Volume 42, Number 1
January 6, 2016

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: In a new certification under the 2009 law requiring the Secretary of Defense to articulate why photos of detainees from Iraq and Afghanistan must still be withheld, Secretary of Defense Ash Carter has indicated that the need to withhold disclosure of more than 2,000 photos remains, although Carter's certification for the first time explains that some 200 photos can now be disclosed. In his certification, Carter noted that "I have determined that public disclosure of any of the photographs would 'endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.'" The prohibition was put in place as a result of compromise legislation allowing the Secretary of Defense to certify the continued need to protect the photos. In return, the OPEN FOIA Act, amending Exemption 3, was passed. As a result of the legislative compromise, the Supreme Court also dropped as moot its plans to review a Second Circuit ruling on whether Exemption 7(F)(harm to a person) applied to the photos.

State OIG Report Lambastes FOIA Processing FOIA Processing at Office of the Secretary

The Inspector General at the Department of State has issued a stinging rebuke of the way in which the Department processes FOIA requests for records from the Office of the Secretary, which includes not only the Secretary of State and his or her staff, but other offices considered part of the Executive Secretariat. Although the current report was certainly prodded by intense congressional attention in the aftermath of the revelation the former Secretary of State Hillary Clinton kept her emails on a private server to which departmental FOIA staff had no access, the institutional dysfunction revealed in the report will not be surprising to readers who have dealt with the agency in the past. As a matter of fact, an OIG report in 2012 strongly criticized the department for many of the same kinds of practices discussed in this report.

The flood of requests and subsequent litigation resulting from the Clinton emails has crippled an agency that was already regarded as one of the poorest performers in keeping up with its flow of FOIA requests. Several statistics in the report bring this into particularly sharp focus. The report, entitled "Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary," noted that one-third of the FOIA staff at the Office of Information Program Services, which processes the lion's share of FOIA requests sent to the department, have been assigned to work on one FOIA case currently in litigation—*Leopold v. Dept of State*—in which the court ordered the department to process and disclose approximately 55,000 pages of the Clinton emails on a rolling basis designed to finish reviewing all of them by January 2016, a date that slipped until at least February. Coupled with its obligations under *Leopold*, the OIG report noted that while average processing times across the federal government were 20.5 days for simple requests, and less than 191 days for complex requests, the same statistics at State were 91 days for a simple request and 535 days for a complex request. The report pointed out that for the past three years, IPS had requested additional staff, including its most recent request for an increase of 27. However, no additional staff had been approved. To meet its immediate obligations, the Department decided to detail staff from a pool of current and retired employees for 9-12 month stints at IPS. So far, only 7 temporary employees have been detailed.

IPS is the central processing office for FOIA requests. However, requests for records falling within the jurisdiction of S/ES are referred to that office which has one FOIA analyst supervised by the Deputy Director of Correspondence, Records & Staffing, who serves as the FOIA coordinator for S/ES. The OIG report noted that since 1997, the FOIA has required agencies to search for and disclose electronic records, including emails, although the department did not make such searches explicit in its regulations until 2010. But the report pointed out that "in addition to searching paper records, S/ES typically searches for relevant documents in several electronic databases, including classified files, the Department's cable and telegram systems, the Secretariat Tracking and Retrieval System (STARS) and EVEREST (which replaced STARS). None of these databases are intended to archive email files. STARS and EVEREST are systems used to route foreign policy memoranda and other documents to the Office of the Secretary. S/ES rarely searched electronic email accounts prior to 2011 and still does not consistently search these accounts, even when relevant records are likely to be uncovered through such a search. For example, S/ES has not searched email accounts for requests seeking all 'correspondence' between the Secretary of State and another party. The FOIA Analyst described the decision to search email accounts to be a discretionary one that is only exercised periodically."

According to the deputy director, S/ES initiates a search of email accounts only if the request specifically mentions emails or asks for "all records." If a FOIA request asks for emails from a current employee, that employee is tasked with searching his or her own email account. Emails for former senior staff may be searchable, but OIG found that such archived emails are "not readily accessible." The report observed that searches of individual email accounts were difficult because they were limited to those that could be undertaken using Microsoft Outlook.

Referring back to its 2012 critique of the agency's FOIA processing, the OIG report pointed out that "the tone at the top—management's philosophy and operating style—is is fundamental to an effective internal control system. . .Department leadership has not played a meaningful role in overseeing or reviewing the quality of FOIA responses." The report called Secretary of State John Kerry's recent appointment of Janice Jacobs to oversee transparency programs a positive step, but indicated OIG had found four areas which required immediate attention—lack of written policies and procedures, inconsistent S/ES monitoring efforts, limited IPS Review capability, and insufficient training.

