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

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Washington Focus: The "Presidential Library Donation Reform Act of 2015" (S. 558), sponsored by Sen. Tom Carper (D-DE), Ron Johnson (R-WI) and Kelly Ayotte (R-NH) and H.R. 1069, sponsored by Rep. John Duncan (R-TN) was reintroduced Feb. 26. The bill would require organizations that raise funds for presidential libraries to disclose data on contributions above $200 to the National Archives. The bill requires names and contribution amounts received prior to the transfer of a library to NARA to be reported and for NARA to make that information available on its website.

Judge Lambastes EPA FOIA Performance

In exceedingly blunt terms, Judge Royce Lamberth has lambasted the EPA's failure to search for emails responsive to Landmark Legal Foundation's FOIA request for communications involving senior agency officials suggesting that EPA regulations should be slowed down until after the 2012 election. The Office of General Counsel issued a litigation hold for any potentially relevant information, including electronically-stored information. The request was then forwarded to agency FOIA coordinators. But for unexplained reasons, the request was not sent to Aaron Dickerson, Special Assistant to then-Administrator Lisa Jackson, or Nena Jones, Special Assistant to then-Deputy Administrator Robert Perciasepe for another three weeks—after the November 2012 election—even though Perciasepe was considered one of the most likely agency officials to have responsive records because he had been the agency point person in dealing with OMB's Office of Information and Regulatory Affairs.

Shortly before it was scheduled to file its summary judgment motion, EPA notified Lamberth that it had discovered an additional 365 potentially responsive pages that needed reviewing. Those documents were apparently uncovered because staff reviewing the responsive records found emails involving the Administrator and Deputy Administrator in records from other EPA employees but had discovered no records that actually originated with the Administrator and Deputy Administrator.

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The agency ultimately required three searches and by the time Lamberth ruled it was still unclear whether all responsive records from the Administrator, Deputy Administrator, and Chief of Staff had been adequately searched or whether any potentially responsive records had been deleted after those officials left the agency in 2013.

Dickerson searched Jackson's alias email account, but he did not search her personal email account. Shaw apparently ignored the request and left the agency in April 2013. When the agency alerted Lamberth that it had conducted a supplemental search and discovered a large number of responsive records that needed to be reviewed, it also told him for the first time that the Chief of Staff's records had not been searched.

Lamberth permitted Landmark to take discovery and a number of EPA officials and FOIA staffers were deposed. Landmark eventually filed a motion asking Lamberth to levy punitive sanctions against the agency for spoliation. Lamberth found Landmark had not shown bad faith in the processing of its request. He noted that "there is no doubt that EPA's behavior following Landmark's August 2012 FOIA request raised a reasonable *suspicion* of wrongdoing." He observed that "yet after months of discovery pertaining to EPA's search process, Landmark has uncovered insufficient evidence that EPA actually failed to preserve responsive documents in bad faith. And without demonstrating that EPA spoliated documents with the culpable state of mind necessary for punitive sanctions, Landmark cannot ask the Court to *infer* the relevance of any potentially missing documents. Devoid of at least a favorable inference of relevance, Landmark has no claim for punitive spoliation." Lamberth added that "while the existing record in this case does not support a holding that EPA acted in bad faith, it is obvious to this Court that EPA has, once again, fumbled its way through its legally unambiguous FOIA obligations" He lamented that the agency was not apologetic about its behavior. He observed that "during what should be a concerted effort to reaffirm the public's trust in the EPA, the agency's general refusal to accept responsibility for its mistakes throughout this case is baffling."

Lamberth reserved his most critical comments for Shaw. He noted that "at best, Shaw demonstrated utter indifference to EPA's FOIA obligations. At worst, Shaw is lying." In her affidavit, Shaw explained that she had eventually conducted a search of the Deputy Administrator's Office and had unsuccessfully tried to upload responsive records twice to the EPA collection database for Landmark's request. When that failed, she printed the responsive documents, but apparently did not remember what she did with them. Lamberth observed that "such an assertion is about as close to a sworn 'dog ate my homework' statement as one can make."

EPA's policy on email retention allowed staffers to delete email from personal accounts once the email had been forwarded to their agency accounts. Troubled by this policy, Lamberth observed that "all mainstream email providers—personal or business—provide storage mechanisms that are not time-consuming, such as tagging, foldering, or some other means to quickly warehouse emails. Requiring EPA employees to both forward *and preserve* business-related information received within or sent from personal email accounts would not impose an undue burden on agency staff and, more importantly, would foster greater public confidence in the agency's professed desire for transparency."

