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Washington Focus: The "Cybersecurity Information Sharing Act of 2015 (S. 754), sponsored by Sen. Richard Burr (R-NC), chair of the Senate Intelligence Committee, creates a stand-alone FOIA exemption for "any information shared with or provided to the Federal Government pursuant to the Cybersecurity Information Sharing Act of 2015." The bill also includes a separate (b)(3) provision providing protection for proprietary information described as "a cyber threat indicator or countermeasure provided by an entity to the Federal Government under this Act shall be considered the commercial, financial, and proprietary information of such entity when so designated by such entity" when the information is voluntarily submitted, much like the protection already existing under the Critical Information Act. Objecting to the inclusion of the FOIA exemptions, Sen. Martin Heinrich (D-NM) and Sen. Marie Hirono (D-HI) wrote in the accompanying report that "the bill's inclusion of a new FOIA exemption is overbroad and unnecessary as the types of information shared with the government through the bill would already be exempt from unnecessary public release under current FOIA exemptions." The two Senators added that "to the extent FOIA exemptions need to be updated, those changes should only be made following open hearings in which all stakeholders have an opportunity to have their voices heard."

Court Upholds Fee Assessment

In another round with Gregory Bartko, serving a 23-year sentence for securities fraud, and the Department of Justice, Judge James Boasberg has rejected Bartko's claim for a fee waiver. But in doing so, he has dealt with some issues that typically do not arise in such litigation and thus are not addressed very often in the case law.

Bartko had made a request to DOJ's Office of Professional Responsibility for records pertaining to himself and his criminal case. He also requested a fee waiver. OPR identified 620 pages that were responsive to Bartko's request, all of which originated with EOUSA. OPR referred the 620 pages to EOUSA for direct response. After several months,

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Bartko filed a supplemental complaint, arguing EOUSA had failed to respond to his request and that he had constructively exhausted his administrative remedies. Two months later, EOUSA responded by producing 89 pages in full and 12 pages in part. One reason for the delay was apparently because the records had been misplaced or lost in transmission between OPR and EOUSA. While EOUSA's letter did not mention Bartko's fee waiver request, it told Bartko that the first 101 pages were free, but that an additional 519 pages would be subject to a payment of $51.90. Bartko filed an appeal with OIP disputing the fee assessment, which is still pending.

In reviewing the parties' motions, Boasberg indicated that there were two issues—the propriety of exemptions as to the 101 pages released, and EOUSA's fee assessment. Because Bartko admitted that the redactions made under Exemption 5 (privileges) were probably appropriate, Boasberg quickly ruled in favor of the agency on the exemption claims.

Turning to the fee assessment, Boasberg noted that "the remaining 519 pages, however, represent more hotly contested territory." EOUSA claimed Bartko had failed to exhaust his administrative remedies and that, regardless, the agency's fee assessment was appropriate. Bartko argued that he had constructively exhausted his administrative remedies and Boasberg agreed. He observed that "Bartko's initial letter included a request both for documents and for a fee waiver. By the time he filed his Second Supplemental Complaint on December 16, 2014, more than two months had passed since OPR referred the 620 pages to EOUSA. EOUSA's failure to respond during that time means that Plaintiff has constructively exhausted his administrative remedies."

Boasberg then explained exactly to what such a finding entitled Bartko. "Constructive exhaustion, it must be emphasized, does not entitle Bartko to *free* copies of the remaining documents. Rather, it allows him judicial review of his fee-waiver request without any requirement that he await the result of his administrative appeal. But the peculiar posture of the case also provided certain advantages to the agency. Boasberg pointed out that "in evaluating a fee-waiver claim courts generally do not consider arguments that an agency failed to make at the administrative level before the plaintiff brought suit. As another court in this district noted, however, that principle applies only when the plaintiff actually, and not constructively, exhausted his administrative remedies. Where a plaintiff constructively exhausts, an agency cannot be penalized for failing to make an argument in the administrative process that never took place. Because Plaintiff filed suit in reliance on a constructive-exhaustion theory, therefore, the Court is not barred from considering the agency's arguments made in this litigation, even though it did not raise these arguments in its initial denial of the fee waiver."

Although Bartko had specifically indicated that he sought records to help him appeal his case, he argued that "the potential *personal* benefit from receiving the documents is inconsequential: 'The fact that those same records may assist [Plaintiff] in achieving exoneration from his conviction by supporting his habeas petition is of no great moment as long as there are public benefits to be gained as well.'" Boasberg observed, however, that "this disclaimer is unconvincing. As is evident from Plaintiff's filings, access to the records is 'crucial' precisely because he seeks evidence to support his *habeas* petition. While there may be incidental public-interest benefits to be gained, they are minimal in comparison to the unavoidably obvious personal purpose for which the records are sought. The Court, therefore, finds that Bartko has not established his entitlement to a 'public interest' fee waiver."

While Bartko also argued that the agency had acted in bad faith, Boasberg noted that "it is less clear that an agency's bad faith excuses a requester from paying fees." Bartko accused the agency of trying "to frustrate him and to avoid releasing the requested documents in a timely manner." But Boasberg replied that "the Court fundamentally disagrees. EOUSA has thus far made reasonable efforts to comply with FOIA and to respond

to Plaintiff's farrago of incendiary motions and correspondence." He pointed out that "to the extent Bartko complains of confusion in interpreting his letter, he himself bears substantial responsibility as he has inundated this Court and the responding Defendants with a truckload of lengthy motions, correspondence, and overlapping FOIA requests, all of which are difficult to keep straight." Bartko complained that the fee assessment itself was a sign of bad faith. Boasberg observed that "Bartko characterizes fees as mere 'technicalities,' but they are, in fact, required. Requiring Plaintiff to pay the assessed fees (absent a waiver)—particularly in installments—does not amount to bad faith." (*Gregory Bartko v. United States Department of Justice*, Civil Action No. 13-1135 (JEB), U.S. District Court for the District of Columbia, May 6)