The report noted that none of the databases used for searches by the Office of the Secretary were FOIA-specific and that the FOIA analyst had told OIG that learning how to conduct a FOIA search was done through on-the-job training. The report observed that "written policies and procedures are. . .important for

continuity because they increase the likelihood that, when organizational changes occur, institutional knowledge is shared with new staff." Oversight of searches has been spotty. The report indicated that the past two Directors of Secretariat Staff, who supervise the Deputy Director, told OIG that they had little involvement with FOIA processing and never reviewed searches or responses for accuracy or completeness. Although IPS is ultimately responsible for the quality of FOIA responses, the report found that "IPS does not have the ability to do independent spot checks in part because it does not have access to the unique databases used to conduct the searches." IPS also told OIG that it is sometimes forced to ask department attorneys for help in attempts to get complete responses to requests. Because the 2012 OIG critique recommended more training, IPS has provided more voluntary training opportunities. However, the report noted that few S/ES staff actually attended such training sessions.

The report cited details from several cases involving high-profile requesters like CREW, Judicial Watch, and the Associated Press, in which the agency failed to find emails or provided inaccurate responses based on information from S/ES. In the case of the AP requests, the agency ultimately located and processed 4,440 pages of emails it originally had claimed did not exist. But although the tone of the report was highly critical, OIG concluded that the agency had taken steps to improve processing of FOIA requests for records in the Office of the Secretary.

Views from the States…

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

Connecticut

A court of appeals has ruled that Nancy Burton does not have standing to sue the FOI Commission for its decision not to levy a civil penalty against the Commissioner of Energy and Environmental Protection for failing to respond to her request in a timely manner. Burton filed a complaint with the FOI Commission against the Commissioner when the agency failed to respond to her request on time. The FOI Commission found the agency had violated FOIA. Although the FOI Commission had the statutory authority to impose a civil penalty payable to the state, it chose not to do so. Instead, it ordered the Commissioner to comply with the FOIA in the future. The Commission did not order the agency to disclose any additional documents, finding the agency had already complied. Burton then sued the FOI Commission to force it to impose a civil penalty. The trial court found Burton did not have standing and, on appeal, the appellate court affirmed the lower court's ruling. The appeals court indicated that "under Connecticut law an agency's failure to impose a civil penalty against a party's opponent can aggrieve the party. However, the court added that "we conclude although she has alleged violations of FOIA that were ongoing at the time she filed her complaint, she still is not aggrieved by the commission's nonimposition of a civil penalty because Connecticut's FOIA does not authorize citizen plaintiffs to seek a civil penalty as a remedy. The plaintiff thus has no legal interest at stake." (*Nancy Burton v. Freedom of Information Commission*, No. 36821, Connecticut Appellate Court, Dec. 15, 2015)

Idaho

A court of appeals has ruled that Gretchen Hymas is not entitled to attorney's fees for her litigation against the Meridian Police Department for records concerning the investigation of the death of her son from

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carbon monoxide poisoning. The police initially denied the request, claiming the investigatory records exemption could be invoked categorically during an investigation. The investigation was completed just before the court was scheduled to hear Hymas' suit and the police disclosed the records at that time. The court ruled the police acted properly when issuing a categorical denial and found Hymas was not entitled to attorney's fees. On appeal to the supreme court, the supreme court ruled that the investigatory records exemption could not be invoked categorically and sent the case back for further consideration of Hymas' entitlement to attorney's fees. This time, the trial court ruled that Hymas was not entitled to attorney's fees because she had not identified the records she believed the police department had frivolously withheld and, alternatively, because the department's invocation of the investigatory records exemption was not frivolous. At the court of appeals, the appellate court rejected the first grounds for denying attorney's fees, but accepted the second. The appeals court noted the trial court had improperly placed the burden of proof on Hymas. Instead, the appeals court pointed out that "where an agency denies a public records request in whole and then subsequently discloses the records after its denial is legally challenged, the moving party need only make a good faith claim that the agency's conduct in denying the request was frivolous and the withholding party must then articulate the statutory basis for withholding the documents." Although it questioned the police department's invocation of the categorical investigatory exemption, particularly in light of the fact that the police department had provided the records to an insurance investigator, the appeals court found the police department had not acted frivolously. The appeals court observed that "much of the law on public records requests was unsettled at the time of the show cause hearing. . .Therefore, because the law was unsettled, the district court appropriately concluded that it was not unreasonable for the [police department] to take the position that the records were protected by the investigative exemption." (*Gretchen Hymas, et al. v. Meridian Police Department*, No. 42626, Idaho Court of Appeals, Dec. 14, 2015)