Lamberth concluded that "at bottom, EPA's mishandling of Landmark's request leaves far too much room for a reasonable observer to suspect misconduct. However, general negligence and indifference in handling a request, without at least clear and convincing evidence of bad faith failure to preserve responsive documents, is insufficient for a finding of punitive spoliation sanctions. . .[T]he recurrent instances of disregard that EPA employees display for FOIA obligations should not be tolerated by the agency at large. . .This Court would

implore the Executive Branch to take greater responsibility in ensuring that all EPA FOIA requests—regardless of the political affiliation of the requester—are treated with equal respect and conscientiousness." (*Landmark Legal Foundation v. Environmental Protection Agency*, Civil Action No. 12-1726 (RCL), U.S. District Court for the District of Columbia, Mar. 2)

Views from the States…

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

California

Reversing a court of appeals decision, the supreme court has ruled that provisions of the 1973 Long-Term Care, Health, Safety, and Security Act requiring the Department of Public Health to disclose citations issued to long-term care facilities with specific redactions supersedes more general patient mental health care confidentiality provisions included in the 1967 Lanterman Act. The Center for Investigative Reporting requested citations for state-owned facilities. DPH produced 55 citations that it heavily redacted under the patient confidentiality provisions of the Lanterman Act. The Center sued and the trial court found that because the two statues could not be reconciled the more specific disclosure provisions of the more-recently enacted Long Term Care Act prevailed. But the court of appeals reversed, deciding the two statutes could be harmonized and then identifying specific information that could be disclosed from citations. However, the supreme court sided with the trial court, find the statutes could not be reconciled and that disclosure provisions of the more recent Long Term Care Act prevailed. The supreme court noted that "the Long-Term Care Act's detailed provisions mandate the contents and public nature of DPH citations, as well as the information that must be redacted before the citations are made public. By specifying that names must be redacted from the public copies of citations but not mentioning any other information that may be redacted, sections 1423 and 1439 leave little room for concluding that any further redaction is permitted. Accordingly, we conclude that the express terms of the Long-Term Care Act require that citations be made public subject only to the restriction that names used in the citation must be redacted, except for the names of DPH's investigating officers, employees, or agents." The court observed that "by contrast, the Lanterman Act's express terms would render most of the information included in a DPH citation confidential and therefore not subject to disclosure." The supreme court concluded that "the Long-Term Care Act is both the more specific and the later-enacted statute. . .Thus, the Long-Term Care Act's provisions govern the scope of information contained in DPH citations that must be released to the public both at facilities themselves and in response to a request pursuant to the Public Records Act." (*State Department of Public Health v. Superior Court of Sacramento County; Center for Investigative Reporting, Real Party in Interest*, No. S214679, California Supreme Court, Feb. 19)

Florida

A court of appeals has upheld the trial court's finding that Consumer Rights, LLC was not entitled to attorney's fees when it filed suit challenging Union County's failure to respond to its anonymous email request until four months after its receipt. Union County received an email request sent to an email address posted on its website but not associated with any employee. The email request came from ask4records@gmail.com, indicated that it was made by an unidentified "Florida company" and requested a list of email addresses for county employees. The county employee who received the request thought it might be a "phishing" scam and did not respond until after Consumer Rights filed suit four months later. The county then provided the records

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and Consumer Rights requested attorney's fees. Agreeing with the trial court's finding that the county acted in good faith, the appellate court noted that "the record of the hearing amply supports the trial court's conclusion that the county was justified in declining to immediately respond to the plaintiff's request. The request was made by an unnamed agent for an undisclosed company and it was sent to the county from an email address that did not appear to be the address of a person. This would lead anyone familiar with the perils of email communication to exercise caution, if not to disregard the communication entirely." Consumer Rights argued at the trial court that the county would have shown bad faith if its spam filter had identified the email request as junk mail. The appeals court observed that "a suspicious email like the one in this case might not reach the intended recipient and even if it did, it might be regarded as computer junk mail." The court pointed out that "we know of no law that requires a governmental entity to provide public records to a generic email address, at least not until such time as it is made clear that the address belongs to a person." (*Consumer Rights, LLC v. Union County, Florida*, No. 1D14-2653, Florida District Court of Appeal, First District, Feb. 26)

Texas

A court of appeals has ruled that the City of Liberty failed to show a compelling reason for withholding cell phone records of a Liberty police officer whose cell phone was used in part for public business and reimbursed by the city. In response to a request for the cell phone records, the City claimed the records were exempt under the exception for ongoing criminal cases and the common-law informer's privilege. The City requested an AG's opinion. The AG found the records were public to the extent they related to official city business and that the City had not shown a compelling reason for withholding the records. The City filed suit challenging the AG's opinion and the trial court ruled that the records were public although information identifying victims, witnesses and informants could be redacted. The appeals court ruled the City had failed to argue that the constitutional right of privacy protected the records and noted that "because the City failed to carry its burden to demonstrate that a 'compelling reason' prevents it from disclosing the requested information, we conclude that the trial court erred in granting partial summary judgment to the City." (*Ken Paxton v. City of Liberty*, No. 13-13-00614-CV, Texas Court of Appeals, Corpus Christi-Edinburg, Feb. 26)

