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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: The FAA recently announced plans to require owners to register their drones, creating a database that could be accessible by registration number, which may, in turn, create its own set of problems with privacy. According to Josh Gerstein in POLITICO, the Newspaper Association of America is already reacting to what appears to be the FAA's plan to prohibit disclosure under FOIA. In the abstract, the database appears analogous to DMV databases where information is available concerning individual incidents but is not publicly available more broadly. . .Sen. Ron Wyden (D-OR) has reacted to an FBI proposal to require individuals using its new eFOIA system to provide a government-issued ID. In a letter to Sen. Charles Grassley (R-IA), chair of the Senate Judiciary Committee, Wyden noted that 'the FBI's new eFOIA system imposes a requirement that can neither be found in statutory law nor case law. The FOIA statute does not require FOIA requestors to submit a government-issued ID, and the D.C. appellate court ruled that even when a privacy waiver was required, requestors need only attest to their identity under penalty of perjury."

Court Refuses to Expedite Requests In Face of Agency Backlog

Dealing with the controversial backlog at the Department of State stemming from the review and processing of emails from former Secretary of State Hillary Clinton and her staff for disclosure under FOIA, Judge Beryl Howell has ruled that the Daily Caller may not enforce the agency's grant of expedited processing for five of its requests because the agency has shown it is acting with due diligence and in good faith in processing the requests along with thousands of other similar requests. In so ruling, Howell, who was instrumental in shepherding the 1996 EFOIA amendments, which included the expedited processing provision, through Congress when she served as counsel to Sen. Patrick Leahy (D-VT), has joined Judge Ketanji Brown Jackson in finding that the expedited processing provisions do not provide much relief beyond an ability to sue the agency more quickly.

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When passed in 1996, expedited processing was intended to provide an alternative for requesters who had a compelling need to obtain requested information more quickly than those requesters subject to agencies' first-in, first-out policies that had evolved as a result of the *Open America* decision in 1976. Theoretically, if a requester was able to convince an agency that he or she qualified for expedited processing, the agency, in turn, would truly provide a more rapid response. At the time, a number of agencies argued that the analysis required to determine if a requester qualified for expedited processing would just add another layer of delay and would not result in a workable streamlined process. Those warnings have largely come true, in part because courts have been reluctant to order agencies to move more quickly. There have been only a few cases dealing with what expedited processing requires and even though an early decision observed that expedited processing meant that an agency must respond to an expedited request more quickly than the normal 20-day time frame, more recent decisions have concluded that the only remedy available for enforcing the plaintiff's grant of expedited processing is to sue the agency.

The online publication, the Daily Caller, whose five FOIA requests to the State Department for various records pertaining to the Clinton email controversy had been granted expedited processing by the agency, decided to sue the State Department for a preliminary injunction requiring the agency to respond to their requests within 20 days. While the State Department had failed to respond to any of the requests, it told Howell that one of its reviewers could be assigned to the requests by March 2016. The agency also indicated that some of the records responsive to the Daily Caller's requests had already been posted on the agency's website as part of the agency's ongoing attempts to respond to multiple requests and litigation demands. Howell pointed out that the D.C. Circuit had stated that a preliminary injunction generally "should not work to give a party essentially the full relief he seeks on the merits." With this in mind, she noted that "in reviewing the present motion, the Court is cognizant that an order granting the requested relief would effectively serve as a summary ruling on the parties' underlying dispute, without the aid of additional factual support and briefing generally available in assessing traditional dispositive motions."

Howell explained that the State Department's regulations implementing expedited processing provided that "FOIA requests granted expedited treatment are taken out of the standard first-in/first-out queue and processed before all non-expedited requests, but after any requests previously granted expedited treatment. FOIA requests subject to litigation or a court-ordered production schedule may be further prioritized even among requests granted expedited processing." Set against this background, Howell pointed out that the Daily Caller was unlikely to succeed on the merits of its claim.