Illinois

A court of appeals has ruled that the Attorney General erred when she issued two opinions finding that the Springfield Board of Education violated the Open Meetings Act because the Board had taken final action in a closed meeting when it signed a termination agreement with the school superintendant and, further, had failed to provide adequate notice of the public meeting in which the action was affirmed. The school superintendant had asked the board about terminating his contract and the board and the superintendant reached an agreement, which was signed at a closed meeting by six members of the board; the agreement was subsequently posted on the board's website and was ratified at the next public meeting. In response to a complaint filed by a local reporter alleging the board had acted improperly, the AG concluded that the board had taken final action at the time the six members signed the termination agreement and that the board had failed to provide sufficient notice of the action to be taken at the public meeting. The trial court ruled in favor of the board on both counts and the AG appealed. The appeals court noted that "a 'final action' as contemplated by the Act, can only occur at a properly conducted public forum where the public entity expresses its opinion—usually in the form of a vote or signature—on a public issue. Thus, we disagree with the AG's interpretation. The board members' signing the Agreement during a closed session could not have constituted a 'final action' within the meaning of [the Open Meetings Act]." Noting that the agreement had been publicly available on the board's website before the board's public meeting, the appellate court observed that "as written, [the notice provision] of the Act requires that the public entity advise the public about the general nature of the final action to be taken and does not, as the AG claims, require that the public body provide a detailed explanation about the significance or impact of the proposed final action." (*Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, No. 4:14-0941, Illinois Appellate Court, Fourth District, Dec. 15, 2015)

Louisiana

The supreme court has restored the trial court's ruling that private emails sent by the executive director of the Jefferson Parish Economic Development Commission pertaining to political activities are public records that may be disclosed to *Times-Picayune* reporter Drew Broach after redaction of identifying information of private citizens. The case involved an audit of Jefferson Parish in which the outside auditing company found that Lucien Gunter, then director of JEDCO, had used his work computer to send and receive emails that dealt with political activities. Broach then requested the emails and JEDCO told him that the emails were private and were not public records. Broach then requested the emails from Jefferson Parish. When Jefferson Parish indicated that it would disclose the emails, William Shane a private citizen who had received some of Gunter's emails, filed suit to block disclosure, claiming his constitutional right of privacy and association would be violated. The trial court found the emails were public records, that Shane did have a claim for violation of his constitutional right to privacy and association, but that his rights could be protected if personally-identifying information of any private citizen was redacted from the emails. Shane appealed and the court of appeals reversed, finding that the emails did not constitute public records. The supreme court, however, reversed again. The supreme court found that the emails were used as part of JEDCO's business during the audit and that because the audit was ordered by Jefferson Parish, they were Parish records as well. The supreme court pointed out that the appellate court's decision was based on its finding that the emails themselves had nothing to do with public business. The supreme court explained that "'content' is not an element of the definition of 'public records.'. . .'Content' only becomes relevant *after* an item listed in [the Public Records Act] and sought to be inspected as a public record, has been determined to meet the definition of 'public record' and *if* the issue is raised as to whether an exception, exemption, or limitation, under the Louisiana Constitution or the Public Records Act supersedes the right of the public to inspect the record." The court added that "obviously, the legislature anticipated that the records of private individuals would often be used by public entities in the conduct of their respective business, work, duties, or functions, thus falling within the broad definition of 'public records.'" The supreme court agreed with the trial court that Gunter probably believed that the emails were private when sent. But the court indicated that the public interest in disclosure of potential ethical violations outweighed any private interests beyond those recognized by the trial court when it ordered redaction of identifying information of private citizens. The supreme court found that both JEDCO and Jefferson Parish were custodians of the emails for purposes of the Public Records Act. The supreme court noted that "our construction of the public records custodian—to include not only the original custodian, but also subsequent officials who have obtained custody of either the original public record or a copy—is consistent with the legislative goal of the Public Records Act." (*William Henry Shane v. Parish of Jefferson, et al.*, No. 2014-C-2225, Louisiana Supreme Court, Dec. 8, 2015)

Michigan

A court of appeals has ruled that the Detroit Public School District improperly responded to Rodd Monts' FOIA request for records of student disciplinary actions that were referred to the police by telling Monts that because it did not refer such matters to the police it did have any responsive records. Monts, the Detroit field director for the ACLU of Michigan, sent a multi-part request to the Detroit School District for records about disciplinary actions, including those referred to the police. The school district responded to part of his request, but told him that it had no records concerning referrals to the police. Monts filed an administrative appeal, providing several forms used by the schools to record student disciplinary incidents that included information about whether the police were involved. Still insisting that no referral records existed, the school district nevertheless provided two lists about student expulsions and school incidents that were considered crimes. When Monts filed suit, the trial court found his request was unclear and that the school district's response was adequate. Calling the school district's response "hyper-technical," the majority noted

