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Washington Focus: An article in The Hill April 1criticizes the Office of Special Counsel for its failure to ever take up a sanctions case under FOIA. While OSC's reputation for dealing with whistleblowers has improved dramatically under the Obama administration, its failure to consider any sanctions under FOIA is more the fault of the statute's requirements than a conscious effort to avoid addressing such complaints. The sanctions provision, part of the 1974 FOIA Amendments, is considered to be the brainchild of Ralph Nader and on paper it appears to provide another layer of accountability. However, the actual language of the sanctions provision severely restricts its reach so that it pertains to only a sliver of litigation. To merit a referral to OSC for a sanctions determination, a district court has to award the plaintiff attorney's fees and, further, "issue a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding." As a practical matter, those hurdles are so high as to be nearly impossible to surmount.

D.C. Circuit Remains Leader In FOIA Litigation

The U.S. District Court for the District of Columbia plays an outsized role in hearing FOIA cases. FOIA makes the District of Columbia the jurisdiction of universal venue for FOIA cases, meaning any plaintiff can sue the government in the District. But it is quite rare when judges actually speak about their attitudes towards FOIA litigation. For that reason alone, a recent article in the *National Law Journal* which contains quotes from four sitting district court judges is worth the read. Coupled with perspective from several leading FOIA litigators, the article provides an interesting glimpse of how FOIA litigation plays out.

Although the FOIA Project, run by TRAC, found that 422 FOIA suits were filed in U.S. district courts in 2014, an increase from 372 in 2013, the *National Law Journal* did its own calculation, coming up with 462 cases, nearly half of which were filed in the D.C. district court. But to put that into perspective, *National Law Journal* noted that is about 10 percent of the D.C. district court's civil docket.

ACCESS REPORTS

The reasons for filing cases in D.C. vary, but the most obvious reason is that after more than 40 years of experience hearing FOIA cases, there is a substantial amount of FOIA case law in the D.C. Circuit, far more than in any other federal appellate circuit, and district court judges in D.C. are far more familiar with the law and its interpretation than any other district. That can cut both ways. Anne Weismann, chief counsel for CREW, told the *National Law Journal* that "its opinions matter. Especially when I have a case that I see of great public significance or the potential to set a new precedent on a broader issue under the FOIA, getting a decision in my favor from the district court I think carries a lot of weight." Julie Murray, an attorney at Public Citizen, told the *National Law Journal* that "there is a well-established body of case law on FOIA in the District and you don't find that elsewhere." She added that "that body of case law provides more certainty when you're thinking about litigation." Murray further observed that because D.C. is the jurisdiction of universal venue, other districts may look to the D.C. district court for guidance and forego developing their own case law. Indeed, many district court judges in jurisdictions that do not hear very many FOIA cases often adopt relevant case law from the D.C. Circuit.

It is a strategic decision for requesters who could file elsewhere, depending on whether the plaintiff is looking for certainty or hopes that a fresher approach will emerge from a judge who does not hear many—or any—FOIA cases. Public interest and media organizations located in San Francisco or New York usually choose the Northern District of California or the Southern District of New York over the D.C. Circuit. But in comparison, the number of cases filed in such jurisdictions is paltry. The *National Law Journal* noted that 21 FOIA cases were filed in the Southern District of New York in 2014, about 10 percent of the number filed in the District of Columbia.

The fact that many judges come from federal government backgrounds appears to cut both ways. David Sobel, senior counsel for EFF, told the *National Law Journal* that "it's certainly no secret if you look at the backgrounds of many of the judges, many of them are former Justice Department attorneys. I think they come to the bench with kind of a pre-existing sensitivity to governmental interests." But Judge John Bates, who worked for 10 years at the civil division of the U.S. Attorney's office in Washington before he was named a district court judge in 2001, indicated that "I don't think that my experience on basically the defense side made me more oriented towards that perspective. I think, if anything, judges who've represented the government a lot recognize some of the problems that may occur on the government side." One judge who was frequently skeptical of the government's claims was Stanley Sporkin, whose previous job was as counsel to the CIA before he was named to the court. Mark Zaid, a frequent litigator under both FOIA and the Privacy Act, told the *National Law Journal* that the experience level of D.C. district court judges helped to smooth the process. He noted that "the judges here will be more aggressive in pushing the agencies to get to a certain point than I think they would in other districts."

Jeffrey Light, who represents Truthout as well as reporters like Jason Leopold, complained of the willingness of judges to give agencies extra time to respond to litigation. He pointed out that "when Congress set 20 business days for [an agency] response, and you are a client who is a reporter and trying to get something in a timely fashion, you often get into litigation and it takes a year before you even get to the processing of it." But from the judges' perspective, things look different. Judge Reggie Walton, appointed in 2001, told the *National Law Journal* that "most of the time when you order that certain things take place or there's been a request made and the government requests a continuance, it's because they lack the personnel to do the searches that need to be done." Judge James Boasberg, appointed in 2011, agreed, noting that "the difficulty in FOIA cases is balancing citizens' rights to an open and transparent government, which we all want, with the incredible burden some of the requests place on government agencies in terms of searching for and redacting documents." Judge Rosemary Collyer, who worked at the National Labor Relations Board and the Federal Mine Safety and Health Review Commission before she was appointed in 2002, said her background made her familiar with the burdens FOIA places on agencies. In particular, she noted, Congress

had created the 20-day time limit for responses "without any expectation of the avalanche of FOIA requests that would result over the years." Nevertheless, she told *National Law Journal* that "we read the responses, we compare the affidavits, we actually work at this for every one of these cases."

