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Washington Focus: After previously announcing that public oversight information about coalition operations in Afghanistan would be classified, U.S. military commanders in Afghanistan have backed down somewhat after the decision received sharp criticism. Writing in Secrecy News, Steve Aftergood explained that the change was first reported in the New York Times Feb. 2. Aftergood also noted that in a report issued last week the Special Inspector General for Afghanistan Reconstruction had called the classification plan "unprecedented" and indicated that SIGAR "for the first time in six years [would be] unable to publicly report on most of the U.S.-taxpayer-funded efforts to build, train, equip, and sustain the ANSF." At least one possible explanation for reconsidering the policy change was a barrage of negative criticism in editorials in the New York Times and the Los Angeles Times as well as a critical piece in the Washington Post.

Both Houses Reintroduce FOIA Legislation

After FOIA amendments that passed the Senate December 8 failed to be scheduled for a vote in the House during the lame-duck session, both the Senate and the House reintroduced February 2 essentially the same set of amendments. While the Senate bill (S. 337) is nearly identical to the legislation passed by that chamber, the House bill (H.R. 653) contains a few tweaks. By reintroducing the amendments so soon after the beginning of a new Congress, the bills' sponsors –Sen. Patrick Leahy (D-VT), Sen. John Cornyn (R-TX), joined by Sen. Charles Grassley (R-IA), the new chair of the Senate Judiciary Committee, Rep. Darrell Issa (R-CA), Rep. Elijah Cummings (D-MD) and Rep. Mike Quigley (D-IL)—have ensured plenty enough time for passage, but merely reintroducing the legislation is not itself a sign that the sponsors are committed to move the bill quickly. However, the fact that the Senate Judiciary Committee is expected to send the bill to the full Senate at its February 5 meeting is surely a sign of its intention not to allow the bill to be bogged down in committee. Unfortunately, the Senate bill has some serious flaws and might well have benefitted from further committee consideration. Meanwhile, the House Oversight and

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Government Reform Committee has scheduled a hearing for February 27 on "Ensuring Government Transparency Through FOIA Reform." Witnesses include former OGIS director Miriam Nisbet, former FDA FOIA Officer Fred Sadler, and Rick Blum, head of the Sunshine in Government Initiative.

Last session's House bill grafted the foreseeable harm standard on to all the exemptions, but it did nothing specific to rein in the overuse of Exemption 5 (privileges), a primary focus of the Senate bill. The new House bill indicates that Exemption 5 does not cover "records that embody the working law, effective policy, or the final decision of the agency" and also follows the Senate's lead by establishing a 25-year cut-off for the use of any Exemption 5 privilege. One of the open-government community's highest priorities has been to get access to the Justice Department's Office of Legal Counsel opinions by removing their privilege because they represent working law and the final decision of the agency. While the inclusion of a "working law" exception may be one way to achieve this goal, the D.C. Circuit, in *EFF v. Dept of Justice*, 739 F.3d 1 (D.C. Cir. 2014), ruled that OLC memos to the FBI did not constitute the agency's working law. As a result, it is quite likely that such a fix would just be ignored by the courts because they already have established a definition for what constitutes "working law."

Other additions to the House bill highlighted by Nate Jones of the National Security Archive include instructing agencies to "make information public to the greatest extent possible through modern technology," which Jones interprets as encouraging agencies to match the best practices of the State Department, the National Archives, and agencies already participating in the FOIA Online project to proactively post the majority of FOIA releases online. Jones also highlights the requirement that agencies' FOIA processing have "standards for interoperability" in their processing software, a change he sees as moving away from restrictions inherent in proprietary software used by many agencies.

An important feature in the Senate bill not currently in the House bill would clarify the current provision prohibiting agencies from charging fees if they missed any deadline in FOIA. The provision comes from the OPEN Government Act and was included originally as a compromise to the original Senate bill's proposal that agencies be severely restricted in their use of exemptions if they missed the statutory time limits. The provision, which appears at 5 U.S.C. § 552(4)A)(viii), provides that "an agency shall not assess search fees (or in the case of a requester [who qualifies for the media or educational fee category], duplication fees) under this subparagraph if the agency fails to comply with any time limit. . .if no unusual or exceptional circumstances. . .apply to the processing of the request." While this provision was intended to penalize agencies for missing time deadlines, the inclusion of unusual or exceptional circumstances created a substantial escape valve for those agencies that routinely missed deadlines because of complex and voluminous requests.

The Senate bill changes that by limiting the use of unusual circumstances as an exception to the fee prohibition to an extra 10 days. In cases where unusual circumstances apply and there are more than 50,000 pages responsive to the request, the agency may still charge fees if it can show that it has made a good-faith effort to work with the requester to narrow the scope of the request. Finally, in the case where a court has recognized the existence of exceptional circumstances, the prohibition on fees is excused for the length of time provided by the court order.

Both bills require agencies to update their FOIA regulations within 180 days after the bills become law. They also codify the presumption of openness from the Holder memorandum, requiring disclosure unless there is a foreseeable harm or a legal requirement prohibiting disclosure. The powers and independence of OGIS are also strengthened.

There was widespread consensus in the open government community that the FOIA amendments that failed last session were certainly worth supporting. Once they failed, the logical next step was to try again with a bill whose political viability had already been tested. However, the misuse of Exemption 5 has become so rampant and routine that unless Congress sets specific parameters for its use by restricting the types of records, the circumstances under which the privileges can be invoked, and the duration of the privileges, particularly to historical records, the exemption will continue to diminish the ability of the public to learn about and understand the way in which government decisions are made. The foreseeable harm test as it first emerged during the Clinton administration was the executive branch's attempt to temper its overuse. That failed miserably. Courts have shown that legally-recognized privileges are considered sacrosanct and off-limits for even commonsensical limitations. That leaves the legislature to correct the problem and based on the fierce pushback from politicians of all stripes, particularly Democrats, in the last session things do not look promising. Rather than rush forward with FOIA amendments for their own sake, Congress should take the time to get it right.