While the State Department acknowledged the requests qualified for expedited processing, it contested the Daily Caller's claim that the law required it to process the requests within 20 days. Howell observed that "instead, given the agency's ongoing effort to process the plaintiff's requests as quickly as possible within the resource constraints imposed by its current workload, the agency argues that its current efforts are already in full compliance with its duty to produce the requested records 'as soon as practicable.'" Agreeing with the agency's position, Howell pointed out that "the agency is plainly correct that FOIA does not require *production* of all responsive, non-exempt documents within twenty days of receiving a request." Instead, an agency was required to make a determination concerning the request and "at that point, FOIA requires only that the agency 'make the records "promptly available," which depending on the circumstances, typically would mean within days or a few weeks of a "determination."' The plaintiff's request for an order requiring the agency to complete production of all records responsive to its various FOIA requests within twenty days therefore finds no support in either the statute or binding precedent, significantly undermining the plaintiff's contention that it is likely to prevail in its effort in the Complaint to obtain such relief."

Howell pointed out that "though FOIA generally requires agencies to make a *determination* as to its anticipated response to an incoming request within twenty days, the plaintiff misconstrues the consequences of

an agency's failure to meet the deadline." Relying on the D.C. Circuit's decision in *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), in which the appeals court found that an agency's failure to make a determination within 20 days entitled the requester to proceed immediately to court without any further administrative appeal, Howell explained that "properly understood, the fact that the State Department did not issue a final determination within the twenty-day statutory deadline is sufficient to merit immediate judicial review of the agency's diligence in responding to the plaintiff's requests. Standing alone, however this fact does not conclusively demonstrate that the plaintiff is likely to prevail in its underlying effort to accelerate the processing of FOIA requests and the ultimate production of any responsive, non-exempt records."

Having established the parameters of the State Department's obligation to expedite the Daily Caller's requests, Howell next addressed how an increase in the agency's backlog might affect its ability to respond in a timely fashion. The Daily Caller argued that the agency's current backlog was not unusual when compared to data on backlogs from 2005-2014. But Howell noted that "this data excludes 2015, the *relevant* fiscal year," in which the agency received nearly 23,000 new requests, a 20 percent increase from the previous year. Howell observed that the State Department was also involved in nearly three dozen FOIA suits in the D.C. Circuit district courts alone, further evidence that "this ongoing litigation has further strained the State Department's FOIA-related resources." Coupled with this sudden increase was an effort by the agency to hire or reallocate staff to deal with the backlog, including the agency's statement to Howell that a reviewer could be assigned to the Daily Caller's requests within the next few months. "For these reasons," she indicated, "at least at this stage of the litigation, the plaintiff has failed to demonstrate a substantial likelihood that it will prevail on the merits of its claim against the agency."

Howell next considered the Daily Caller's interest in having its requests responded to in a timely manner. She noted that "the plaintiff's requested injunction would compel production of the sought-after materials, at most, only marginally sooner than the agency has indicated it intends to complete its processing of the plaintiff's request without compulsion. Moreover, the plaintiff does not dispute that some records requested by the plaintiff have already been released publicly, and are available on the State Department's website, as a result of other, related FOIA requests."

Howell pointed out that completing responses to the Daily Caller's requests would work hardship on both the agency and other requesters. She observed that "in working to process all outstanding requests as quickly as possible, the agency has a responsibility to balance the public's interest in disclosure with equally important public and private interests in safeguarding potentially sensitive information. . .Requiring the agency to process and produce these materials under an abbreviated deadline raises a significant risk of inadvertent disclosure of records properly subject to exemption under FOIA." Further, "diverting resources to accelerate processing of the plaintiff's request necessarily will redound to the detriment of other requesters, many of whom submitted their expedited requests earlier than the plaintiff." Weighing these factors, Howell observed that "balanced against these substantial interests, the plaintiff's bald reliance on its own interest in obtaining the sought-after records and the more generalized public interest in the disclosure of those records does little to distinguish the plaintiff's requests from every other time-sensitive FOIA request." (*Daily Caller v. U.S. Department of State*, Civil Action No. 15-1777 (BAH), U.S. District Court for the District of Columbia, Dec. 8)

ACCESS REPORTS

Disclosure of Agency Database Found Too Burdensome

The public interest organization TRAC, housed at Syracuse University, has been dealt a severe blow in its attempts to access large quantities of agency data that it, in turn, uses to analyze government operations, by a ruling by Judge Amit Mehta finding that disclosure of several databases at the Department of Homeland Security would be too burdensome for the agency. The case explores agencies' obligations under FOIA to provide such massive amounts of data when to do so would cause serious disruptions in the agency's normal FOIA processes, either by requiring the agency to manipulate its databases in ways that it does not usually do or by presenting practically insurmountable problems in redacting data that is legitimately exempt.