Washington

A court of appeals has affirmed the trial court's ruling that the City of Fife failed to show why substantial redactions were required in a report concerning allegations made by Fife police officer Russell Hicks of favoritism by certain high-ranking police officials. Hicks and another Fife police officer filed a whistleblower complaint with city manager Dave Zabell. The city hired the Prothman Company to investigate the charges. Prothman's report concluded there was insufficient evidence to prove or disprove some allegations and that other allegations were unfounded. Hicks then requested the records related to the investigation. The city told Fife it would respond in installments. Six days before releasing the first installment, the city filed a motion for declaratory judgment arguing that audio tapes and transcripts of witness interviews prepared by Prothman were not public records or that they were exempt under the attorney work product privilege. Hicks filed a counterclaim asking the court to order the city to disclose the records. The court ruled the audio tapes were not protected and ordered them processed. The city then filed an affidavit supporting its claim that identifying redactions were proper under both the law enforcement exemption and the privacy exemption because disclosure would chill future internal investigations. The court rejected the city's claims, allowing the city to redact only the identities of subjects of unsubstantiated allegations of sexual misconduct. The city appealed to the supreme court, which referred the appeal to the appellate court. The court first dismissed Hicks' claim that the investigation did not qualify as a law enforcement investigation, in part because it was conducted by an outside entity. The appeals court, however, noted that "the fact that the City's agent or subagent conducted the investigation and compiled the records rather than city officials is

immaterial. The fact that the records were not physically located in the City's files is not dispositive." The court then found the City had failed to show that either the law enforcement exemption or the privacy exemption overcame the public interest in disclosure Rejecting the city's sole affidavit from one of the accused police officers, the appeals court noted that "[the] allegations, furthermore, concerned the official conduct of high-ranking police officials, inherently a matter of greater interest to the public than, for example, allegations of misconduct by rank-and-file officers." The city had redacted Hicks' personal information, claiming it was required to treat all requesters equally. But the court pointed out that "a rule prohibiting redaction of the requestor's own name, however, would not on its face require agencies to distinguish among requestors, since all requestors would be entitled to their own identifying information. The key inquiry, rather, is whether any exemption to disclosure allows the City to redact this material." The court found that because Hicks was the prevailing party he was entitled to attorney's fees and costs, including those associated with the city's unsuccessful declaratory judgment motion. (*City of Fife v. Russell P. Hicks*, No. 45450-5-II, Washington Court of Appeals, Division 2, Feb. 24)

The Federal Courts…

Judge Gladys Kessler has ruled that the White House Office of Science and Technology Policy is not required to search OSTP Director John Holdren's email account maintained by his former employer Woods Hole Research Center for any OSTP-related emails because the agency does not have **custody or control** of the account. The Competitive Enterprise Institute requested any emails sent to Holdren's Woods Hole account that dealt with OSTP-related issues. OSTP told CEI that it did not have access to that account and could not search it. CEI appealed and the agency reaffirmed its position. CEI then sued under FOIA, the APA, and the Federal Records Act. Rejecting CEI's FOIA claims, Kessler noted that "the law is clear, however, that agencies do not—merely by way of the employer/employee relationship—gain 'control' over their employees' personal email accounts. That is precisely why agencies admonish their employees to use their official accounts for government business." She added that "CEI fails to cite any authority supporting the proposition that simply because Dr. Holdren heads the OSTP, his unofficial email account falls under the agency's control." Kessler pointed out that the Federal Records Act and the Federal Records Disposal Act provided administrative remedies for wrongful removal of records. However, the remedy under the FRA requires the Archivist to ask the Attorney General to investigate the improper removal of records and does not provide a private cause of action, except to the extent that a plaintiff can ask the Archivist to investigate a claim. But Kessler indicated that "the Complaint never directly alleges that Dr. Holdren failed to place copies of agency records on his official account." She observed that "CEI would have the Court interpret OSTP's refusal to search Dr. Holdren's unofficial account to be an admission that uncopied agency records reside there. That does not suffice to state a claim." (*Competitive Enterprise Institute v. Office of Science and Technology Policy*, Civil Action No. 14-765 (GK), U.S. District Court for the District of Columbia, Mar. 3)

Judge Barbara Rothstein has ruled that the FBI and the Justice Department's Criminal Division properly withheld records concerning the WikiLeaks investigation under **Exemption 7(A) (interference with ongoing investigation or proceeding)** but that DOJ's National Security Division had not yet shown that it conducted an **adequate search** for its records pertaining to the investigation. After it became public that DOJ had obtained a court order requiring Twitter to disclose account information for five individuals, including Bradley Manning, who was convicted of leaking the classified records, WikiLeaks spokesman Jacob Appelbaum, and WikiLeaks founder Julian Assange, EPIC filed a FOIA request with DOJ for records that might show the government was targeting individuals who had done nothing more than show support or