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 San Diego Police Department failed to comply with its obligations under the California Public Records Act when it declined to provide Farhad Fredericks with six months worth of incident reports for burglaries and identity theft, disclosing 60 days worth of incidents instead and heavily redacting the records provided. The police also told Fredericks that if he wanted to pursue the longer time frame he would be charged $65 an hour for processing. The police persuaded the trial court that *County of Los Angeles v. Superior Court (Kusar)*, a 1993 appellate decision restricting the disclosure of law enforcement investigatory records to those relating to current or contemporaneous police activity, created a limit on the time frame for disclosure of such records. However, the appeals court here pointed out that the investigatory exemption that existed in 1993 required disclosure of current addresses of perpetrators and victims, which provided the interpretative context for *Kusar*. The current address requirement was dropped from the exemption by 1995 legislative amendments, diminishing *Kusar*'s rationale. The police claimed the records had been redacted to protect privacy, but the appeals court noted that "the Calls for Service reports provided fail to give any details about some of the information listed [as required to be disclosed in the investigatory exemption] concerning 'the time and nature of the response,' or 'the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved.'" The appeals court pointed out that when a request was complicated or voluminous, part of the legitimate balancing test to determine if the public interest in non-disclosure outweighed the public interest in disclosure was consideration of costs and time required. The court of appeals sent the case back to the trial court to determine both the appropriate scope of disclosure and the appropriate costs, including possible computer costs, which should be calculated separately. (*Farhad Fredericks v. Superior Court of San Diego County; City of San Diego, Real Party in Interest*, No. D066229, California Court of Appeal, Fourth District, Division 1, Jan. 16)

A court of appeals has ruled that a multi-part request to the City of Sebastopol for electronic records pertaining to a traffic accident in which 15-year-old Julia Anna Bertoli was struck by a car while crossing a

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state highway within the crosswalk, resulting in permanent physical and mental disability, was not clearly frivolous and that the trial court erred in awarding the city $45,000 to cover its costs in the litigation, which included a petition to the supreme court. Attorney David Rouda submitted Public Records Act requests to the police and the city asking for multiple categories of records, including electronic records. The city worked with Rouda in providing records and allowed him to review a number of potentially responsive records and select those he wanted. However, the city also concluded that emails on personal computers of city council members were not subject to the PRA and that it had no further obligation to allow a third-party company specializing in recovery of electronically-stored information to have access to city computers so that a more sophisticated search could be conducted. After Rouda filed suit on the accident claim, the city told him he would need to complete his review of PRA records quickly. He then filed a PRA suit against the city, requesting the court to order the city to comply with his third-party ESI review suggestion. Instead, the court ruled in favor of the city, finding the request was unfocused, unduly burdensome, and clearly frivolous. Rouda appealed the decision to the court of appeals, which summarily dismissed it, and then to the supreme court, which also declined to hear the case. The city then filed a petition for recovery of costs with the trial court based on its finding that Rouda's requests were clearly frivolous. The trial court agreed and awarded the city $45,000. Rouda appealed the award and this time the appellate court reversed, noting that to qualify under the PRA provision providing for recovery of costs by a public body if a request was clearly frivolous required the litigation to be totally without merit, a threshold the court admitted was extremely high. The appeals court noted that the trial court had been influenced by its conclusion that Rouda was using the PRA as a supplement to discovery. The court pointed out that "there was no basis for deeming appellants' motives improper. Thus, the trial court's conclusion that the matter was 'clearly frivolous' can only be supported if the Petition, itself, was entirely lacking in merit." Although the appellate court characterized Rouda's litigation as improperly unfocused, it observed that the city had admitted the existence of potentially responsive emails and pointed out that the legal question of whether emails pertaining to the conduct of public business were public records was the subject of separate litigation to be heard by the supreme court. (*Julia Anna Bertoli, et al. v. City of Sebastopol*, No. A132916, California Court of Appeal, First District, Division 4, Jan. 20)

Connecticut

A trial court has agreed with the FOI Commission's conclusion that the Board of Pardons and Paroles should have disclosed to reporter Alexander Wood records of individuals whose absolute pardons had not yet been granted, but that the grant of absolute pardons before Wood's complaint was heard by the Commission provided a statutory basis for withholding them under the erasure statute. When the Board denied Wood's request, he complained to the FOI Commission. But before the Commission heard the case, some absolute pardons were granted. Wood argued that the Board should have been required to disclose the pardons because they had been improperly withheld in the first instance. However, the FOI Commission ruled that once the absolute pardons were granted they became immediately subject to the erasure statute which prohibited the Board from disclosing them. Wood filed suit challenging the Commission's decision and the court sided with the Commission. Wood argued that to rule in favor of the Board would encourage it to improperly withhold records in the future based on the possibility that the individuals would be granted absolute pardons. The court noted that "the board should and must comply with the act. But the plaintiff's remedy for noncompliance is worse than the problem. . .[T]he plaintiff's proposal would negate the statutory right earned by the recipient of the pardon that, upon receipt of the pardon his or her records 'shall be erased.'" The court pointed out that the Commission had cited the board for non-compliance and that the board could be penalized if it continued not to comply. The court observed that "these remedies are narrowly tailored to address the problem of noncompliance by the board with the act without impairing the functioning of the erasure statute. This approach achieves a balance that harmonizes the goals of each statutory scheme, as favored by our rules of statutory construction." (*Alexander Wood v. Freedom of Information Commission*, No. HHB CV14-5015956S, Connecticut Superior Court, Judicial District of New Britain, Jan. 21)

Michigan

A court of appeals has ruled that a list of donors to the Village of Oakley's police donation fund is not protected by the privacy exemption and that disclosure would be in the public interest. Shannon Bitterman requested a list of donors to the police donation fund as well as a list of police reservists. Noting that Oakley had 300 residents, 100 of whom were police reservists, the court explained that Bitterman contended there existed a "pay to play" scheme, which had been the subject of media coverage, and that "disclosure of the names will serve a core FOIA purpose by facilitating the public's access to information regarding the affairs of its local government." Oakley argued that a list of reservists as such did not exist. But the court pointed out that "the Village admitted that it likely has numerous documents containing the requested information. Since those documents already exist, the Village is not being asked to create a new document or to compile, summarize, or create a report of the information." However, since the law enforcement exemption protects the identities of law enforcement officers, the court remanded the case back to the trial court for a determination as to whether the police reservists qualified as law enforcement officers. (*Shannon Bitterman v. Village of Oakley*, No. 320984, Michigan Court of Appeals, Jan. 22)

