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Washington Focus: "The FOIA Oversight and Implementation Act" (H.R. 653) was passed by the House Oversight and Government Reform Committee Mar. 25. The bill, sponsored by Rep. Darrell Issa (R-CA) and Rep. Elijah Cummings (D-MD) is similar to the FOIA bill passed by the House in the last Congress that failed in the lame duck session. At the Committee hearing, Chair Rep. Jason Chaffetz (R-UT) added two substantial amendments. The first would require agencies to disclose documents that could be withheld under Exemption 5 (privileges) when they were "opinions that are controlling interpretations of law," "final reports or memoranda created by an entity other than the agency, including other Government entities, at the request of the agency and used to make a final policy decision," and "guidance documents used by the agency to respond to the public." Chaffetz's other amendment deletes the word "may" at the beginning of the attorney's fees provision and substitutes the word "shall," changing the award of attorney's fees from discretionary to mandatory once the court determines the plaintiff has substantially prevailed. Rep. Mark Meadows (R-NC) added an amendment requiring agencies to accept FOIA requests by email. Rep. Carolyn Maloney (D-NY) offered an amendment clarifying that the inclusion of the phrase "presumption of openness" in the bill would not weaken the protections for confidential business and financial information under Exemption 4 (confidential business information) and Exemption 8 (bank examination records). Maloney withdrew her amendment when the Committee agreed to include her concerns in the House report and take it up on the House floor.

CIA Detention Review Protected by Exemption 5

Handing another victory to the CIA, Judge James Boasberg has ruled that an internal study created by the agency as part of its review of the contents of the records being turned over to the Senate Select Intelligence Committee as part of the Committee's investigation of the CIA's detention and interrogation program is entirely protected by Exemption 5 (deliberative process privilege).

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When the Senate Select Committee on Intelligence announced in 2009 that it would review the CIA's detention and interrogation program, it negotiated access to millions of pages of unredacted records for certain staff members. Then-CIA Director Leon Panetta asked to be kept apprised of the Senate review and the agency created a Special Review Team that was tasked with researching various related topics. Team members would then include anything significant in written reviews. The project was abandoned, however, after a year because the agency concluded it could complicate a separate criminal investigation being conducted by the Justice Department. The team reviewed less than half the responsive documents and its reviews were left unfinished. Several years after the project was terminated, Sen. Mark Udall (D-NM) publicly referenced an "internal study" the agency had allegedly drafted about its detention program. Journalist Jason Leopold then made a FOIA request for the study. After some negotiation, Leopold agreed to limit his request to what was known as the Panetta Review. The agency then told Leopold that it was withholding the review entirely, citing Exemption 1 (national security) and Exemption 3 (other statutes) as well as Exemption 5. Boasberg, however, found the review was properly withheld under Exemption 5 and did not discuss either of the other exemptions.

Relying on *Senate of Puerto Rico v. Dept of Justice*, 823 F.2d 574 (D.C. Cir. 1987), Leopold argued that "the agency's reference to various potential uses to which the Reviews might have been put is too general, and that the government must be able to point to a specific decision—*e.g.* 'whether to use particular methods of interrogation in the future'—to which the documents could have contributed." Unfortunately for Leopold, the D.C. Circuit had rejected the "specific decision" limitation in my one contribution to FOIA litigation, *Access Reports v. Dept of Justice*, 926 F.2d 1192 (D.C. Cir. 1991), in which the D.C. Circuit concluded the deliberative process privilege extended to a potentially endless series of deliberations an agency might conduct as long as they somehow were marginally connected together. Although Boasberg did not mention the Supreme Court's decision in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), a footnote in *Sears* indicating that agencies should be constantly deliberating on matters regardless of whether they reached a decision, was a crucial observation in rebutting the 'specific decision" analysis. Quoting from *Access Reports*, Boasberg observed that the deliberative process privilege was "aimed at protecting [an agency's] decisional *process*' and that it is unnecessary to identify a *specific* decision to which withheld materials contributed." He noted that the D.C. Circuit accepted "that the Justice Department's assertion that a memo was prepared to aid its 'study of how to shepherd [a] bill through Congress' sufficiently defined the decisionmaking process to which the document contributed, and that the agency had sustained it burden of showing that the memo was predecisional."

Applying the holding of *Access Reports* to the case before him, Boasberg indicated that 'the decisionmaking process identified here is no more vague than the one described in *Access Reports*. According to the CIA, the Reviews were created to aid senior agency officials' deliberations about how to respond to the SSCI's investigation into its former program, as well as how to deal with other policy issues that might arise therefrom. Contrary to Plaintiff's assertions, a finding that the documents are predecisional would not stretch the meaning of the term too far or risk rendering every document exempt because it might someday be used by agency officials to make 'various policy decisions.' Here, there was a congressional inquiry underway about a specific CIA program. That program had already generated considerable international controversy, and senior CIA officials knew that they would have to respond to the Committee's eventual report. They also knew that they might be called upon to make other decisions stemming from the Committee's study, such as how to prepare for meetings with other agencies on the subject. The agency was thus engaged in an ongoing, multi-year, deliberative process about how to handle these issues, and the Reviews preceded the agency's final decisions in that process."