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interest in WikiLeaks. NSD told the court it had limited its search to records maintained by its lead attorney after the attorney indicated that was the only likely place that records might exist. Rothstein pointed out that "NSD's reason for limiting its search to this one employee's files was that 'no other locations within NSD area [were] reasonably likely to have responsive records that are not duplicated in the electronic files of the lead attorney.' However, this conclusion is based solely on the lead attorney's representations, and it is not obvious why the lead attorney would know the contents of all the responsive records so as to affirm that they are duplicative of his files or, conversely, that his files are duplicative of all other files." She added that "moreover, it does not appear that NSD used any search terms to search its records, or, if it did, NSD does not provide these search terms to the Court. This is especially troubling given the specificity of EPIC's request, which expressly included the names of people and companies it sought information about." By contrast, Rothstein found the FBI's search was adequate, even though it had limited its initial search to the term WikiLeaks only. Rothstein observed that "the FBI used the key term WikiLeaks to search its [Central Records System], but its search efforts did not cease there. The FBI then used the results of the CRS search to locate the case agents working with potentially responsive material. . .Once identifying the case agents, the FBI requested that these case agents review their files for further responsive documents, specifically referring to the language in Plaintiff's FOIA request." EPIC argued DOJ had not shown the records pertained to a legitimate law enforcement investigation, particularly if they were about individuals targeted solely because of their support of WikiLeaks. Rothstein noted that "the documents generated in the course of investigating the unauthorized release of classified material on the WikiLeaks website were quite obviously related to the FBI and CRM's law enforcement duties to enforce criminal laws and to protect against national security threats." She added that "there is no support for the notion that Defendants' investigation into the unauthorized publishing of classified material on WikiLeaks is pretext and that Defendants are conducting illegal investigations of innocent WikiLeaks supporters." Rothstein agreed with EPIC that the agency was required to disclose subpoenas that had become part of the public record because "their release will not interfere with a law enforcement proceeding." But she noted that "releasing all of the records with investigatory techniques similar to that involved in the Twitter litigation may, for instance, reveal information regarding the scope of this ongoing multi-subject investigation. This is precisely the type of information that Exemption 7(A) protects and why this Court must defer to the agencies' expertise." EPIC relied on *CREW v. Dept of Justice*, 746 F.3d 1082 (D.C. Cir. 2014), to argue that the investigation was too vague. Rothstein pointed out that "unlike the vague characterization of the investigation in *CREW*, Defendants have provided sufficient specificity as to the status of the investigation, and sufficient explanation as to why the investigation is of long-term duration." (*Electronic Privacy Information Center v. Department of Justice Criminal Division, et al.*, Civil Action No. 12-127 (BJR), U.S. District Court for the District of Columbia, Mar. 4)

A federal court in Pennsylvania has ruled that two memos prepared by the Justice Department's Office of Legal Counsel concerning the President's constitutional authority to make recess appointments are protected by **Exemption 5 (privileges)** and that Tuan Samahon has failed to show that the privileges were **waived** when both memos were referred to in the subsequent 2012 OLC Seitz Memorandum, which was publicly disclosed at the time President Barack Obama decided to make recess appointments even though the Senate was holding pro forma sessions to prevent such appointments. Samahon, a law professor at Villanova researching federal separation of powers issues, requested the 2004 memo prepared by Jack Goldsmith and a 2009 file memorandum prepared by John Elwood. OLC denied Samahon's request, citing a combination of the deliberative process privilege, the attorney-client privilege, and the presidential communications privilege to deny the request. Samahon argued that the privileges were waived by the references to the two memos in the Seitz Memorandum as well as subsequent references by then-Press Secretary Jay Carney pertaining to the government's acceptance of the Seitz Memorandum's conclusions and, further, cites to the two memos in the government's brief defending Obama's decision at the Supreme Court. Judge Joel Slomsky noted that whether the two memos had either been adopted or incorporated by reference or constituted the working law

of the agency depended on whether the Seitz Memorandum fell into either of those waivers of the privileges. DOJ argued that since OLC did not have final policymaking powers its opinions could not be considered final opinions for purposes of adoption. But Slomsky pointed out that "although the OLC is not an agency policymaker and its memoranda are not binding on those who request it, an OLC memorandum is still final when it serves as the OLC's last word on the subject matter that was provided to the decisionmaker who requested it. Here, the Seitz Memorandum was in fact the last word by the OLC on the subject of recess appointments during pro forma sessions of the Senate." Slomsky rejected Samahon's claim that Carney's reference to the Seitz Memorandum during a press conference constituted a waiver by adoption. Slomsky observed that "Carney's reference to the Seitz Memorandum was in response to a reporter's question as to whether the Administration was prepared for litigation. It was not a comment on the quality of the advice contained therein." Although there were several citations to the Seitz Memorandum in the government's brief defending Obama's recess appointments, Slomsky found they did not constitute adoption. He also noted that "because the NLRB [the agency defending the suit] was not a 'decisionmaker' behind the recess appointments, which was the President, its adoption of the analysis is not binding on President Obama and is not relevant to whether the Obama Administration make an adoption of the reasoning of the Seitz Memorandum." He indicated that "because the Court holds in this case that the Obama Administration did not expressly adopt the reasoning of the Seitz Memorandum, it would be illogical to find that by association, the Administration expressly adopted the reasoning of the Goldsmith and Elwood Memoranda cited therein." Slomsky found that the Goldmith memo was not subject to **segregability** because it was protected by the presidential communications privilege. But because the government claimed only the deliberative process privilege and attorney-client privilege to withhold the Elwood memo, Slomsky indicated he would conduct an *in camera* review to determine if it contained any segregable portions. (*Tuan Samahon v. United States Department of Justice*, Civil Action No. 13-6462, U.S. District Court for the Eastern District of Pennsylvania, Feb. 27)