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that "Monts' description of the information he sought was not perfect, in that 'student discipline matters' such as the decision whether to expel or suspend a student are the business of the school, and are not 'referred' to the police. But successful use of the FOIA does not depend on drafting lawyerly requests. In common-sense, everyday parlance, Monts' request obviously sought matters of student discipline in which the police had become involved through referral by a school employee. This is precisely the information contained within [the two forms]. Had the District produced the forms in addition to the documents it eventually ceded, it would have fulfilled its FOIA obligation." (*Rodd Monts v. Detroit Public School District*, No. 321790, Michigan Court of Appeals, Jan. 5)

A court of appeals has ruled that Glenn Miller is not entitled to attorney's fees as the prevailing party in his case because Miller's attorney, Craig Rolfe, made the request in his own name and never referred to Miller as his client until the case had gone to trial. Miller retained Rolfe to investigate alleged misappropriation of funds by the Lake Templene Improvement Board. Rolfe made a FOIA request to the board in his own name and did not indicate that the request was being made on behalf of Miller. When Rolfe sued the board for failure to respond, his complaint did not mention Miller. At a pretrial conference, the board provided Rolfe with records that satisfied his FOIA request. The trial court then granted Rolfe's motion to amend his complaint to include Miller. The trial court found that Rolfe was the requester, not Miller, and that because Rolfe represented himself he was not entitled to attorney's fees. Miller then appealed. The appeals court upheld the trial court's ruling, noting that "Miller could not prevail in a FOIA action when he was not 'the requesting party,' and insofar as Rolfe represented himself, he could not claim attorneys' fees while proceeding *in propria persona*. In particular, a civil action under the FOIA may be commenced by 'the requesting party,'" The court observed that "because Rolfe was 'the requesting party,' Rolfe could commence a civil action in his own name. In contrast, given that Miller did not make a FOIA request, there is no provision that would empower Miller to file or maintain an action under the FOIA." The court added that "because Miller failed to assert his right to public information by submitting a FOIA request, he could not file a civil action and he could not have prevailed within the meaning [of the statute]. Consequently, Miller is not entitled to an award of attorneys' fees." (*Craig A. Rolfe, PLLC v. Lake Templene Improvement Board*, No. 327513, Dec. 29, 2015)

New Jersey

A court of appeals has ruled that a records custodian does not have a cause of action to bring suit for a declaratory judgment determining the public body's obligations under the Open Public Records Act, a remedy available in some state laws. Further, the court found that Jeff Carter has a right under both OPRA and the common law of access to records about an individual who was granted financial aid by the New Jersey Firemen's Association. Carter, a member of the Firemen's Association, requested records pertaining to payments made to an unidentified individual, who had previously been dismissed as a volunteer firefighter because of misconduct. To avoid disclosure, the Association filed suit under the Declaratory Judgment Act to block disclosure of the records. The trial court granted the Association's request and Carter appealed. The appeals court reversed, noting that "we conclude that OPRA does not vest a right of action in a records custodian. Consequently, a records custodian has no right to declaratory relief. Put another way, the Legislature intended that only requesters may seek review of OPRA decisions, by resort to the Government Records Council or the court." The court added that "such a right of action would also undermine requestors' express right under OPRA to choose whether to challenge the denial of access before the GRC or in court, by empowering records custodians to choose the forum. Just the threat of suit may deter some citizens from exercising their rights under OPRA." The court then assessed whether the individual's privacy rights outweighed the public interest in disclosure here. While the court found several factors weighed against disclosure, the public interest factors weighed heavily in favor of disclosure. The court pointed out that "the lack of transparency in the Association's decision-making process, including the lack of publicly available

rules and regulations adopted after notice and comment, heightens the need for disclosure of documents related to individual cases." To show that a requester has a common law right of access, he or she must show a personal interest in the records. Here, because Carter was a member of the Association and was seeking the records not for his personal benefit but to better understand the Association's policies, the court found Carter had met the personal interest test. As a result, the court concluded he was entitled to disclosure on that basis as well. (*In the Matter of the New Jersey Firemen's Association Obligation to Provide Relief Applications Under the Open Public Records Law, Jeff Carter v. John Doe*, No. a2810-13, New Jersey Superior Court, Appellate Division, Dec. 18, 2015)