Nebraska

The supreme court has ruled that Falls City Economic Development and Growth Enterprise, a non-profit corporation designed to encourage economic growth in the region, the majority of whose funds come from local governments, is not an agency for purposes of the public records law. However, in reaching its conclusion, the supreme court adopted the functional equivalency test—that a non-governmental entity is performing a governmental function—in place of its previous test that relied on the degree of delegated authority to determine if a non-government entity was acting on behalf of the government. EDGE was created by eight private individuals and its 21-member board of directors included the mayor of Falls City and one member of the city council who were required to sign confidentiality agreements. EDGE hired and paid its own employees. In 2012, it received $105,000 from local governments and $77,000 from private entities. David Frederick, the co-owner of a grain elevator, requested records about discussions to encourage another company to build a new grain elevator. EDGE denied his request and Fredericks filed suit. The trial court found the records were public records, but allowed EDGE to redact certain privileged information. EDGE and Falls City appealed and the supreme court added the case to its docket. Noting that the delegation test "is better suited to documents prepared in the course of an isolated transaction between a public body and a private entity" and that "utilizing separate tests, depending upon whether the entity's relationship with government is ongoing as in this case or limited to a single transactions as in the [previous decision adopting the delegation test], is consistent with the statutory directive that our public records laws be 'liberally construed' so that citizens 'shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them.'" The functional equivalency test has four factors – whether the entity is performing a governmental function, the level of government funding, the degree of government involvement or regulation, and whether the entity was created by government. Applying those factors to the facts here, the supreme court noted that "promoting economic development is a governmental function. But it is permissive, not mandatory." The court added that "the fact that EDGE receives 63 percent of its funding from public sources lends some support to Frederick's argument that it is the equivalent of a public agency, branch, or department. But we agree with the observation of the Maine Supreme Court that the fact that a private entity received substantial financial support from public entities is not by itself sufficient to render it a public agency. . ." Because the degree of government funding was the only factor supporting Frederick's contention that EDGE was performing a government function, the supreme court concluded that EDGE was not a public agency. (*David Leon Frederick v. City of Falls City*, No. S-13-275, Nebraska Supreme Court, Jan. 16)

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New York

A trial court has ruled that license-reader data for specific license plates maintained by the Monroe County Sheriff's Office must be disclosed to reports Steve Orr to the extent that Orr can show that he has consent to disclosure of the vehicle's owner or, in the case of county or City of Rochester vehicles, that the vehicle is not assigned to an individual for personal use. Orr requested license-plate reader data on nine license plates belonging to Orr and six other newspaper employees, as well as a vehicle that belonged to Monroe County and another vehicle belonging to the City of Rochester. The Monroe County Sheriff's Office denied the request claiming the data was collected for law enforcement purposes. The Sheriff's Office upheld its decision on appeal and Orr filed suit. At that time, Orr provided the identities of newspaper employees who owned the seven vehicles and furnished consent forms. The court explained that while license-plate readers provided data about vehicle locations that were public, that data when combined could yield tracking information that was not commonly public. Agreeing that the Sheriff's Office was required to disclose information on specific vehicles where consent was provided, the court nevertheless accepted the government's worst case scenario to explain why disclosure of such data was dangerous. In suggesting that a single mother could be stalked by the estranged father of her child even with the existence of a court order, the court noted that "most certainly the perpetrator being given information that would assist his discovering the residence, place of employment and school, in contravention of a court order of protection, would result in a personal hardship to the mother. Although infrequent, there is little, if any, rationale for the unfettered access to another person's license plate records to counteract the purpose of an order of protection." Although the court admitted that neither the county nor the city had any legal privacy rights, if a government vehicle could be linked to an individual the data could still be protected. The court pointed out that "quite simply, if the single mother above worked for the government or a corporation and was assigned a car per her employment, and the [estranged father] knew the license plate of her assigned car, the order of protection would be compromised and the LPR disclosure may be 'an unwarranted invasion of personal privacy.'" (*Gannett Co., Inc., Democrat & Chronicle, and Steve Orr v. County of Monroe*, No. 2014/11424, New York Supreme Court, Monroe County, Jan. 22)

Pennsylvania

A court of appeals has ruled that the State Employees' Retirement System did not provide sufficient evidence to justify a categorical exemption under the personal security exception to protect names and addresses of retirees over the age of 60 based on statistic evidence that certain individuals that age suffer cognitive impairment that might make them more susceptible to fraud. However, the court found that the Office of Open Records erred when it refused to consider evidence from 22 individuals who claimed they had received personal threats. The case involved a voluminous request by Kenneth Fultz for name and address information about retirees. SERS provided much of the information, but withheld the names of the retirees over 60 and the home addresses and names of judges and law enforcement officers. SERS provided affidavits from two academics suggesting that a certain number of individuals over 60 would have cognitive impairment that could make them susceptible to fraud. Finding the affidavits insufficient, OOR asked SERS to supplement its claims, but subsequently found an affidavit from SERS security officer also was insufficient. SERS then appealed. Noting that in an earlier case the court had agreed that affidavits concerning identity theft were adequate to support a categorical exemption, the court found SERS' affidavit fell short. The court pointed out that the affidavits from the two academics "do not opine that the risk to the personal security by the disclosure of the home addresses is a risk that is common to all of the SERS members and their beneficiaries who are over the age of 60. To the contrary, these Affidavits only support a statistical likelihood of increased vulnerability from age-related cognitive impairment to a certain percentage of the population." As a result, the court observed that "SERS did not meet its burden, through the submission of sufficient evidence, of showing the likelihood of a substantial and demonstrable risk to SERS members and their

beneficiaries over the age of 60 by the disclosure of the requested home addresses." Although the Right to Know Law allowed OOR to refuse to accept evidence that it considered cumulative, the court indicated that OOR erred in refusing to accept the affidavits of 22 individuals claiming specific harm to their personal security. The court observed that "in light of the OOR's holding that SERS' evidence was too general and broad-sweeping to meet its burden, it may very well be that these direct interest participants put forth evidence that would be probative to the issue of whether their names and home addresses should be exempt from disclosure pursuant to the personal security exception." A separate exception protected the home addresses of judges and law enforcement officers. Finding that SERS improperly withheld the first name of a law enforcement officer, the court pointed out that "the exception only expressly exempts a law enforcement officer's home address. Accordingly, the OOR did not err by directing the disclosure of the first names of the law enforcement officers that were requested." (*State Employees' Retirement System v. Kenneth W. Fultz*, No. 206 C.D. 2014, Pennsylvania Commonwealth Court, Jan. 9)