Views from the States…

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

California

A court of appeals has ruled that license plates scanned by Automatic License Plate Reader technology used by both the Los Angeles Police Department and the Los Angeles Sheriff's Department and compared against lists of vehicles identified with being involved in a crime qualify as law enforcement investigatory records under the California Public Records Act. The ACLU of Southern California requested policies and procedures from the police and the sheriff's department as well as a week's worth of scanned license numbers. The departments agreed to provide the policies and procedures but withheld the week's sampling of scanned license plates under the investigatory records exemption. The trial court ruled in favor of the law enforcement agencies and the ACLU of Southern California appealed. The appellate court affirmed. The ACLU of Southern California argued that the investigatory exemption applied only when there was a specific investigation and the primary purpose of the automated scanning system was to collect data. The court disagreed, noting that 'the plate scans performed by the ALPR system are precipitated by specific criminal investigations—namely, the investigations that produced the 'hot list' of license plate numbers associated with suspected crimes. . .The fact that the ALPR system automates this process does not make it any less an investigation to locate automobiles associated with specific suspected crimes." The ACLU of Southern California also argued that the fact the data was kept for several years suggested it was primarily for data collection purposes. The court pointed out, however, that "records generated by the ALPR system for the purposes of locating automobiles associated with a suspected crime. . .continue to meet the applicable statutory definition even after the investigations for which they were created conclude. . ." (*American Civil Liberties Union Foundation of Southern California v. Superior Court of Los Angeles County; County of Los Angeles, Real Parties in Interest*, No. B259392, California Court of Appeals, Second District, Division 3, May 11)

Michigan

A court of appeals has ruled that Peter Arabo is required to pay half the Michigan Gaming Control Board's fee estimate for complying with his request for why several Detroit hotels were allowed to offer blackjack between 1996 and 2013 before he can challenge the agency's response in court. Arabo requested the records from the Gaming Board, which told him it would grant his request for non-exempt records, but because this required reviewing 6,200 records he would be required to pay a fee of $4,300. Arabo sued and the trial court ruled that the Board had granted Arabo's request and that because there was no cause of action in the Michigan FOIA to challenge a fee estimate he was required to pay half the deposit before the Board was

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obligated to proceed any further. But the appeals court found that based on its recent ruling in *King v. State Police Dept*, 841 NW 2d 914 (2013), the Board's response limiting its disclosure to non-exempt records constituted a partial denial rather than a grant of Arabo's request. Ordinarily, Arabo would then have been able to challenge that decision, but because the Board had properly imposed an obligation to pay estimated fees, Arabo was blocked from moving forward until he paid the required deposit. The court noted that "plaintiff never paid the deposit and the Board's obligation to make a final determination never arose; plaintiff's claim accordingly rested on a contingent future event. It is undisputed that the Board stood ready to process plaintiff's request upon payment of the required deposit. . ." The appeals court then found that there was an implicit right to challenge fees, which were provided for in a separate section of the Michigan FOIA, pointing out that "plaintiff alleged a viable claim for declaratory or injunctive relief, effectively seeking a declaration that the fees assessed violated § 4 of the FOIA. . ." Arabo had asked the court to order the Board to provide an index of responsive records, explain how the responsive records had been identified, or provide discovery of the Board's FOIA coordinator. The court indicated that requiring the Board to provide an index or to provide an explanation would entail improper costs and probable disclosure of potentially exempt information. However, it concluded that deposing the FOIA coordinator would be an appropriate unintrusive remedy. (*Peter Arabo v. Michigan Gaming Control Board*, No. 318623, Michigan Court of Appeals, May 5)

New Hampshire

The supreme court has ruled that the New Hampshire Uniform Trade Secrets Act qualifies as a separate statute prohibiting disclosure under the Right to Know Law and that disclosure of the bid and final contract submitted by CaremarkPCS Health to manage the state's pharmacy benefit services, portions of which were marked by Caremark as confidential and proprietary, would constitute a misappropriation of trade secrets under the UTSA. The request for proposals that resulted in the award of the contract to Caremark included language indicating that information would be subject to the Right to Know Law and that the vendor would be responsible for going to court to obtain an injunction if it sought greater protection. After the Department of Administrative Services received multiple requests for the bid and contract, including from two of Caremark's competitors, Caremark obtained an injunction against disclosure based on its assertion that disclosure constituted a misappropriation of trade secrets under the UTSA. The Department appealed, arguing that whether the records qualified for protection should be assessed based on the confidential business information exemption in the RTKL. Ruling in favor of Caremark, the supreme court observed that "although the Department contends that submitting a bid constituted 'consent' to the disclosure of the designated information, the RFP contradicts this assertion. Caremark marked the information as 'confidential,' objected to its disclosure, and sought an injunction to prevent disclosure. Disclosure of Caremark's trade secrets under these circumstances would constitute a 'misappropriation' as defined by the UTSA." The court concluded that "a 'misappropriation' of a trade secret is 'prohibited' by the UTSA. Accordingly, because disclosure of the designated information by the Department would be a misappropriation of Caremark's trade secrets under the UTSA, we conclude that disclosure of that information is 'prohibited by statute' and, therefore, we hold that the designated information is exempt from disclosure under the [RTKL]." (*CaremarkPCS Health, LLC v. New Hampshire Department of Administrative Services*, No. 2014-120, New Hampshire Supreme Court, April 30)

New Jersey

A court of appeals has ruled that the Township of Bloomfield has not shown that disclosure of one day's worth of video recordings from a surveillance camera mounted behind the township's municipal building is protected by exemptions in the Open Public Records Act for security information and techniques for buildings and facilities. When Patricia Gilleran requested the tape, arguing it would show politicians coming and going daily to influence town administrators, the township denied access to any recordings, arguing it would potentially reveal security information. Gilleran, joined by the ACLU of New Jersey, sued.