The case involved seven requests submitted by TRAC. Two requests asked for documentation related to several databases used by Immigration and Customs Enforcement—the Enforcement Integrated Database, which includes information related to the investigation, arrest, booking, detention, and removal of individuals, and the Integrated Decision Support Database, a subset of the EID database that provides a continuously updated snapshot of certain EID data. In response to those two requests, ICE produced 97 pages and withheld the remaining responsive documents. The other five requests were for snapshots of data from the EID database. Two requests were sent to ICE. One request asked for information about actual snapshots of data extracted from the EID database, including how those snapshots were prepared and who was responsible for preparing the snapshots. The second request asked for a snapshot of the ENFORCE, which allows the agency to create, modify and access data stored in the EID database. TRAC next sent a request to Customs and Border Protection for a snapshot of EID data prepared for that agency. TRAC's final requests to ICE asked for a snapshot of the EID database prepared for the EARM Data Mart. The other request went to both ICE and CBP and asked for a snapshot of the EID data prepared for EID Data Mart. Both the EARM Datamart and the EID Datamart are subsets of data from the EID database pertaining to individuals involved in removal proceedings. In response to TRAC's request about how snapshots from the EID database were prepared, the agency disclosed nine pages redacted under Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records) and Exemption 7(E) (investigative methods and techniques). The agency did not respond to the requests for actual snapshots of data.

By the time the case got to court, the agency asserted information related to the databases was protected by Exemption 3 (other statutes), Exemption 7(A) (interference with ongoing investigation or proceeding) and Exemption 7(E). The agency also told Mehta that "the snapshots Plaintiff requested were not retained for the date ranges of the subject FOIA requests,. . .the requested information could not be produced with the technology currently in the Agency's possession and. . . even if the information could be produced, Defendants were not capable of redacting the information."

The agency primarily relied on Exemption 7(E) for withholding the records about the structure of the database. TRAC argued the databases were not created for law enforcement purposes, a proposition Mehta quickly rejected. He noted that "plaintiffs concede that Defendants use the EID and IIDS databases for law enforcement purposes—to assist ICE and CBP with deporting people unlawfully in the United States, to arrest those who violate federal immigration laws, and to track investigations and court proceedings of those apprehended. Thus, records concerning how these databases are constructed and how they operate—like the data itself—clearly have a rational 'nexus' to Defendants' law enforcement duties." He added that "these are not the kind of records compiled for generalized snooping of individuals' lives, but were prepared to effectuate the agencies' law enforcement responsibilities." Mehta then explained that the D.C. Circuit's decision in *Blackwell v. FBI*, 646 F.3d 37 (D.C. Cir. 2011), finding that methods of data collection could be protected

under Exemption 7(E), meant that the DHS databases qualified for the exemption as well. He observed that "*Blackwell* [and similar district court rulings] teach that internal database codes, fields, and other types of identifiers used by law enforcement agencies to conduct, organize, and manage investigations and prosecutions qualify, at least, as law enforcement guidelines, if not also law enforcement methods and techniques."

Mehta found TRAC offered its strongest argument as to why Exemption 7(E) did not apply when it came to the agency's claim that disclosure of database information could risk circumvention of law by allowing hackers to get into the databases. TRAC argued that "an unlawful cyber-attack cannot serve as a basis for withholding EID and IIDS metadata and database schema because such information, if disclosed, does not risk circumvention of the laws enforced by Defendants." But Mehta found that interpretation too narrow, noting that 'Congress did not qualify or modify 'the law' in any way to circumscribe the types of laws that might be violated in the event of disclosure for Exemption 7(E) to apply. Thus, a plain reading of the statute does not support Plaintiff's interpretation."