Washington

The supreme court has ruled that the trial court erred when it dismissed John Worthington's Public Records Act suit against West Sound Narcotics Enforcement Team, a multijurisdictional task force created under the Interlocal Cooperation Act, before determining if WestNET was subject to the Public Records Act. Worthington made four requests to concerning the operation of WestNET to Kitsap County, one of 10 WestNET members. Kitsap County responded to the requests. Worthington, however, filed suit, naming WestNET as the defendant. Kitsap County responded to the suit by arguing the WestNET was not a government agency. The trial court dismissed the claim and WestNET asked for reconsideration, arguing for the first time that under the terms of the agreement establishing WestNET it was not an independent entity subject to suit. The trial court agreed and the court of appeals affirmed. But the supreme court reversed, finding the trial court did not consider whether WestNET was subject to the PRA. The supreme court pointed out that "the affiliates cannot designate a task force as a nonentity if doing so would conflict with PRA obligations and requirements." The court added that "the interplay of these statutes creates a question of both law and fact in which the reviewing court must determine whether enforcement of the Agreement's terms would effectively frustrate the purpose of the PRA." (*John Worthington v WestNET*, No. 90037-0, Washington Supreme Court, Jan. 22)

West Virginia

The supreme court of appeals has ruled that Rule 2.4 of the West Virginia Rules of Judicial Disciplinary Procedure prohibits the Judicial Investigation Commission from disclosing details of complaints filed against West Virginia judges. Jay Smith, a free-lance reporter, requested complaints filed against 27 West Virginia judges. The Judicial Investigation Commission denied the request based on the confidentiality provisions in Rule 2.4. Smith sued and the trial court sided with the Commission. Affirming the trial court, the supreme court noted that "in those requests, petitioner did not seek information regarding admonishments or hearings on formal charges before the Judicial Hearing Board, which would be public. . .Instead, petitioner sought information regarding 'complaints filed;' such information expressly falls within that class protected by Rule 2. 4." Smith argued that in an earlier decision, the supreme court had found that records of complaints filed against attorneys could be disclosed. But, here, the court pointed out that "lawyers are representatives of the public's business, employed by individuals or entities based upon an intelligent understanding of the lawyer's abilities, and the reporting of a dismissed ethics complaint poses no real threat to a lawyer's reputation. Lawyers can defend themselves against such meritless complaints. Judges lack the freedom to defend themselves publicly against all meritless complaints and to choose the cased or parties before them."

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(*Jay Lawrence Smith v. Teresa Tarr, Counsel, West Virginia Judicial Investigation Commission*, No. 13-1230, West Virginia Supreme Court of Appeals, Jan. 12)

The Federal Courts…

A federal court in California has ruled that the IRS must disclose nine Form 990s for tax exempt organizations in the Modernized E-file format requested by Public.Resource.org., the form in which the agency receives 990s, because the agency has not shown that such a release would be an undue burden. Public.Resource.org requested the nine 990 forms in MeF format, but because the agency redacts certain exempt information from the forms before disclosing them, it converts the MeF format into TIF format for public disclosure. The IRS argued that the Form 990s were not readily or reasonably available because it would need to develop a new protocol at an estimated cost of $6200 to produce the redacted Form 990s in MeF format. Public.Resource.org argued that disclosure in the MeF format would enhance the public's ability to review and study the data contained in Form 990s. Judge William Orrick framed the issue as "whether the fact that the IRS would need to spend $6200 to develop protocols and train staff to be able to redact exempt information from the Form 990s at issue in the MeF format before the non-exempt information is produced means those Form 990s are not 'readily producible' as a matter of law under FOIA. In making that determination, I consider not only the fact that Form 990s are currently maintained in MeF, but also the purported burden the IRS would face if required to produce the requested nine Form 990s in MeF format after redacting exempt information." The IRS pointed out that its funding was hard hit by the recent sequestration. But Orrick observed that "the fact that an agency may be under significant financial distress because it is underfunded does not excuse an agency's duty to comply with the FOIA. There is no evidence that the general business of the IRS or even the business of the IRS employees tasked with responding to FOIA requests will be *significantly* burdened or affected by fulfilling Public.Resource.org's request for production of nine Form 990s in MeF." Orrick pointed out that "that the IRS will have to develop new protocols and train staff to respond to Public.Resource.org's request does not somehow excuse its need to comply with E-FOIA. If that was a valid excuse, anytime there was a request for production in a format that the agency has not accommodated before, the agency could argue undue burden. To the contrary, in enacting E-FOIA, Congress expressly recognized that new and changing technology could improve both agency FOIA compliance and public access to government information, and as such, Congress demanded that agencies act proactively to enhance public access to and use of government information." The IRS argued Public.Resource.org's request was unique. But Orrick noted that "it seems likely that Public.Resource.org's request for production in MeF is 'unique' because the IRS by its own admission *requires* requesters to [use the format preferred by the IRS]. . .The IRS cannot defeat Public.Resource.org's request for disclosure of information in the MeF format by relying on its own prior practices that are inconsistent with the E-FOIA amendments." Orrick added that "the record demonstrates that if the IRS were to comply with additional requests for production of Form 990s in MeF, the costs would be significantly less than for these initial nine requested by Public.Resource.org." (*Public.Rexource.org v. United States Internal Revenue Service*, Civil Action No. 13-02789-WHO, U.S. District Court for the Northern District of California, Jan. 29)

