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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 National Security Archive published its new FOIA audit as part of Sunshine Week 2015 focusing on the paucity of agencies that have full-fledged electronic reading rooms as required by the 1996 EFOIA Amendments. Of 165 federal agencies surveyed, the NSA audit found that only 67 agencies have electronic reading rooms. The NSA audit named electronic reading rooms at the Department of Energy, the Department of State, the FBI and the Nuclear Regulatory Commission as the best surveyed. The survey found that DEA and the Office of Science and Technology Policy were among a handful of agencies that had no electronic reading rooms. . .In a Federal Register notice published Mar. 17 that did not go unnoticed during Sunshine Week, the White House indicated it was deleting previous FOIA regulations for its Office of Administration. Once the office designated for accepting White House FOIA requests, the D.C. Circuit ruled in 2009 that the office was not subject to FOIA because it did not have the requisite independent authority to qualify as an agency.

Clinton Emails Raise Questions About Agency Record Obligations

The recent revelation that Hillary Clinton used her personal email account to conduct government business while she was Secretary of State, retained custody of those emails on a personal server at her home in New York, and did not transfer the emails back to the State Department until two years after she resigned, leaves a number of unanswered questions about the legality of the arrangement. But more broadly, the Clinton emails raise concerns about how agencies treat emails for record-keeping purposes and potential FOIA disclosure. And while there is now no doubt that emails are agency records when they relate to the conduct of government business—regardless of whether the emails were sent or received on a government or personal account—instances like the arrangement Clinton had with State strongly suggest that agencies are willing to play fast and loose with some of their record-keeping obligations when it comes to emails.

Why Clinton did not use a government email account for government business is a mystery all by itself, but her explanation is that it was a matter of convenience and with

ACCESS REPORTS

someone with such multi-faceted political interests it might well have been very appealing to her to be able to control her entire email traffic through a single source. Since the record-keeping and disclosure obligations are the responsibility of the State Department, its willingness to accept such an arrangement probably was not illegal, but to ensure that such an arrangement was appropriate the agency needed to make sure it had access to her government emails while she was at State and, further, to have those records transferred to agency custody as quickly as possible when she left. What State agreed to is currently unknown, although it is likely to come out as investigations are conducted by Congress and the agency's inspector general. But there is no doubt that Clinton's emails related to government business were agency records and that they were subject to contemporaneous FOIA disclosure. The small amount of anecdotal evidence so far suggests that State did not have access to her emails directly. Clinton argued that most of her emails were sent to others at the State Department and, thus, were captured as agency records. However, such a process is inadequate for FOIA purposes because, while various emails might be in someone else's files or in subject matter files, they are not searchable as being her emails because they are not in her files.

Clinton apparently turned over 55,000 pages containing her government-related emails. But she also indicated that her attorneys had reviewed and deleted 32,000 other emails they decided were personal. At her press conference, Clinton explained that agency employees typically made the first cut in determining what emails are agency-related and which are personal. While employees are generally responsible for making such determinations, it seems less appropriate for someone at Clinton's level to be able to decide what records are deleted without a further review. Dan Metcalfe, former co-director of the Justice Department's Office of Information and Privacy, told the Canadian Press that "her suggestion that government employees can unilaterally determine which of their records are personal and which are official, even in the face of a FOIA request, is laughable." He noted that "you can't have the Secretary of State do that; that's just a prescription for the circumvention of the FOIA. Plus, fundamentally, there's no way the people at the National Archives should permit that if you tell them over there." He added that "there is no doubt that the scheme she established was a blatant circumvention of the Freedom of Information Act, atop the Federal Records Act."