However, Mehta was more convinced by TRAC's argument that a cyber-attack was not a credible threat because such an attack would require a publicly accessible interface with the EID or IIDS systems and such an outside interface did not exist. The agency pointed to an attack on Home Depot's database, but TRAC responded that attack was accomplished by gaining access through a point-of-sale machine, a scenario that did not exist here. Mehta indicated that the agency's burden for showing a risk of circumvention was quite low and observed that "judges are not cyber specialists and it would be the height of judicial irresponsibility for a court to blithely disregard such a claimed risk." Nevertheless, Mehta found the agency had not yet met the low bar for showing a risk of circumvention. He pointed out that "the court is left unconvinced, at this juncture, that the sole risk of circumvention of the law claimed by Defendants—SQL injection attack—would be increased if the requested metadata and database schema were disclosed." He ordered the agency to supplement the record on the issue.

Alternatively, the agency claimed the database information was protected by the Federal Information Security Management Act. Unfortunately for the agency, Mehta observed that statute was repealed entirely on December 18, 2014 while the litigation was pending and was replaced by the Federal Information Security Modernization Act of 2014, which, Mehta noted, did not qualify as an Exemption 3 statute because it did not cite to FOIA as required by the OPEN FOIA Act and because it did not alter agencies' FOIA obligations.

Turning to TRAC's requests for snapshots, Mehta agreed with the agency that it did not have the technological ability to comply with the requests. Mehta observed that "Defendants have demonstrated that producing and redacting the requested snapshots would be unduly burdensome. The agency argued that the kind of snapshots requested by TRAC did not exist and that to create them would require programming that might run into the millions of dollars. Further, "even if Defendants could replicate the snapshot for production, they would face tremendous challenges in redacting sensitive personal and law enforcement material, which even Plaintiffs concede are subject to valid FOIA exemptions. The tables available in the EID consist of more than 6.7 *billion* rows of data, with the total amount of information contained within the EID exceeding five terabytes."

TRAC submitted an affidavit from its own software engineer who indicated that commercial software provided significant ability to extract data and that the agency's cost estimate appeared overblown. But Mehta noted that "although [TRAC's declaration] raises some questions about whether the snapshots are indeed readily reproducible and redactable, the court ultimately finds those questions insufficient to create a genuine dispute of material fact that would preclude summary judgment in Defendants' favor. FOIA requires courts to

ACCESS REPORTS

'accord *substantial weight* to an affidavit of an agency concerning the agency's determination as to technical feasibility. . .Plaintiff's declarant, though an expert in the field of database systems and management, has not offered any evidence that specifically rebuts [the agency's] assertions about the agencies' present technological capabilities *as to the EID database and associated datamarts* or regarding the burden that reproduction and redaction of the snapshots would impose on them. . .But once, as here, an agency has proffered a declaration as to the technical feasibility and reproducibility of a records request—which, by statute, must be accorded substantial weight—a plaintiff must offer more than generalities about technical capabilities of generic systems to overcome or raise questions about that declaration."

TRAC's last argument was that disclosing the snapshots could not be that complex because ICE had provided similar snapshots to TRAC in response to previous requests. The agency argued that TRAC's current requests "are meaningfully different in scope and scale. Whereas Plaintiffs' previous, fulfilled requests sought specific information contained in the snapshots, the present requests seek the snapshots in their entirety." Mehta agreed, noting that "a request for a snapshot of the entire database is 'vastly different' from Plaintiffs' previous requests and, as a consequence, the manner in which ICE responded to the prior requests is 'wholly inadequate for responding to a request for all the data replicated at unspecified points in time into other datamarts.'. . .Plaintiffs have not offered any evidence specific to the databases at issue here that rebuts those contentions." (*Susan B. Long, et al. v. Immigration and Customs Enforcement, et al.*, Civil Action No. 14-00109 (APM), U.S. District Court for the District of Columbia, Dec. 14)

Views from the States...

