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*Washington Focus: The CIA has told a district court judge that the agency can complete Muckrock's request for its database of 12 million declassified documents in only six years rather than its original estimate of 28 years and that the cost will be only $108,000. Muckrock plans to put the database online, but the CIA argued that "the Agency anticipates the entire CREST database at NARA will be available at [the CIA's] e-FOIA website in about four years" so there was no public interest in expending the resources to provide it to Muckrock. Muckrock's attorney Kel McClanahan told Josh Gerstein of POLITICO that "CIA has intentionally decided that it is going to insist on taking the most convoluted, most burdensome, most unnecessarily slow path to filling this request because it simply doesn't want to process the request at all.". . .In an editorial Feb. 18, the New York Times has shown its support of passage of the new FOIA legislation. The editorial observed that "for Republicans, this is a rare chance to log a significant bipartisan accomplishment in the public interest—one that Mitch McConnell, the Senate majority leader, and Mr. Boehner should promptly seize." The editorial added that "strengthening the law will help ensure that basic principles of transparency are not a matter of executive discretion"*

## D.C. Circuit Affirms Exemption 7(F)'s Broad Coverage

Last year a conservative panel of the D.C. Circuit concluded that Exemption 7(F) (harm to any person)) applied to flood inundation plans because they could be characterized as relating to security of dams from terrorist attacks. In *PEER v. U.S. Section, International Boundary & Water Commission, U.S.-Mexico*, 740 F.3d 195 (D.C. Cir. 2014), the court concluded that although the Boundary & Water Commission had no real law enforcement role, to the extent that the inundation plans dealt with security matters and thus could become part of some future law enforcement matter, they could be protected by Exemption 7(F). Because the legal analysis seemed to be based almost exclusively on Justice Samuel Alito's non-relevant ruminations in his concurrence in *Milner v. Dept of Navy*, critics hoped the case was more an outlier than anything else. But now another panel with a majority of conservatives, but one that also includes liberal

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judge Judith Rogers, has recognized *PEER*'s precedential value and ruled that guidelines for determining when a cellular network might be shut down or disrupted because of a terrorism event are protected under Exemption 7(F), even though the Department of Homeland Security was unable to identify who might be harmed in such an event except in broad terms.

EPIC requested Standard Operating Procedure 303, which had been developed by the Department of Homeland Security's National Coordinating Center for Communications in response to the 2005 London bombings, in which bombs were detonated by cell phones, to create a process by which cellular networks could be shut down in response to such threats. Homeland Security initially claimed it could not find the document, but on appeal the agency produced SOP 303 but withheld it entirely under Exemption 7(F) and Exemption 7(E) (investigative methods and techniques). EPIC sued and the district court ruled that neither exemption applied. The government then appealed to the D.C. Circuit.

A key question in *PEER* was whether the Boundary & Water Commission had a law enforcement function that qualified it to claim Exemption 7. The *PEER* court relied exclusively on Alito's concurrence in *Milner* in which he indicated that "law enforcement entails more than just investigating and prosecuting individuals *after* a violation of the law" and "includes. . .proactive steps designed to prevent criminal activity and to maintain security." While such a connection seemed a leap of faith in the case of the Boundary & Water Commission, Homeland Security's claim that SOP 303 was grounded in law enforcement seemed substantially more plausible. Writing for the court, Rogers noted that "here, too, the Department has shown that it compiled SOP 303 for law enforcement purposes. . .SOP 303 was created to prevent crime and keep people safe, which qualify as law enforcement purposes."

Having determined that SOP 303 qualified as a law enforcement record, Rogers turned to the agency's claim that it could harm individuals if disclosed. As described by Homeland Security, disclosure "would enable bad actors to circumvent or interfere with a law enforcement strategy designed to prevent activation of improvised explosive devices" and "to insert themselves into the process of shutting down or reactivating wireless networks by appropriating verification methods and then impersonating officials designed for involvement in the verification process."

EPIC relied on *ACLU v. Dept of Defense*, 543 F.3d 59 (2d Cir. 2008), *vacated on other grounds*, 558 U.S. 1042 (2009), where the Second Circuit rejected the Defense Department's claim that disclosure of photographs depicting the abuse of detainees was protected under Exemption 7(F) because it could endanger U.S. personnel in Iraq and Afghanistan. The Second Circuit noted that "the phrase 'any individual'. . .may be flexible, but is not vacuous" and concluded that "Exemption 7(F), by conditioning its application on a reasonable expectation of danger *to an individual*, excludes from consideration risks that are speculative to any individual."