The trial court found the township had not shown that the recordings were exempt and indicated that only if the tapes were reviewed could the township plausibly argue that some images might be protected. Bloomfield appealed and, although it showed considerable sympathy to Bloomfield's plight, the appeals court agreed that the recordings were not categorically exempt. Finding Gilleran's suggestion that the township review the tapes before disclosing them to be impractical, the appeals court noted that "we do not hold that security camera recordings must necessarily be disclosed unless government officials view them in their entirety and isolate specific footage that meets the requirements of the exclusions upon which Bloomfield relies. We only hold that Bloomfield did not satisfy its burden of proving the requested recordings are exempt from disclosure through the general statements of its Administrator and its argument for a blanket exemption." But the court noted that "the Legislature could not have contemplated that the OPRA disclosure requirement would engage the services of government employees to view video recordings from stationary surveillance cameras for hours upon hours to determine whether they contain confidential or exempt material." The court acknowledged that surveillance cameras played an important role in security. Rejecting Gilleran's argument that any person standing in the municipal building's parking lot could observe the same thing, the court pointed out that "but the close study of surveillance recordings over time is different from a one-time personal observation. That, in fact, is an important value of maintaining security recordings." (*Patricia Gilleran v. Township of Bloomfield*, No. A5640-13, New Jersey Superior Court, Appellate Division, May 13)

Pennsylvania

A court of appeals has ruled that the Department of Education has not yet shown that three emails between the former Secretary of Education and the Governor's Office of General Counsel concerning the appointment of an outside law firm to investigate the Sandusky child abuse scandal at Penn State University are privileged. Ryan Bagwell requested the emails. The agency withheld the emails on the basis of the deliberative process privilege, attorney-client privilege, and attorney work-product privilege. Bagwell filed a complaint with the Office of Open Records, arguing that the agency had waived any privilege by sharing them with a member of Penn State's Board of Trustees. OOR reviewed the emails *in camera* and asked the department to respond to Bagwell's waiver claim. The agency declined to supplement the record and indicated it was relying solely on its original privilege claim. OOR ultimately decided that the agency had not substantiated its claim of privilege and ordered the emails disclosed. The agency then appealed. The court of appeals found that because the record was incomplete the only claim it could rule on was the agency's deliberative process claim, which it rejected as being insufficiently supported. The court explained why the certified record for the appeal was incomplete. "At a minimum, the record on appeal shall consist of all evidence an appeals officer considered when making a determination. This includes records OOR accepted under seal and that the appeals officer reviewed *in camera*." The court added that "the certified record should include communications regarding a disputed procedural issue. Here, that issue involves efforts to supplement the record. Thus, any requests by the appeals officer to supplement the record, and any responses, should be included in the record on appeal where the issue is raised. This would also include a refusal to supplement the record as requested, and offers of alternatives such as hearings, depositions or sworn statements." The court also recognized that Bagwell's ability to argue that the agency had waived the claimed privileges had been frustrated. As a result, the court indicated that "in the interest of fundamental fairness, Requester deserves an opportunity to present evidence regarding waiver. Thus, we remand to OOR as to the attorney privileges in part to provide Requester an opportunity to develop a complete record on this issue." (*Pennsylvania Department of Education v. Ryan Bagwell*, No. 1138 C.D. 2014, Pennsylvania Commonwealth Court, Apr. 16)

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South Dakota

The supreme court has ruled that records of the South Dakota Attorney General's Office pertaining to its investigation of the death of Richard Benda, former Secretary of Tourism, are protected by the exemption for criminal investigations. Benda was apparently suspected of misusing government funds and improperly procuring worker visas for Northern Beef. He was found dead of what was ruled to be a self-inflicted shotgun wound on a farm in Charles Mix County. County officials requested that the Attorney General's Office conduct an investigation, which it did. Robert Mercer then requested the AG's investigation file. The AG denied access to the file, but later, recognizing the public interest surrounding Benda's death, agreed to disclose the records if the Benda family would sign a written release granting disclosure. Mercer appealed to the Office of Hearing Examiners, which upheld the AG's decision. Unable to fill the AG's condition, Mercer filed suit. The trial court ruled against him, finding the records were exempt from disclosure and that the AG had the discretion to provide an alternative remedy. Upholding the lower decisions, the supreme court noted that "there is no evidence that the OHE erred in its interpretation of the statutes. Further, the OHE did not err when it ruled that the Attorney General had the authority to release the records in whole or in part and to exercise his discretion to release them under certain conditions. The evidence establishes that the Attorney General took into account the public's interest in Benda's death and weighed that against the personal privacy interests of the Benda family." (*Robert M. Mercer v. South Dakota Attorney General Office*, No. 27215, South Dakota Supreme Court, May 13)