A federal court in Louisiana has ruled that U.S. Citizenship and Immigration Services is legally responsible for justifying the withholding of portions of records referred to Immigration and Customs Enforcement. Immigration attorney Michael Gahagan requested the alien file for Miztle Amado-Castillo, whom Gahagan was representing in a removal proceeding. USCIS disclosed 209 pages in full and 10 pages with redactions, withheld 17 pages, and referred 51 pages to ICE for direct response to Gahagan. Gahagan appealed and USCIS disclosed an additional 17 pages. Gahagan then filed suit against USCIS, arguing the

agency's exemption claims were improper and that the referral to ICE had resulted in an improper delay. ICE emailed Gahagan the 51 referred pages with redactions during the litigation, including withholding 10 pages because they were labeled as duplicates of pages Gahagan had already received. Gahagan argued that withholding documents as duplicates was not permissible under FOIA and that the government had not justified the ICE response except for its unsworn explanation identifying various exemptions. USCIS claimed it had acted properly and that such referrals were common. Judge Nannette Jolivette Brown found the agency had conducted an adequate search, but agreed with Gahagan that withholding documents as duplicates was not permissible under FOIA. Johnson pointed out that "the Court has not found any language in FOIA capable of supporting an exemption on the basis that a document is a 'duplicate' of another, and even if any such language existed, Defendant has not furnished the court with any information that permits it to determine *de novo* whether the documents actually are duplicates of documents already disclosed." USCIS argued that Gahagan was trying to force ICE, a non-party to the suit, to defend its response. But Gahagan claimed that "even if an agency referred documents to other agencies for review and processing, the agency is still responsible for explaining their nonproduction." Relying primarily on *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1978), where the D.C. Circuit ruled that the CIA could not absolve itself of responsibility for responding to McGehee's request by referring documents to other agencies and that such a referral practice was improper when it interfered with the requester's ability to obtain timely access to the records, Johnson explained that to analyze USCIS's claim that Gahagan was trying to obtain an order against ICE "the Court must first resolve the logically antecedent question of whether ICE or Defendant is responsible for responding to Gahagan's FOIA request." She noted that "it is undisputed that Gahagan has been unable to obtain the 'duplicate' documents despite months of waiting and, now, litigation. Therefore, the net effect of the referral at issue here is 'significantly to impair' Gahagan's ability to obtain the records and 'significantly to increase the amount of time he must wait to obtain them,' rendering the referral a 'withholding' under *McGehee*. Defendant has offered no facts or argument that reasonably explains its procedure, particularly in light of the impediments to disclosure that the procedure has created here. Therefore, the 10 pages of 'duplicate' documents have been improperly withheld, and the responsibility to account for them rests with Defendant, not ICE." (*Michael Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 14-2233, U.S. District Court for the Eastern District of Louisiana, Jan. 23)

Judge Emmet Sullivan has ruled that pulmonary function testing (PFT) data for workers exposed to Libby amphibole asbestos, collected as part of federal contracts with the University of Cincinnati, is not an **agency record** of the EPA because the agency never had custody or control of the data. The EPA was the lead agency studying the effects of Libby amphibole asbestos and was completing a toxicological review of its effects on workers. It had contracted with the University of Cincinnati to study the ways in which workers were exposed. But the second phase of the UC contract to study the effects on workers was not funded by EPA, but by the Transportation Department. A related contract to study health effects of Libby amphibole asbestos was awarded to UC by the Agency for Toxic Substances and Disease Registry, a component of the Department of Health and Human Services. The EPA contracted with Syracuse Research Corporation to assist the agency in responding to comments and recommendations from EPA's Science Advisory Board concerning the draft toxicological review. Because the contract required SRC to subcontract with a third party knowledgeable about the health studies, UC was brought in as a subcontractor. The law firm of Beveridge & Diamond requested information from EPA about their Libby amphibole asbestos review, including high resolution tomography (HRCT) data and PFT data. EPA provided 71 documents and several redacted contracts, but told Beveridge that it did not have either the HRCT or the PFT data. During the litigation, the agency provided an Excel spreadsheet of HRCT data that it had received from UC as an email attachment, but continued to claim that it did not have the PFT data. Beveridge argued that because the HRCT and PFT data are "companion data" collected as part of the same study, the EPA must have control of the PFT data as well.

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But Sullivan noted that "Beveridge's leap of logic relies on *its* characterization of the HRCT and PFT data as 'companion data.' Beveridge's unsupported assertion is wholly insufficient to overcome the record in this case. . ." Sullivan pointed out that "even assuming that the EPA had a right to acquire the PFT data, which it does not, *the EPA has not exercised its right*. By ordering the EPA to 'exercise its right of access' the Court would be effectively compelling the EPA to create an agency record." Beveridge claimed that the federal government had a right of access to the data and it was created to aid EPA in its toxicological review. Sullivan indicated that "the EPA cannot require UC to provide it with the PFT data UC may have collected under the [DOT] contract, nor does the EPA have a right to access UC's PFT data under the [HHS] grant." Beveridge contended that *Burka v. Dept of HHS*, 87 F.3d 508 (D.C. Cir. 1996), in which the D.C. Circuit found that NCI had constructive control of data because of its close supervision of the grantee, required EPA to provide the records. Sullivan however, found that use of the records was the decisive factor under *Burka* and that there was no evidence that EPA had even seen the PFT data. (*Beveridge & Diamond v. United States Environmental Protection Agency*, Civil Action No. 14-631 (EGS), U.S. District Court for the District of Columbia, Jan. 20)