Leopold argued that the reviews were not predecisional because they addressed the CIA's *former* detention and interrogation program. Unfortunately, *Access Reports* had rejected that argument as well.

Boasberg explained that "the plaintiff there contended that a memo about the potential impacts of certain proposed amendments to FOIA could not be considered predecisional because it was drafted *after* the Department submitted its legislative proposals to Congress. The court explained, however, that the Department had not prepared the memo to explain its past decisions, but instead 'as ammunition for the expected fray.' It analogized the memo to 'a staffer's preparation of "talking points" for an agency chief about how to handle a potentially explosive press conference.' Such talking points, while they may relate to past decisions or events, are predecisional because they are drafted to aid future policy-oriented decisions—*e.g.*, how to respond to press inquiries."

Boasberg then found the reviews were deliberative. He rejected Leopold's contention that the agency was required to disclose factual materials. He pointed out, however, that "the Reviews were not comprehensive, matter-of-fact summaries about the selected topics, nor were they rote recitations of facts. Rather, the authors strove to write briefing materials that would aid senior officials' decisionmaking." He observed that "the Reviews, consequently, reflected a point of view—namely, what agency personnel thought important enough to bring to senior officials' attention in light of their understanding of the policy issues that the CIA might face as a result of the investigation." Leopold argued that because the reviews did not incorporate any feedback from the CIA's leadership disclosure would not reveal any internal give-and-take. Boasberg noted that "but the agency's intended editing process was not what makes the Reviews deliberative. Instead, it is their planned role in the agency's decisionmaking process and the significant discretion that the authors exercised in order to prepare useful briefing documents on their selected topics." (*Jason Leopold v. Central Intelligence Agency*, Civil Action No. 14-48 (JEB), U.S. District Court for the District of Columbia, March 31)

Views from the States…

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

Connecticut

The supreme court has ruled that the trial court erred in finding that the Planning and Zoning Commission of the Town of Monroe properly went into executive session to consider what action it might take in regard to the court-ordered extension of a permit awarded to Handsome to excavate a property for the construction of an industrial building. The planning and zoning commission had granted Handsome a permit in 2003, but when the company attempted to renew the permit in 2008, the commission rejected the application based on violations by Handsome during the period of the original permit. Handsome then filed suit and the trial court sided with the company and ordered the commission to renew the permit. Months later, the commission met and went into executive session under the pending litigation exception to consider how to respond to the court order and how to address Handsome's prior non-compliance. Handsome filed a complaint with the FOI Commission, which found that the exception for pending litigation was inapplicable because there was no pending litigation involving the planning and zoning commission at the time of the executive session. The trial court then ruled that while there was no pending litigation related to its order, the planning and zoning commission's discussion of its options regarding Handsome's non-compliance with the permit satisfied the requirements of the exemption. The supreme court disagreed, siding with the FOI Commission. Pointing out that by its terms the pending litigation exception required the litigation involve the public body, the supreme court noted that "the zoning commission was not justified in convening an executive

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session to discuss its zoning enforcement options in respect to Handsome's original permit because, at the time, there was no pending litigation regarding the permit to which the zoning commission was a party. It is clear there was no pending or prospective litigation regarding Handsome's alleged permit violations." The zoning commission argued that the trial court's initial ruling requiring it to renew Handsome's permit qualified as pending litigation because there might be post-litigation orders. The supreme court rejected that claim, observing that "this interpretation of 'finally adjudicated,' however, ignores the fact that adjudication fundamentally pertains to legal issues being resolved and decided. Moreover, interpreting 'finally adjudicated' as hinging on the possibility of postjudgment litigation would effectively remove the temporal limitation in [the exception] and make the pending claim or pending litigation exception apply indefinitely to certain litigation. Such an interpretation would undermine the basic policy of limiting the exceptions to the act's open meeting requirement." (*Planning and Zoning Commission of the Town of Monroe v. Freedom of Information Commission*, No. 19263 and No. 19264, Connecticut Supreme Court, March 24)