Judge Tanya Chutkan has ruled that the FBI's CD interim release policy is permitted under the **fee provisions** of FOIA and that the Civil Division properly denied National Security Counselors a **fee waiver** for its request for information about how DOJ attorneys were assigned to FOIA litigation. NSC was joined by Truthout and Jeffrey Stein in the litigation. All three had requested voluminous records from the FBI and specifically requested the agency provide them on the smallest number of CDs possible, rather than following the agency's CD interim release policy which provided CDs containing 500 pages each at $15 per CD. Under that policy, NSC was charged $65 for five CDs, Truthout was charged $765 for 52 CDs, and Stein was charged $665 for 44 CDs. All three argued that if the agency maximized the amount of information on each CD their costs would be less. Chutkan noted that "plaintiffs raise the possibility that the cost to process a single CD filled to capacity might be less than the cost of processing the same number of pages in 500-page batches. While possible, that scenario is irrelevant to the question at hand—whether the fee charged for the 500-page CD ($15.00) is in excess of the fee permitted by the regulation: 'the direct costs, including operator time, of producing the copy.' Plaintiffs concede it is not, and point to no authority suggesting that agencies must release documents according to a policy that ensures the lowest possible cost for each requester under any scenario." The plaintiffs argued that since they would continue to make large requests to the agency this policy created a pattern and practice that harmed them. But Chutkan pointed out that "to the contrary, the undisputed facts demonstrate that the IRP provides medium- and large-queue requesters with records faster than if all records were produced simultaneously. . .and that the IRP presents requesters with cost savings over hard copy duplication. Rather than a refusal to supply information, the undisputed facts show that the CD IRP is the FBI's attempt to produce portions of large FOIA requests more expeditiously and economically for the agency and requesters and is consistent with its obligation" to provide records promptly. Civil Division had denied NSC's fee waiver for the data on FOIA litigation assignments, claiming it was public record. But Chutkan observed that NSC would have to find the records at various courthouses and that "this process would

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pose significant logistical and financial obstacles, as compared to obtaining the materials through FOIA requests." Affirming the agency's denial of the fee waiver, Chutkan agreed that NSC had not shown an ability to disseminate the information. She pointed out that "NSC presented no specific plans to disseminate the information it sought, other than its plan to analyze the information. The theoretical possibility of future articles is insufficient to establish that public understanding will be increased." She added that NSC had failed to "indicate what segment of the public beyond itself may be interested in these highly specific administrative matters." (*National Security Counselors, et al. v. Department of Justice*, Civil Action No. 13-0556 (TSC), U.S. District Court for the District of Columbia, Feb. 18)

Continuing to resolve prisoner Jeremy Pinson's multiple suits against the Justice Department, Judge Rudolph Contreras has ruled that Pinson's failure to oppose the Civil Division's claim that records responsive to one of his requests were protected under **Exemption 5 (privileges)** meant he had conceded that point. However, in dealing with another of Pinson's requests for records pertaining to suits complaining of conditions at the Florence, Colorado federal penitentiary, Contreras has found that the Civil Division failed to show that a **search for records was unduly burdensome**. The Civil Division argued that because its databases were not set up to conduct such a search it was unduly burdensome. Based on that claim alone, Contreras disagreed. He noted that "where an agency has provided a good faith estimate of the excessive amount of time required to complete a search that it feels is unreasonably burdensome, this Court has upheld the agency's refusal to conduct the requested search. But where an agency vaguely characterizes a search as 'costly' and notes that such a search would 'take many hours to complete,' this Court has rejected the agency's claim as inadequate in explaining why the search would be unreasonably burdensome." Applying this to the case at hand, Contreras observed that "the DOJ, however, offers no estimate of the time required to conduct Mr. Pinson's requested search, the cost of such a search, or the number of files that would have to be manually searched. Moreover, the DOJ fails to explain why a more limited search would be unfruitful or whether other parts of the Civil Division might have easier access to, at least, some of the requested information. The Court is unable to grant summary judgment to the government without knowing, at the very least, the number of Civil Division files the DOJ would have to search or the amount of time that would be required to locate documents responsive to Mr. Pinson's request." (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, Feb. 23)

Judge John Bates has ruled that the Federal Energy Regulatory Commission has not yet provided sufficient justification for its decision to withhold all responsive records requested by STS Energy Partners under **Exemption 4 (confidential business information)**, **Exemption 5 (deliberative process privilege)** and **Exemption 7(A) (interference with ongoing investigation or proceeding)**. STS Energy, an energy trader, requested records concerning FERC's investigation of Oceanside Power LLC, another energy trader. The agency withheld all responsive records under Exemption 4 and Exemption 7(A). In a second request, STS Energy asked for records concerning the agency's decision to deny a complaint against Black Oak Energy. The agency withheld records responsive to that request under Exemption 5. Finding that the exemptions probably applied in both cases, Bates faulted the agency for failing to support its decisions to categorically withhold the records. Turning first to the Oceanside Power request, Bates noted that "beyond showing that Exemption 4 applies to these contested documents, FERC must also prove that there is no 'reasonably segregable' material in the withheld documents that can be released to the public." He explained that "the Oceanside *Vaughn* index is silent as to segregability, and the agency's declaration does not improve things. It says only that 'there is no additional segregable factual information that could be released without revealing protected information.' Such 'conclusory statements' will not suffice." STS Energy argued that Exemption 7(A) was not applicable because FERC's investigation had been closed. Saying that "this cuts the exemption far too thin," Bates pointed out that "Exemption 7(A), by its terms, applies whenever production of law-