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

Connecticut

The supreme court has ruled that reports prepared by the Health Center Appeals Committee in response to a grievance filed by Michael Aronow, an orthopedic surgeon at the health center, against Jay Lieberman, chair of the orthopedic surgery department at the health center, is not protected by the exemption for performance and evaluation. After the committee's resolution of Aronow's grievance against Lieberman, Aronow requested a copy of a four-page report prepared by the committee and a one-page report prepared by the president emeritus of the University of Connecticut reviewing the committee's report. The health center denied Aronow access to the report, claiming it was protected by the performance and evaluation exemption. Aronow complained to the FOI Commission, which found that such a grievance report did not constitute the formal performance evaluation review contemplated by the exemption. The trial court sided with Aronow and the FOI Commission. Lieberman then appealed to the supreme court. Lieberman argued that the exemption covered any review that included evaluative materials. The supreme court disagreed, noting that "conceivably almost all records relating to a faculty or professional staff member's employment could include some form of evaluative content. Thus, to adopt Lieberman's position would make the exception so broad that it would threaten to swallow the general rule of disclosure under the [FOIA], as it applies to university faculty and professional staff members. Therefore, we reject Lieberman's broad construction of [the exemption] and, instead, narrowly construe the exemption." (*Jay R. Lieberman v. Michael Aronow, et al.*, No. SC 19452, Connecticut Supreme Court, Dec. 8)

Kentucky

A court of appeals has ruled that the Cabinet for Health and Family Services violated the Open Records Act when it refused to cooperate with the Attorney General's Office in resolving a complaint filed by the Todd County Standard after the Cabinet told the Standard in had no records pertaining to the death of A.D., a minor who the Standard claimed had died as a result of abuse or neglect, because the Cabinet claimed A.D.'s death was not a result of abuse or neglect and, thus, the Cabinet had not investigated the child's death. In response to the AG's queries, the Cabinet again indicated that it had no records related to A.D.'s death. The AG ruled that the Cabinet had violated the Open Records Act by failing to provide a written response to the Standard's request. The Cabinet did not appeal the AG's order and the Standard filed suit urging the trial court to enforce the AG's order, which has the force of law if not appealed. The trial court agreed, enforced the order, and granted the Standard attorney's fees as well. On appeal, the Cabinet argued that the AG's order had not found that it had records. But the appellate court noted that "however, the Attorney General was prevented by the Cabinet from reaching this issue. The Cabinet repeatedly claimed to the Attorney General and to the Standard that it possessed no records concerning A.D.'s fatality. It was only after the enforcement action was filed in the [trial] court that the Cabinet admitted to even possessing records as to A.D. Additionally, the Cabinet blatantly refused to respond to the Attorney General's specific questions as to the Cabinet's involvement with A.D. or her family. It is highly probable that if the Cabinet had responded truthfully to these questions the existence of records relating to A.D. would have been revealed. By refusing to respond to the Attorney General's questions, the Cabinet certainly frustrated the Attorney General's statutory review and also the timely release of records under the ORA." The court indicated that "under the unique facts of this case, we hold that the [trial] court properly enforced the Attorney General's Opinion by ordering production of records relating to A.D. The Cabinet cannot benefit from intentionally frustrating the Attorney General's review of an open records request; such result would subvert the General Assembly's intent behind providing review by the Attorney General." The appeals court also upheld the trial court's award of attorney's fees. The court noted that "upon the whole of this case, we cannot conclude that the [trial court's] finding that the Cabinet acted willfully to be clearly erroneous. Consequently, we hold that the [trial court] did not err in awarding attorney's fees, costs and penalties.' (*Cabinet for Health and Family Services v. Todd County Standard, Inc.*, No. 212-CA-000336-MR, Kentucky Court of Appeals, Dec. 11)