New Mexico

The supreme court has ruled that a plaintiff whose request is denied is eligible for attorney's fees and costs if he or she prevails, but that a plaintiff is not eligible for statutory damages provided for in a separate section of the New Mexico Inspection of Public Records Act to penalize agencies that fail to respond to a request within the statutory time limit. Daniel Faber filed a federal gender discrimination lawsuit against the Attorney General. When the federal court temporarily stayed all proceedings, Faber made an IPRA request to the Attorney General for employment data. The Attorney General denied the request the next day, asserting that it was solely an attempt to circumvent the federal proceeding. Faber then filed suit against the Attorney General, claiming he should be awarded fees based on the provision allowing penalties of $100 a day when an agency failed to comply with the time limit for responding to a request. The trial court sided with Faber, required the AG to provide the records, and awarded him fees based on $10 a day, which rose to $100 a day for continued failure of the AG to provide the records. The supreme court noted that the statutory damages "are not applicable in this case because the Attorney General's Office timely answered the request with a denial by following the denial procedures [in the statute]. However, because this action is for the post-denial enforcement of Faber's IPRA request, the enforcement and damages provisions [allowing for recovery of attorney's fees and costs] apply." The court explained that the goal of the IPRA was government accountability, which was typically achieved when records were disclosed. The court refused to believe that the legislature would have intended that "an agency would be subject to penalties simply for asserting a good faith reason for nonproduction as IPRA entitles it to do." The supreme court observed that "with the resolution of this case, Faber will receive the requested records and can recover his actual costs, thereby maintaining the goals of providing access to public records and enforcing accountability. Faber is not entitled to attorney's fees because he is an attorney and he litigated this matter pro se." (*Daniel M. Faber v. Gary K. King*, No. 34-204 and No. 34,194, New Mexico Supreme Court, March 12)

New York

A trial court has ruled that the Erie County Sheriff's Office improperly withheld records concerning its use of Stingray cell phone technology from the New York Civil Liberties Union. The NYCLU made a multi-part request to the sheriff's office for records pertaining to its use of Stingray technology. The sheriff's office denied the request in its entirety, citing eight different exemptions and telling the court that all of them applied to every part of the request. When the case was finally ready to be heard, the sheriff's office disclosed a number of documents, most of which were heavily redacted. After reviewing the redactions *in camera*, the court found that the claimed exemptions—primarily law enforcement records, deliberative process, and the federal Export Administration Act—did not apply. The court found the sheriff's office had ultimately conducted an adequate search but that its exemption claims frequently were not warranted. The court rejected

the sheriff office's claims that purchase orders and a letter from the manufacturer Harris Corporation were law enforcement records. As to the letter, the court noted that "its redacted verbiage was not 'compiled for law enforcement purposes' in the sense meant by the statute. Even if it was, the Court is certain that its disclosure would not have the prejudicial effect upon a criminal investigation or prosecution that the statute makes the linchpin of the FOIL exemption." The court indicated that 47 complaint summaries relating to the use of Stingray technology qualified under the law enforcement exemption but that by redacting personal information they could be disclosed. The court found that "the complaint summaries are (even at their most detailed)—very brief synopses of those complaints or information, or interagency requests that led to the Sheriff's office's use of its cellular tracking device, and of what resulted, investigatively speaking, when the complaint or information was acted upon." The court concluded the NYCLU had substantially prevailed and was entitled to attorney's fees. As a result, the court asked the parties to provide motions for a determination of an award of attorney's fees. (*In the Matter of New York Civil Liberties Union v. Erie County Sheriff's Office*, No. 2014/000206, New York Supreme Court, Erie County, March 17)

Ohio

The supreme court has ruled that the Butler County Prosecuting Attorney improperly withheld a 911 call that contained a murder confession from the *Cincinnati Enquirer* under the trial preparation exemption as well as a claim that disclosure would violate the defendant's Sixth Amendment right to a fair trial. The supreme court also criticized Butler County Prosecuting Attorney Michael Gmoser for requesting a protective order from the judge hearing the murder case that prolonged the open records litigation. Butler County 911 Dispatcher Debra Rednour received a call from an unidentified female caller indicating that an accident had taken place, her husband was not breathing, and that an ambulance was needed. Rednour dispatched an ambulance, but when she tried to ask the caller more questions the caller hung up. Rednour then called the number back and got no answer. She tried a second time and an individual who identified himself as Michael Ray answered and said he had snapped at his father and stabbed him. The *Enquirer* requested the 911 call and the follow-up calls. Butler County released the 911 call and the uncompleted first follow-up call, but denied access to the completed second follow-up call, claiming it was protected by the exemption for investigatory records and trial preparation records. Gmoser subsequently filed for a protective order from the judge assigned to the murder trial. The *Enquirer* filed a motion with the court of appeals to overturn the protective order. The trial court judge dissolved the protective order and the second follow-up call was disclosed shortly before Ray's trial began. The court of appeals then ruled in favor of the *Enquirer* but denied the newspaper attorney's fees. The supreme court rejected Butler County's two exemption claims. The court noted that "the recording is not a trial-preparation record because Rednour did not place the return call to question Ray for the specific purpose of preparing for a criminal proceeding. And the recording could not suddenly transform into a trial-preparation record simply because it moved from Rednour's office to the prosecutor's file." Likewise, the court found since Rednour was not a law enforcement officer she could not have created the record for law enforcement investigatory purposes. As to the Sixth Amendment claim, the supreme court found Butler County had not shown that disclosure would prejudice Ray's trial. The supreme court reversed the appeals court's denial of attorney's fees. The supreme court pointed out that "the prosecutor's office lacked legal authority for withholding the records, it drove up the Enquirer's burdens and costs by dragging the Enquirer into Ray's criminal case, and it stymied a significant public benefit in the process." (*The State ex rel. Cincinnati Enquirer v. Michael Sage*, No. 2013-0945, Ohio Supreme Court, March 19)