Exemption 7(F) was originally part of the 1974 FOIA amendments and protected law enforcement personnel who might be endangered by disclosure. At the time, this was considered to be particularly applicable to undercover agents. However, in the 1986 FOIA amendments that resulted in a lower threshold for applying Exemption 7, the language of Exemption 7(F) was amended to "endanger the life or physical safety of any individual," a change which at the time was generally considered to encompass confidential sources and witnesses whose lives might also be endangered but had not qualified because they were not law enforcement personnel. Until 911, the use of Exemption 7(F) was limited to such individuals. But after 911, the government began pushing Exemption 7(F) as a basis for withholding records that could possibly aide a terrorist, including information that had usually been public concerning any number of scenarios involving public safety. Nevertheless, the most prominent decision supporting the government's position is a Utah district court ruling, *Living Rivers v. Bureau of Reclamation* (D. Utah Mar. 25, 2003), whose analysis was

specifically repudiated by the Second Circuit in *ACLU v. Dept of Defense*, but largely restored by the D.C. Circuit's decision in *PEER*.

While the *PEER* decision clearly implied that flood inundation data was protected even under the Second Circuit's analysis, Rogers seemed to backpedal slightly. She pointed out that "our decision in *PEER* does not foreclose [the Second Circuit's] interpretation of Exemption 7(F), for in *PEER* the court had no occasion to decide whether it agreed with it." Rogers then pointed out that Homeland Security had adequately described the type of individuals that needed protection. She observed that the agency claimed "release of SOP 303 would endanger anyone in the United States who happens to be near an unexploded bomb or frequents high value targets" and added that "if viewed without regard to SOP 303's requirement that there be a critical emergency for a shutdown to take place, then the Department's interpretation may not accord with the Second Circuit's approach. .[but the Second Circuit] disclaimed that it was confronting a case where there was a showing of a reasonable expectation of danger with respect to one or more individuals, which we conclude there is here."

Given the plain language of Exemption 7(F), Rogers noted that "the FOIA provides no textual basis for requiring the Department, for purposes of Exemption 7(F), to identify the specific individuals at risk from disclosure, and to do so would be to 'take a red pen' to the words chosen by Congress that are to be understood to have their ordinary meaning." She observed that "understood in context, the phrase 'any individual' makes clear that Exemption 7(F) now shields the life or physical safety of *any* person, not only the law enforcement personnel protected under the pre-1986 version of the statute." She added that "in any event, what Congress enacted was broad language that was not limited to protection of law enforcement personnel and related persons." The D.C. Circuit remanded the case to the district court to determine if any information in SOP 303 could be segregated and disclosed. (*Electronic Privacy Information Center v. United States Department of Homeland Security*, No. 14-5013, U.S. Court of Appeals for the District of Columbia, Feb. 10)

## Views from the States…

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

### Florida

A court of appeals has ruled that video surveillance footage from buses operated by the Central Florida Regional Transportation Authority (LYNX) is confidential under the exemption for security systems and that the trial court erred in finding that LYNX was required to disclose the footage to an Orlando television station. The security system was partially funded by a grant from the Department of Homeland Security and publicly-posted signs announced the existence of the video cameras. WKMG in Orlando requested footage for buses and LYNX denied its request based on the security system exemption. The trial court found the records were not protected and ordered LYNX to disclose them. LYNX then appealed. The appeals court reversed, noting that "we agree with LYNX that the video footage captured by the bus camera directly relates to and reveals information about a security system." The court added that "the videos, which are records, reveal the capabilities—and as a corollary, the vulnerabilities—of the current system." (*Central Florida Regional Transportation Authority v. Post-Newsweek Stations*, No. 5D14-360, Florida District Court of Appeal, Fifth District, Jan. 30)

## New Jersey

A court of appeals has ruled that the Government Records Council improperly upheld claims made by the Office of the Attorney General that records related to its review of whether the New York City Police had legal authority to conduct surveillance of Muslim organizations in New Jersey as part of its operations to protect New York City from possible terrorist threats were exempt. After Attorney General Jeffrey Chiesa announced his office had concluded the program had not violated any New Jersey civil or criminal laws, Glenn Katon requested records used in the review and the basis for determining the legality of the NYPD activities. OAG responded that it either had no responsive records or any records were either privileged or protected by the security exemption in the Open Public Records Act. Katon complained to the GRC, which upheld OAG's denial based on the fact that it had no responsive records. Katon appealed and the appellate court reversed, finding the GRC had insufficient evidence to uphold the denial. Rejecting OAG's assertion that all records used in its review were privileged, the court noted that "it is undeniable that a decision-maker can rely on factual documents containing no opinions, recommendations, or advice. . .Whether the withheld 610 pages contain such factual documents is unclear from the Custodian's Statement." The appeals court also found OAG had not shown that various documents qualified as pre-decisional. Requiring OAG to provide a more detailed index of records, the court sent the case back to GRC for further consideration. The court observed that "the Custodian simply stated he was withholding more than 600 pages and asserting four privileges. His failure to relate each privilege to particular documents is particularly worrisome as the GRC did not consider three of the asserted privileges, and thus it is possible 'that some of the documents may not in fact be privileged.'" (*Glenn Katon v. NJ Department of Law and Public Safety*, No. A-0183, 13, New Jersey Superior Court, Appellate Division, Feb. 12)