One judge the *National Law Journal* did not interview is Beryl Howell, who was appointed in 2010. However, Howell has a particularly unique perspective on FOIA, which seems to have informed her analysis in cases on which she has ruled. Howell served as staff counsel to Sen. Patrick Leahy (D-VT) during the mid-1990s when the Electronic Freedom of Information Act amendments were put together. She was largely responsible for the original version of the amendments that passed the Senate, although because the House took up the amendments later, it had a more dominant role in role in the final language.

Other very useful pieces of the puzzle concerning FOIA litigation in the D.C. district court was fleshed out by the FOIA Project. In a summary of statistics for FOIA cases filed nationwide in 2014, the FOIA Project found that public interest groups, most of them located in Washington, filed more than 30 percent of the cases. On the conservative side, Judicial Watch led with 34 suits, the Competitive Enterprise Institute filed 6 suits, the Energy & Environment Legal Instituted filed 6 suits, Cause of Action filed 3 suits, and Citizens United filed one suit, for a total of 50 FOIA suits, all filed in the D.C. district court. On the liberal side, EPIC filed 7 suits, PEER filed 6 suits, CREW filed two suits, and EFF filed one suit, for total of 16 suits filed in the D.C. district court. That means public interest groups located in Washington filed 66 FOIA suits in 2014 and this figure does not even include related cases in which attorneys for a public interest group represented other plaintiffs. More than 200 cases were filed in D.C. district court in 2014 meaning that about a third were filed by public interest organizations. FOIA Project also found that the Justice Department was the leading defendant with 121cases filed against it or its components. The Defense Department was second with 54 suits, while the Department of Homeland Security was third with 49 suits.

Views from the States…

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

Connecticut

The court of appeals has ruled that Roger Emerick's petition to the FOI Commission to reconsider its adverse decision in his complaint was filed after the statutory 45 days had expired. Emerick argued the statute allowed 45 days after mailing of the petition. The FOI Commission contended that the pertinent statutory time limit provided 45 days after the commission's decision was made, rather than when the decision was mailed. The appeals court agreed, noting that "unlike [two other subdivisions related to time limits] there is no mention in [this section] of the mailing date of the final decision. Pursuant to [that section], it is the denial of the petition for reconsideration that commences the time period for an appeal." The court concluded that "the [trial] court correctly determined that the plaintiff's appeal was untimely, and it consequently lacked jurisdiction over the appeal." (*Roger Emerick v. Freedom of Information Commission*, No. 36114, Connecticut Appellate Court, March 31)

District of Columbia

A court of appeals has ruled that a motion for declaratory judgment filed by the Fraternal Order of Police as one of its claims in its FOIA suit against the District of Columbia for a number of emails pertaining to

ACCESS REPORTS

recruiting became moot when the trial court ruled the District had properly responded to FOP's request. Although the District failed to respond to the request within the statutory time limits, causing FOP to file suit, the redacted records were disclosed shortly after the time the District's summary judgment motion was due in court. The trial court upheld both the adequacy of the District's search as well as its exemption claims. The trial court dismissed FOP's claims as moot except for its attorney's fees request. While the trial court took notice of the fact that the District responded at the time its summary judgment motion was due, it found the District's failure to respond on time was due more to a lack of resources than to FOP's suit. FOP argued that both its declaratory judgment motion and its attorney's fees motion were still in dispute. But the appeals court noted that for the court to issue a declaratory judgment in this case would do nothing. The court observed that "issuing a declaratory judgment after the District produces documents does nothing to 'enforce' FOIA's time limits, as it does not direct the District to *do* anything. A declaration that the District's production was unlawfully late cannot undo that lateness or force the District to be timely in future cases." Turning to the attorney's fees request, the court noted it used the catalyst standard in the federal FOIA to assess whether a plaintiff deserved an award. Upholding the trial court's decision denying an award, the appeals court indicated that "as the trial court noted, the District's delay—while unlawful—was not significantly different from 'the average amount of time it takes the District to respond to FOIA requests.'" (*Fraternal Order of Police, Metropolitan Labor Committee v. District of Columbia*, No. 13-CV-164, District of Columbia Court of Appeals, April 2)

Montana

The supreme court has upheld a trial court's *in camera* review of Valarie Addis's personnel file when she was employed as supervisor of food services by the Missoula County Public Schools. The Missoula County Schools investigated Addis on charges of fraudulent or illegal transactions. She was disciplined as a result, left the Schools, and filed a wrongful discharge suit. She then was hired as Ravalli County Treasurer, where she was subsequently investigated for irregularities and sanctioned. Two weekly newspapers, the *Bitterroot Star* and the *Missoula Independent*, along with KECI-TV requested records concerning her termination from the Missoula Schools. The Schools notified Addis, who asserted her right to privacy. The Schools then asked the trial court to review the records *in camera* and decide what should or should not be disclosed. The trial court found that disclosure of several documents would constitute an invasion of privacy, but ordered documents about the investigation disclosed. Addis appealed the trial court's decision. Approving the trial court's actions, the supreme court observed that "we agree that the initiation of a proceeding in this case was an appropriate process for the Schools to invoke to resolve the request by the media." The court indicated that "documents are not shielded from public disclosure simply because they are in a public official's personnel file when the official occupies a position of trust." The court pointed out that "the [trial] court found that Addis' position as supervisor of food services was 'one of public trust because she was responsible for the expenditure of public money.' Finally, the [trial court] concluded that Addis could have no reasonable expectation of privacy in documents relating to a violation of public trust. . ." (*In re Petition of Missoula County Schools, Missoula County v. Bitterroot Star*, No. DA 14-0473, Montana Supreme Court, March 31)