enforcement information 'could reasonably be expected to interfere with enforcement proceeding'—full stop. Hence, so long as 'enforcement proceedings' continue against *someone*, it matters not that proceedings have ended against someone *else*. It is therefore irrelevant in this case that FERC's investigation of Oceanside has come to a close. The investigation—writ large—continues, and that is enough under Exemption 7(A)." But Bates found FERC had not adequately addressed the segregability issue under Exemption 7(A) either. He observed that "this justification is just as unsatisfactory in the Exemption 7 context as it is in the context of Exemption 4." Assessing the Black Oak request, Bates noted that because the agency had not explained its decision-making process it had failed to show that all the withheld records were predecisional or deliberative. FERC argued that the documents "are *categorically* deliberative in nature." Bates indicated that "but there is no such thing. There are, of course, documents that usually are deliberative—'recommendations, draft documents, proposals, suggestions,' and the like. But none of these types of documents are 'categorically' protected from disclosure." He pointed out that "certainly, many of the disputed documents exhibit the hallmarks of Exemption 5 information. But the Court is not yet requiring FERC to produce any part of these 126 documents. It is, instead, requiring the agency to provide more—and more specific—information regarding its decision to withhold these documents under Exemption 5." Bates dismissed FERC's insistence that only factual information was required to be disclosed under Exemption 5 as too simplistic. He observed that "FERC cannot wash its hands of the FOIA segregability requirement by simply reviewing the 'factual information' in its withheld documents; it must, instead, examine the entirety of the documents—both fact and opinion—in its search for segregable material." (*STS Energy Partners LP v. Federal Energy Regulatory Commission*, Civil Action No. 14-591 (JDB), U.S. District Court for the District of Columbia, Mar. 4)

Judge Colleen Kollar-Kotelly has awarded EPIC nearly $30,000 in **attorney's fees** for its suit against the FBI for records pertaining to Stingray technology for tracking cell phones. After the FBI failed to respond, EPIC filed an administrative appeal with OIP, which also failed to respond. EPIC then filed suit and the FBI indicated it needed two and a half years to process the request. Kollar-Kotelly denied the agency's motion for an *Open America* stay. EPIC and the agency then agreed on a 500-page sample of released documents selected by EPIC. The parties ultimately settled their differences except for the matter of attorney's fees. EPIC's attorney's fees motion was heard by Magistrate Judge Alan Kay, who concluded that EPIC should be awarded $21,000 in fees. Both EPIC and the FBI objected, leaving Kollar-Kotelly as the final arbiter. Kollar-Kotelly noted that since Kay had found that EPIC was both eligible and entitled to fees, the only remaining issues concerned disputes over the amount. EPIC particularly challenged Kay's finding that EPIC had overbilled for work on its complaint and that it was not entitled to compensation for reviewing documents during the litigation. Kollar-Kotelly agreed with Kay that EPIC's fee request for drafting its complaint was excessive. She noted that "a review of the case billing record reveals inefficiencies and redundancies that makes EPIC's fee request for the Complaint unreasonable." As a result, she reduced the fee request by $2,773. She disagreed, however, with Kay as to the compensation for reviewing documents. She pointed out that "to the extent an attorney spends time reviewing released documents for a purpose unrelated to the FOIA litigation. . .fees should not be awarded for that time." But, in this case, the review of documents by EPIC's attorneys "was directly related to the ongoing FOIA litigation, specifically, challenging the sufficiency of the FBI's document release and the propriety of the FBI's withholding." She added that 'the time EPIC attorney's spent reviewing the released documents was an integral part of this FOIA litigation and crucial to EPIC's success in the litigation." Kay had left the consideration of a fees-on-fees award—fees awarded for the time spent litigating the attorney's fee award—to Kollar-Kotelly. EPIC argued its fees-on-fees request was for $8,145, but the FBI contended that all fees requested after the merits of the case had been resolved qualified as fees-on-fees, which it calculated as $21,664. Pointing out that this fee was excessive, Kollar-Kotelly explained that to award EPIC fees for its objections to Kay's recommendation would "effectively be a 'fees-on-fees-on-fees' award because EPIC's Opposition only addresses its request for a fees-on-fees award. Such a

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'fees-on-fees-on-fees' award is too attenuated from original adjudication to be compensable." Further, she noted that "the Court is mindful that the amount billed by EPIC for these activities totals $18,244, nearly 90% of the amount the Court is awarding EPIC in attorney's fees for litigating the merits of their FOIA action." She denied EPIC's fee request for its objections to Kay's recommendation and reduced EPIC's fees-on-fees request by an additional 21 percent, awarding a total of $9,175 for the fees-on-fees litigation. (*Electronic Privacy Information Center v. Federal Bureau of Investigation*, Civil Action No. 12-667 (CKK), U.S. District Court for the District of Columbia, Feb. 20)