Tennessee

A court of appeals has reversed the trial court's ruling that a closed meeting held by the Covington Board of Mayor and Aldermen violated the Open Meetings Act. Flat Iron Partners had earlier presented a conceptual plan to Covington's Municipal-Regional Planning Commission for construction of a gated-community project on a 10-acre lot owned by Flat Iron Partners. The Commission still had a number of questions about the Flat Iron Partners' proposal when it met on November 27, 2000 with the BMA to inform the Board that the Commission intended to propose a temporary moratorium on building permits at its meeting the next day. The moratorium was presented to the BMA at the Commission's November 28 meeting. The proposal was extensively debated at the Commission's public meeting and was adopted by the BMA. At two public meetings on November 29 and November 30, the BMA further discussed the moratorium and amended the zoning ordinance to include the temporary moratorium. Flat Iron Partners subsequently filed suit on a number of issues, including that the Board had violated the Open Meetings Act by failing to provide notice of the November 27 meeting. The trial court ruled in Flat Iron Partners' favor on the Open Meetings Act claim and, as a result, the Board's adoption of the moratorium was declared null and void. But the court of appeals, relying on the affidavit of Covington's Mayor that indicated the Board did not discuss the moratorium or take any action at the November 27 meeting, reversed. The appeals court noted that "there is no indication that the activities at the November 27, 2000 meeting 'went beyond the provision of information, and extended to substantive discussion of positions and attempts to develop a consensus.' In this regard, the November 27, 2000 gathering did not constitute a 'meeting' under the Open Meetings Act." Further, the court indicated that any violation was cured when the Board discussed the moratorium in subsequent public meetings. The court observed that "there is no dispute that the vote on the proposed moratorium was held after subsequent meetings on November 28, 29, and 30, 2000, for which notice was given and at which members of the public spoke and debated. . .[E]ven assuming *arguendo* that deliberations occurred at the November 27, 2000 meeting in violation of the Act, such violation was cured by the subsequent meetings where the BMA fully and fairly considered the proposed moratorium ordinances." (*Flat Iron Partners, LP v. City of Covington*, No. W2013-02235-COA-R3-CV, Tennessee Court of Appeals, April 30)

Virginia

The supreme court has ruled that the Loudon County Sheriff's Office properly withheld a suicide note written by Charles Reichers, a senior Air Force official who was found dead in his car in his closed garage. After a neighbor found Reichers' body, the Loudon County Fire and Rescue Department and the Loudon County Sheriff's Office responded to the 911 call. The Sheriff's Office investigated Reichers' death, and based on the autopsy and an apparent suicide note, the investigation was closed. Benjamin Fitzgerald then requested the investigative file from the Sheriff's Office, which initially denied access, but later disclosed some records. However, it continued to withhold the suicide note. Fitzgerald filed suit and both a trial court and, later, a circuit judge ruled against him, finding that the suicide note remained a criminal investigation record even though Reichers' death had been classified as non-criminal. Fitzgerald also argued that a records-retention requirement that was part of the Virginia FOIA mandating that law enforcement agencies maintain compilations of various non-criminal incident reports, including suicides, was evidence that the suicide note was a public record. The supreme court also rejected Fitzgerald's arguments. Addressing Fitzgerald's claim that the suicide note no longer qualified as a criminal investigation record, the court pointed out that "a criminal investigation may or may not lead to a prosecution. But that does not mean that the application of FOIA disclosure requirements is dependent upon the outcome of the investigation. In this case, investigators discovered the suicide note during an ongoing criminal investigation. That the investigation was later closed is inconsequential for purposes of FOIA disclosure principles." Turning to the records retention provision requiring compilations of records such as suicides, the court observed that "a file containing reports concerning a single incident, later determined to be a suicide, is not a compiled collection of information concerning multiple suicides. The criminal investigative file in this case—protected against mandatory disclosure by [the criminal investigation exemption]—did not become, and never was, a compilation of suicides." (*Benjamin B. Fitzgerald v. Loudon County Sheriff's Office*, No. 141238, Virginia Supreme Court, April 16)

The Federal Courts…

Judge Reggie Walton has ruled that the FBI conducted **adequate searches** and properly withheld records about terrorists Zacarias Moussaui and Abderraouf Jdey under **Exemption 1 (national security)** and **Exemption 7 (law enforcement records)** from Kenneth Dillon. Dillon requested records on the detention of Moussaoui and Jdey, but ultimately agreed to accept any records documenting the items in Moussaoui's possession when he was detained and any records from the detention that referenced cropdusting or biological or chemical terrorism. He made a second FOIA request for the FBI's file on Jdey. In response to the first request, the agency disclosed seven pages in full and 57 pages in part pertaining to Moussaoui's detention. The agency withheld Jdey's file under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. In response to the second request, the agency once again withheld Jdey's file under Exemption 7(A), but released 12 pages of public source material. After OIP upheld the agency's action, Dillon filed suit. Walton found the agency's detailed affidavits explaining its search, including contacting the special agent who worked on the Moussaoui investigation, were more than sufficient to justify its search. Dillon argued the FBI had improperly restricted his request on Moussaoui to records concerning his arrest. But Walton noted that Dillon had limited his request to Moussaoui's arrest records and that "the FBI imposed a limitation on the scope of its search based upon a reasonable interpretation of the plaintiff's request." In response to Dillon's claim that the agency had failed to provide records about Moussaoui's indictment, Walton pointed out that "but documents pertaining to any Moussaoui indictment fall outside a reasonable interpretation of the scope of the plaintiff's original request for documents pertaining to Moussaoui's *arrest* on August 16, 2001." After

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approving the agency's withholdings under Exemption 1, Walton turned to Exemption 7, which the agency had used to withhold the majority of records, Walton rejected Dillon's claim that a categorical claim of Exemption 7(A) was inapplicable because Jdey already knew about his own detention and thus the records could not help him evade detection. But, noting that the FBI's claim was based on the potential interference with other ongoing investigations, Walton indicated that "Jdey's familiarity with the information noted in his own file is of no consequence, as Exemption (b)(7)(A) only requires an agency to demonstrate that disclosure 'could reasonably be expected to interfere with. . .proceedings that are. . .pending or reasonably anticipated' and the FBI's representations adequately explain the impact that disclosure may have on enforcement proceedings concerning known or suspected terrorists other than Jdey." Dillon challenged the FBI's claim under **Exemption 7(E) (investigative methods and techniques)** to protect use of a publicly known database by state and local law enforcement. Walton noted that "the fact that law enforcement officers outside of the FBI have access to a particular database does not preclude the FBI from withholding information regarding the methods of its utilization of that database pursuant to this Exemption." Dillon also argued the FBI had failed to show why disclosure of certain information would risk harm of circumvention of the law. Walton, however, pointed out that "the FBI has set forth sufficient factual detail demonstrating that the disclosure of the withheld information 'could reasonably be expected to risk circumvention of the law.'" (*Kenneth J. Dillon v. Dept of Justice*, Civil Acton No. 13-532 (RBW), U.S. District Court for the District of Columbia, May 1)