Pennsylvania

A court of appeals has ruled on a variety of decisions by the Office of Open Records concerning the disclosure of home address information on individuals in the State Employees' Retirement System. The case

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involved a request by Pennsylvanians for Union Reform for records from the SERS system, excluding certain records that were exempt by law, such as home address information for law enforcement officers as well as judges. SERS also withheld records concerning retirees who had reached a certain age under the security exemption based on its claim that such individuals were susceptible to identity theft. When PFUR appealed SERS' decision, based on recent case law developments requiring that individuals be notified to contest the disclosure of personal information, SERS notified its members and OOR provided an email address for providing such complaints, which ultimately numbered 3,851. PFUR appealed OOR's decision that it had waived its right to challenge the claims of objectors, but the court of appeals agreed with PFUR that there was no evidence that it had actually waived that claim. PFUR further argued that the Right to Know Law required that intervenors be notified within 15 days of receipt of an appeal and that OOR had allowed individuals to intervene until just before it issued its decision. Noting that the 15-day limitation was discretionary, the court observed that "OOR took reasonable steps to ensure that these individuals had notice and an opportunity to object to disclosure of their personal information to PFUR." Corrections employees claimed they deserved the same security exemption as law enforcement officers. The court agreed that names and home addresses were protected for those employees "who are employed within correctional facilities and who have regular and personal interaction with prisoners." The court found that SERS had properly withheld home addresses for judges and law enforcement officers but pointed out that their names were not exempt. The court indicated that there was no constitutional right of privacy in Pennsylvania, but to ensure that individuals had the ability to challenge disclosure of personal information notification was required. (*State Employees' Retirement System v. Pennsylvanians for Union Reform*, No. 206 C.D. 2014 and No. 293 C.D. 2014, Pennsylvania Commonwealth Court, March 20)

Texas

The supreme court has ruled that the provision requiring a public body to seek an Attorney General's opinion if it believes requested information is exempt binds the public body only and not the requester, who may file suit in court instead before the Attorney General issues an opinion. Russell Kallinen made a request to the City of Houston for records concerning a study of traffic light cameras. The City produced some records, but asked for an AG's opinion concerning others. Before the AG could respond, Kallinen filed suit against Houston. The City argued the trial court did not have jurisdiction, but the court decided the case, ruled in favor of Kallinen, and awarded him $175,000 in attorney's fees. The City then appealed and the court of appeals reversed, finding the trial court did not have jurisdiction until the AG issued an opinion. But the supreme court disagreed, restoring the trial court's ruling. The supreme court noted that "the requirement that a governmental body seek a ruling from the Attorney General when withholding requested information is a check on the governmental body, not a remedy for the requester to exhaust." But the court observed that "if the court determines that under the circumstances of a particular case a decision from the Attorney General before adjudication of the merits of disclosure would be beneficial and any delay would not impinge on a requestor's right to information, [waiting] would be within the court's discretion." (*Randall Kallinen v. City of Houston*, No. 14-0015, Texas Supreme Court, March 20)

The Federal Courts…

Judge Tanya Chutkan has ruled that several memos prepared by the Federal Reserve Board during its consideration of steps it could take to lessen the effects of several high-profile 2008 bankruptcies are protected by **Exemption 5 (privileges)**. Chutkan also ruled that records of the Federal Reserve Bank of New York, which made the loans, are not **agency records** of the Federal Reserve Board, and that, further, the Federal Reserve Banks qualified as financial institutions for purposes of **Exemption 8 (bank examination records)**.