## New York

A trial court has ruled that the New York City Police Department has failed to show that the investigatory file of an unsolved 1987 rape/murder is protected by a variety of law enforcement exceptions. On reconsideration of the court's previous ruling that the NYPD had failed to substantiate its claims, this time the NYPD asserted a number of exemption claims. Again, Judge Doris Ling-Cohan rejected all of them except for those related to information that would reveal the identity of a victim of a sexual crime. Rejecting the agency's claim that disclosure would reveal investigative methods, she noted that "the passage of time does not, in and of itself, establish that non-routine investigative practices are involved. If anything, it illustrates that the routine investigative techniques and procedures have not produced the desired results, in this 'cold' case dating from 1987." She dismissed NYPD's claims of personal privacy by pointing out that "NYPD has failed herein and in the prior motions to produce an affidavit of a person with knowledge of the records in issue who states that there is any information which falls within any of the categories listed [in the privacy exemption]." She indicated that if personal information was contained in the files it could be redacted. She agreed with the NYPD that any crime photos of the victim were covered by an exemption. She ordered an *in camera* review of the files to determine what records might be protected by an exemption prohibiting disclosure of records identifying the victim of a sex offense. She noted that "in this matter, NYPD has made no particularized showing that any particular document tends to identify the victim, although it seems likely that some of the documents may." (*Loevy & Loevy v. New York City Police Department*, No. 100812/12, New York Supreme Court, New York County, Jan. 21)

## Pennsylvania

A court of appeals has ruled that constitutional due process requires that individuals be notified that their home address information may be released as a result of a Right to Know Law request and provided with an opportunity to challenge the disclosure. Ruling in a complicated case concerning disclosure of home

address information for public school employees that had been remanded from the supreme court after that court found that the statutorily-mandated complaint process to the Office of Open Records did not provide adequate opportunity for affected individuals to challenge disclosure of their home address information, the appeals court was also faced with a separate supreme court ruling finding that there was no constitutionally-protected expectation of privacy for home addresses. As a result, OOR argued that individuals did not have standing to challenge disclosure of their home addresses. But viewing the issue as a violation of due process, the appeals court noted that "an agency, as defined in the RTKL, is prohibited from granting access to an individual's personal address information without first notifying that affected individual with an opportunity to demonstrate that disclosure of the requested information should be denied pursuant to the personal security exemption of the RTKL. We further declare that the OOR is prohibited from granting access to personal address information of an individual who objected to the disclosure of such information pursuant to the personal security exemption without first permitting that individual to intervene as of right in an appeal from an agency's denial of a requester's request for access to such information." One judge dissented, pointing out that the majority "just assumes that it can exclude home addresses merely because they involve some personal information." Another judge concurred by observing that such due process rights should be extended to business submitters as well. (*Pennsylvania State Education Association v. Commonwealth of Pennsylvania*, No. 396 M.D. 2009, Pennsylvania Commonwealth Court, Feb. 17)

A court of appeals has ruled that metadata is part of electronically stored information and is subject to the Right to Know Law. However, because Paint Township showed that data stored on Board of Supervisors' chair Randy Vossburg's township cell phone had been deleted, the township was not required to hire a third-party forensics expert to try to retrieve any data that might still exist. Prior to Robert Clark's request, Vossburg had stopped using the township's cell phone and had deleted the data stored on it. He then leased a cell phone in his own name, although the township continued to reimburse him for the costs of the cell phone. Clark, chair of the township's board of auditors, requested data from both of the cell phones used by Vossburg. The township initially claimed that it could not retrieve the data from Vossburg's township cell phone and that it did not have custody of records for his private cell phone. The trial court accepted the township's explanation that the data from the township cell phone had been deleted, but concluded that the township was obligated to use a forensics expert to try to retrieve any remaining data. Further, the trial court found that records from Vossburg's private cell phone were public records to the extent they reflected use of the cell phone to conduct public business. The appeals court first noted that "metadata is inseparable from Electronic Stored Information and, being a conjoined part of ESI documents, metadata must be disclosed along with an ESI document." But the court pointed out that "the record demonstrates that all ESI has been deleted." Finding the trial court's order requiring the township to hire a forensic expert to attempt to retrieve any remaining data inappropriate, the appeals court observed that "there is a dramatic difference between drawing information known to exist from a computer database in a 'format available to the agency' and where, as here, it has been established that the information does not exist in any ascertainable format." The appeals court added that "out of respect for the trial court's apparent concern that Supervisor Vossburg may not have properly 'deleted' the information/data on the publicly-funded cell phone, we remand the matter to the trial court for further proceedings of a limited nature." The appeals court agreed with the trial court's ruling that Vossburg's conduct of public business on a private cell phone was a public record. The court explained that "the Township is reimbursing Supervisor Vossburg on a monthly basis for his cell phone and Supervisor Vossburg cannot privatize his public correspondence." (*Paint Township v. Robert L. Clark*, No. 2113 C.D. 2013, Pennsylvania Commonwealth Court, Feb. 5)