New Jersey

A court of appeals has ruled that the Zoning Board for the Borough of Point Pleasant Beach held an improper closed meeting with the board's engineer to discuss the application of FEMA regulations to variances. Anthony and Joan Graceffos requested a variance for their home in an area zoned for one-story homes. The Graceffos wanted to remove an existing pool and deck and add a garage and elevator. The board expressed concerns about the height and size of the addition, but allowed the Graceffos to appear at the next meeting to address those concerns. Prior to its next public meeting, board members met in private with their

engineer to discuss the application of FEMA regulations generally. The board then met in public, discussed FEMA requirements, and denied the Graceffos' variance. A trial court ruled that the board properly denied the Graceffos' variance and that the board did not violate the Open Public Meetings Act when it met in private. Addressing only the OPMA violation, the court of appeals reversed, noting that "holding a closed-door meeting prior to a public meeting creates a perception of impropriety and undermines public trust." The board argued that it had cured any violation by discussing the FEMA regulations during the public meeting. But the appeals court pointed out that "the fact that concerns about FEMA compliance were also discussed in the public portion of the meeting, as well as in private, does not cure the OPMA violations." Because a violation of OPMA required voiding the public body's action, the court sent the variance back to the board for corrective action. (*Anthony W. and Joan M. Gracefo v. Zoning Board of Adjustment of the Borough of Point Pleasant Beach*, No. 2182-13, New Jersey Superior Court, Appellate Division, March 26)

Washington

The supreme court sitting *en banc* has ruled that records that reveal the existence of an ongoing investigation of public employees are not protected by the exemptions for personal privacy or law enforcement records in the Public Records Act. Anthony Predisik and Christopher Katke, longtime employees of the Spokane School District, were placed on administrative leave while separate, unrelated allegations against them were investigated. Two media requests were received for records pertaining to the reasons for the administrative leave and the amount of salary being paid to each of them while they remained on administrative leave. Both Predisik and Katke objected to the disclosure of the records as an invasion of privacy. Based on *Bellevue John Does 1-11 v. Bellevue School District No. 405* 189 P.3d 139 (2008), in which the supreme court had ruled that public school teachers had a right to challenge disclosure of unsubstantiated allegations against them, the court of appeals had ruled in favor of Predisik and Katke. But the supreme court retreated somewhat from the *Bellevue* decision, finding that the disclosure of the existence of an investigation did not constitute an invasion of privacy. The court observed that "we distinguish the investigation itself from the employee's conduct giving rise to that investigation. This difference, though subtle, is very important to the privacy interest analysis. A public employer's investigation is certainly not a *private* matter; it arises exclusively from the employee's *public* employment. . .A public employer's investigation is an act of the government, not a closely held private matter that gives rise to a privacy right under the PRA." Distinguishing its ruling in *Bellevue* as dealing with salacious allegations, the court observed that "the records [here] contain no specific allegations of misconduct at all. It makes no difference if the allegations here are eventually substantiated because the records do not describe them." The court pointed out that the law enforcement investigation exemption did not apply because the school district had no law enforcement authority. (*Anthony J. Predisik and Christopher Katke v. Spokane School District No. 81*, No. 90129-S, Washington Supreme Court, April 2)

The Federal Courts…

A federal court in California has granted declaratory judgment to Our Children's Earth Foundation after finding the National Marine Fisheries Service's routine violation of FOIA's time limits constituted a **pattern and practice**. Judge Samuel Conti noted that "although the Court and many others have recognized that agencies' resources are heavily taxed by the quantity and depth of FOIA requests, that does not grant the agency carte blanche to repeatedly violate congressionally mandated deadlines." The case involved four FOIA requests that the Foundation made as part of its complex litigation against the government for alleged violations of the Endangered Species Act relating to the Steelhead trout and the role Stanford University's

ACCESS REPORTS

water-use practices might play in the Steelhead's fate. The Foundation challenged the agency's **search** as to two of the four requests. While the affidavit of Gary Stern, the Branch Chief of the Fisheries Service's San Francisco Bay Branch, provided significant detail as to the search for one request that yielded 36,000 pages, the court was disturbed by the lack of detail pertaining to the search for the second request, particularly since the search did not uncover responsive records of an investigation in the Office of Law Enforcement, even though Stern was part of some conversations pertaining to those records. Conti noted that "documents from that investigation clearly fall within the Scope of Plaintiffs' first and third FOIA requests. . .Yet it is undisputed that Plaintiffs' requests were not forwarded to the Office of Law Enforcement and no searches took place there." The agency had withheld information on email chains identifying personnel in the Office of Law Enforcement under **Exemption 6 (invasion of privacy)**. Conti observed that "the investigation of the Steelhead is not hotly controversial and is unlikely to subject any of the individuals involved to harassment or embarrassment." Finding the agency's claims were so far insufficiently justified, he pointed out that "to be sure, there may well be some non-trivial privacy interest implicated here. However, the Court cannot conclude these documents are categorically protected merely because they contain names and contact information." He found the agency had failed to show that it had conducted an adequate **segregability** analysis for records withheld under **Exemption 5 (privileges)**. He pointed out that an attachment containing an email about a conversation between Stern and a staffer of a public interest organization that Stern forwarded to an agency attorney for legal advice did not likely qualify for attorney-client privilege. (*Our Children's Earth Foundation v. National Marine Fisheries Service, et al.*, Civil Action No. 14-1130 SC, U.S. District Court for the Northern District of California, March 30)