The D.C. Circuit has ruled that the State Department conducted an **adequate search** for records requested by Freedom Watch concerning alleged leaks to *New York Times* reporter David Sanger pertaining to the U.S. computer-driven attack on Iran's nuclear program and has remanded that part of the case back to the district court to oversee further searches. The CIA and NSA issued a *Glomar* response neither confirming nor denying the existence of records and the Defense Department denied the request on the basis of **Exemption 1 (national security)**. The State Department initially found three responsive records, but after filing its summary judgment motion, the agency found more records and ultimately produced 79 records, disclosing 48 records in full and 20 in part. Before oral argument, the existence of former Secretary of State Hillary Clinton's emails on her personal server was made public and Freedom Watch requested an expanded search. The government requested that the D.C. Circuit remand the case to the district court and allow the State Department to supplement the record with any responsive Clinton emails. The D.C. Circuit noted that "we shall. . .remand to the district court to manage records development and oversee the search of the former Secretary's emails for records responsive to Freedom Watch's FOIA request. In doing so, we remind the State Department that, although it may choose of its own accord to release the emails to the public at large, it has a statutory duty to search for and produce documents responsive to FOIA requests 'in the shortest amount of time.' The district court should therefore determine the most efficient way to proceed *under FOIA*." The D.C. Circuit further upheld the responses of the other three agencies as well as the previous searches conducted by the State Department. (*Freedom Watch, Inc. v. National Security Agency, et al.*, No. 14-5174, U.S. Court of Appeals for the District of Columbia Circuit, April 24)

Judge John Bates has ruled that while the FBI's **search** for records pertaining to Fayiz Mohammed Ahmed Al Kandari and Fawzi Khaled Abdullah Fahad Al Odah may have been adequate it has not yet provided a sufficient explanation to allow Bates to rule in its favor. The International Counsel Bureau requested records on the two individuals and after searching is Central Records System, the FBI indicated that it found no records. Bates noted that "the government has made some strides towards meeting [the legal standard for justifying a search], but ultimately falls just short" in its explanation that the CRS was the only place in which records would likely be found. He pointed out that "it is not the plaintiff's burden to supply particularities. And although the Court takes the agency's declaration in good faith, that principle does not absolve the FBI of its responsibility to provide a 'reasonably detailed affidavit.'" Bates indicated that the FBI

had adequately shown why its National Name Check Program would not contain responsive records because it "merely disseminates information from FBI files in response to name check requests received from federal agencies" and that it was not a database itself but "conducts searches of the CRS." Bates noted that "this simple explanation effectively ameliorates ICB's concerns as to the National Name Check Program. A similar description of the rest of the FBI"s system would do much to streamline what remains of this case." The remaining sticking point was the FBI's Data Integration and Visualization System, which "facilitates the sharing of information from internal and external data sources, to include the CRS." Finding the explanation insufficient, Bates pointed out that "the declaration only states that the Data Integration and Visualization System *includes* CRS; it does not say that CRS is the exclusive source of information in that system. And it provides no information about any other systems that might inform the search, which might not be duplicative at all." Returning the case to the FBI for a more detailed explanation, Bates observed that "the Court is not yet convinced that the FBI has *not* completed a satisfactory search, it just cannot tell." (*International Counsel Bureau v. United States Department of Defense, et al.*, Civil Action No. 13-1591 (JDB), U.S. District Court for the District of Columbia, April 29)

A federal court in Florida has ruled that various components of the Justice Department properly invoked a *Glomar* response neither confirming nor denying the existence of records concerning an investigation of Guy Lewis, a former head of EOUSA during the Bush administration, under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The Miccosukee Tribe of Indians of Florida had hired Lewis as their attorney. The Tribe later accused Lewis of fraud and legal malpractice and made a number of FOIA requests to DOJ for records showing that Lewis had left EOUSA because of misconduct. After finding that the Tribe had **failed to exhaust its administrative remedies** for all the DOJ components except for EOUSA and the Office of Tribal Justice –both of which had failed to respond to the Tribe's requests until after they had filed suit—the court addressed whether the *Glomar* responses were appropriate. The Tribe argued that since Lewis had testified in a deposition that no records existed because he had not been terminated as a result of misconduct, EOUSA could not refuse to either confirm or deny the existence of records. The court rejected the argument, noting that "his testimony says next to nothing about any wrongdoing or malfeasance on his part, or any investigation, internal inquiry, or discipline against him: the most one could know from Lewis's testimony was that such alleged events—assuming they happened and corroborating documents exist—were not his reason for leaving EOUSA. The fallacy in the Tribe's argument is that if one of those events occurred, Lewis either would have been terminated or would have left his job because of the occurrence. But that is not necessarily true. For example, an internal inquiry or disciplinary action can be a means to correct an employee's behavior in order to avoid firing him." The court indicated that "based on the evidence submitted, the Court finds the existence, or non-existence, of the records the Tribe is seeking has not been publicly disclosed." The court observed that "Lewis's testimony about why he voluntarily left the EOUSA does not open the door to all matters potentially related to his employment at the EOUSA, especially matters that could associate him with criminal activity. Lewis therefore has a substantial privacy interest under Exemption 7(C)." The Tribe tried to analogize its request with those in *CREW v. Dept of Justice*, 746 F.3d 1082 (D.C. Cir. 2014), in which the D.C. Circuit found that the public interest in disclosure of information about an acknowledged investigation of a member of Congress outweighed any privacy interest served by a *Glomar* response. But the court pointed out that "in contrast [to *CREW*], the Tribe's request is premised on unsubstantiated speculation of wrongdoing, which is not a cognizable public interest under the FOIA. To allow the Tribe to override Lewis's significant privacy interest for the sake of finding out whether an imagined investigation actually took place is to read Exemption 7(C) as tolerating fishing expeditions, which would leave the FOIA's privacy concerns meaning little to nothing." (*Miccosukee Tribe of Indians of Florida v. United States Department of Justice*, Civil Action No. 14-20643-CMA, U.S. District Court for the Southern District of Florida, April 14)