Clinton's use of a personal email account to conduct government business and, further, personally retaining custody of the records is certainly not common in the federal government. But evidence of the use of anonymous email accounts designed in part to obscure the existence of electronic communications by high-ranking agency officials at the EPA in particular suggests that agencies place the desire to be able to communicate with fewer restrictions above their statutory record-keeping and public disclosure obligations. In litigation with several conservative groups, the EPA has admitted that former Administrator Lisa Jackson used an email account under the alias Richard Windsor and others at the agency seem to have done the same thing. Groups like Landmark Legal Foundation and the Competitive Enterprise Institute have accused EPA of deleting emails and text messages to avoid public disclosure. Judge Royce Lamberth recently considered sanctioning the agency for its dismal failure to search for emails from Jackson and former Deputy Administrator Robert Perciasepe until it became clear from reviewing other officials' emails that both had participated in discussions relevant to the request. In another recent decision, Judge Gladys Kessler ruled against CEI in its suit against the Office of Science and Technology Policy for emails sent by agency head John Holdren on an email account he retained from his prior employer Woods Hole Research Center. Kessler ruled against CEI not because the agency showed Holdren had not used the account, but because CEI had not shown that Holdren did not integrate any such agency-related emails into agency files. In other words, she did not address whether Holdren's use of his non-government email account was appropriate.

The seminal case on an agency's legal obligation to retrieve agency records that have been improperly taken from an agency's possession and custody is *Kissinger v. Reporters Committee*, 445 U.S. 136 (1980), which in some respects is eerily similar to the Clinton case. In *Kissinger*, the Reporters Committee and others complained that the State Department had a legal duty under FOIA to retrieve records that former Secretary of

State Henry Kissinger had taken with him when he left State. The Supreme Court ruled the State Department did not have the requisite custody or control of the records required to obligate the agency to attempt to retrieve them from Kissinger and process them under FOIA. The Supreme Court found that while Kissinger's records might be agency records under the terms of the Federal Records Act, the FOIA provided for the disclosure of records in the possession and control of an agency and did not extend to retrieval of records, whether or not they had been taken improperly. In this case, Clinton seems to have recognized that her government-related emails were agency records, but that she was largely entitled to determine where the line occurred between government-related email and personal emails. Once she made that determination and deleted records she concluded were personal, the agency had no practical recourse to recover them and, under FOIA, no legal obligation to do so.

The Clinton email case has certainly attracted the most publicity because of who was involved. The myriad investigations that will be undertaken as a result promise to keep the case in the news for some time to come. But an immediate lesson to be learned is that agencies are still not to the point where systems exist that ensure such electronic records are always preserved by the government.

Views from the States…

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

Nevada

The supreme court has ruled that the Las Vegas Metropolitan Police Department has legal custody of call detail records for inmates who used phones provided by a contractor to contact bail bond companies. Law enforcement agencies are required to allow individuals arrested to contact an attorney as well as a bail bondsman. The Las Vegas Police Department contracted with CenturyLink to provide such services at the Clark County Detention Center. Blackjack Bonding requested call detail records for phone calls to bail bondsmen whose numbers were available on a list for inmates to call. Blackjack agreed to have any personal information redacted and, further, to pay for the costs associated with its request. LVMPD denied the request on the basis that it did not have the records, that it was not required to create a record to respond to a request, and that disclosure would violate inmates' privacy. Blackjack sued and the trial court ruled in its favor, but found that because it agreed to pay for production of the records it was not the prevailing party for purposes of an attorney's fees award. Both parties appealed. The supreme court agreed that the phone records were subject to the Nevada Public Records Act, noting that "the inmate telephone services provided by CenturyLink assist LVMPD's facilitation of detainees' statutory rights to use a telephone. The fact that telephone calls between private individuals are detailed in the call histories does not alter the public service at issue because [Nevada law] contemplates detainees making telephone calls to private parties. Therefore, these calls relate to the provision of a public service and the public has an interest in having governmental entities honor inmates' statutory rights." The court next found that "the contract indicates that the requested information could be generated by the inmate telephone system that CenturyLink provides and could be obtained by LVMPD. Therefore, the information is in LVMPD's legal control." The court then pointed out that the privacy exemption did not apply because personal information would be redacted. The supreme court indicated that the provision for attorney's fees "does not preclude a prevailing requester from recovering costs when the requester is to pay the agency for the expenses associated with the production. By its plain meaning, this statute grants a requester who prevails in NPRA litigation the right to recover attorney fees and costs, without