A federal court in New York has ruled that the Justice Department properly withheld legal guidance sent to various DOJ components, particularly the Bureau of Alcohol, Tobacco, and Firearms concerning the immediate consequences of the Supreme Court's 2012 ruling in *United States v. Jones*, in which the Court found that the use of GPS tracking devices for law enforcement surveillance normally required a search warrant under **Exemption 5 (privileges)**. *New York Times* reporter Michael Schmidt sent a request to ATF for records indicating the advice given to its agents in light of the *Jones* decision. ATF referred some responsive documents to the Criminal Division and OIP, which processed requests for the Office of the Deputy Attorney General. The *Times* appealed ATF's denial to OIP and then filed suit. Other records were then referred to the FBI. The *Times* challenged withholdings under Exemption 5 as well as **Exemption 7(E) (investigative methods and techniques)**. The *Times* argued that six memos that were found as a result of Schmidt's request were not protected by either the deliberative process privilege, attorney-client privilege, or attorney work-product privilege because they constituted the working law of the agency. But Judge Denise Cote disagreed. She noted that the memos were drafted and circulated shortly after *Jones* was decided and were intended to help agencies minimize the effects of the *Jones* decision on ongoing investigations and anticipated litigation. As to an email sent by ATF's attorney to agents, Cote pointed out that "an email, distributed on the day following the *Jones* opinion by a person who lacks final authority to make policy is not a final opinion." One memo originated with the FBI and Cote questioned whether it was even responsive to Schmidt's request for advice from ATF. Regardless, she observed that the memo "does not constitute the working law of the FBI. The guidance was drafted within hours of the *Jones* decision. In this sense, it is much closer in form and function to predecisional, deliberative documents that are generally exempt from disclosure under FOIA than an agency's working law." Even a document from the Criminal Appellate Section of DOJ entitled "Final Guidance Memo" did not constitute the agency's working law. Cote pointed out that "policy interpretations and statements that go beyond providing a neutral analysis of an agency's obligations under the law are not working law." She added that "here, DOJ's views regarding the likely challenges to the use of GPS tracking devices and available defense to those challenges will be borne out publicly in court. Because these positions described in these memoranda will ultimately become public, the 'secret law' rationale does not support the application of the working law principle in this situation." (*New York Times and Michael Schmidt v. United*

States Department of Justice, Civil Action No. 14-328 (DLC), U.S. District Court for the Southern District of New York, March 31)

Judge James Boasberg has ruled that *Glomar* responses issued by both EOUSA and the FBI in response to Adolfo Correa Coss' FOIA request for drug-transaction notebooks that were seized when Guillermo Casas, a confidential informant, was arrested are inappropriate. Coss was convicted of possession of cocaine with intent to deliver and deported to Mexico. He believed he had been wrongfully convicted based on the testimony of Casas. He learned that Casas had served as a confidential informant during his trial and that Casas himself had been arrested for cocaine distribution the subsequent year and that the existence of his drug-transaction notebook had been publicly revealed during his trial. Coss then made requests for Casas' drug-transaction notebook to both EOUSA and the FBI. But when Coss appealed EOUSA's *Glomar* response, the agency dropped that defense and agreed to search nine boxes of materials from Casas' trial if Coss would agree to pay the search costs. Coss did so, but the agency found no responsive records. Coss claimed EOUSA had misspelled the names when conducting the search, a claim Boasberg rejected. However, the FBI continued to assert its *Glomar* response, arguing as well that Coss had failed to **exhaust administrative remedies** by not appealing the *Glomar* denial. Coss had responded to the FBI's *Glomar* by asserting that there was a public interest in disclosure of the records. Boasberg observed that "as the FBI never responded therefore, it seems disingenuous for the Bureau to now adopt a failure-to-appeal position. In other words, Plaintiff followed the instructions of the July 30 letter, and even though his justification was rather scant, the Bureau would still have needed to reject it in order for Coss to know he should then pursue an appeal. Its radio silence left him in FOIA limbo." Rejecting the FBI's *Glomar* response, Boasberg noted that all Coss demands in this suit are the notebooks fin which Casas detailed his drug transactions. Their existence is not secret; indeed, it is printed for all to see in the pages of the federal reporter." Boasberg pointed out that "refusing to acknowledge whether or not the notebooks exist borders on foolishness." Boasberg, added a caveat, observing that "as a practical matter, however, Coss might be wise not to get his hopes up. EOUSA's failure to locate the notebooks in nine boxes relating to the conspiracy trial could well mean the FBI has no greater success. Yet, at the least, it will have to search for them." (*Adolfo Correa Coss v. United States Department of Justice*, Civil Action No. 14-1326 (JEB), U.S. District Court for the District of Columbia, April 15)

Judge Amy Berman Jackson has ruled that the IRS has not shown that it conducted an **adequate search** for all records concerning the Sea Shepherd Conservation Society, whose tax exempt status had been recently examined. Sea Shepherd, a non-profit environmental organization advocating for the preservation of oceanic habitat and wildlife, including whales, had been involved in "confrontation campaigns" against the Institute of Cetacean Research, an organization that Sea Shepherd characterized as hunting whales for commercial purposes. Sea Shepherd also alleged Cetacean was partly funded by the Japanese government. Two classified cables published by Wikileaks in 2011 described conversations between the United States and Japanese governments concerning an examination of Sea Shepherd's tax exempt status. The IRS began an examination of Sea Shepherd's tax exempt status in 2013. Sea Shepherd requested IRS records about itself, focusing on the tax examination. The IRS produced over 3000 pages and three months later disclosed another set of documents. The IRS then filed its motion for summary judgment in May 2014, indicating that some records had been withheld under **Exemption 7(A) (ongoing investigation or proceeding)** and **Exemption 7(D) (confidential sources)**. When the IRS completed its examination in November 2014 affirming Sea Shepherd's tax exempt status, Jackson asked the agency if it wanted to reconsider its Exemption 7 claims. The IRS told Jackson it would proceed with its current claims. The agency searched its Tax Exempt Organizations Examination office, the files of the IRS agent who conducted the examination, as well as several other offices involved in such reviews. Jackson found that the agency's initial description of its