The Federal Courts…

Judge Randolph Moss has ruled that the U.S. Transportation Command acted arbitrarily and capriciously when it rejected the claims of confidentiality made by AAR Airlift Group as part of a **reverse-FOIA** suit the company had brought. The agency told AAR Airlift that the FOIA Group had requested its contract for passenger and cargo airlift services for U.S. Africa Command in Uganda, the Central African Republic, the Democratic Republic of the Congo, and South Sudan. After receiving the request, the agency asked AAR to identify any information in the contract it believed qualified for protection under Exemption 4 (confidential business information). AAR redacted the dollar amounts for Contract Line Item Numbers. The agency emailed AAR that its justification for withholding the proposal did not sufficiently explain why disclosure would cause competitive harm. AAR emailed back explaining why disclosure of the proposal would cause competitive harm. In its final response to AAR, the agency indicated it was planning to disclose the line item amounts in the contract because AAR had addressed only the proposal and had not shown how disclosure of the CLIN amounts in the contract would cause competitive harm. AAR then filed suit to block disclosure. The agency claimed AAR had failed to justify how disclosure of the line item amounts would cause competitive harm. But Moss noted that the agency had not asked AAR to address that issue, but instead had

ACCESS REPORTS

asked for AAR's "justification to withhold the company's *proposal*," not more information about its justification for withholding portions of the *contract.* Moss observed that "the record indicates the parties have been talking past one another all along." He added that "to the extent that USTC's determination that AAR 'addressed the proposal' rather than 'the contract itself' is based on AAR's discussion of the proposal in its second response, the determination is arbitrary and capricious because AAR's second response was based on a fair—and, indeed the only fair—reading of USTC's request for more information. Moreover, in light of the administrative record of the parties' correspondence, the Decision Letter and the agency's decision to disclose cannot reasonably be construed as merely relying on the ground that AAR's initial response failed to justify the company's redaction of the line-item pricing information in the contract, and not on USTC's apparently mistaken belief that AAR had ignored a subsequent request for that justification." Moss acknowledged that he could uphold the agency's decision if the basis of its decision was clear, but indicated that "the Court cannot, however, affirm USTC's disclosure determination based on a rationale that was not in fact considered or relied upon by the agency." Moss sent the case back to the agency for further determination. He rejected the agency's claim that AAR was asking for a third bite of the apple, noting instead that "the second 'opportunity' was directed at the proposal, and not to the contract." (*AAR Airlift Group, Inc. v. United States Transportation Command*, Civil Action No. 15-373 (RDM), U.S. District Court for the District of Columbia, Dec. 8)

A federal court in Louisiana has ruled that U.S. Citizenship and Immigration Services conducted an **adequate search** for records pertaining to one of immigration attorney Michael Gahagan's clients and that its *Vaughn* index sufficiently justified its search and the majority of its exemption claims. However, the court also found that USCIS had not adequately explained the status of four pages **referred** to the State Department and had failed to provide adequate explanations of a handful of documents withheld under **Exemption 5 (privileges)**. Gahagan filed suit before the agency had responded. The agency then disclosed 555 pages in full, 32 pages in part, withheld one page in full, and referred four pages to the State Department. Once the agency's search was complete, it located an additional 32 pages, of which it released 23 pages in full, six pages with redactions, and withheld three pages in full. Gahagan attacked the agency's affidavit because it was written by the assistant FOIA director, who, Gahagan alleged, did not have personal knowledge about how his FOIA request was processed. Judge Sarah Vance rejected the claim, noting that the staffer "attests to her active role in USCIS's search for records responsive to plaintiff's request, as well as her familiarity with both the search procedures that the agency used and the documents at issue." Vance found the agency's search was adequate. She noted in reference to its search for emails from USCIS's New Orleans office that the agency's affidavit "names every individual involved in the search and specifically describes each person's search methods, including the locations searched and the search terms used. Contrary to plaintiff's assertion, this description is neither vague nor conclusory. It contains specific details about who searched for records and how they approached the task, thereby permitting the Court to evaluate the adequacy of USCIS's efforts." Gahagan argued that the agency's affidavit did not identity why certain databases were not searched, which Gahagan said was required by the D.C. Circuit. But Vance pointed out that in the Fifth Circuit "an agency's declarant need not identify every path *not* taken in order to demonstrate the adequacy of its search." Vance, however, turned to D.C. Circuit case law to interpret USCIS's referral obligations. The agency pointed out that only four pages had been referred to State. But Vance observed that "the page count, however, is not dispositive. USCIS is not absolved of its FOIA obligation with respect to records that originated with the Department of State merely because it happens to have many internally-produced documents on hand as well. Instead, the issue is whether USCIS's referral procedure significantly delays or impairs plaintiff's ability to obtain those records that were referred instead of released." Vance then indicated that "USCIS has not explained, in light of these circumstances, why its referral will not significantly delay plaintiff's FOIA request or impair his ability to obtain responsive agency records." Vance found several of USCIS's exemption claims were not sufficiently justified. Dismissing the agency's claim that an email chain was protected by attorney-