## Texas

A court of appeals has ruled that the Attorney General properly rejected an opinion request from the Criminal District Attorney of Victoria County asking for a ruling on whether it could withhold records concerning its use of outside attorney under the attorney-client privilege and the attorney work-product privilege because the DA's request was received after the ten-day statutory deadline for making such a request. But the appeals court also found the trial court had improperly ruled in favor of the Attorney General's conclusion that the DA had not shown a compelling reason for withholding the records, a statutory requirement for agencies once they miss the ten-day deadline. The DA's opinion request was dated June 26, 2009, but the postmark showed it had been sent June 29, 2009. As a result, the AG dismissed the request and because the AG considered privileges to be discretionary, found the DA had failed to show a compelling need to withhold the records. The DA argued that the later postmark was inadvertent and the request had been prepared in good faith in time to reach the AG during the 10-day time limit. The court noted that the requirement for requesting an AG opinion "does not expressly include a 'good faith' defense for failure to comply with the deadline or contain any similar language by which we might reasonably infer such a standard." But after finding the DA's opinion request was untimely, the court explained that its recent decision in *Abbott v. City of Dallas* (Tex. App.-Austin, Dec. 23, 2014), recognized that the attorney-client privilege qualified as a compelling reason for withholding records. The court pointed out that because it had recognized that the attorney-client privilege qualified as a compelling reason to withhold records, "the AG has failed to establish as a matter of law that the DA cannot demonstrate a compelling reason to withhold the information by establishing that it was protected by the attorney-client privilege. . ." (*Stephen B. Tyler v. Ken Paxton*, No. 03-12-00747, Texas Court of Appeals, Austin, Jan. 28)

In a subsequent ruling with almost identical facts, a court of appeals has ruled that by invoking attorney-client privilege to protect certain records from disclosure, the City of Dallas had provided a compelling reason for withholding the records even though it missed the 10-day time limit for requesting an Attorney General's opinion by more than two months. The AG rejected the City's request because it was received after the time limits and told the City that because the attorney-client privilege could be waived it did not qualify as a compelling reason to withhold under the exemption for state and federal laws or regulations that prohibited disclosure. Based on the earlier ruling in *Abbott v. City of Dallas* (Tex. App-Austin, Dec. 23, 2014), the court again rejected the AG's argument, noting that "we conclude that the attorney-client information at issue 'falls within the purview of section 552.101 and that the City has demonstrated a compelling reason to withhold the information by establishing that it is protected by the attorney-client privilege. . ." The appellate court also reversed the trial court's $5,500 award of attorney's fees to the AG. (*City of Dallas v. Ken Paxton*, No. 13-13-00397, Texas Court of Appeals, Corpus Christi-Edinburg, Feb. 12)

## Virginia

The Attorney General has found that a 2013 amendment to the Virginia Freedom of Information Act requiring local law enforcement agencies to make public mug shots of adult arrestees unless doing so would jeopardize a felony investigation applies when a law enforcement agency maintains mug shots in a separate database. Finding that the Chesapeake Sherriff's Office, which operates the Chesapeake City jail, must disclose mug shots maintained in their own database, the Attorney General distinguished this source from the Central Criminal Records Exchange, run by the State Police, the dissemination of whose mug shots are statutorily limited to forty-four identified requesters. The Attorney General noted that "persons seeking criminal history record information pursuant to FOIA are not authorized requesters or recipients" but added that "while mug shots are included in the CCRE database, [the statute] explicitly does not preclude a local law enforcement agency 'from maintaining its own separate photographic database.'. . .[T]he restrictions on releasing on CCRE information dates from 2001 or earlier, several years prior to the 2013 FOIA amendment

requiring the release of mug shots, which lends support to the conclusion that the FOIA amendment requires the release of mug shots that are in a 'separate photographic database.'" The AG concluded that "FOIA, as amended in 2013, evinces a clear and unmistakable legislative intent that mug shots must be released to the public upon proper request, without differentiating between active and closed cases. In contrast, laws related to [Criminal Justice Information System] and CCRE that predate the FOIA amendment evince an equally clear legislative intent that CJIS records, which are maintained in, but not exclusively in, the CCRE, and which include mug shots, be confidential and *not* accessible by the general public. However, this strict mandate against release is tempered by one statutory provision that allows the release of factual information concerning arrests and another statutory provision that allows a local law enforcement agency to maintain its own database of mug shots." (Office of the Attorney General of Virginia, Feb. 5)