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searches failed "to indicate that a search was conducted for the broader category of records requested by plaintiff—and not solely records related to the audit of plaintiff." Although the agency provided a more detailed description of the search by a senior official, Jackson pointed out again that "it does not address the portion of plaintiff's request that sought 'any and all' records related to Sea Shepherd within the specified timeframe." The agency insisted that Exemption 7(A) continued to apply because a further examination might be warranted. But Jackson noted that "the IRS has not provided any authority for the proposition that the possibility that another investigation might be launched in the future is sufficient to give rise to the risk that disclosure of records of the previous investigation would 'interfere with enforcement proceedings,' which is the necessary predicate for the cited exemption." The IRS had withheld names of donors under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Jackson observed that "the Court finds that plaintiff has pointed to a public interest in disclosure that the IRS did not consider in the balancing test" and ordered the agency to reassess its decision to withhold those records. The IRS had also withheld information under **Exemption 3 (other statutes)**, citing 26 U.S.C. § 6103 protecting taxpayer information. Jackson, however, found the agency had failed to show that disclosure of the information would impair federal tax administration. She also indicated the agency could not use §6103 to withhold Sea Shepherd's own return information from the organization. (*Sea Shepherd Conservation Society v. Internal Revenue Service*, Civil Action No. 13-422 (ABJ), U.S. District Court for the District of Columbia, March 31)

In a case presenting a unique set of circumstances, Judge Beryl Howell has ruled that EPIC is entitled to $31,180 in **attorney's fees** from the National Security Agency. However, at the same time Howell denied EPIC more than fifty percent of the award it had requested. EPIC requested National Security Presidential Directive 54, setting forth the government's cybersecurity policies, from the NSA. The NSA denied the request under **Exemption 5 (privileges)**, citing the presidential communications privilege. EPIC filed suit and Howell concluded on her own that NSPD 54 was not an agency record and that she did not have jurisdiction to hear the case. EPIC appealed to the D.C. Circuit. While its appeal was pending, however, EPIC accepted a Rule 68 Offer of Judgment for $3,500 in full resolution of all its claims, including attorney's fees as of January 27, 2014. EPIC nevertheless continued its appeal and the NSA disclosed an unclassified version of NSPD to EPIC in June, 2014. The D.C. Circuit then granted the parties motion to vacate Howell's ruling. EPIC then filed a request for $68, 354 in attorney's fees. The NSA argued EPIC did not substantially prevail because Howell's decision to dismiss was legally correct. But Howell pointed out that her decision had been vacated and had no legal standing. She noted that "the language of the statute is clear and reflects a generally practical consideration regarding whether a FOIA plaintiff obtained the relief it wanted, in the form of the release of the requested information. . .qualifies a FOIA plaintiff as a prevailing party eligible for attorney's fees." In an attempt to bring in its nearly $22,000 fee request for its work before it accepted the agency's Rule 68 offer, EPIC contended Howell "had ruled that the request for NSPD 54 was not properly before the Court." Howell explained that "whether NSPD 54 was an 'agency record' for purposes of FOIA was still 'a live controversy' up to and until the defendant released the document. Thus, the plaintiff's contention that its litigation regarding the disclosure of NSPD 54 was 'not properly before the Court' is incorrect as a matter of law. The fact that the Court concluded that this part of the plaintiff's suit was not subject to a FOIA request does not mean litigation did not occur or that there was no live controversy." Howell found that EPIC was bound by its acceptance of $3500 under Rule 68 for all litigation before the January 27, 2014 judgment. Howell next concluded that the four factors usually assessed in determining entitlement to attorney's fees favored EPIC, including the reasonableness of the government's position. Although vacating Howell's original decision left the parties with an untested status quo, Howell noted that Judge Ellen Segal Huvelle had ruled in *Center for Effective Government v. Dept of State*, 7. F. Supp. 3d 16 (D.D.C. 2013), that presidential directives were not protected by Exemption 5. She pointed out that "thus, far from asserting a position that was 'correct as a matter of law' the defendant, in light of *Center for Effective Government* asserted a position that was *incorrect*

as a matter of law." NSA argued that EPIC had negotiated in bad faith by used "exploding" settlement offers—offers made just prior to court deadlines to make it appear as if the parties were negotiating but which were then withdrawn almost immediately after the court submissions were filed. Howell observed that "the plaintiff may, as the defendant admits, place any time limits on negotiations and offers that it wishes. Nevertheless such sharp practice of extending, and then withdrawing settlement offers subverts the purpose of Rule 68 and the local rules, which are designed to encourage settlement. . .The defendant is correct that such tactics should not be countenanced to maintain the letter and spirit of the rules." As a result, Howell disallowed more than $15,000 "sought after the abrupt withdrawal of the plaintiff's first settlement offer on October 1, 2014." (*Electronic Privacy Information Center v. National Security Agency*, Civil Action No. 10-186 (BAH), U.S. District Court for the District of Columbia, April 8)