Laurence Ball, an economics professor at Johns Hopkins, requested two memorandums analyzing the Federal Reserve's legal justification for extending loans to Bear Stearns/JPMorgan and AIG and two spreadsheets listing the collateral securing those loans. The agency withheld all four documents. Ball challenged the agency's search only in respect to the collateral spreadsheet for the AIG loan. He argued the Federal Reserve was required to search the records of the Federal Reserve Bank of New York as well. Acknowledging that her interpretation of what constituted records of the Board differed somewhat from the Second Circuit's interpretation, Chutkan indicated that Board records included those records created by the Board or created by a Federal Reserve Bank working for or on behalf of the Board and records housed by the Board or any Federal Reserve Bank for administrative reasons as long as those records were created while working for or on behalf of the Board in connection with official business. She observed that "crucial to the inquiry here, for a FRB record to be a Board record, the FRB must have been working for or on behalf of the Board." Ball argued that the Board authorized the FRBNY loan and, thus, it was made "on behalf" of the Board. But Chutkan explained that "an analysis of the phrase 'on behalf of' reveals that it contemplates something more like delegation than authorization." She added that "action 'on behalf of' requires more than authorization; it requires a principal to delegate power to the representative to act on their behalf. Authorization is merely the act of giving permission or formally approving. Even if one is authorized to act, this does not mean they are acting on behalf of another." She pointed out that the "the Board [had the statutory] power to authorize the FRBs to extend loans. [The statute] did not give the Board the power to extend a loan, therefore the Board could not delegate that authority to the FRBNY. FRBs could choose not to extend a loan, even after the Board authorized it." Ball argued the legal memos were no longer privileged because the agency had adopted them as its working law or had adopted them by public reference. Chutkan found the memos were focused on the specific situation and were not intended to establish working law more broadly. As to public adoption, she found Ball's reference to statements made by Board General Counsel Scott Alvarez to the Financial Crisis Inquiry Commission came closest to publicly adopting the memos, but she noted that "it is not clear whether Alvarez had the authority to adopt Board policy in the first place. Even more damaging to Ball's argument, however, was Chutkan's finding that the D.C. Circuit had found nearly identical memos were protected in *McKinley v. Board of Governors of the Federal Reserve System*647 F.3d 331 (D.C. Cir. 2011). Ball argued that FRBs did not qualify as financial institutions for purposes of Exemption 8 because they "engage in other activities that are not the domain of traditional financial institutions." Chutkan disagreed, pointing out that "the FRBs are hybrid entities, with some public and some private functions, but at least some of their functions are those of a financial institution. They manage 'money, credit, or capital,' and therefore under a plain meaning interpretation they qualify as financial institutions." (*Laurence M. Ball v. Board of Governors of the Federal Reserve System*, Civil Action No. 13-603 (TSC), U.S. District Court for the District of Columbia, March 31)

Judge Alvin Hellerstein has ordered the Defense Department to disclose the remaining withheld photographs responsive to the ACLU's request after he rejected the government's 2012 certification as inadequate. The Second Circuit had previously ruled that the photos were not protected under Exemption 7(F) (harm to any person) and to avoid Supreme Court consideration, Congress passed an Exemption 3 statute entitled the "Certification under the Protected National Security Documents Act," which allowed the Secretary of Defense to certify every three years that disclosure of the photos would cause harm. Former Secretary of Defense Robert Gates provided the original certification, but when it came time to renew the certification in 2012, DOD provided essentially the same certification signed by then-Secretary of Defense Leon Panetta. Hellerstein found the renewed certification was inadequate and ordered the government to provide a more detailed certification or disclose the photos. Instead of complying with Hellerstein's order, the government asked him to stay disclosure of the photos until a 2015 certification could be prepared. But Hellerstein noted that "I have already found that the 2012 Certification is inadequate and, having declined to follow my

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instructions for bringing the 2012 Certification into compliance, the Government gives the Court no reason to believe that the 2015 Certification would fare better." The government also asked Hellerstein for a 60-day stay so that the Solicitor General could decide whether to appeal. Hellerstein granted the stay grudgingly, noting that "the Government has known since August 27, 2014 that I considered a general *en grosse* certification inadequate. Certainly, that has been clear since the hearing on February 4, 2015. I commented on February 4th that it appeared the Government's conduct reflected a 'sophisticated ability to obtain a very substantial delay,' tending to defeat FOIA's purpose of prompt disclosure. Accordingly, any subsequent stays must be issued by the Court of Appeals." (*American Civil Liberties Union v. Department of Defense*, Civil Action No. 04-4151 (AKH), U.S. District Court for the Southern District of New York, March 20)