ACCESS REPORTS

regard to whether the requester is to bear the costs of production." The court added that "Blackjack was a prevailing party and is entitled to recover attorney fees and costs associated with its efforts to secure access to the telephone records, despite the fact that it was to pay the costs of production." (*Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, No. 62864 and No. 63541, Nevada Supreme Court, Mar. 5)

Texas

A court of appeals has ruled that emails related to public business contained on Tommy Adkisson's personal email account are nevertheless public records that must be disclosed to a reporter for the *San Antonio Express-News*. The reporter requested copies of certain emails to or from Adkisson, a Bexar County Commissioner and chair of the San Antonio-Bexar County Metropolitan Planning Organization, in his official capacity. Bexar County requested an opinion letter from the Attorney General and argued the records did not qualify as public records under the Public Information Act. The AG ruled that to the extent emails on Adkisson's personal email account related to public business they were public records. Rather than abide by the AG's opinion, Bexar County filed suit for declaratory judgment overturning the AG's opinion. Hearst Newspapers intervened in the suit. The trial court found the records from Adkisson's personal email account were public records and should be disclosed. The trial court further ruled that both Adkisson and Bexar County were liable for attorney's fees for both the AG and Hearst. The appeals court largely upheld the trial court's ruling. The appeals court noted that "these emails sent or received in the Commissioner's official capacity that are connected with County business that the Commissioner is involved with are transactions of official business because they are communications involving two parties that reciprocally affect or influence each other. In other words, if the Commissioner is communicating in his official capacity about official County business, he is 'transacting official business' and the communications satisfy the definition of 'public information,' assuming the other components of the definition are satisfied." Further, the court noted that under the Local Government Code, Adkisson "as Commissioner, is responsible for maintaining public information created or received by him or by his employees or his office—no matter where that information is physically created or received—*for the County*." Having found the emails were public records, the court indicated that Adkisson had failed to provide any reason why they did not need to be disclosed. The court rejected Adkisson's claim of a common-law right of privacy as having been raised too late, and, beyond that, as being inapplicable. The court upheld the trial court's ruling on attorney's fees except to the extent that the trial court had found Adkisson personally liable for such fees, finding that it was Bexar County that was liable for processing and providing the information. (*Tommy Adkisson v. Ken Paxton*, No. 03-12-00535-CV, Texas Court of Appeals, Austin, March 6)

A court of appeals has ruled that Max Hudson did not substantially prevail for purposes of an attorney's fees award because the disclosure of information originally withheld by Region 16 Education Services Center during the litigation mooted the case. Hudson requested his personnel files from the Center, which claimed portions of the records were protected by the attorney-client privilege. The Center requested an Attorney General's opinion and the AG found that because the Center's request was filed too late it was required to disclose the records unless it could show a compelling reason. The Center then filed for declaratory judgment against the AG. Hudson intervened and the Center voluntarily released all the requested information. Hudson then filed for attorney's fees, arguing he was the prevailing party. Although the Public Information Act is modeled after the federal FOIA, state courts have ruled that the U.S. Supreme Court's *Buckhannon* ruling limiting the term "substantially prevail" to situations in which the plaintiff obtained court relief, continues to apply in Texas. Because Congress found *Buckhannon*'s strictures too limiting in the federal FOIA context and amended the fee provision as part of the OPEN Government Act, the court noted that "nothing in the [PIA] evidences the legislature's intent that this policy be pursued by conforming the PIA in every respect to the Freedom of Information Act. We decline to read into the PIA amendments to FOIA that Congress passed for the purpose of expanding the category of plaintiffs eligible for attorney's fees awards

under that statute." (*Max Hudson v. Ken Paxton*, N. 03-13-00368-CV, Texas Court of Appeals, Austin, Feb. 20)