A federal court in New Jersey has ruled that the Department of Homeland Security and the FBI conducted **adequate searches** for records concerning Mohammad Qatanani, a Jordanian national who had immigrated to the United States in 1996 where he serves as Imam at the Islamic Center of Passaic County, and properly withheld records under a variety of exemptions. In 1993, Qatanani had been detained and allegedly tortured by the Israeli Defense Forces, who released him after he had signed a "finishing paper" that was apparently used as the basis for his conviction in Israel of supporting Hamas. Qatanani applied for permanent residency in the U.S. in 1999, but his application was not heard until 2005. During an interview with FBI and Immigration and Customs Enforcement agents, Qatanani told them of his detention by IDF, but did not characterize it as an arrest. The interviewing agents later concluded that Qatanani had lied about his arrest in Israel and his application for permanent residency was denied. While Qatanani's removal proceeding was pending, his attorney made a series of FOIA requests to Homeland Security and the FBI. DHS ultimately found thousands of responsive pages and the FBI located another 279 pages. Qatanani filed suit challenging both the searches conducted by the agencies and their exemption claims. Qatanani's primary challenge to ICE's search was that it did not involve senior officials. The court noted that "if the Court adopted Qatanani's premise, the determinative factor for the reasonableness of a FOIA search would be its results. . .ICE need not scour every office to locate responsive records absent a finely tailored request identifying specific documents or places to search, nor must it expand its search based on speculations derived from vague references without 'a positive indication of overlooked materials.'" DHS had withheld a number of records under **Exemption 5 (privileges)**. Qatanani argued that some records had lost their privilege because they constituted final decisions. Addressing one such document, the court pointed out that "the document remains deliberative and predecisional because it recommends and analyzes litigation strategy and its recommendations had yet to be acted on. There is no indication that this [document] or any other withholdings that Qatanani challenges constitute formal interpretations of established ICE policy or later became policy. . ." Qatanani claimed the agency was improperly withholding factual case summaries under the attorney work-product privilege. The court explained that "considering the broad scope a court should afford the work product doctrine, the Court finds that ICE has demonstrated its right to invoke it under Exemption 5." The FBI had withheld records under **Exemption 7(A) (interference with ongoing investigation or proceedings)**. Qatanani questioned the agency's category-by-category descriptions of withheld documents. The court, however, indicated that "the FBI provides the same level of detail under the other four subcategories and logically connects their disclosure to an articulable harm." The court rejected Qatanani's claim that disclosure of personally-identifying information for agency officials involved in his case would be in the public interest, noting instead that "he originally submitted his FOIA request in order to get information he thought would be relevant in his removal proceeding, a purely personal interest." As to whether the individuals' information was protected under **Exemption 6 (invasion of privacy)** or **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, the court indicated that "even if their identities are already publicly known or if they possessed a diminished privacy interest, these persons still retain a privacy interest entitled to protection under Exemption

ACCESS REPORTS

7(C)." (*Mohammad Mahdi Ahmad Hassan Qatanani and Claudia Slovinsky v. Department of Justice and Department of Homeland Security*, Civil Action No. 12-4042 (KSH)(CLW), U.S. District Court for the District of New Jersey, March 31)

A federal court in New York has ruled that U.S. Citizenship and Immigration Services conducted an **adequate search** for records concerning possible fraud in visa applications filed by attorney John Assadi on behalf of clients in several countries and that it properly withheld records under **Exemption 5 (privileges)**. After the agency had responded to Assadi's request, it uncovered the existence of more than 1,000 pages of emails involving a CIS attorney who had worked on Assadi's threat to sue the agency over a non-FOIA related matter. The agency also conducted another search when two other CIS attorneys' names showed up as having been copied on the emails. Assadi argued that the agency's search was inadequate because it took far too long. But the court noted that "although CIS's delay in conducting its searches was extensive, Plaintiff cites no case and the Court knows of no precedent suggesting that delay alone may serve as a basis for finding that the Government's search was inadequate. . . 'General criticism' and allegations of delay are insufficient to demonstrate that CIS acted in bad faith. . .Furthermore, each time CIS became aware of insufficiencies in its prior productions, it notified the Court and conducted additional searches." CIS withheld a number of records concerning Asadi's suits or threats to sue the State Department. Finding these records protected by Exemption 5, the court pointed out that "they are deliberative in that they are subjective documents which reflect the personal opinions of the attorneys rather than the policy of the agency, and are an integral part of the process by which DOS decisions about the Assadi actions were formulated." (*John Assadi v. United States Citizenship and Immigration Services*, Civil Action No. 12-1374 (RLE), U.S. District Court for the Southern District of New York, March 31)

Perhaps in an effort to complete more prisoner-initiated FOIA cases, judges in the D.C. Circuit have been kept busy resolving cases that involve multiple, often incoherent counts, frequently against multiple agencies. Judge Amy Berman Jackson seems to have had more than her share of such cases recently and her resolution of a case brought by Enitan Osabie Isiwele is a good example. Although Berman identifies Isiwele as a federal prisoner, she does not identify the charges. However, his multiple requests were sent to EOUSA in relation to his conviction in the Eastern District of Texas, but also to the Office of Inspector General and the Centers for Medicare and Medicaid Services at the Department of Health and Human Services for data concerning wheelchairs and other medical products, suggesting he was probably convicted of Medicare fraud. Isiwele also requested his alien file from U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement. In resolving the agencies' responses to Isiwele, Jackson divided them into claims that Isiwele had **failed to exhaust his administrative remedies** and those requests in which agencies were relying on exemption claims. CMS argued that it had given Isiwele a fee estimate for one request but that he failed to commit to pay fees. On other requests, the agency said it had sent a letter to Isiwele asking if he was still interested in his pending requests and when he did not respond, his requests were closed. Finding the agency's explanation was insufficient, Jackson noted that "by the declarant's own admission, CMS cannot show that plaintiff received the no-records response and notice of his right to appeal that would trigger the exhaustion requirement." As to exhaustion claims made by EOUSA and DHS that Isiwele had failed to appeal their decisions, Jackson explained that because both agencies made exemption claims "addressing the merits of [those] claims 'presents no risk of undermining the purposes and policies underlying the exhaustion requirement.'" Prisoner FOIA litigation is often more idiosyncratic than litigation brought by more sophisticated plaintiffs and one common result is that exemption claims are poorly fleshed out. Jackson found that the explanations of exemption claims by both HHS and EOUSA were "too sweeping and vague to permit an assessment of the asserted exemptions." She upheld the exemption claims made by both CIS and ICE pertaining to Isiwele's alien file. Isiwele had asked CIS to refund $78.20 he had paid for documents he

already had obtained. But Jackson concluded that she did not have jurisdiction to hear his claim. She noted that "the request does not concern the agency's denial of a fee waiver, which is subject to judicial review under the FOIA, nor is it premised on the statutory reasons for considering a fee waiver. Hence, the Court finds that it lacks authority to consider plaintiff's refund request." (*Enitan Osagie Isiwele v. United States Department of Health and Human Services, et al.*, Civil Action No. 12-1447 (ABJ), U.S. District Court for the District of Columbia, March 30)