client privilege and the deliberative process privilege, she noted that "Plaintiff contends, however, that neither of the individuals that the supplemental *Vaughn* index names as participants in the email chain are attorneys. USCIS does not dispute this assertion. Nor does it explain why it characterizes an email chain between two non-attorneys as involving a 'discussion between USCIS counsel to USCIS personnel.' Without further explanation, the Court cannot evaluate whether USCIS's assertion of the attorney-client privilege is lawful." Gahagan contended the agency had failed to show that it conducted an adequate **segregability analysis**. Vance found the agency had sufficiently explained why no non-exempt information could be disclosed from one document protected by the deliberative process privilege, but noted as to another document that because "the agency describes a 'portion' of the document as being exempt suggests that other portions might not contain protected information. The index does not indicate whether USCIS considered this possibility. Nor does it provide any explanation for the agency's conclusion that the document must be withheld in full, rather than being partially disclosed." (*Michael Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 15-2540, U.S. District Court for the Eastern District of Louisiana, Dec. 2)

Judge Amy Berman Jackson has resolved a handful of issues remaining in prisoner Willie Boyd's FOIA suit pertaining to records of his conviction in Missouri in 1998. Jackson indicated that she had previously rejected EOUSA's explanation for why one document was protected by **Exemption 5 (attorney work-product privilege)** as being insufficient. She had then conducted an *in camera* review of the remaining documents. EOUSA narrowed its Exemption 5 claims and relied primarily on **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Based on the privacy exemption claims, Jackson agreed that a memo containing notes from witness interviews qualified for protection. Assessing the privacy interest, she noted that "the privacy interests are especially acute in this case because, based on the Court's *in camera* review of the records, there is a fair possibility that plaintiff would be able to identify the parties based on other information in the documents, even if their names were redacted." Boyd had claimed the government had failed to provide evidence in discovery that might support his innocence. But Jackson noted that "the interview memoranda at issue in document 1 contain, at most, 'little or nothing' about the Department of Justice's investigation into the plaintiff, other than to recount interviews with potential witnesses. The documents do not even seem to shed light on plaintiff's alleged discovery violations, but even if they did, plaintiff would still not be entitled to them." EOUSA had withheld another record under **Exemption 3 (other statutes)**, citing Rule 6(e) on grand jury secrecy as the basis for its claim. But Jackson, indicating that grand jury secrecy only covered matters occurring before the grand jury, observed that part of the withheld record "appears to be letters sent among the prosecution team, or between counsel for the government and counsel for plaintiff. Those letters were sent well after plaintiff's indictment, and do not reflect any grand jury material protected by Rule 6(e)." EOUSA contended that a postscript in one record was protected by the attorney work-product privilege because it revealed information about the theory of the case. Jackson noted, however, that "the proposed redaction contains none of that protected information—it merely contains a request that the recipients of the letter pass the information it contains to someone else." (*Willie E. Boyd v. Executive Office for United States Attorneys*, Civil Action No. 13-1304 (ABJ), U.S. District Court for the District of Columbia, Nov. 30)

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Editor's Note: This is the last issue of *Access Reports* for 2015. *Access Reports* will take a break for the holidays. The next issue of *Access Reports* will be dated January 6, 2016, v. 42, n. 1.