The Federal Courts…

Judge Ellen Segal Huvelle has ruled that EOUSA has not yet shown that its refusal to either confirm or deny records about grants of immunity or non-prosecution in the trial of Marty Lorenzo Wright is proper under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Wright requested records concerning immunity grants made as part of his trial. EOUSA denied the request, indicating that it would neither confirm nor deny the existence of records. Wright's attorney then requested any documents concerning grants of immunity or non-prosecution in Wright's trial. The agency decided the request was duplicative of Wright's request and did not respond. EOUSA apparently decided to relabel its privacy *Glomar* defense and told Huvelle it was relying on a "third party categorical denial." Huvelle noted that the request submitted by Wright's attorney was broader than Wright's request and encompassed records such as "notes outlining the rationale for offering a particular witness immunity. Such documents might shed light on how the U.S. Attorney's Office in Virginia exercises its prosecutorial discretion. As such, the Court cannot categorically conclude that plaintiff's request could not possibly yield any information of public interest." Huvelle noted the categorical approach to privacy articulated in *Reporters Committee* and *SafeCard Services v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), allowed the withholding of information that would reveal the identities of individuals involved in law enforcement investigations. Here, she observed that "if plaintiff were requesting information about a named individual defendant could potentially argue that every document produced would necessarily reveal protected personal details, since the request *itself* would link the documents to the individual's identity. In the present case, however, plaintiff is not asking for documents related to any particular person. . .A search might therefore uncover responsive documents that could be redacted to protect the identities of any named individuals. The search might also reveal documents that do not themselves contain personal information but merely describe the decision-making process culminating in the immunity agreements." (*Marty Lorenzo Wright v. United States Department of Justice*, Civil Action No. 14-558 (ESH), U.S. District Court for the District of Columbia, March 16)

Judge Tanya Chutkan has ruled that while the EPA conducted an **adequate search** for records responsive to those requests submitted by Hall & Associates which the agency believed qualified as FOIA requests, for a series of other requests it violated its FOIA regulations by failing to work with Hall to modify the requests so that they would be acceptable. Hall represented the Great Bay Municipal Coalition, a coalition of municipalities in New Hampshire, challenging the EPA's decision to promulgate more stringent total nitrogen requirements for the Great Bay Estuary. Hall accused EPA of scientific misconduct in its decision and sent multiple requests to Region I as well as EPA headquarters for records that questioned the agency's final decision. Both Region I and EPA headquarters rejected multiple requests as not properly describing the records sought after determining they posed questions requiring research and answers rather than responsive records. But while Region I offered Hall an opportunity to rework its requests to qualify, EPA headquarters rejected its requests entirely. Chutkan agreed the requests were facially inadequate but observed that EPA regulations required the agency to give Hall an opportunity to make the requests valid. As to EPA headquarters' rejection of the requests, Chutkan noted that "EPA did not tell Hall what additional information it needed to provide, and did not give Hall 'an opportunity to discuss and modify' the requests, instead only notifying Hall of its right to appeal. EPA has not adequately explained why it failed to engage in the required collaborative process to allow Hall to modify [its] requests." She pointed out that when Hall tried to clarify its

ACCESS REPORTS

requests, "for reasons the EPA has not explained, it ignored in its final response (and ignores now) this reformulation of the [original] requests. EPA simply reiterated its prior position and nowhere acknowledged Hall's explanation of the requests or considered whether the requests had been modified." By contrast, Region I when faced with the identical problem, worked with Hall and accepted its clarifications as validating its original requests. Chutkan noted that EPA headquarters "ignored Hall's modification and refused to process the requests even after Region I had processed two similar sets of requests. This is strong evidence that EPA violated FOIA—and failed to follow its own regulations—by not considering a proposed modification intended to narrow the requests to reasonably describe the records sought." Chutkan rejected Hall's challenge to the agency's search based primarily on the fact that Region I found documents that should have been responsive to its headquarters requests as well. She observed that "Hall has not identified any information contained in the five documents produced in response to the October 4 Request that reference other potential sources of responsive records or prove that EPA should have found the Region I documents in its own files." (*Hall & Associates v. U.S. Environmental Protection Agency*, Civil Action No. 13-823 (TSC), U.S. District Court for the District of Columbia, March 16)