In another prisoner case, Judge Amy Berman Jackson has ruled that frequent requester and litigator Willie Boyd has not shown that new evidence exists that would require either EOUSA or the Bureau of Alcohol, Tobacco and Firearms to disclose records on confidential informant Bryant Troupe or former St. Louis policeman Bobby Garrett, particularly in the face of a previous D.C. Circuit decision upholding the agencies' decision to withhold third-party information. Boyd was convicted on gun and drug charges in 1998. He became a frequent FOIA requester and litigator and an earlier suit for records pertaining to his conviction had gone to the D.C. Circuit, *Boyd v. Criminal Division of U.S. Dept of Justice*, 475 F.3d 381 (D.C. Cir. 2007), which upheld the government's withholding of third-party information. Boyd now claimed that records that had been disclosed along with an affidavit from his former criminal defense attorney showed the government had failed to provide exculpatory evidence and had relied on Garrett's testimony even though it knew he was corrupt. The present litigation involved two requests to EOUSA and one to ATF. EOUSA referred some of its records to ATF. ATF refused to process either request because it claimed Boyd had already received all non-exempt records. Boyd argued that his new evidence, particularly an affidavit from his criminal defense attorney Carl Epstein, showed misconduct on the part of the government. Rejecting Boyd's claim, Jackson noted that "Epstein's affidavit does nothing more than restate the same contentions that the D.C. Circuit already concluded did not constitute evidence of government misconduct. . .[T]he [D.C. Circuit] held that there was no basis to infer that the government had withheld purportedly exculpatory information from Epstein, given that it had undisputedly released exculpatory grand jury testimony to Boyd that implicated Troupe. . .The fact Epstein's contentions are now contained within a sworn affidavit instead of an unsworn letter does not constitute a change that is material, and so the D.C. Circuit's conclusion on this issue remains binding on the Court." Boyd pointed to two pages from a version of his police report he had previously obtained from ATF which had been omitted from the copy of his police report he received at the time of trial as evidence of government misconduct. Finding that the omission was not material, Jackson explained that "under these circumstances, the Court cannot see how a reasonable person could infer that the omission of these two pages, if it occurred, rises to the level of potential evidence of government misconduct." (*Willie E. Boyd v. Executive Office for United States Attorneys, et al.*, Civil Action No. 13-1304 (ABJ), U.S. District Court for the District of Columbia, March 31)

Judge Richard Roberts has ruled that the Bureau of Alcohol, Tobacco and Firearms conducted an **adequate search** for records of a gun trace used to convict Earnest Wilson of possession of a firearm that had been shipped in interstate commerce and that the agency was prohibited from disclosing the gun trace under **Exemption 3 (other statutes)**. Wilson was tried and convicted under Illinois state law for possession of a handgun that had been manufactured in Connecticut, shipped to Wisconsin, and then purchased by Wilson in Illinois. Wilson brought his suit under the **Privacy Act** claiming ATF's gun trace summary inaccurately inferred that his purchase of the gun in Illinois implicated him in interstate commerce. The agency processed his request as if it had been made under FOIA. Based on the statute that prohibits ATF from using any funds to process FOIA requests for gun trace records, the agency denied the request. Wilson challenged the agency's search. Roberts noted that "plaintiff is evaluating the adequacy of the search based on its results. Plaintiff's dissatisfaction with the results neither rebuts the presumption of good faith accorded to the ATF's

ACCESS REPORTS

supporting declaration nor demonstrates a genuine issue of material fact in dispute as to the ATF's compliance with the FOIA." Wilson claimed the agency failed to maintain fair and complete records under subsection (e)(5) of the Privacy Act. Roberts explained that because Wilson was attacking the validity of his sentence his appropriate remedy was to ask for a writ of habeas corpus. He then observed that "the Privacy Act is not the proper means by which a prisoner collaterally may attack his conviction or sentence. In other words, plaintiff cannot revise the underlying interstate nexus determination by means of this Privacy Act suit." (*Earnest Wilson v. United States of America*, Civil Action No. 13-0428 (RWR), U.S. District Court for the District of Columbia, March 31)

Judge James Boasberg has ruled that while the FAA's explanation of its **search** and **Exemption 7(E) (investigative methods and techniques)** claim are considerably better than when he first ruled the agency still has not sufficiently justified its actions in response to David Elkins' FOIA request for records concerning a plane that took off from Tampa Airport and allegedly conducted surveillance of Elkins. In response to Elkins' multi-part request, the agency initially disclosed responsive voice recordings from the Tampa Airport Traffic Control Tower with the Aircraft Registration Number redacted. In his prior ruling, Boasberg found the agency had not shown why it only searched the Tampa Traffic Control Tower while parts of Elkins' request appeared to be for records that should be somewhere else and that the agency's exemption claims were too vague. This time around, however, Boasberg applauded the agency for conducting a much more comprehensive search and providing an explanation for its search. The agency found no responsive records for several parts of Elkins' request, bur Boasberg pointed out that the agency's affidavit did not "describe the place such a record would be stored if it did exist, what [was done] to search that location, or any detail regarding how [the agency] came to conclude that no responsive records exist." Elkins argued the agency could use an algorithm to determine the registration number. Boasberg indicated that "even if the FAA did have the resources to determine the plane's N number, 'FOIA imposes no duty on the agency to *create* records.' And since the agency's search did not uncover records related to the N number, its obligation ended there." With the exception of one document that would identify the operator of the plane, Boasberg rejected the agency's Exemption 7(E) claims. He pointed out that "in this case, however, the FAA has provided no basis upon which to conclude that these specific records—*i.e.*, the voice recordings and flight-tracking records—although originally created for non-law-enforcement purposes, were ever subsequently compiled to enforce the law." (*David J. Elkins v. Federal Aviation Administration*, Civil Action No. 14-476 (JEB), U.S. District Court for the District of Columbia, Apr. 16)