### Washington

A court of appeals has reversed a $723,000 penalty and a $103,000 attorney's fees award levied by a trial court against the University of Washington after ruling the trial court erred when it presumed the university was able to disclose an additional 12,000 pages of emails requested by Isabelle Bichindaritz, a former professor at the University of Washington Tacoma Institute of Technology, because they had been assembled. Bichindaritz made a Public Records Act request for all email related to herself from a list of 96 university employees. The university gathered 25,000 responsive emails and began the process of reviewing and redacting them. The university disclosed 13,000 pages over a span of 14 months. The university terminated Bichindaritz and she filed a sexual discrimination suit. Six months later, Bichindartiz instructed the university to stop processing her PRA request, apparently because her counsel told her all relevant information would be disclosed in discovery. However, four months later after discovery proved inadequate, Bichindaritz told the university to resume processing the 12,000 remaining pages of her PRA request. The university finished processing those records five months later. Three months after that, Bichindaritz filed a civil rights claim against the university in state court and, two weeks later amended her state complaint to add a charge that the university had violated the PRA. The state court ultimately found the university had violated the PRA by failing to respond to her request until November 2011 when the records had been assembled by October 2009. The university argued the trial court incorrectly concluded that "as soon as the documents were assembled, they were ready to be produced." The appeals court agreed, noting that "by the time Bichindaritz closed her 2009 request in February 2011, the University had assembled about 25,000 pages but had reviewed only about half of them for applicable exemptions. It was unreasonable to expect the University to *produce* the remaining 12,000 pages the same day Bichindartiz reopened her request simply because it had already *assembled* those documents." (*Isabelle Bichindaritz v. University of Washington*, No. 70992-5-I, Washington Court of Appeals, Feb. 17)

## The Federal Courts…

The First Circuit has ruled that the Department of Health and Human Services properly withheld records concerning a sole-source contract the agency granted to Planned Parenthood to provide family planning services in New Hampshire after the state terminated its previous contract with Planned Parenthood because of concerns the organization promoted abortion. The agency withheld Planned Parenthood's manual and fee structure under **Exemption 4 (confidential business information)** and internal memos concerning the legality of the federal action under **Exemption 5 (privileges)** in response to a request from New Hampshire Right to Life. Under Title X, the federal government funds state contracts for various medical services, one of which covers family planning. When New Hampshire terminated its contract with Planned Parenthood, HHS

asked the state to come up with an alternative provider. The state indicated that it had found no alternative and HHS decided to fund Planned Parenthood directly in the short-term to continue state services and then to open future contracts to qualified bidders. New Hampshire Right to Life requested the agency's records concerning the contract. Initially, HHS decided to release some portions of Planned Parenthood's manual and after the agency rejected Planned Parenthood's objections, Planned Parenthood filed suit to block disclosure. The district court remanded the case back to HHS for further consideration. The agency then withheld the entire manual and related materials on cost structure, as well as memos concerning the validity of its own actions in funding the grant. After the district court upheld the agency's decision, New Hampshire Right to Life appealed to the First Circuit. New Hampshire Right to Life argued that as a non-profit, Planned Parenthood could not be considered commercial. But the First Circuit noted that "if accepted, this argument would amount to a per se exclusion of non-profit entities from protection under Exemption 4. Neither the language of the statute nor common sense lean in Right to Life's favor here. The term 'commercial' as used in the statute modifies 'information' and not the entity supplying the information. . .How the tax code treats income from that commerce is a separate issue that has no bearing on our inquiry here." Right to Life next argued that the government had awarded the grant to Planned Parenthood based on its finding that it was the only Title X provider in the region and it could not say now that Planned Parenthood did face competition. The First Circuit observed that "Right to Life's view of actual competition is myopic, focusing only on the ad-hoc, non-competitive grant process that took place in 2011. The district court aptly noted that Planned Parenthood faces plenty of competition from other entities for patients. . .Although Planned Parenthood admittedly did not compete for the federal grant in 2011, it certainly does face actual competitors—community health clinics—in a number of different arenas, and in future Title X bids." The court then found the manual and the fee schedule were confidential, pointing out that "Planned Parenthood treated these documents as confidential information not generally available to the public. Pricing information like that contained in these documents is undoubtedly valuable information for competitors." In a footnote, the First Circuit indicated the district court had used the voluntary submission standard from *Critical Mass* to establish confidentiality. But the First Circuit observed that "we decline at this time to adopt that lessened standard for voluntary submissions." Turning to those documents withheld under Exemption 5, the court explained that New Hampshire Right to Life claimed the government had waived its privilege once the White House signed off on the grant to Planned Parenthood. The First Circuit rejected the claim, noting the evidence indicated that the decision had not yet been finalized when it was discussed at the White House. New Hampshire Right to Life also argued that the agency had adopted the legal memo on the validity of its plan when it went ahead and followed the legal advice. The First Circuit indicated that "the record provides no factual support for this claim unless one presumes that every time an agency acts in accord with counsel's view it necessarily adopts counsel's view as 'policy of the Agency.' As a categorical rule, this makes no sense, especially where counsel's legal advice is simply that there is no impediment to the agency doing what it wants to do." The court added that "it is a good thing that Government officials on appropriate occasions confirm with legal counsel that what the officials wish to do is legal. To hold that the Government must turn over its communications with counsel whenever it acts in this manner could well reduce the likelihood that advice will be sought. Nothing in the FOIA compels such a result." (*New Hampshire Right to Life v. United States Department of Health and Human Services*, No. 14-1011, U.S. Court of Appeals for the First Circuit, Feb. 4)