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The Eighth Circuit has ruled that although the DEA showed that the release of five documents responsive to Christopher Madel's requests for records on oxycodone transactions in Georgia by five companies contained information subject to **Exemption 4 (confidential business information)**, it failed to show that information in the records could not be **segregated**. In response to Madel's requests, the DEA found one report and four spreadsheets. After consulting the companies, DEA withheld all the records under Exemption 4. Madel filed suit and the trial court ruled in favor of the agency on both Exemption 4 and segregability. DEA argued that disclosure of the records could cause substantial competitive harm. The Eighth Circuit noted that "DEA shows substantial competitive harm is likely. DEA does not make 'barren assertions' that the documents are exempt, but links each document to identifiable competitive harms. Madel has offered no reason or evidence to disbelieve DEA's claims of harm." But the appeals court sent the case back to the trial court for a determination on segregability. The court pointed out that "although DEA expresses the concern that *any* connection between individual buyers and sellers would lead to substantial competitive harm, this is not supported by [its affidavit]." The court added that "the claims of harm are undermined by DEA's public release of four charts showing total dosage units sold per month by [one of the five companies] to four buyers in Florida over four years." (*Christopher W. Madel v. United States Department of Justice*, No. 14-2210, U.S. Court of Appeals for the Eighth Circuit, April 21)

A federal court in Pennsylvania has ruled that while documents contained in a TSA attorney's folder related to an altercation between Nadine Pellegrino and TSA employees at the Philadelphia airport are not categorically exempt under the **attorney-work product privilege**, the vast majority of the individual records are protected by attorney work-product, or **attorney-client privilege**. As part of the litigation between TSA and Pellegrino, Pellegrino had requested any records about herself. The agency located 375 pages and disclosed all but 90 pages, which were withheld entirely under the attorney work-product privilege. The court reviewed the records *in camera* to determine if Pellegino's allegation that they dealt with fraud or misconduct on the part of the agency applied. After finding no evidence of fraud or misconduct, the court turned to an examination of whether the records were categorically privileged. Rejecting the categorical exemption claim, the court noted that "there is no evidence—from either the TSA's briefing or our review of the documents—that anything about the selection or grouping of these documents would reveal that attorney's mental processes. Instead, this appears to just be a collection of documents that happened to be in the possession of an attorney. The mere fact that an attorney holds a document cannot, by itself, be the basis for a valid work product claim." But the court pointed out that "this does not mean the documents are not protected at all. In fact, the vast majority of the documents are themselves attorney work product because they were *created* in anticipation of litigation." The court then found that the records that did not qualify as work product were either protected by the attorney-client privilege or the deliberative process privilege. (*Nadine Pellegrino v. United State of America Transportation Security Administration*, Civil Action No. 09-5505, U.S. District Court for the Eastern District of Pennsylvania, May 6)

Judge James Boasberg has ruled that David Elkins failed to **exhaust his administrative remedies** before filing suit against the FAA pertaining to a request for information about a plane he believed was conducting surveillance of him, but that in its response to another multi-part request from Elkins, the agency so far has failed to justify either its **search** or one of two claims made under **Exemption 7(E) (investigative methods or techniques)**. While the agency provided some information responsive to Elkins' request for the identity of the aircraft he observed, the FAA argued that Elkins had filed suit before the agency's time to respond had expired. Because Elkins' request fell within the parameters of several FOIA provisions allowing an agency to extend its time for responding, Boasberg agreed. He explained that "the FAA here received [Elkins' request] on September 16, 2014, but Plaintiff faxed it to the wrong office. As this triggered the first

10-working-days extension, the 20-day response period did not begin to run until September 30, 2014. The FAA replied to Plaintiff on October 8, 2014—six working days into the 20-day period—by asking for clarification of an acronym used in his request, thereby tolling the time to respond. In this same reply, it notified Elkins that his request constituted unusual circumstances, thus providing an additional 10 days for the FAA's answer. After receiving no response, the FAA sent a follow-up letter on November 6, 2014, including a note explaining that it was the second such communication. Plaintiff replied by voicemail with the requested clarification on November 12, 2014. Because the FAA was 'awaiting such information' from Plaintiff, the period to respond only then resumed. The agency, consequently, had an additional 24-working-days (the original 14 remaining plus 10 for unusual circumstances) from that point to respond—*i.e.*, until December 17, 2014. Plaintiff filed his Complaint on October 23, 2014—well before that deadline." Elkins argued he had not received the October 8 letter and that the first agency communication he received was on November 10, 2014, after he filed suit. Boasberg, however, pointed out that "while Plaintiff may not have received the letter, the FAA has provided a declaration attesting that it was indeed mailed to Elkins on October 8, 2014. "'Government records and official conduct [are generally accorded] a presumption of legitimacy' and it will take more than Plaintiff's non-receipt to rebut the presumption." As to Elkins' other request, Boasberg indicated that "nowhere in the FAA's declaration does [the agency] aver that all files likely to contain responsive records were searched or that no other offices would likely contain responsive records." He rejected Elkins' claim that the agency should use a confidential algorithm to discern the aircraft's identification number. Instead, he pointed out that "'FOIA imposes no duty on the agency to *create* records.' Since the agency's search did not uncover records related to the 'N number' or 'Mode S' code, its obligation ended there." Finally, Boasberg found the agency had not justified its claim that a radar plot was protected under Exemption 7(E), but that he had already found in a previous case brought by Elkins that another document containing beacon codes and call signs was properly withheld. (*David J. Elkins v. Federal Aviation Administration*, Civil Action No. 14-1791 (JEB), U.S. District Court for the District of Columbia, May 12)