Judge Amit Mehta has ruled that the DEA cannot invoke a *Glomar* response neither confirming nor denying the existence of a DEA Form 473 pertaining to a cooperating witness agreement because the existence of the record was publicly disclosed at Jesse Dean's trial. Dean requested the Form 473 and the DEA refused to confirm or deny its existence. Dean argued that the U.S. Attorney at his trial had introduced the form on at least two occasions. Mehta agreed. He noted that "the testimony presented supports Plaintiff's assertion that the requested document exists, and Defendants have not questioned the transcripts' authenticity. Here, Plaintiff has carried his burden to show the existence of the Form 473, and Defendant has failed to demonstrate entitlement to summary judgment on their *Glomar* response." (*Jesse Jerome Dean, Jr. v. United States Department of Justice*, Civil Action No. 14-00715 (APM), U.S. District Court for the District of Columbia, April 10)

Judge John Bates has ruled that Edmon Felipe Elias Yunes may proceed with his FOIA suit against the FBI after finding that OIP had closed his administrative appeal after he filed suit. Yunes had requested records about himself from the FBI. The agency sent a no records response on August 8, 2014. Before his

attorney received the agency's response, she filed suit on August 15, 2014. Yunes' D.C.-based attorney filed an administrative appeal on September 3 and Yunes' attorney received the FBI's response on September 19. Bates originally sided with the FBI, indicating that Yunes had failed to **exhaust administrative remedies** by filing after the agency had sent its response letter. But he subsequently learned that OIP had administratively closed Yunes' appeal because he had filed suit, but had not bothered to inform the court. Allowing Yunes' suit to continue under these unique circumstances, Bates noted that "barring [an actual administrative appeal decision] the Court is reluctant to reach a conclusion that bars the courthouse doors for this plaintiff, in this unique set of circumstances, where his best efforts to resolve this case have been stymied at every turn by the vagaries of the government—be it the FBI, the Office of Information Policy, or the postal service." (*Edmon Felipe Elias Yunes v. United States Department of Justice*, Civil Action No. 14-1397 (JDB), U.S. District Court for the District of Columbia, April 16)

The D.C. Circuit has agreed to consider EPIC's petition for a rehearing *en banc* of the recent panel decision in *EPIC v. Dept of Homeland Security*, in which the court ruled that **Exemption 7(F) (harm to any individual)** protected records about procedures for initiating an emergency shutdown of cell phone networks in the event of a terrorist attack. In its order, the D.C. Circuit gave the agency 15 days to respond to EPIC's request for rehearing and noted that "absent further order of the Court, no reply to the response will be accepted." (*Electronic Privacy Information Center v. United States Department of Homeland Security*, No. 14-5013, U.S. Court of Appeals for the District of Columbia Circuit, April 3)

A federal court in California has ruled that the CIA properly declined to respond to Stephen Yagman's request for the identities of all individuals referred to by President Barack Obama in a press conference as having been responsible for torturing individuals in the aftermath of 911. The CIA declined to respond to Yagman's request because it required responding to questions rather than providing records. Yagman sent a second letter to the agency arguing that his request was for records rather than information, but the agency affirmed its earlier decision. Yagman then filed a class-action suit. The court sided with the agency, noting that "although Plaintiff stated that he sought 'information/records' about these names and affiliations, simply labeling something as a request for records does not make it so." Noting that an agency might respond to a request for information when the request clearly identified the information sought, the court observed that "this vague request for information does not direct the Defendants to a specific database or set of records that could answer Plaintiff's question." (*Stephen Yagman v. John Owen Brennan*, Civil Action No. 14-8033 PSG, U.S. District Court for the Central District of California, March 19)

A federal court in Maryland has declined to award Mark Reaves **costs** for his pro se suit against the Department of the Interior for records pertaining to his EEO complaint against the National Park Service as the result of a disciplinary action. After the agency failed to respond to his request, Reaves filed suit. The agency provided some records and redacted others. The agency then asked the court to declare the case was moot. The court agreed the complaint, which was based on the agency's failure to respond, was moot, but allowed Reaves to amend his complaint to challenge the redactions. Reaves then filed a motion that mentioned the redactions in passing and requested costs as well. The court found Reaves had not sufficiently challenged the redactions. While the court expressed doubts that Reaves had substantially prevailed, it concluded his litigation was motivated more from his personal interest in the records rather than any public interest in disclosure. The court observed that "it appears that at least some of the information sought pertained to his EEO complaint against Defendant. Although Defendant should have responded to the FOIA request within the time frame prescribed by statute and should not have delayed its response as to whether to

ACCESS REPORTS

comply with the FOIA request, the court declines to award costs in this instance." (*Osborne Mark Reaves v. Sally Jewell*, Civil Action No. DKC-14-2245, U.S. District Court for the District of Maryland, Apr. 3)

Editor's Note: *Access Reports* will take a break after this issue to attend to non-FOIA-related business. The next issue of *Access Reports* will be dated May 13, 2015.