A federal court in Illinois has ruled that the Department of Homeland Security must complete its processing of a voluminous request for records on immigrant detention facilities within 45 days of the court's order after Judge Matthew Kennelly found the agency had failed miserably to conduct an **adequate search** in the nearly four years since the National Immigrant Justice Center submitted its request. NIJC's request identified eight categories covering 250 detention facilities. During the course of the litigation, NIJC narrowed its request to the top 100 detention facilities and also agreed to accept summaries rather than checklists for facilities. Immigration and Customs Enforcement initially estimated the request would take 80

weeks to complete, but told Kennelly earlier in the litigation that it would complete the request within 40 weeks. However, by the time of Kennelly's ruling, the agency had already exceeded 80 weeks and was still nowhere near completion. Kennelly noted that "the agencies have provided only sketchy details of what they did in the two-and-one-half years preceding their [increased activity in the fall of 2013] to search for relevant records. The only reasonable conclusion that may be drawn is that they did not conduct a reasonable search. The gaping holes in the agencies' production of documents during that extraordinarily long delay are virtually impossible to justify." Kennelly was also incensed by what he believed was the government's misleading statements to him concerning when NIJC's request would be complete. He pointed out that "the agencies came nowhere near meeting the estimate—indeed they did not even meet the original, much longer estimate even though the requests were narrowed after that. This strongly suggests that there was an extended period of hand-sitting, and that this changed only when, during the course of the litigation, the agencies perceived themselves, rightly, to be under the gun." The agencies asked Kennelly to allow continuing disclosure on a rolling basis. Noting that this process had already proven to be inadequate, Kennelly observed that "allowing even more time for an already extraordinarily protracted production of records based on problems faced by many, if not all, government agencies would undermine the purpose behind the FOIA." NIJC asked Kennelly to require the agency to provide more recent data rather than use the search cut-off date. But Kennelly pointed out that while "a date-of-search cut-off is not entirely satisfactory in the present case [because] it allows the defendants' delays to leave the NIJC with relatively dated information. . .a date-of-release cut-off would be counterproductive to the overall goal of completing the production as quickly as possible going forward." (*National Immigrant Justice Center v. Unites States Department of Homeland Security*, Civil Action No. 12-05358, U.S. District Court for the Northern District of Illinois, Feb. 2)

A federal court in Minnesota has ordered that records containing personally-identifying information about Concentrated Animal Feeding Operations be sealed until a **reverse-FOIA** suit brought against the EPA by the Animal Farm Bureau Federation and the National Pork Producers Council is resolved. Under the Clean Water Act, the EPA is required to make public permits issued under the National Pollutant Discharge Elimination System. When Food & Water Watch, the Environmental Integrity Project, and Iowa Citizens for Community Improvement requested NPDES permits for CAFOs under FOIA, the two trade organizations filed suit to block disclosure, arguing personally-identifying information about the businesses was protected by **Exemption 6 (invasion of privacy)**. The trade organizations argued that *Reporters Committee* stood for the proposition that personal information submitted to the government was still subject to protection. Judge Ann Montgomery disagreed, noting that *Reporters Committee* hinged on the difficulty of accessing much of the information at issue there. She pointed out that the EPA was required to disclose the NPDES data and that the information was considerably more accessible than the rap sheets at issue in *Reporters Committee*: "Here, the information Plaintiffs want protected is easily accessible and widely available, often times voluntarily so by the farmers who seek to promote their business." She initially rejected the trade organizations' claims of **standing**, observing that "because the Plaintiffs' member farmers' information, including their physical addresses, is publicly available from multiple sources, Plaintiffs face a seemingly impossible task of showing that prohibiting the EPA's distribution of already public information will redress the speculative injuries they currently allege." Nevertheless, the court subsequently decided to allow the case to continue and the parties agreed to the sealing order. (*American Farm Bureau Federation and National Pork Producers Council v. U.S. Environmental Protection Agency*, Civil Action No. 13-1751 ADM/TNL, U.S. District Court for the District of Minnesota, Jan 27 and Feb. 6)