A court of appeals has ruled that the Office of the Governor properly responded to journalist Mark Lagerkvist's request for records of third-party funded travel by Gov. Chris Christie by telling him that it was unclear and then, after Lagerkvist provided a short explanation, ignoring the request further. The Office of the Governor responded to Lagerkvist's request by telling him it was unclear and then citing case law requiring a request to identify specific records. When Lagerkvist explained that he was seeking records required to be created by a specific Treasury circular and during a certain time period, the Office of the Governor ignored his explanation and did not respond further. Lagerkvist then filed suit, arguing the Office had an obligation to work with requesters to narrow requests. The trial court ruled in favor of the Office and Lagerkvist appealed. The appeals court noted that "Lagerkvist's second request was no more than a rephrasing of the first. Although Lagerkvist purported to make the second request narrower, in truth nothing in it changed from the initial inquiry. The custodian had already explained that the substantively identical initial inquiry was unclear and overbroad. Indeed, the statute states that silence will 'be deemed a denial. . .'" Rejecting Lagerkvist's claim that the Office of the Governor was required to work with requesters, the court pointed out that "efforts at working out an agreement between the requestor and custodian are necessary when the governmental entity's objection stems from the potential for 'substantial disruption to agency operations." The court observed that "in this case, no efforts at accommodation were necessary because the custodian's objection was that the request was unclear and overbroad, not that the process of responding would excessively burden the agency or disrupt day-to-day operations." Indicating that to respond to Lagerkvist's request would have taken considerable research, the court noted that "OPRA does not convert a custodian into a researcher, and that would have been the effect of Lagerkvist's request." (*Mark Lagerkvist v. Office of the Governor*, No. a0250-14, New Jersey Superior Court, Appellate Division, Dec. 17, 2015)

Pennsylvania

A court of appeals has ruled that pornographic emails sent to or from individual employees' email addresses at the Office of the Attorney General are not public records and need not be disclosed to the *Philadelphia Inquirer*. *Inquirer* reporter Amy Warden requested records about pornographic emails sent or received by staff at the Attorney General's Office. The AG claimed some parts of the request did not adequately identify the records, that other records were protected by the investigatory records exemption, and that pornographic emails themselves were not agency records because they were not related to the agency's operations. When Warden complained to the Office of Open Records, OOR found the emails were agency records because they reflected activities taking place at the AG's Office. The AG then appealed OOR's finding that the records were agency records. The newspaper argued that the emails were agency records because "they document a violation of agency policy and that transforms them into an 'activity of the agency' and makes them a public record under the Right to Know Law." The court found that characterization far too broad. The court noted that "if we were to adopt that view, then no personal emails would ever be exempt from disclosure because that principle is sufficiently broad to encompass all personal emails, and they would all have to be disclosed to determine whether an agency is properly enforcing its fair use email policy." The court indicated that "while the public has the right to access 'records' relating to OAG's employees and its

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'transactions' or 'activities,' the RTKL does not compel disclosure of all OAG emails solely on the basis that they violate OAG policy. As a result, the requested emails are not disclosable as records under the RTKL merely because they were sent or received using an OAG email address or by virtue of their location on an OAG computer in violation of OAG policy." (*Pennsylvania Office of Attorney General v. Philadelphia Inquirer*. No. 2096 C.D. 2014, Pennsylvania Commonwealth Court, Nov. 19, 2015)

A court of appeals has ruled that the Office of Administration properly responded to a request by Pennsylvanians for Union Reform for information about political action committee contribution deductions from the payroll checks of two identified state employees who were union members by refusing to confirm or deny the existence records because disclosure of such financial information would violate the union members' First Amendment rights. After the Office of Administration complained to the Office of Open Records, OOR affirmed the agency's decision. PFUR then filed suit alleging OOR should have required the agency to identify whether the two union members had made contributions from their paychecks. During OOR's consideration of the complaint, one of the identified union members told OOR that he had not made any political action committee deductions from his paycheck. However, the other identified union member indicated that he would permit the union to represent his interests in the matter. PFUR argued the agency lied when it said it would not confirm the existence of records because it must have known that one of the union members had not made contributions. The court disagreed, noting that the agency relied on an earlier OOR ruling in a case brought by PFUR that "established that the names of PAC contributors are not subject to disclosure." The court indicated that disclosure of such information would violate the First Amendment. The court pointed out that "as a balance between employees' privacy and association rights and the public's right to know, OOR has consistently required disclosure of the amount of PAC contributions and the receiving PACs. Information revealed in that manner would enlighten PFUR as to one way in which Commonwealth employees use Commonwealth resources to influence elections. However, specifically naming one particular individual contributor and specifying how much he may have contributed is not necessary for PFUR to achieve that end." (*Pennsylvanians for Union Reform v. Pennsylvania Office of Administration*, No. 1019 C.D. 2014, Pennsylvania Commonwealth Court, Dec. 18, 2015)