A federal court in New York has ruled that with one exception the Department of Justice conducted an **adequate search** for records concerning when the agency believes it is obligated to notify a criminal defendant that it intends to introduce evidence derived from warrantless surveillance at the defendant's trial. In a 2012 brief to the Supreme Court, the Solicitor General argued that criminal defendants would be able to challenge the use of evidence derived from warrantless surveillance at trial. But it was not until 2013 that the government actually provided such a notice to a defendant. This change prompted the ACLU to request records of this policy from the National Security Division at the Justice Department. The agency found some records, but withheld them under **Exemption 5 (privileges)**. The ACLU argued that NSD had improperly limited its search to one part of its request by reading the term "governing" into one part of the ACLU's request asking for "legal memoranda or opinions *addressing or interpreting* the notice provisions." The court pointed out that "DOJ is bound to read the ACLU's request as drafted, and because Part 3 seeks records 'addressing or interpreting,' rather than 'governing,' NSD improperly limited its search under Part 3. DOJ is ordered to conduct a new search that comports with the actual terms of Part 3 of the ACLU's request and to release any responsive records that do not fall under a FOIA exemption." Noting that the agency's *Vaughn* index containing its justification for withholding records under Exemption 5 was insufficient, the court indicated that it after reviewing them *in camera* it agreed with all the agency's privilege claims. The ACLU argued that the privileges had been **waived** by adoption or because they contained the working law of the agency. The court disagreed and suggested that DOJ may not have come to a final policy decision. The court pointed out that "if DOJ decides *not* to create a document outlining its effective law and policy on this issue, that decision does not automatically convert an earlier, pre-decisional, deliberative document into 'working law.'" (*American Civil Liberties Union v. United States Department of Justice*, Civil Action No. 13-7347-GHW, U.S. District Court for the Southern District of New York, March 3)

Clearly irritated by the parties' lack of detail concerning the specifics of the **attorney's fees award** requested by the American Immigration Council and the government's opposition to the amount, Judge James Boasberg has awarded AIC $82,513 for its FOIA suit against Customs and Border Protection, a reduction of $50,000 from the original request. AIC had requested information from CBP about access to counsel for immigrants. The agency initially told AIC that responsive information was available online. Eventually the agency provided two responsive records. AIC sued the agency. CBP filed a summary judgment motion, but after reviewing AIC's opposition realized that its search was inadequate and withdrew its summary judgment motion. It then searched a number of field offices suggested by AIC, locating over 300 documents. During the litigation the parties settled their differences except for seven documents. Boasberg upheld the agency's