Judge Christopher Cooper has awarded CREW $35,000 in **attorney's fees** and costs for its litigation against the Justice Department for records concerning the investigation and prosecution of Paul Magliocchetti,

a prominent lobbyist who pled guilty to federal campaign finance law violations. DOJ did not dispute that CREW was entitled to fees, but challenged CREW's use of the *Laffey* matrix adjusted for inflation by applying the legal services component of the Consumer Price Index as the basis for determining hourly rates. The LSI-adjusted *Laffey* provided hourly rates of more than $700, while DOJ urged the use of the *Laffey* matrix adjusted by the overall Consumer Price Index for the Washington-Baltimore area, which yielded an hourly rate of about $500. After reviewing a number of cases over the past several years in which the LSI-adjusted *Laffey* has been used to calculate rates for D.C. attorneys, Cooper pointed out that because rates varied from survey to survey, rates were often discounted, and firms often did not collect the entire amount charged, "the reported rates surely overstate the actual fees that law firms are paid—and expect to be paid—for their services." Cooper noted that "the litigation required to overcome DOJ's categorical withholding of potentially responsive records is aptly described as 'complex.'" He accepted the LSI-adjusted *Laffey* matrix, but because of his concerns about its reliability he indicated that "the Court will reduce those rates by 15 percent, however, to account for the differences between reported rates and actual law firm billing realization." As a result, he awarded CREW $28,000 for the underlying litigation as well at $8,000 for CREW's fee petition. (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, Civil Action No. 11-00374 (CRC), U.S. District Court for the District of Columbia, Feb. 11)

Judge Rudolph Contreras has ruled that the U.S. Marshals Service has shown that federal prisoner Jeremy Pinson **failed to exhaust his administrative remedies** in relation to his request for records concerning Jamil Abdullah Al-Amin, another prisoner, after Pinson was told the agency would not disclose the records without Al-Amin's consent. Pinson did not appeal the decision, but instead filed another request for Al-Amin's records, this time accompanied by a consent form signed by Al-Amin. The Marshals Service concluded that Al-Amin's signature was not authentic and denied the request. Dismissing the first request on exhaustion grounds, Contreras noted that "Mr. Pinson avers nothing suggesting that he disputes the DOJ's exhaustion argument." He added that "as a consequence, this Court finds that Mr. Pinson has effectively conceded that he failed to appeal the USMS's decision and thus failed to exhaust his administrative remedies regarding [his first request]." As to the second request, USMS contended Al-Amin's signature was not authentic. But Contreras pointed out that DOJ had made the same argument previously in connection to Pinson's request for Al-Amin's records from DOJ's National Security Division. At that time, Contreras had ordered DOJ to contact Al-Amin to confirm the authenticity of his signature. As a result of that investigation, Al-Amin confirmed that he had signed the certification of identity giving Pinson permission to access his records, including those from USMS. Contreras observed that "the DOJ's own submissions offer two contradictory versions of the facts. . . Accordingly, because the DOJ has submitted a declaration contradicting the evidence it relies on in its motion, summary judgment is not appropriate." (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, Feb. 10)

Judge Rudolph Contreras has ruled that Gale Rachuy must pay **fees** assessed by the FBI and EOUSA for copies of records responsive to his request for records on his conviction. Rachuy requested records pertaining to his conviction in the Western District of Wisconsin. EOUSA located and released about 120 pages. It then found many more records and told Rachuy that because of their volume he would be required to pay fees. It released an additional 1000 pages while waiting for Rachuy to commit to paying fees. The FBI also located a large number of records and charged Rachuy $79 for duplication. The FBI processed more records referred by EOUSA and charged Rachuy another $69 for duplication. The agencies claimed Rachuy had not responded to their requests for payment, but Rachuy provided letters indicating that he had challenged the quality of the records and said he would not pay for duplicates. Contreras pointed out that "plaintiff's dissatisfaction with the delay in receipt of documents and the quality of those documents does not relieve him

of his obligation to pay fees, and he remains obligated to pay fees even after having filed a lawsuit. In response to defendant's showing, plaintiff does not demonstrate that he actually paid any part of the requested fees." (*Gale A. Rachuy v. Director of the Federal Bureau of Investigation*, Civil Action No. 13-1508 (RC), U.S. District Court for the District of Columbia, Feb. 5)