A federal court in California has ruled that the FBI has failed to provide a rational nexus to any law enforcement authority pertaining to its surveillance of Muslims and other ethnic groups in Northern California. The ACLU of Northern California, the San Francisco Guardian, and the Asian Law Caucus made requests to the FBI for the records. The agency granted their request for expedited processing, but after no progress had been made in seven months, the organizations filed suit. The agency located over 50,000 pages responsive to the request and withheld nearly 48,000 pages under various exemptions, primarily **Exemption 7 (law enforcement records)**. The plaintiffs agreed to a representative sampling of the withheld documents accompanied by a detailed *Vaughn* index. The court recognized that the FBI had a law enforcement function. However, the FBI's explanation for withholding records stressed such techniques as "community outreach efforts [that] serve the purpose of establishing working relationships with community partners whose cooperation is essential to law enforcement missions." The court pointed out that "that this may all be true does not, without more, permit the FBI to apply Exemption 7 to withhold or redact information about such tactics. [The agency's affidavits do not] tether the activities the withheld documents concern to the enforcement of any particular law." Finding that the agency could not claim Exemption 7 under these circumstances, the court observed that "the FBI's refrain at oral argument that many of the withheld documents do not relate to particular investigations, and thus cannot be linked to any particular provision of law, only serves to emphasize the point that Exemption 7 is not the appropriate umbrella under which to shield these documents from public view." (*American Civil Liberties Union of Northern California, et al. v. Federal Bureau of Investigation* , Civil Action No. 10-03759-RS, U.S. District Court for the Northern District of California, March 23)

In a case parallel to one he decided in January, Judge Emmet Sullivan has ruled that data compiled by the University of Cincinnati pursuant to funding from the Department of Transportation and the Department of Health and Human Services' Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry to study the effects on workers of Libby Amphibole Asbestos are not **agency records** of HHS. The law firm of Beveridge & Diamond requested research on Libby Amphibole Asbestos conducted by UC, particularly high resolution computer tomography data and pulmonary function testing data. Beveridge argued that HHS had constructive control of the UC records because the government "surely has access to the underlying data and could have received it on request." Sullivan indicated that HHS had withheld the draft manuscript under Exemption 5 (privileges). He noted that "until the draft manuscript is accepted for publication and published [HHS] does not have a right of access to the data." He then observed that "even assuming that the defendants had a right to acquire the PFT and HRCT data, which it does not, *the defendants have not exercised that right*." He added that "by ordering the defendants to 'exercise [their] right of access' the Court would be effectively compelling the defendants to create an agency record." Beveridge argued that "the defendants had constructive control over the data because the data, under the [DOT and HHS] grants were generated for federal government purposes and were to be provided to and used by the EPA in its Toxicological Assessment." Sullivan explained that "the law is settled that the mere fact –without extensive

supervision and control by the defendants—UC 'received federal funds to finance its research [is not] sufficient to conclude the data were created or obtained by the agency.' The defendants cannot require UC to provide them with the data UC may have collected under the [DOT] contract, nor do the defendants have a right to access UC's data under the [HHS] grant until the draft manuscript is accepted for publication and published. To date, the draft manuscript has not been published." (*Beveridge & Diamond, P.C. v. United States Department of Health and Human Services*, Civil Action No. 14-80 (EGS), U.S. District Court for the District of Columbia, March 30)

Judge Emmet Sullivan has ruled that the Bureau of Prisons has not yet justified its **search** for records pertaining to a Special Investigative Service report of a prison incident involving Martin Sanchez-Alaniz or its claim that **Exemption 7(F) (harm to an individual)** applies to parts of the records. Sanchez-Alaniz requested the records pertaining to an incident at Atwater Penitentiary. BOP said the SIS records remained at the originating institution and searched it Western Regional Counsel's Office and disclosed the five pages it found to Sanchez-Alaniz. Sullivan found the agency had so far failed to describe the search sufficiently. He noted that "missing from the declaration is any description of the search itself. The declarant neither identifies which files were searched, nor explains why particular files were searched, nor describes how the files were searched. The declaration is vague and conclusory, and it does not explain adequately the scope and method of the BOP's search." In invoking Exemption 7(F), the agency explained that "a reasonable likelihood that there was a threat of harm to BOP SIS employees and inmates could be inferred from the facts and circumstances evident in the document in question." Sullivan indicated that "this description is vague and conclusory. Based on BOP's declaration and review of the redacted Inmate Investigation Report, there is no apparent connection between disclosure and possible harm to SIS employees or to inmates." (*Martin Sanchez-Alaniz v. Federal Bureau of Prisons*, Civil Action No. 13-1812 (EGS), U.S. District Court for the District of Columbia, March 28)

Judge Tanya Chutkan has ruled that the DEA conducted an **adequate search** for records pertaining to information allegedly provided by several co-defendants to an Assistant U.S. Attorney or detectives at the Raleigh Police Department during the investigation of cocaine distribution charges against Torrance Jones. Jones was tried and convicted in 1998. He later made a FOIA request for records showing what his co-defendants told the AUSA and several Raleigh police officers and provided his case number for reference. By searching its main database, DEA was able to locate Jones' case file, which contained 26 pages, none of which pertained to the alleged testimony Jones sought. However, DEA disclosed 23 pages in part, two pages in full, and withheld one page. The agency conducted a search based on the names of the individuals Jones had provided, but "the DEA had no additional information by which to positively identify these individuals or files in [the database] containing information about these individuals." Jones argued that in an earlier ruling, Chutkan had ordered DEA to conduct a more comprehensive search. Chutkan, however, observed that her previous ruling stated that "the DEA could not rest on its Glomar response—it could not refuse to confirm or deny the existence of records responsive to plaintiff's FOIA request for the co-defendants' statements. The ruling did not, as plaintiff suggests, set forth 'specific instructions. . .to turn over the records as to [the co-defendants]." Jones also argued the agency was required to contact the Raleigh police to see if they had responsive records. Chutkan pointed out that "none of these individuals is an employee or officer of the DEA and plaintiff cites no authority for the proposition that an agency is obligated to conduct a search for information in [a] system of records that the agency does not maintain." (*Torrance Jones v. Drug Enforcement Administration*, Civil Action No. 13-0123 (TSC), U.S. District Court for the District of Columbia, March 20)