Edward Snowden's revelations about electronic communications metadata collection by the NSA has led to the development of a new theory in FOIA litigation—because the NSA vacuums up all electronic communications it must have data on all sorts of individuals, entities, and even government agencies. The Competitive Enterprise Institute's suit against the NSA to obtain phone, email and text messages for former EPA administrator Lisa Jackson and current EPA administrator Gina McCarthy is perhaps more fully developed than any previous attack, but, nevertheless, has failed to persuade Judge James Boasberg that the NSA waived its right to invoke a *Glomar* response because of public acknowledgement that the agency had access to such records. CEI had already litigated several cases against the EPA for access to Jackson and McCarthy's communications. But after the EPA told CEI that it did not have text messages for Jackson or McCarthy, CEI decided to request them from NSA. NSA invoked a *Glomar* response neither confirming nor denying the existence of records under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. While CEI agreed that such records would be protected by Exemption 3, it argued that because the government had publicly acknowledged the existence of the NSA's telephony metadata collection program, it had admitted that the NSA had access to all telephone records. Finding CEI had vastly over-interpreted the government's acknowledgments, Boasberg found no support that the NSA had admitted to having telephone records on either Jackson or McCarthy. Dismissing CEI's requests for text messages, he pointed out that the government's public acknowledgments "consistently define 'telephony metadata' as details about *phone calls*, not texts or e-mails. Particularly, in the national-security context, the Court should not be in the business of guessing whether information about text messages falls under the heading of 'telephony metadata.'" Next, he explained that "while the Court agrees with Plaintiffs' assertion that [the government's documents] show that NSA engages in the 'bulk' collection of telephony metadata, the problem is that 'bulk' does not mean universal. These documents, in other words, in no way suggest that the NSA collects metadata records for *all* phone customers in the U.S." CEI claimed that statements made by the White House acknowledged the collection of all records. But Boasberg observed that "the white paper, similarly, did not admit to the universal collection of Americans' phone records." Likewise, a district court's finding that there was sufficient evidence to allow a challenge to the NSA surveillance program to go forward was not sufficient to provide acknowledgment that all Verizon wireless records were routinely collected. Boasberg indicated that "while relying on 'strong evidence' may be acceptable in a standing analysis, it does not suffice under the official-acknowledgment doctrine." CEI had also provided media accounts of the program. But Boasberg pointed out that "speculation by the press—no matter how widespread—and disclosures in the press from unnamed sources are not sufficient to waive an agency's right to withhold information under FOIA." Boasberg found that regardless of the government acknowledgment of the program, the NSA had shown that disclosure could risk further harm. He noted that "in essence, were the agency required to confirm or deny the

existence of records for specific individuals, it would begin to sketch the contours of the program, including, for example, which providers turn over data and whether the data for those providers is complete." (*Competitive Enterprise Institute, et al. v. National Security Agency*, Civil Action No. 14-975 (JEB), U.S. District Court for the District of Columbia, Jan. 13)

Judge Christopher Cooper has ruled that the FBI properly withheld records from Amine Touarsi under a variety of exemptions. Touarsi fled Algeria and applied for political asylum in the United States in 1996. Three years later, he was detained on suspicion of being connected with a terrorist plot and held for a year. He was ultimately granted asylum and released. However, he contended the FBI and other federal agents continued to hound him, including routinely questioning him for hours whenever he arrived back in the U.S. from travel abroad. He requested his records from the FBI and asked that they be expunged. The FBI disclosed 175 pages, referred 130 pages to ICE and CBP, and withheld about 160 pages entirely. Touarsi did not challenge the agency's search, but contended that its *Vaughn* index was insufficient to support any of its withholding claims. Approving the FBI's **Exemption 1 (national security)** withholdings after an *in camera* review, Cooper noted that the agency's affidavit "explains that revealing methods of intelligence gathering could enable entities and individuals to better hide malicious activities from investigation. And revealing specific information uncovered by an investigation method can likewise reveal the method itself. Having reviewed these materials, the Court agrees that the only additional information the FBI could plausibly provide would disclose the very intelligence methods the government seeks to protect." Touarsi claimed the agency waived **Exemption 5 (privileges)** because the government's decision not to prosecute him meant that its investigation was improper. But Cooper observed that "the government may have decided not to prosecute Touarsi for any number of reasons, and its decision is not evidence that it lacked a basis to investigate him in the first instance." Touarsi argued that the agency had failed to provide enough information about its invocation of the attorney-client privilege. Cooper pointed out that "requiring the Bureau to divulge details of the communications beyond their general subject matter—a criminal investigation and potential prosecution—is not necessary for the Court to determine whether the information is privileged and would invade the very privilege itself." Cooper rejected Touarsi's request that his records be expunged under FOIA. Noting that the Privacy Act proved an amendment remedy but that Touarsi had not brought a Privacy Act claim, Cooper indicated that "compelling disclosure is the only explicitly available remedy under FOIA and Touarsi cites no case whether a court has expunged records as a remedy for the government's misapplication of FOIA exemptions. Ordering expungement, moreover, would be inappropriate given that the Court does not analyze the content of the records requested in a FOIA action other than to determine whether material is properly withheld under the statute's specifically enumerated exemptions." (*Amine Touarsi v. United States Department of Justice*, Civil Action No. 13-01105 (CRC), U.S. District Court for the District of Columbia, Jan. 23)

Judge John Bates has ruled that Edmon Elias Yunes **failed to exhaust his administrative remedies** because he filed his suit against the Justice Department after the FBI had mailed its response to his request, even though he had not yet received the response when he filed suit. Elias Yunes, a citizen of the Dominican Republic, was flagged by the Justice Department as a suspected terrorist. With the assistance of an attorney, Elias Yunes requested his records in June 2013 from the FBI. In a letter dated August 8, 2013, the agency responded that it found no records. Before receiving the letter, Elias Yunes filed suit on August 15. His attorney received the letter on September 3. She then appealed the decision to OIP, which received the appeal on October 15. DOJ asked Bates to dismiss the case because Elias Yunes had failed to exhaust his administrative remedies by filing suit after the agency had responded. Elias Yunes argued that he had exhausted his administrative remedies because he had filed suit before he received the agency's response. Bates disagreed, noting that Elias Yunes' position had no support in case law. He explained that "the Court of Appeals' focus [in *Oglesby v. Dept of Army*] on response, rather than receipt, comports with the relevant

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statutory language as well: the statute requires an agency to make a 'determination' within twenty days of the receipt of a request. There is no stricture on when that determination must be received by the requester." Elias Yunes also contended that he had exhausted his administrative appeals by appealing the FBI's decision to OIP. Bates, however, noted that "that assertion does not comport with any accepted definition of exhaustion. True, he took the right steps to start—but he did so *after* filing this complaint, and he failed to wait for the appeal to be resolved." (*Edmon Felipe Elias Yunes v. United States Department of Justice*, Civil Action No. 14-1397 (JDB), U.S. District Court for the District of Columbia, Jan. 5)