Judge Randolph Moss has ruled that Louis Manna's suit for a copy of a surveillance video is **moot** because the FBI provided him with an unredacted copy of the tape after he filed suit. Manna requested a second copy of the tape and explained that although the agency had disclosed the tape to him previously, his copy had been submitted as part of a post-conviction motion and had never been returned. The agency initially told Manna that it could not find the tape and OIP upheld the FBI's no records response. However, after Manna filed suit, the FBI produced the tape. Manna argued that he had also asked for the videotape and all relevant material and the FBI had not yet responded to that portion of his request. Moss observed that "it is unclear if Plaintiff means that Defendants have failed to provide all the materials requested in his May 2012 request, or that Defendants have failed to respond to his other FOIA requests." Regardless, Moss noted that "to the extent that Plaintiff contends that his May 2012 request sought material in addition to the videotape, that is not a fair construction of the request." He added that "the surveillance video was the only material requested and 'reasonably described' in Plaintiff's May 2012 FOIA request. Likewise, Plaintiff's administrative appeal characterized his request as directed to the videotape." Manna argued that his May 2012 request did cite to other pending requests, but Moss explained that "it did so, however, only in the course of describing the videotape, explaining the circumstances leading up to Plaintiff's request for another copy, and requesting expedited release. Thus, to the extent that Plaintiff argues that Defendant erred in reading his May 2012 request as limited to the videotape, that contention is not supported by the record. . ." Moss then indicated Manna could not bring in other pending requests. "To the extent Plaintiff argues that his other FOIA requests remain unaddressed, his allegations are not properly before the Court. Although Plaintiff has made numerous FOIA requests over the years, his complaint only asserted claims based on the May 2012 request. Plaintiff never moved to amend his complaint to add claims based on other requests, and he cannot expand the scope of this litigation by merely referring to other requests in his opposition to Defendants' motion." (*Louis*

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Manna v. U.S. Department of Justice, Civil Action No. 13-0313 (RDM), U.S. District Court for the District of Columbia, May 13)

A federal court in Illinois has ruled that the State Department conducted an **adequate search** for records requested by Northwestern professor Jacqueline Stevens pertaining to its handling of Mark Lyttle's deportation case, except for the search conducted at the U.S. Embassy in Honduras. Because she was interested in learning about Lyttle's case, Stevens requested information about him. State refused to search for Lyttle's records without authorization, which Stevens supplied shortly after she had filed suit. State searched is Central Foreign Policy Records, the Office of the Legal Advisor, the Bureau of Consular Affairs, the Bureau of Diplomatic Security, and the U.S. Embassy in Honduras. The entire search yielded 48 documents which were disclosed to Stevens with redactions. Stevens only challenged the agency's search at the U.S. Embassy in Honduras, arguing the database search conducted there did not include Lyttle's name as a search term. The court observed that "in this case, as plaintiff points out, when defendant searched three databases and a shared drive at the U.S. Embassy in Tegucigalpa, it failed to search for what the Court considers to be the most obvious search term, 'Lyttle,' the third party's surname. The State Department offers no explanation for why it failed to search for that term. . .[T]he State Department searched for the term 'Lyttle' in other databases in other locations. The very fact that defendant used 'Lyttle' as a search term in other databases shows that it is a term reasonably calculated to uncover relevant documents." Stevens also claimed the Embassy's search was inadequate because it had not searched the email records of Wendy Clemens and another unknown individual who apparently had worked on Lyttle's case. The State Department told the court that neither individual was at the Embassy any longer when the search was conducted and that "it has a policy that both prevents employees from taking documents with them when they leave and requires employees to provide all documents to their successors. Thus, the searches the State Department actually performed in Honduras would have found the documents Wendy Clemens and the unnamed investigator left behind." The court indicated that while Stevens had prevailed in part it could not say she had substantially prevailed since the court found only a small portion of the agency's search was inadequate. As a result, the court concluded both parties should bear their own costs. (*Jacqueline Stevens v. United States Department of State*, Civil Action No. 13-5152, U.S. District Court for the Northern District of Illinois, Eastern Division, April 14)

A federal court in New York has ruled that the CIA conducted an **adequate search** for records concerning Michael Kuzma and properly invoked a *Glomar* response neither confirming nor denying the existence of records pertaining to any classified connection the agency might have with Kuzma. While Kuzma's request asked for all records referring to him, his primary focus was on records and photographs of a protest outside CIA headquarters on January 16, 2010 in which Kuzma participated. The agency searched its National Clandestine Service and its Directorate of Support for responsive records and found no records. By issuing a *Glomar* response the agency effectively indicated that it would not search any classified records and does not imply any classified connection with Kuzma. After the agency denied Kuzma's administrative appeal, he filed suit. He argued the agency had failed to adequately describe its search because its *Vaughn* index was insufficient and because it did not identify the agency personnel conducting the search, the search terms used, whether all files likely to contain responsive records were searched, and whether potentially responsive records had been destroyed. Finding the agency's affidavit sufficiently detailed, the court noted that the affidavit "discloses that the threat-assessment unit and individuals acting as 'special policemen' to protect CIA headquarters also searched for any photographs taken during any protests in January 2010." The court observed that "all files likely to contain responsive documents were searched (those in the NCS and DS directorates), the search term used ('Michael Kuzma') [was identified], and no potentially responsive records were ever destroyed or transferred to another agency. This establishes the sufficiency of the CIA's search." Kuzma argued that the agency was "seeking to avoid public embarrassment and conceal its illegal monitoring