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A federal court in Colorado has ruled that the Western Energy Alliance is not entitled to **attorney's fees** for its suit against the Bureau of Land Management for disclosure of its "Report on National Greater Sage-Grouse Measures" because none of the factors typically assessed in determining entitlement to attorney's fees supports an award. WEA requested the report from BLM and when the agency failed to respond in time, WEA filed suit. BLM disclosed the report within two months after the litigation was filed. WEA then filed a motion for attorney's fees. The court noted that WEA was a non-profit business league for tax purposes and that its stated primary goal was to promote exploration of oil and natural gas. WEA argued that it had disseminated the report on its website and that the organization had influenced a bill to amend the Endangered Species Act. The court indicated that "the WEA says it made the information available to its members and to the public. However, the WEA provides no details about these disclosures, and the defendant contends the information is not available on the publicly available portion of the WEA website." As to WEA's influence on the congressional legislation, the court observed that "the WEA makes no specific showing that the peer review information [contained in the report] at issue here had a significant influence on that effort." Having concluded that WEA had shown no public benefit from disclosure, the court turned to whether WEA had a commercial or personal interest in the records. The court pointed out that "here, it is clear the WEA seeks to achieve a benefit for its members by obtaining the FOIA information and using it to challenge regulations of its industry which its members oppose. The record demonstrates use of the FOIA material primarily for such purposes. In this context, an award of attorney fees and costs 'would merely subsidize a matter of private concern.'" (*Western Energy Alliance v. Bureau of Land Management*, Civil Action No. 13-02814-REB-CBS, U.S. District Court for the District of Colorado, March 23)

Judge Amy Berman Jackson has ruled that the Bureau of Alcohol, Tobacco and Firearms conducted an **adequate search** for records concerning the investigation and conviction of David Barouch for possession of an unregistered destructive device and that with the exception of its **Exemption 3 (other statutes)** claim, it properly withheld records from Barouch under several exemptions. Barouch claimed there should be recordings of several interviews with an individual named Eddie Sutton that had been conducted by ATF agents. A database search failed to locate any recordings, but the ATF Special Agent who handled Barouch's investigation found one tape and indicated that he believed one other interview took place conducted by the Texas Rangers. Jackson observed that "the Court notes that [the agency's] affidavit also indicates that there may be a perfectly reasonable explanation for why defendants did not find the tapes plaintiff seeks: that instead of recording the conversations, law enforcement agents opted to have 'an *unbiased* witness' present." Barouch also questioned why the agency could not locate chain-of-custody records. Jackson explained that "defendants state that ATF 'does not have any subordinated agencies or sub-agencies and it does not supervise or control the records of any other law enforcement agency.'" Barouch claimed there was a public interest in disclosing the contents of the recording of the interview with Sutton. But Jackson pointed out that "third-party identifying information that appears in law enforcement records is generally not subject to disclosure under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** 'unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity,' and access to the identifying information 'is necessary in order to confirm or refute that evidence.' Plaintiff's speculation about what the contents of the recording might reveal does not constitute 'compelling evidence.' Moreover, to the extent plaintiff seeks to claim that the protections of Exemption 7(C) were waived as a result of the third party's judicial proceedings, plaintiff has not made the requisite showing." ATF had withheld 97 pages under Rule 6(e) pertaining to grand jury secrecy. Jackson found the agency's description inadequate and noted that "because defendants have failed to provide virtually any description of the grand jury materials they withheld, the Court cannot determine whether the withholding was justified under Exemption 3." Jackson agreed that records contained in a **Privacy Act** system of law enforcement records that was exempt under subsection (j)(2) were protected, but noted that "defendants have failed, however, to account for the fact that one of the

responsive records [withheld under (j)(2)] was located in the personal file of an ATF Special Agent, which was 'not an official agency file.' Defendants have not explained whether records found in this agent's personal file are also subject to withholding under the Privacy Act." (*David Jack Barouch v. United States Department of Justice*, Civil Action No. 14-0552 (ABJ), U.S. District Court for the District of Columbia, March 31)