Washington

A court of appeals has ruled that video surveillance tapes related to a fatal shooting at Seattle Pacific University are not exempt and must be disclosed under the Public Records Act. Aaron Ybarra killed a student on the Seattle Pacific University campus on June 5, 2014. He then entered a classroom building where he shot and wounded another student. He was subdued by several students and arrested by Seattle police. A three-minute surveillance tape showed Ybarra's actions while in the building and Seattle Pacific later found other surveillance tapes taken when Ybarra visited the campus several weeks earlier. Several media organizations requested the video from the Seattle Police Department, which indicated that it intended to disclose the three-minute video with students' images pixilated so that they could not be identified. Students and the university then brought suit against King County to block disclosure of both the three-minute video and the other surveillance tapes. The trial court found that the tapes were not exempt after they had been properly pixilated. The students and the university then appealed. The university argued that the videotapes that did not show the shooting were not public records because they did not show any governmental activity. But the court noted that here "a government agency obtained privately generated information for the purpose of investigating a crime. [The PRA] does not, by its plain language, limit the definition of 'public record' to those showing only direct government action, but rather uses broad language to capture 'information *relating* to the conduct of government or the performance of any governmental or proprietary function." The court also rejected the claim that the records were protected by the law enforcement exemption. The court noted that "the Students fail to offer a persuasive reason as to why disclosure would be harmful. They argue that disclosure with their faces merely pixilated will impair law enforcement by making victims and witnesses less willing to come

forward or cooperate with law enforcement officers—that is, disclosure will have a 'chilling effect' moving forward. The Supreme Court, however, has made clear that 'a general contention of chilling future witnesses is not enough to exempt disclosure.'" (*John Does 1 through 15 v. King County*, No. 72159-3-I, Washington Court of Appeals, Division I, Dec. 28, 2015)

The Federal Courts…

The D.C. Circuit has ruled that an assessment recommendation made by a case officer at U.S. Citizenship and Immigration Services after interviewing asylum applicant Anteneh Abtew is protected by **Exemption 5 (deliberative process privilege)**. Abtew, an Ethiopian citizen, applied for asylum. USCIS denied his application, which is currently on appeal in immigration court. Abtew also requested the Assessment to Refer document prepared by the case officer after Abtew's interview, but before any final decision was made on his asylum application. The agency withheld the entire document under Exemption 5, a decision which was upheld by the district court. Finding that the assessment was both predecisional and deliberative, the D.C. Circuit rejected Abtew's challenge to the agency's denial. Abtew argued the fact the assessment was initialed by the case officer's supervisor suggested it had been accepted as the final decision. The court noted that "initialing a memo may suggest approval of the memo's bottom-line recommendation, but it would be wrong and misleading to think that initialing necessarily indicates adoption or approval of all of the memo's reasoning." Abtew contended the assessment was not deliberative because it contained no give-and-take. The court pointed out, however, that "the interviewing officer wrote the Assessment as a recommendation to the supervisor. A recommendation to a supervisor on a matter pending before the supervisor is a classic example of a deliberative document." Abtew argued that because the agency had disclosed similar documents in the past it was estopped from claiming the assessment was privileged. The court observed that "here, Abtew is citing other litigation with other parties, not a past phase of his case. Put simply, an agency does not forfeit a FOIA exemption simply by releasing similar documents in other contexts." Abtew claimed he was entitled to see the assessment as part of his challenge in immigration court. The D.C. Circuit indicated that "if Abtew seeks the Assessment in that proceeding and does not receive it in a timely fashion, he may appeal that decision in the ordinary course." (*Anteneh Abtew v. United States Department of Homeland Security*, No. 14-5169, U.S. Court of Appeals for the District of Columbia Circuit, Dec.22, 2015)

Judge Christopher Cooper has ruled that the Department of Justice has not shown that it conducted an **adequate search** for records concerning its investigation of child-abuse charges against former Penn State University assistant football coach Jerry Sandusky nor has it justified its **Exemption 3 (other statutes)** claim to withhold 2,700 pages and 86 gigabytes of data as protected by Rule 6(e) on grand jury secrecy. In response to a request from Ryan Bagwell, a Penn State alumnus who previously has brought litigation under Pennsylvania's Right to Know Law to obtain Penn State's investigation files on Sandusky, EOUSA released 517 records and withheld 104 pages. It withheld all the other records without reviewing them, claiming they were categorically exempt under Rule 6(e). Finding the agency's explanations insufficient, Cooper indicated he was bothered by the fact that the agency had uncovered no emails, even though it had referred to emails that had been withheld. Cooper noted that "the Court has no way of knowing, however, the method by which DOJ searched for and located those particular emails [that were withheld] and thus cannot determine whether the search was likely to have captured all responsive emails. Second, the Court's confusion over the status of any email search is heightened by the public remarks of former FBI Director Freeh, who conducted the independent investigation into the Sandusky matter 'in parallel with several other active investigations by agencies and government authorities, including the. . .United States Attorney[for the Middle District of