Judge James Boasberg has ruled that the Office of Special Counsel conducted an **adequate search** for records concerning Judicial Watch's 2010 complaint to the agency that White House officials Jim Messina and Rahm Emanuel violated the Hatch Act. After hearing nothing about their complaint in three years, Judicial Watch sent a letter to OSC asking about the investigation. They were told that because neither Messina nor Emanuel still worked for the federal government the complaints have been closed without further action. Judicial Watch then submitted a FOIA request for records pertaining to its Hatch Act complaint against Messina and Emanuel. Judicial Watch filed suit a year later, but before OSC had responded to its request. During the litigation, OSC identified 645 pages of responsive records, withholding 260 in full, 233 in part, and releasing 152 pages in full. Judicial Watch did not challenge any of agency's exemption claims, but argued that its search was inadequate because it did not produce certain records that Judicial Watch contended were required to be created pursuant to a Hatch Act violation investigation. Having found the agency's search sufficient, Boasberg turned to Judicial Watch's specific claim that the agency was required to keep Judicial Watch updated about the investigation. But Boasberg noted that because the pertinent provision in the Hatch Act was discretionary, OSC was not required to create such records if it chose not to. He noted that "laid bare, Plaintiff's argument is nothing more than a red herring. An agency's failure to release documents it was never required to generate tells the Court nothing about the adequacy of its search. In fact, it seems rather unlikely that these documents ever existed since Judicial Watch received no updates in response to its Hatch Act allegations." He pointed out that "Judicial Watch cannot use a FOIA suit to enforce its interpretation of OSC's obligations under the Hatch Act. Even if Defendant had been required to create these records in 2010 and did so, moreover, this would still not make Plaintiff's case. Generally, identifying a handful of documents that an agency failed to uncover does not, in itself, demonstrate that a search was inadequate." (*Judicial Watch, Inc. v. United States Office of Special Counsel*, Civil Action No. 14-724 (JEB), U.S. District Court for the District of Columbia, Jan. 13)

A federal court in Oregon has ruled that the FAA properly withheld a large amount of descriptive information from several incident investigation reports under **Exemption 6 (invasion of privacy)** because disclosure of certain details would allow identification of those involved. Jeffrey Lewis, a former air traffic controller who since his termination in 2008 had filed more than 200 FOIA requests with the FAA, requested multiple items. Dissatisfied with the agency's responses, he filed suit challenging the processing of a handful of his requests. By the time he ruled, there were only two disputes left for Judge Marco Hernandez. The first involved an operational error investigation which was inconclusive. But the agency had already made public a detailed five-page memo on the investigation. Lewis claimed a two-page report with more identifying information should also be disclosed. But after reviewing the reports, Hernandez noted that "if it were provided, the person who made the report could be identified because the documents contain, in addition to information already in the public domain, the position of the person who submitted the report. As Defendants note, that person could be identified by obtaining a roster of employees who worked at that facility on that date and time. On balance, the privacy interest at stake outweighs the public interest in obtaining the report." As to the other investigation report, Lewis argued that he should be allowed to see more details so he could compare the agency's response with its investigation of another incident involving Lewis. Hernandez observed that the report "contains a significant amount of information which could lead to the identity of the investigated employee as well as witnesses. However, given that Defendants found it appropriate to release

some information to Plaintiff about the incident, it would be inconsistent to not order Defendants to release additional, consistent information about this incident provided that all identifying information is redacted." (*Jeffrey Nathan Lewis v. Federal Aviation Administration*, Civil Action No. 13-00992-HZ, U.S. District Court for the District of Oregon, Jan. 6)

Judge James Boasberg has ruled that the State Department conducted an **adequate search** for records concerning waivers allowing countries or other interests to do business with Iran under the Comprehensive Iran Sanctions, Accountability and Divestment Act or Executive Order 13553. After conducting a comprehensive search, State told Freedom Watch that it could find no records. Freedom Watch expressed incredulity, noting that it had found four press releases on the agency's website. But Boasberg pointed out that "this is because none relates to either the Comprehensive Iran Sanctions, Accountability, and Divestment Act or Executive Order 13533, which lie at the heart of the request. All of these documents, instead, discuss a separate statute, the National Defense Authorization Act of 2012 and sanctions thereunder. . .In any event, even if the press releases were responsive, identifying a handful of documents that an agency failed to uncover does not, in itself, demonstrate that a search was inadequate." Freedom Watch next claimed the waivers under the two statutes were essentially the same. Rejecting the claim, Boasberg pointed out that "in other words, State was somehow supposed to divine that a FOIA request for documents about waivers pursuant to a specific statute should also be construed as seeking documents relating to an entirely different statute. This in not a serious argument." Freedom Watch contended that State's search did not involve talking to subject matter experts. Boasberg observed that "as State's initial declaration did not describe a wordless turnover of the search to robots or droids, the Court is perplexed about the basis of Plaintiff's position. [The agency's] affidavit not only explains how human beings in each of the eleven components went about their searches, but he also talks about the sizeable number of people involved in the searches." Boasberg concluded that "State has plainly carried its burden of conducting an adequate search." (*Freedom Watch, Inc. v. United States Department of State*, Civil Action No. 14-1832 (JEB), U.S. District Court for the District of Columbia, Jan. 8)

Concluding four years of litigation, Judge Amy Berman Jackson has ruled that a single memo found in a file folder of a former AUSA that was labeled with the name of former AUSA Lesa Jackson is responsive to Lonnie Parker's request for records concerning Jackson's unauthorized practice of law, but that almost the entire memo is protected by **Exemption 5 (privileges)**. EOUSA claimed the record was not responsive to Parker's request because it did not mention Jackson or refer to any unauthorized practice of law. After reviewing the memo *in camera*, Jackson noted that "this document was located in the files of a former U.S. Attorney in a folder labeled with Lesa Jackson's name, and it discusses matters related to potential disciplinary action to be taken against a female AUSA. Moreover, defendant does not deny that the unnamed female AUSA in the record was Lesa Jackson. Thus, it is fair to conclude that this record concerns former AUSA Jackson and that it is therefore responsive to category two of plaintiff's FOIA request, which sought records related to disciplinary matters." But, Jackson pointed out, it was almost entirely protected by Exemption 5. "Document 2 falls within the ambit of all three civil evidentiary privileges: its contents are 'both predecisional and deliberative;' it reflects a confidential attorney-client communication; and it appears to have been 'prepared in the course of an investigation that was undertaken with litigation in mind.' There are small and segregable portions of the record, however, that are not privileged, and so defendant will be ordered to release it [with redactions]." (*Lonnie J. Parker v. U.S. Department of Justice*, Civil Action No. 10-2068 (ABJ), U.S. District Court for the District of Columbia, Jan. 21)