Judge Rudolph Contreras continues to work through the multiple claims made by prisoner Jeremy Pinson against the Department of Justice. In his most recent ruling, Contreras has resolved a number of requests Pinson sent to the Office of Inspector General at DOJ. Pinson argued he had not received responses to several OIG requests. Contreras pointed out, however, that Pinson admitted to receiving the disputed records. He noted that "previously this Court has credited statements in Mr. Pinson's declarations asserting that he had not received responsive letters from various DOJ components—despite the existence of contrary assertions in his verified complaint—where Mr. Pinson explained that he had received acknowledgement letters rather than final response letters, or where the date of receipt listed in Mr. Pinson's verified complaint preceded the date of the agency's response such that it appeared the contradictory assertion in Mr. Pinson's complaint may have been the result of confusion. In this instance, however, Mr. Pinson has not provided the Court with any reason whatsoever 'for believing the supposed correction is more accurate than the prior testimony.'" Contreras upheld OIG's **search** claim for records pertaining to himself, but indicated that its search for records related to a case number was inadequate because the database could only be searched by name. He observed that the agency "would have needed the names of the defendants in the case in order to have searched the OIG's investigative records database, but that information was not included in Mr. Pinson's request. And OIG never asked Mr. Pinson to clarify his request or provide the appropriate names, despite the fact that DOJ FOIA regulations require agencies to contact requesters if their requests" do not reasonably describe the records. Pinson claimed he had not received records for another request, but OIG argued the records had been sent back as undeliverable. Contreras noted that "on these facts, it is far from clear that the OIG has 'properly released records to Plaintiff. . .Moreover, because the DOJ does not dispute that the request was proper or that the OIG's search uncovered documents responsive to [Pinson's] FOIA request, the agency is instructed to provide those responsive documents to Mr. Pinson." Pinson argued OIG could not issue a *Glomar* response for records about Jamil Abdullah Al-Amin because Pinson had provided Al-Amin's waiver. But Contreras pointed out that "without any evidence that Mr. Pinson sent Mr. Al-Amin's consent form to the OIG prior to its issuance of a *Glomar* response, let alone any evidence that the agency actually received the form prior to issuing its final response letter, Mr. Pinson has failed to establish that the agency's issuance of a *Glomar* response was improper. Mr. Pinson may again pursue this request by submitting it along with proof of Mr. Al-Amin's consent, but he has failed to establish a genuine issue of material fact with respect to the propriety of the agency's *Glomar* response." (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, March 19)

In two separate but related opinions, Judge Emmet Sullivan has resolved the issues remaining in a case brought by Alvin Dorsey against various components of the Justice Department for records related to the agency's investigation and conviction of Dorsey. Dorsey had filed suit against EOUSA, but the remaining records at issue were referrals made to DEA and the FBI. Sullivan upheld claims of **Exemption 7(D) (confidential sources)** and **Exemption 7(E) (investigative methods and techniques)** for both agencies. He rejected Dorsey's assertion that the agencies had failed to consider **segregability** of the records, pointing out that "contrary to plaintiff's assertion, from the Court's review of the supporting declarations, the DEA's Vaughn Index, and copies of the relevant FBI records, defendant demonstrates that all reasonably segregable material has been released from the records referred by the EOUSA." Dismissing Dorsey's claim for **fees**,

Sullivan noted that "it is apparent that plaintiff is not entitled to fees and costs. As a *pro se* plaintiff who is not an attorney, plaintiff is not eligible for attorney fees. He neither identifies a public benefit derived from this case nor explains the nature of his interest in the requested information." (*Alvin Dorsey v. Executive Office for United States Attorneys*, Civil Action No. 12-0534 (EGS), U.S. District Court for the District of Columbia, March 19)

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Dorsey had also filed suit against the DEA asking for records about several named informants. DEA had referred some records responsive to Dorsey's request to the FBI, OIP, and the Criminal Division. Both the FBI and OIP agreed to release all the records referred to them, but the Criminal Division withheld the four pages referred to it. Sullivan approved the Criminal Division's withholding of two wiretap authorization memos under **Exemption 3 (other statutes**), citing Title III, as well as under **Exemption 5 (attorney work-product privilege)**. DEA itself had withheld records under **Exemption 7(D) (confidential sources)**. Dorsey challenged the adequacy of the promise of confidentiality, but Sullivan indicated that "plaintiff has not offered any support for his assertion, however, and based on the DEA's showing, the Court concludes that an assurance of confidentiality can be implied under the circumstances set forth in its declaration." Sullivan once again rejected Dorsey's claim that he was entitled to costs, noting that "it is apparent that plaintiff has not substantially prevailed in this action." (*Alvin Dorsey v. Drug Enforcement Administration*, Civil Action No. 11-1350 (EGS), U.S. District Court for the District of Columbia, March 28)