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Pennsylvania].' Mr. Freeh stated that he 'continuously interfaced and cooperated with those agencies and authorities,' which at least suggests that a record of communication may exist between his firm and USAO/MDPA regarding the investigation. While 'an agency's failure to find a particular document does not necessarily indicate that its search was inadequate,' in this instance the search's apparent failure to uncover any material along these lines raises a legitimate question as to the thoroughness of the search." Cooper pointed out that Rule 6(e) only protected information about matters occurring before the grand jury. He observed that "without any additional specificity as to what documents and files it withheld, however, DOJ has not demonstrated—and the Court cannot determine—that all 2,700 pages and 86 gigabytes of withheld material would reveal some secret aspect of the grand jury's proceedings or deliberations. The Court is further troubled by the possibility that no review was ever conducted of the 'records related to the grand jury proceedings' in the first place. Without such a review, it is unclear how EOUSA could determine that the exemption applies, let alone. . .that the material it withheld would reveal some secret aspect of the grand jury's inner workings or investigation." Faulting the agency's *Vaughn* index for its brevity, its lack of specificity, and its failure to explain whether non-exempt information could be segregated and disclosed, Cooper sent the case back to the agency to provide a better explanation. (*Ryan Bagwell v. United States Department of Justice*, Civil Action No. 15-00531 (CRC), U.S. District Court for the District of Columbia, Dec. 18, 2015)

In yet another in a long line of opinions resolving multi-agency litigation brought by convicted securities dealer Gregory Bartko concerning his conviction, Judge James Boasberg has ruled that the FBI properly withheld the contents of a thumb drive under **Exemption 3 (other statutes)** and that it also properly redacted identifying information about third parties under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Boasberg had expressed skepticism of the agency's categorical claims concerning the thumb drive, but after reviewing the documents *in camera*, he agreed with the agency's exemption claims. He noted that "having reviewed the contents, the Court is satisfied that the records were properly withheld as containing information about the names of recipients of federal grand-jury subpoenas; information that identifies specific records subpoenaed by a federal grand jury; and copies of specific records provided to a federal grand jury in response to such a subpoena. In light of this, the FBI appropriately declined to articulate the precise contents of the thumb drive so as to avoid 'revealing statutorily protected Federal Grand Jury Information.'" Bartko emphasized that he was seeking records on prosecutorial misconduct. But Boasberg indicated that "having conducted its *in camera* review, the Court is satisfied that. . .the documents were properly withheld or redacted on the basis that their release would reveal names and/or other identifying information about private citizens, and that these records do not 'shed light' on the agency's conduct as Plaintiff believes." Bartko also argued that records released by the U.S. Postal Inspection Service were substantially the same as records the FBI was withholding. Boasberg found that Bartko had not provided sufficient evidence that any records the FBI was withholding had previously been made public. He noted that "it is not the Court's job to cross-reference his half-dozen FOIA actions to determine precisely what was released, by whom and when. That burden falls on Plaintiff and nowhere in this Cross-Motion for Summary Judgment or in his Reply does he identify the precise records released by USPIS or another agency that have been withheld by the FBI." (*Gregory Bartko v. United States Department of Justice*, Civil Action No. 13-1135 (JEB), U.S. District Court for the District of Columbia, Dec. 18, 2015)

A federal court in California has ruled that the U.S. Postal Service properly invoked **Exemption 3 (other statutes)** to withhold data about customer transactions during various time periods for the Rincon post office because the information qualified as confidential business information under §410(c)(2) of the Postal Reorganization Act. Douglas Carlson filed suit against the Postal Service for failing to respond to 19 of his FOIA requests. The court ruled on three requests for customer transaction data at Rincon for different time periods. For all the requests, the Postal Service had told Carlson it would not disclose any records because