exemption claims. AIC continued to press its claim for attorney's fees, but after another five months of negotiations, CBP suddenly changed course and indicated it now believed AIC was not entitled to fees. AIC then asked Boasberg to rule on the issue of attorney's fees. The agency argued that it had not changed its position as a result of the litigation. But Boasberg noted that "it is baffling—and hardly helpful to their credibility here—that Defendants still adamantly assert that no change in position occurred during the pendency of the litigation. On the contrary, Defendants' release of at least 156 additional responsive documents manifests a 180-degree reversal from their initial position that no further responsive records existed. The sequence of events—as well as the Government's representations throughout—makes clear, moreover, that Plaintiff's lawsuit served as a necessary catalyst for the agency's release of a significant body of responsive material." The agency argued that it had won the second summary judgment motion. Boasberg responded by indicating that "to be eligible for fees, a complainant must only *substantially*—not completely—prevail. That the Court ultimately acquiesced in Defendants' withholdings in seven documents does not mean that AIC is stripped of its eligibility for fees." In arguing against entitlement to fees, the agency claimed AIC's dissemination was to a small community of immigration attorneys. Boasberg pointed out that "the issue of noncitizens' access to counsel is an important component of a vigorous political debate over immigration and is, therefore, of widespread public interest." He faulted the agency for making inconsistent claims since it had already granted AIC a fee waiver based on its determination that disclosure of the records was a matter of public interest. Boasberg then turned to what he clearly felt was the drudgery of calculating fees—particularly in the face of a lack of specificity by the parties. Both parties argued over whether a version of the *Laffey* matrix based on a survey of legal fees, or one based on a survey of consumer prices more broadly was appropriate. Boasberg indicated that he could avoid that determination in this case because fees charged by AIC's outside counsel, Dorsey & Whitney, provided an appropriate basis for finding that AIC's in-house attorneys qualified at the same experience rates as those at Dorsey & Whitney. Boasberg agreed with the agency that the number of hours claimed by multiple attorneys was unreasonable. Rather than get into the minutiae of calculations, he reduced the fees by 25 percent across the board. Unlike some other judges in the D.C. Circuit, Boasberg refused to grant fees for reviewing documents for exemption claims. Pointing out that AIC's complaint was for untimely disclosure of documents, he observed that "Plaintiff would have had to expend this time had CBP timely produced the documents without litigation; the cost of reviewing documents produced in response to a FOIA request—to see if they are responsive or for other reasons—is simply the price of making such a request." The agency argued AIC's fee request was excessive because it had settled similar cases against USCIS for $45,000 and ICE for $35,000. But Boasberg explained that "parties routinely settle cases for less than their true value—that is, at a discount—to account for the elimination of risk and uncertainty and energy expended that inhere in further litigation. That is the very nature of settlement. . .The Government cannot now insist that any fee award be anchored to the amount Plaintiff settled for in comparable cases." Although AIC had not succeeded on all its claims for attorney's fees, Boasberg declined to reduce those fees, particularly since, he noted, the agency had significantly prolonged that phase of the litigation by suddenly halting negotiations. AIC had originally requested $131,000 in fees and after his reductions, Boasberg awarded $82,000. (*American Immigration Council v. United States Department of Homeland Security*, Civil Action No. 11-1972 (JEB), U.S. District Court for the District of Columbia, Mar. 10)

Judge Christopher Cooper has ruled that the FBI properly withheld records on Marie Mason, an environmental activist serving a 20-year prison term, under **Exemption 7(A) (interference with ongoing investigation or proceeding)**, but has admonished the agency to review investigative files for any non-exempt materials before making a blanket exemption claim. Susan Tipograph, Mason's attorney, requested the records. The agency told her it had an investigative file on Mason but that it was entirely exempt under Exemption 7(A). When Tipograph sued, the FBI disclosed 199 pages of public source information, but

ACCESS REPORTS

continued to assert Exemption 7(A), along with **Exemption 7(D) (confidential sources)** and **Exemption 5 (privileges)**. Noting he was satisfied that the remainder of the file was protected by Exemption 7(A), Cooper rejected Tipograph's argument that the agency had failed to divide the files into functional categories, and then review each document to determine if they qualified for that category. Instead, he pointed out that "the [agency] declarations provide sufficient detail for the Court to trace a rational link between the information contained in the records and the potential interference with law enforcement proceedings." He added that "because this explanation describes the nature of the information contained in the records, rather than merely the nature of the records themselves, it permits the court to infer a rational link between the records and an investigative purpose." Tipograph had also charged that the FBI had a practice of failing to review investigative records it claimed fell under Exemption 7(A) until a requester filed suit. Cooper expressed sympathy, but observed that "because Tipograph has not established that foregoing the document-by-document review required by Exemption 7(A) is a widespread practice at the FBI, the Court declines to issue a declaratory judgment or injunction. But because the Court has doubts about whether the FBI conducted the required review at the administrative stage in this case, it will remind the Bureau of its obligation to perform such reviews in the future." (*Susan Tipograph v. Department of Justice*, Civil Action No. 13-00239 (CRC), U.S. District Court for the District of Columbia, March 18)