Judge James Boasberg has ruled the IRS properly withheld 136 pages of interviews in a criminal investigation from Gregory Bartko under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Bartko, convicted of white-collar crimes, had submitted a request to the U.S. Postal Inspection Service for records pertaining to himself. USPIS had referred the 136 records to the IRS, which dealt with criminal investigations of third parties other than Bartko. As a result, the agency withheld them entirely under **Exemption 6 (invasion of privacy)** and Exemption 7(C). Finding the records were protected by Exemption 7(C), Boasberg noted that "even the mere acknowledgement of the existence of records relating to criminal investigations (let alone their contents) can constitute an invasion of privacy. This privacy interest is strongest where the individuals in question 'have been investigated but never publicly charged.'" He observed that "the IRS has thus placed a significant privacy weight on the scales." He pointed out that "to offset this weight, Bartko produces very little" except to argue that the records were relevant to his case. Boasberg indicated that "but relevance is not the test. The question under [the pertinent case law] is whether disclosure is necessary in the public interest to determine if the agency engaged in illegal activity. As Plaintiff does not even assay this hurdle, the Court cannot find he has surmounted it. In an ultimate balancing, something in the privacy bowl outweighs nothing in the public-interest bowl every time." Bartko also argued the IRS had failed to show why the records were not **segregable**. Boasberg noted that "the documents at issue are all memoranda of witness interviews. Since any disclosure of the identity of either the subject of the investigation or witnesses would be improper, it is highly unlikely that any material in these memoranda could be released without compromising such information." (*Gregory Bartko v. United States Department of Justice, et al.*, Civil Action No. 13-1135 (JEB), U.S. District Court for the District of Columbia, Feb. 9)

Judge Rosemary Collyer has ruled the FBI properly withheld 17 pages pertaining to threats of violence against the Occupy Houston participants under **Exemption 7 (law enforcement records)**. After having ruled in favor of the FBI on other counts, Collyer had found in a prior ruling that the agency had failed to show a rationale nexus to criminal activity. But after reviewing the records *in camera*, Collyer agreed the agency had shown a law enforcement purpose and had properly withheld the records under several subsections of Exemption 7. Ryan Shapiro argued the agency had failed to show the nature of the crime or the source's relationship to the information for purposes of **Exemption 7(D) (confidential sources)**. But Collyer pointed out that "FBI has articulated that the names and information withheld on the basis of implied confidentiality are from 'individuals who are members of organized violent groups' that 'come into conduct with criminal elements and share information that such elements believe is not intended for disclosure to law enforcement.'" She noted that "based on these statements and a review of the documents, the Court finds that Exemption 7(D) applies to protect the names of and information about individuals whose relationships to criminal activity stems from their involvement in 'organized violent groups.' As members of these violent groups, the sources could reasonably expect retaliation unless their activities were kept confidential, particularly in light of the fact that the groups believe such information should not be shared with law enforcement agencies." The FBI had withheld internal web addresses and phone numbers under **Exemption 7(E) (investigative methods and techniques)**. Collyer agreed with the agency, noting that "considering both FBI's arguments and the documents themselves, the Court is confident that FBI has met the 'relatively low bar' of demonstrating how individuals could use the withheld information to circumvent the law either by altering their criminal behavior after learning of FBI's specific investigative techniques or by disrupting FBI activity." (*Ryan Noah Shapiro v.*

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*U.S. Department of Justice*, Civil Action No. 13-595 (RMC), U.S. District Court for the District of Columbia, Feb. 2)

A federal court in Connecticut has ruled that the FBI properly refused to either confirm or deny the existence of records showing telephone calls from a specific number because convicted murderer Russell Peeler failed to provide third-party authorizations for disclosure or to show any public interest in disclosure. Peeler had been convicted of murder in state court. Believing that telephone records for two numbers might provide exculpatory information, Peeler filed two FOIA requests with the FBI. In response to his first request for records for his mother's telephone number, the agency ultimately found 18 pages, releasing some with redactions. However, in response to his second request for another third-party number, the agency told him it would neither confirm nor deny the existence of records without authorization or a showing of public interest. Because Peeler had failed to file a motion opposing the government's summary judgment motion, Judge Jeffrey Meyer assessed the agency's behavior, finding it had conducted an adequate search and properly withheld records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. He noted that Peeler had not identified a public interest in disclosure and "merely states that he seeks the information to challenge his criminal conviction. This is a personal, rather than public, interest." Accepting the agency's decision to neither confirm nor deny the existence of records pertaining to the second request, Meyer pointed out that "association in any fashion with an FBI criminal investigation may expose an individual to unwarranted harassment and danger. . .Plaintiff has identified no contrary evidence in the record nor made a showing of bad faith on the part of the defendants." (*Russell Peeler v. U.S. Dept. of Justice*, Civil Action No. 13-1323 (JAM), U.S. District Court for the District of Connecticut, Jan. 30)

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