After ruling previously that the DEA was required to search for records concerning a publicly-identified confidential source, Judge Ellen Segal Huvelle has found that most of the records the agency finally processed concerning the source were protected by **Exemption 7(D) (confidential sources)**. Huvelle had agreed to review the records *in camera*, but after the DEA provided the records without an accompanying index, Huvelle declined to review them until the agency provided a better explanation. Once the agency provided an index, Huvelle reviewed the records and found most of them were indeed protected. Huvelle pointed out that "to the extent plaintiff is arguing that public knowledge of a confidential source's *identity* precludes application of Exemption 7(D) to protect *information provided by* that source, that proposition is clearly wrong. Exemption 7(D) expressly protects each independently of the other." Huvelle then found that disclosure of the identity of a confidential source did not affect the agency's ability to withhold information furnished by the source. She concluded that everything but the confidentiality agreements was protected by Exemption 7(D). Ordering the agency to disclose the agreements, Huvelle pointed out that "it does not appear that any of the generic conditions set forth in the Confidential Source Agreement, standing alone, qualify for protection under Exemption 7(D). Defendant appears to rely solely on the fact that these documents 'relate' to a confidential source, but that is not the applicable standard. Nor does defendant provide any explanation for why this generic information would be exempt from disclosure under any exemption." (*Rene Oswald Cobar v. U.S. Department of Justice*, Civil Action No. 12-1222 (ESH), U.S. District Court for the District of Columbia, Feb. 27)

Judge Beryl Howell has ruled that the State Department conducted an **adequate search** for records concerning alleged payments to Miami-based journalists to provide favorable coverage of the trial of five individuals who were tried for acting as unregistered Cuban intelligence agents. Liberation Newspaper requested any contracts showing payments to 90 journalists between 1998 and 2002. Liberation believed the payments would have been authorized by U.S. Information Agency, which was abolished in 1999 and whose records were transferred to the custody of the State Department. State found no records and Liberation challenging the adequacy of the agency's search, produced a "purchase order" for $28,000 paid to one of the identified journalists for "public relations services" during the relevant time period that Liberation had found by searching the public Federal Procurement Data System. After reviewing the agency's three detailed affidavits, Howell noted that "the defendant reviewed both hard copy and electronic documents contained in numerous databases across multiple divisions within the State Department. Beyond the requirements placed upon the defendant, defendant responded to criticism from the plaintiff and revised its search parameters to provide an even broader search for responsive documents. Although the plaintiff has pointed to a single document discovered outside of the search process, one such document is not 'sufficient to overcome an adequate agency affidavit,' let alone the three declarations submitted in the present case." Liberation also complained that State's search of retired USIA records was inadequate. Howell pointed out, however, that "after consultation with analysts familiar with the FOIA request and the retired records system, along with the former records manager for the USIA, the defendant manually searched all the descriptions [of relevant retired USIA records] dated January 1998 to December 2002, the period of time sought by the plaintiffs. The search yielded no results." Liberation also challenged the search terms used. Howell indicated that "although the

defendant used different search terms for different databases, this discrepancy does not undermine the conclusion that the search was reasonable given that the search terms were used after consultation with employees familiar with the databases and were reasonably designed to yield responsive information." (*Liberation Newspaper v. U.S. Department of State*, Civil Action No. 13-0836 (BAH), U.S. District Court for the District of Columbia, Feb. 20)

A federal court in New York has ruled that the CIA properly invoked a *Glomar* response neither confirming nor denying the existence of records on Armando Florez, the Cuban charge d'affaires in Washington in 1960 when the United States severed diplomatic ties with Cuba, under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Florez eventually was granted asylum in the U.S. Sergio Florez, Armando's son, requested the records. The CIA initially refused to confirm or deny the existence of records, but once Sergio located two records on the CIA's public website, the agency conducted further searches and ultimately produced four declassified records referring to Florez. However, it continued to insist that it could neither confirm nor deny the existence of any possible classified connection with Florez. Judge Sidney Stein found the CIA's affidavits supported its *Glomar* response. He noted that "unlike an affidavit which summarily recycles the language of the classification standards or exempting statutes, the CIA has outlined how any acknowledgment of the existence of the requested records would reveal classified information regarding intelligence activities, sources and methods, and why that information should logically remain classified. Such declarations are given 'substantial weight' when offered in the context of national security." Sergio argued that the declassified documents referring to the possibility that Florez would provoke a U.S. request for the recall of the Cuban ambassador showed an intelligence interest in Florez that required the agency to disclose more records. Stein disagreed, observing that "the two documents plaintiff identified do not show that the CIA was employing Dr. Florez as an intelligence source or targeting him in any way. They certainly do not reveal any intelligence activity conducted by Dr. Florez or any relationship that he may have had with the CIA. By necessity, the CIA collects and relies upon a plethora of information, but it does not follow that all information reviewed by the CIA is perforce clandestine or classified intelligence." (*Sergio Florez v. Central Intelligence Agency*, Civil Action No. 14-1002 (SHS), U.S. District Court for the Southern District of New York, Feb. 19)

Judge Ellen Segal Huvelle has ruled that EOUSA has not yet explained why it released only certain still shots from a video related to Henry Richardson's conviction for murder. Richardson requested records concerning his conviction in the Eastern District of Virginia. EOUSA located 1240 responsive pages, released 22 pages in full and one page in part, and withheld the 1217 remaining pages under **Exemption 5 (privileges)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Huvelle found the agency had properly withheld the majority of the records because they constituted attorney work-product. She also found the remaining records containing third-party information were likely protected, but since the agency had not shown that it considered their **segregability**, she sent them back to EOUSA for further explanation. Richardson complained that EOUSA had released several still photos taken from a surveillance video, but had not explained why there were no other photos. Huvelle agreed that the agency had not sufficiently justified its **search** for the photos. She noted that "there is uncontroverted evidence that defendant released only a partial set of pictures from the videotape. Defendant perhaps has an explanation for why it did not locate or release a complete set of pictures, but no such explanation has been provided to the Court." She added that "although the adequacy of an agency's search is not generally judged by its results, the unexplained absence of responsive documents whose existence the agency does not deny goes beyond mere speculation and calls the reasonableness of the agency's search into question." (*Henry Paul Richardson v. United States of America*, Civil Action No. 13-1203 (ESH), U.S. District Court for the District of Columbia, Feb. 19)