Judge Richard Leon has ruled that CREW is not eligible for **attorney's fees** because it did not substantially prevail in its suit against the Justice Department for records concerning its investigation of former Rep. John Murtha and others for contracting improprieties. CREW requested records from DOJ concerning the Murtha investigation. The FBI denied the request on the basis of **Exemption 7(A) (interference with ongoing investigation or proceeding)**. CREW filed suit and after the portions of the investigation pertaining to Murtha were closed, the FBI began processing the request. It was able to separate the main file concerning Murtha—which it began to process—from cross-references in files pertaining to third parties—which it continued to withhold. The FBI disclosed portions of about 230 pages. It then withheld another 194 pages and disclosed 50 pages that had been referred by the Criminal Division. CREW challenged the FBI's withholding of 200 pages. The parties continued to negotiate, including mediation, and the FBI eventually disclosed another handful of records. Neither EOUSA nor Criminal Division disclosed any records and CREW did not challenge those decisions. CREW then requested $25,000 in attorney's fees. CREW argued that its suit had caused the agency to process and disclose records. But Leon pointed out that "plaintiff's argument rests almost entirely on the time between the commencement of its suit in June 2011 and the FBI's first release of documents in October 2011. Although the time between the plaintiff's initiation of this lawsuit and the agency's release of responsive records is a salient factor in the Court's analysis, it is by no means dispositive evidence of causation. The sole question is whether plaintiff's lawsuit was *necessary* for its attainment of the requested documents. In this instance, it plainly was not." Leon explained that since the Murtha investigation was still ongoing when CREW first submitted its request the FBI had invoked Exemption 7(A) but "Exemption 7(A) is inherently 'temporal in nature' and expires when disclosure no longer interferes with active law enforcement proceedings. That was the case here. When portions of the investigation pertaining to Congressman Murtha closed subsequent to the filing of plaintiff's action, the FBI revised its stance, and determined that Exemption 7(A) no longer shielded *all* investigative records encompassed by plaintiff's request. Shortly thereafter, the FBI began to review, segregate, and produce non-exempt records responsive to plaintiff's request. It is abundantly clear that this disclosure was not caused by plaintiff's litigation. It resulted instead from the closure of certain investigations during the pendency of the lawsuit. As such, plaintiff did not 'substantially prevail' in its request of records from the FBI." Leon rejected CREW's assertion that it had prevailed because the FBI clarified its exemption claims. Instead, he observed that "the *sin quo non* of eligibility is the release of tangible records. A party simply does not 'prevail' by failing to obtain the requested records. As such, the FBI's release of information regarding the reasons for its withholding does not meet the litmus test for eligibility." He found the same fault with the ultimate responses

of EOUSA and the Criminal Division. He noted that "plaintiff's argument fails [because] neither request bore any tangible fruit. In both instances, the EOUSA and the DOJ Criminal Division declined to release even a single responsive document. FOIA does not reward Pyrrhic victories, and neither will this Court." *Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, Civil Action No. 11-1106 (RJL), U.S. District Court for the District of Columbia, March 18)

Judge Rudolph Contreras has ruled that Kevin Dugan **failed to exhaust his administrative remedies** for several FOIA requests by failing to appeal denials from Homeland Security and the Justice Department's Office of Information Policy, but that the Bureau of Alcohol, Tobacco and Firearms has not justified its claim that records concerning an investigation of Dugan for cultivating marijuana while also selling firearms are protected under **Exemption 7(A) (ongoing investigation or proceeding)**. Dugan made several requests to ATF, all of which were denied under Exemption 7(A). He also made requests to DHS, OIP and DEA. Both DHS and OIP denied his request on procedural grounds. DEA searched it database and found no records. Contreras agreed that Dugan had not appealed the adverse decisions by DHS or OIP. He also found DEA had conducted an adequate search. But he found ATF had failed to justify its Exemption 7(A) claims. Contreras noted that "the only remaining aspect of plaintiff's case at the time [of the agency's] declaration was filed was 'in relation to an appeal of the forfeiture of firearms,' which the declarant has not specifically linked with an ongoing investigation and explained how disclosure of the withheld information would interfere with the investigation or a reasonably anticipated enforcement proceeding. The declarant does not suggest that plaintiff's conviction is not final or that the ongoing investigation involves 'not only [the plaintiff] but also other suspects' who might face charges." He observed that "given that plaintiff has already been prosecuted, convicted, and sentenced—and appears to have served his sentence, the Court needs considerably more information to conclude that the release of specific types of information will interfere with prospective or ongoing enforcement proceedings." (*Kevin Dugan v. Department of Justice*, Civil Action No. 13-2003 (RC), U.S. District Court for the District of Columbia, March 12)