of domestic political dissent." But the court disagreed, pointing out that "the *Vaughn* index makes clear that the CIA asserts its *Glomar* response only as to records pertaining generally to Plaintiff himself. The CIA does not assert a *Glomar* response concerning the January 16, 2010 protest." (*Michael Kuzma v. Central Intelligence Agency*, Civil Action No. 13-1175S, U.S. District Court for the Western District of New York, April 16)

A federal magistrate judge in Oregon has ruled that Columbia River Keeper is entitled to $89,000 in **atorney's fees and costs** for its successful litigation against the U.S. Army Corps of Engineers. CRK requested fees for Christopher Winter, a Portland environmental law attorney, and Miles Johnson, a recent member of the bar who worked as an attorney at CRK. After finding the hourly rates for attorneys in Portland applied to both attorneys, the magistrate judge rejected the Corps' argument that Winter's hourly rate should not be based on his experience as an environmental attorney because that background was not relevant to the FOIA action. The magistrate judge agreed with CRK and pointed out that "Winter's special knowledge of environmental law, and [the National Environmental Policy Act] in particular, was necessary to justify why the documents at issue did not fall under the various privileges asserted by the Corps." But because of Johnson's limited experience and the fact that he was assisted by Winter, the magistrate judge agreed that his hours were excessive. Part of the litigation focused on the Corps' motion for a protective order covering the inadvertent disclosure of a document it claimed was exempt. The Corps argued that it had prevailed on that aspect of the litigation and that it was unrelated to the FOIA claim. The magistrate agreed, noting that "the Corp's motion for protective order, and by extension, CRK's opposition brief, was unrelated to the FOIA claim CRK was ultimately successful on." As a result, the magistrate judge reduced the number of hours claimed to account for that portion of the litigation. The magistrate judge awarded CRK fees for its litigation of the fee issue, but again reduced Johnson's claimed hours as excessive. The Corps challenged CRK's request for $6,000 in costs, $5,500 of which was for three expert witnesses to support the fee claim. The magistrate judge found that one of the expert's declarations "provided the Court with some guidance during its review of materials submitted in this case." But the magistrate judge concluded the other two expert witness declarations were duplicative and reduced CRK's cost award to cover only the one expert witness declaration. (*Columbia River Keeper v. U.S. Army Corps of Engineers*, Civil Action No. 13-01494-PK, U.S. District Court for the District of Oregon, May 5)

The Tenth Circuit has ruled that a trial court properly exercised its discretion in finding that the Western Energy Alliance was not entitled to **attorney's fees** even though the judge had concluded that the Fish and Wildlife Service had not legal basis to withhold the record. WEA, a non-profit regional trade organization representing 400 oil companies, requested a copy of the Greater Sage-grouse Conservation Objectives Final Report from the Fish and Wildlife Service. FWS failed to provide the record and WEA sued. Shortly after suit was filed, the agency disclosed the report. WEA then filed for attorney's fees. The trial court found WEA had failed to show that it intended to make the report public and that it had both a personal and commercial interest in disclosure. Those three factors outweighed the improper delay on the part of the agency and the trial court found WEA was not entitled to attorney's fees. WEA then appealed to the Tenth Circuit. WEA argued that it had no commercial interest in the records. The court responded by explaining that "WEA does not cite any case precluding the district court from considering, as a factor in denying a fee award, the private benefit derived by a nonprofit entity in obtaining information pursuant to a FOIA request." WEA claimed that the district court's finding that the agency's delay was unreasonable "can tip the balance in favor of a fee award" and that "FWS's egregious neglect of its duties supports such an award." The Tenth Circuit noted, however, that "WEA fails to show that the district court abused its discretion in finding that the FWS did not act in bad faith or in declining to give this final factor greater weight than the other combined."

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(*Western Energy Alliance v. U.S. Fish and Wildlife Service*, Civil Action No. 14-1435, U.S. Court of Appeals for the Tenth Circuit, April 28)

A federal court in Alabama has ruled that the Justice Department properly declined to resolve prisoner Mistrell Alvin's administrative appeal because it arrived at OIP four days after the 60-day deadline for filing an appeal. The court also rejected Alvin's contention that the prison mailbox rule—assuming that a prisoner's letter has been posted once it is given to prison officials to be mailed—applied to his appeal letter. Although the court agreed that DOJ's Office of Enforcement Operations' response to Alvin was not initially received because it did not include his prisoner number, the fact that Alvin received the response with 30 days remaining in which to file an appeal did not excuse him from missing the deadline. Alvin argued that he mailed his appeal on January 30, 2013, days before the due date of February 4, 2013, but the court observed that "he has not provided this court with a single fact that would show why he was unable to place his appeal letter in the mail prior to January 30, 2013." The court indicated that it found no Supreme Court or Eleventh Circuit cases extending the prison mailbox rule to FOIA appeals. The court noted that "because the Eleventh Circuit, like several other circuits, has failed to extend the prison mailbox rule to FOIA administrative appeals, Mr. Alvin's objection in favor of the rule's extension is due to be overruled." (*Mistrell Alvin v. United States Department of Justice*, Civil Action No. 14-964-WKW, U.S. District Court for the Middle District of Alabama, Northern Division, May 12)