A federal court in California has ruled that the Department of Energy has shown that the number of hours claimed by individual workers on a DOE-financed solar energy project is protected under **Exemption 4 (confidential business information)** because disclosure would cause competitive harm to the contractor. The

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Laborers' International Union of North America Pacific Southwest Region requested the payroll records to check the contractor's compliance with the Davis-Bacon Act, which requires federal contractors to pay the prevailing local wage. DOE redacted everything except for each employee's work classification and the rate of pay, claiming the disclosure of any other information would cause competitive harm by revealing the contractor's labor costs. The union argued that "each solar project varies and that the payroll information from one project would not provide competitors with enough information to undercut [the contractor] in future bidding processes." The court responded that "it is true that substantial competitive harm is less likely to be found when the information redacted provides insight into only one of several variables a competitor needs to gain an advantage. However, [the union] has not provided sufficient evidence to convince the Court that such is the case here. [The union's] declarations are from individuals with no experience with the bidding process for large-scale solar utility projects. Those declarants cannot say, based on their personal knowledge, that labor costs and labor efficiency are not the distinguishing factors in the bidding process for large-scale solar utility projects." Finding DOE had met its burden, the court observed that the union's declarations "from individuals who are unfamiliar with the bidding process on large scale solar utility projects are not enough to survive summary judgment." (*Laborers' International Union of North America Pacific Southwest Region v. U.S. Department of Energy*, Civil Action No. 13-02204-MCE-DAD, U.S. District Court for the Eastern District of California, Jan. 16)

A federal magistrate judge in Oregon has ruled that emails sent from the work computer of an Army Corps of Engineers employee to his fiancé are **personal records** not subject to FOIA. Augustus Fennerty, an FBI employee, divorced his wife Erin in 2010. In 2011, she began dating Erik Peterson, an Army Corps of Engineers employee, and the two were married later that year. Peterson, concerned that several of his interactions with Augustus Fennerty were threatening, talked to an attorney at his office and shared the emails with him. The attorney helped Peterson prepare a memorandum about Fennerty's behavior and a complaint was filed with the FBI. During a custody dispute, Fennerty learned of emails sent by Peterson to Erin Fennerty using his work computer. Fennerty made a FOIA request for copies of Peterson's emails. The agency withheld three emails under **Exemption 6 (invasion of privacy)** and told Finnerty the rest of the emails were personal records and not agency records subject to FOIA. The court agreed with the agency's decision, noting that "the e-mails were personal to Peterson and he intended to maintain control over the records. The e-mails were not intended to be used by the Corps to carry out its business. Nor were the e-mails integrated into official files or records. Although Peterson did not have an expectation of privacy over the e-mails and shared them with other agency employees, such expectations and conduct do not convert the e-mails concerning personal matters into agency records." The court added that "a lack of privacy does not equate to a lack of control. Peterson states that the e-mails and photos have nothing to do with his job or the business of the Corps and that because he is allowed to use Corps' computers for personal e-mails, he intended to retain control. Indeed, Peterson and the other authors of the documents were free to dispose of the documents at any time without violating the Corps' policies." (*Augustus Fennerty, IV v. Department of the Army*, Civil Action No. 14-48-TC, U.S. District Court for the District of Oregon. Jan. 26)

A federal court in Tennessee has order the State Department to finish processing Avelino Cruz Martinez's FOIA request within 20 days and to provide any responsive records or the reasons for withholding them within 30 days. Martinez, a U.S. citizen who faces extradition to Mexico, where he claims villagers have threatened to kill him if he returns, requested records from the State Department and asked for expedited processing as well. The agency denied his expedited processing request and eventually estimated that it would complete his request by June 2015. Finding in favor of Martinez, the court noted that "Defendant has not asked the Court to find that exceptional circumstances exist. A delay that results from a predictable agency workload of requests does not constitute exceptional circumstances under the FOIA statute unless the agency demonstrates reasonable progress in reducing its backlog of pending requests. Defendant has not made this showing." The court added that "plaintiff has demonstrated a genuine need for urgency in gaining access to

these records. Plaintiff is a U.S. citizen facing extradition to Mexico, where he faces death threats. He believes the requested documents will fortify his case against extradition, and time is of the essence." (*Avelino Cruz Martinez v. United States State Department*, Civil Action No. 3-14-1616, U.S. District Court for the Middle District of Tennessee, Nashville Division, Jan. 14)

A federal court in West Virginia has ruled that the Mine Safety and Health Administration has not shown that it has completely responded to Marshall Justice's FOIA request for records concerning his discrimination complaint to the MSHA against his former employer, Gateway Eagle Coal Company, although it found that Justice has not shown that discovery is warranted. Justice claimed the agency had a pattern and practice of delaying its response to requests for investigative files of complaints made under the Mine Safety and Health Act. The agency argued that Justice's request for a declaratory judgment was not available under FOIA. The court, however, noted that "assuming that a declaration concerning the impropriety of an agency's response to a FOIA request would be improper once the requested documents had been disclosed does not require the dismissal of [Justice's declaratory judgment claim] because Justice alleges that MSHA has *not* yet disclosed the documents pertinent to his FOIA request. MSHA clearly disagrees, but it has not moved to dismiss the case as moot, and, at this stage, the court is constrained to accept the facts pled in the complaint as true." Justice had also requested discovery into the adequacy of the agency's response and the agency countered that "any discovery relating to the agency's search would be premature." The court agreed, pointing out that "any factual disputes involving the issues identified by the plaintiff—such as whether the agency engaged in a good-faith search for all materials—are likely to arise only *after* the defendant has submitted its affidavits." The court added that "this is not to say that some limited discovery may not ultimately prove necessary. . . Should MSHA's submissions fail to meet [the standard for *Vaughn* indexes], the plaintiff may renew his request to conduct limited discovery at that time." (*Marshall Justice v. Mine Safety and Health Administration*, Civil Action No. 14-14438, U.S. District Court for the Southern District of West Virginia, Jan. 23)