A federal magistrate judge in California has found that the DEA properly withheld information about the confidential status of Hilliard Hughes under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Leonard Brown, who was convicted on drug charges he believed were based on illegal use of his friend Hughes as a confidential informant, requested a 2004 DEA report of investigation concerning what Hughes told the agency he would be willing to testify to at trial. Brown argued that disclosure of an unredacted version of the 2004 ROI would not be an invasion of privacy because two other DEA reports containing identifying information about Hughes had already been released. The magistrate judge noted that "however, Plaintiff''s belief that all redacted portions of the 2004 DEA ROI are simply elaborations of the unredacted portions of the report and do not contain critical, identifying, personal information, or are duplicative of unredacted portions of two completely different reports, is not the legal standard for determining whether a strong privacy interest exists in nondisclosure." The magistrate judge added that "the fact that a witness has publicly testified at trial does not diminish or waive his privacy interest." Balanced against this privacy interest, the magistrate judge found Brown had identified no public interest. The magistrate judge pointed out that "because Hilliard Hughes'—*and any other individual involved with or associated with Hilliard Hughes*—privacy interest, however slight, necessarily outweighs the nonexistent interest in release of the 2004 DEA ROI, Plaintiff's FOIA request is foreclosed by FOIA Exemption 7(C)." The magistrate judge agreed with Brown that the agency had failed to provide a *Vaughn* index as required under Ninth Circuit precedent, but concluded it was not necessary under the circumstances. The magistrate judge observed that "the Court cannot discern a way to require the DOJ to provide 'a particularized explanation of how disclosure of the particular document would damage the interest protected

by the claimed exemption,' without also forcing the agency to *reveal* the protected information contained in the withheld documents." (*Leonard Brown v. U.S. Department of Justice*, Civil Action No. 13-01122-LJO-SKO, U.S. District Court for the Eastern District of California, March 17)

Judge Richard Leon has ruled that the DEA conducted an **adequate search** for chain-of-custody records requested by Brian Smith and that it properly withheld records under various subsections of **Exemption 7 (law enforcement records).** Smith requested records from DEA and EOUSA pertaining to the government's chain of custody for drugs seized in Pittsburgh by providing a specific case number. EOUSA referred that portion of Smith's request to the DEA, which determined that it had already searched for the records based on Smith's direct request to the DEA and closed the EOUSA referral. By using Smith's case number, DEA located its records that described and catalogued the drugs seized, but indicated it did not have any record confirming the chain of custody. The agency reviewed the documents a second time to look for records pertaining specifically to Smith and not his co-defendant. Smith challenged the adequacy of DEA's search. Leon noted that "plaintiff misunderstands not only the extent of an agency's obligations under the FOIA, but also the purposes of defendant's supplemental summary judgment motion." Dissatisfied with the agency's search, Smith contended the agency must have more records pertaining to the drugs when they were sent to the DEA Indianapolis office. But Leon observed that Smith "neither offers support for this proposition nor demonstrates that the DEA was required to conduct an entirely new search. Furthermore, the DEA is not obligated to answer questions or to produce particular records supporting plaintiff's many challenges to certain facts underlying his arrest and conviction." (*Brian Eugene Smith v. Executive Office for United States Attorneys, et al.*, Civil Action No. 13-1088 (RJL), U.S. District Court for the District of Columbia, March 18)

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