than a decade previously the agency was unable to find any request except for that filed by Kohake. However, a second search located the accession numbers allowing the agency to retrieve the two files from the National Archives. As a result, the IRS disclosed 770 pages to Kohake. The trial court ruled that the agency's search had been adequate and Kohake appealed, arguing the agency should have located a 1998 request concerning the estate as well as a 1981 letter from GAO, which Kohake contended was available from the Jefferson County Courthouse in Texas. The Sixth Circuit found neither of Kohake's claims persuasive. The court noted that the 1998 FOIA request "would have been purged from the IRS's files years before Kokake submitted her FOIA request in July 2012, as the district court correctly found. Therefore, there was no FOIA request to give Kohake." As to the GAO letter, the court pointed out that "the FOIA does not obligate the IRS to search for documents not in its possession. Here, the IRS provided evidence that it had conducted a good faith search and that it did not possess the requested documents, thus, Kohake's argument is without merit." (*Jacqueline Kohake v. Department of Treasury*, No. 15-3068, U.S. Court of Appeals for the Sixth Circuit, Nov. 17)

A federal court in West Virginia has ruled that Ryan Ramey **failed to state a claim** that would support his suit against the Social Security Administration for records concerning the role a randomly-generated number that appears on social security cards plays in linking his social security account to other agencies like the Federal Reserve. The agency explained that the vendor who supplies the SSA with card stock for social security cards uses the number printed on the back of the card in red ink for security and control purposes to prevent fraud and counterfeiting. The agency indicated that each social security card contained a unique control number and is included as part of an individual's electronic record of their social security card. Rejecting Ramey's request for information about the number, the court noted that "much of Ramey's claims relate to information that simply does not exist. The Court cannot order the Commissioner to produce policies, procedures, trust accounts, and insurance policies that do not exist." Because Ramey was requesting amendment of his records, the court pointed out that "to the extent Ramey is seeking the electronic record linking his social security number to the control number for purposes of amendment or deletion, he has failed to properly request the same under the Privacy Act." (*Ryan R. Ramey v. Commissioner of Social Security*, Civil Action No. 14-179, U.S. District Court for the Northern District of West Virginia, Nov. 17)

A federal court in Tennessee has ruled that individuals at the EEOC named as defendants in pro se litigant Rodney Harper's FOIA suit should be dismissed because FOIA provides a cause of action only against agencies, not individuals. Harper submitted a FOIA request to the EEOC for records about his complaint. When the agency failed to respond, Harper filed suit, naming several employees at the EEOC as defendants. The court agreed with the magistrate judge that individual agency employees should be dismissed. The court noted that "FOIA requires an 'agency' to 'make available to the public' specific kinds of information. FOIA defines an 'agency' as 'each authority of the Government of the United States, whether or not it is within or subject to review by another agency,' subject to limited exceptions. An individual employee of an 'agency' is not the 'agency' itself." Harper wanted to add the chair of the EEOC to his complaint and also add a count under the First Amendment for failure to provide access to the requested records. The court dismissed both claims, pointing out that "the Court holds that Plaintiff's proposed amendment to add the chair of the EEOC as a Defendant to this action would be futile. For the reasons already explained, Plaintiff cannot state a plausible claim for relief against an individual employee of a federal agency." The court added that "to the extent that

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Plaintiff's amended pleading will allege a violation of his First Amendment rights based on the EEOC's handling of his FOIA request, such a claim would not withstand a motion to dismiss." (*Rodney Harper v. U.S. Equal Employment Opportunity Commission*, Civil Action No. 15-2629-STA-ege, U.S. District Court for the Western District of Tennessee, Nov. 17)