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A federal court in California has ruled that almost all of the FBI's exemption claims for 27 remaining documents concerning Occupy movements in California are proper. While finding in her prior ruling that many of the agency's claims might well be applicable, Judge Susan Illston had ordered an *in camera* review of the records because the agency's justifications were not sufficient. However, after reviewing the documents *in camera*, Illston agreed, approving the use of various subparts of **Exemption 7 (law enforcement records)**. The FBI had provided a chart showing why its **Exemption 7(C) (invasion of privacy concerning law enforcement records)** applied to names of third parties and local law enforcement officers. Illston, however, noted that "while this information is helpful, it still fails, standing alone, to show why it would be reasonable to conclude that the third parties might be subject to retaliation, harassment, or other negative consequences if their names are revealed, and why the release of their names would not shed any light on the FBI's performance of its statutory duties." But after reviewing the documents she found all the agency's claims appropriate. She also agreed with the agency's claims under **Exemption 7(A) (interference with law enforcement investigation or proceedings)** and **Exemption 7(D) (confidential sources)**. She rejected the agency's claims under **Exemption 7(E) (investigative methods and techniques)**, observing that "here, the government's failure to meet its burden through public declarations appears to be symptomatic of the fact that the claimed exemption simply does not apply to the withheld material." (*American Civil Liberties Union of Northern California v. Federal Bureau of Investigation*, Civil Action No. 12-03728-SI, U.S. District Court for the Northern District of California, Feb. 17)

A federal magistrate judge in California has once again rejected the DEA's *Vaughn* index concerning confidential informant Gordon Todd Skinner, whose identity as an informant had already been publicly disclosed. The case involves ongoing eight-year litigation by William Pickard to force the agency to disclose information about Skinner's role in a drug operation that led to Pickard's conviction. The Ninth Circuit previously ruled that Skinner's identity had been revealed in court proceedings and could not be protected. Since that decision, the parties have continued to argue over the extent of disclosure. Relying on *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991), the magistrate judge found the DEA continued to describe withheld records too broadly and required it to provide more detail. The magistrate judge noted the DEA described a "Report of Investigation" as containing "information provided by a source." But after reviewing the document, the magistrate judge pointed out that "the section actually describes information involving the moving of an LSD laboratory, money the DEA reportedly seized, and efforts by different individuals to exchange money from one currency to another. The government could have revealed this information in the Vaughn Index, without violating the privacy interests of any third parties or DEA agents." Telling the agency to supplement its index, the magistrate judge observed that "put simply, by using boilerplate language throughout the declaration—both to describe the contents of the document and to describe what exemptions apply—the government failed to sufficiently describe the information in the documents, and provide a 'particularized explanation' of how disclosure would damage the interest protected by the claimed exemption." (*William Leonard Pickard v. Department of Justice*, Civil Action No. 06-00185-CRB (NC), U.S. District Court for the Northern District of California, Feb. 19)

A federal court in Missouri has ruled that the Justice Department has failed to show that **Exemption 7 (C) (invasion of privacy concerning law enforcement records)** applies to identifying information about Assistant U.S. Attorney Cindy Hyde and the contents of her notes taken when she talked to Bureau of Prison officials about allegations made by prisoner Russell Marks. Marks provided information he hoped would lead to a sentence reduction, but after interviewing BOP officials, Hyde declined to pursue the matter. Marks then made a FOIA request for the records. The agency eventually provided a record created to respond to Marks'

request, but withheld Hyde's notes and a letter she wrote to a BOP official. The court previously ruled that Exemption 7(C) applied to identifying information in Hyde's notes, but not to the notes themselves. DOJ continued to argue that it needed to withhold the information to protect Hyde and suggested the **Exemption 7(F) (harm to any person)** might be applicable as well. But the court noted that "plaintiff has been well-aware of AUSA Hyde's involvement in this matter for quite some time. . .And, for that matter, the address of the United States Attorney's Office is a matter of public record. The Court sees little additional risk to AUSA Hyde's safety if her name remains on the documents. The Court, will, however, allow her phone number to be redacted if it appears on any of the documents." (*Russell Marks v. United States Department of Justice*, Civil Action No. 13-3380-S-ODS, U.S. District Court for the Western District of Missouri, Southern Division, Feb. 19)

In Memoriam

Bob Saloschin, the first director of the Justice Department's office established to provide agency-wide guidance on the newly-passed FOIA, died Feb. 24. Saloschin directed the Office of Information, Law and Policy, the predecessor of OIP, which included an informal FOI Committee that reviewed the merits of cases brought against agencies under FOIA and, at least occasionally, recommended the agencies disclose the information rather than pursue the matter in court. After retiring in 1981, Saloschin remained active in FOIA as a consultant to the American Bar Association and also occasionally attended ASAP programs.