they were protected by § 410(c)(2). Carlson, a frequent litigant against the Postal Service, had previously won narrow victories against the Postal Service pertaining to mailbox deliveries after the court found the records were not commercial, but in this case the court concluded the data easily fell within the parameters of §410(c)(2), which was designed to provide protection to the Postal Service from competitors like UPS and Federal Express by allowing the agency to withhold records of a "commercial nature" which "under good business practice would not be publicly disclosed." The Postal Service admitted that it tracked such data to help make decisions about staffing and supplies, data the agency characterized as commercial. Carlson attacked both prongs of § 410(c)(2), but failed to persuade the court. Relying on the Ninth Circuit's decision in *Carlson v. U.S. Postal Service*, 504 F.3d 1123 (9th Cir. 2007), Carlson argued the data was not commercial. However, the court pointed out that the Ninth Circuit decision dealt with a single mail delivery and that here there were multiple transactions. The court noted that "while the information's value alone does not render it commercial, here the data is about transactions—*i.e.*, commerce. Where the information *is* commercial in nature, [the Ninth Circuit ruling] does not rule out the possibility that, consistent with Postal Service regulations, the use of the information is one factor that may contribute to finding the information commercial for the purposes of Section 410(c)(2)." Carlson admitted that the data was of a kind that normally would not be disclosed by a business, but argued that the Postal Service had to show that disclosure would cause competitive harm. Rejecting that argument, the court observed that the agency "sufficiently describes how Defendant's competitors could use the transaction-per-half-hour data that Defendants compiled to adjust their own staffing practices to offer shorter wait-times and more efficient services than the nearby Postal Service branch, thus attracting Defendants' customers to the Defendant's detriment. While Plaintiff underscores that Defendant is the exclusive provider of certain services, like First Class Mail, such that some customers will patronize Defendant despite shorter lines elsewhere, this is not enough to overshadow that Defendant stands to suffer at least some competitive harm." (*Douglas F. Carlson v. United States Postal Service*, Civil Action No. 13-06017-JSC, U.S. District Court for the Northern District of California,
Dec. 18, 2015)

A federal court in Connecticut has ruled that the Justice Department conducted an **adequate search** and properly withheld records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to one of two requests by Navigators Insurance Company for information about several specific cases, including two financial companies, but has so far failed to justify its search for records responsive to Navigators' second request. In July 2013, Navigators requested information from EOUSA about the outcome of four criminal cases. EOUSA told Navigators that it would neither confirm nor deny the existence of records, but that Navigators could submit a FOIA request for the records. Navigators did so several months later and the agency forwarded the request to the U.S. Attorney's Office for the District of Connecticut where the cases had been prosecuted. A month later, Navigators submitted a second FOIA request to EOUSA for records about investigations of New England Cash Dispensing Systems and Integrated Merchant Systems. That request also was forwarded to the District of Connecticut. EOUSA estimated that the number of records potentially responsive to both requests was between 3,000-5,000 pages and indicated that it would review the documents as quickly as possible. In response to Navigators' first request, EOUSA disclosed 538 pages with redactions, and disclosed 176 pages with redactions in response to the Navigators' second request. Navigators' moved to strike the affidavit of the AUSA who oversaw the agency's response because it was self-serving. The court, however, noted that the motion to strike was inappropriate and indicated that "rather, a party should state its objections to the admissibility of evidence presented at summary judgment in its briefing and the Court will rely only upon admissible evidence in ruling on a motion for summary judgment." The court then rejected Navigators' claim that the agency's failure to respond to their requests on time was a violation FOIA. The court pointed out that "plaintiffs cite no authority for the proposition that an agency's violation of FOIA's deadlines entitles the requester to automatic disclosure of the

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requested documents without any analysis of the agency's claimed exemptions." Explaining that "the Court agrees that the DOJ's delay in this case was egregious," the court noted that "plaintiffs here have made no claim that Defendant failed to conduct a thorough search, nor have they introduced any evidence from which such a conclusion could reasonably be reached." The court then found DOJ had failed to adequately explain its search and, as a result, refused to grant summary judgment to the agency on that issue alone. Instead, the court assessed the agency's Exemption 7(C) claims as they applied to Navigators' first request. Navigators identified the public interest in understanding how the government had prosecuted these cases and, further, how the government had determined the terms of the parties' guilty pleas. The court pointed out that "plaintiffs have made no argument regarding how the specific documents they seek here are likely to advance the interest they claim. Nor have they adduced anything more than 'a bare suspicion' that DOJ officials acted improperly by affording certain defendants preferential treatment." The court rejected Navigators' request for an *in camera* review, noting that "DOJ's declarations are sufficiently detailed with respect to the claimed exemptions that *in camera* review is unnecessary." The court granted summary judgment to the agency regarding Navigators' first request, but because the court had found the agency's explanation of its search for records responsive to its second request was inadequate, the court sent that portion of the case back to EOUSA for a further search. (*Navigators Insurance Company v. Department of Justice*, Civil Action No. 15-329 (JBA), U.S. District Court for the District of Connecticut, Jan. 5)

In yet another episode in the continuing saga of prisoner Jeremy Pinson's multiple FOIA requests to the Department of Justice, Judge Rudolph Contreras has dismissed a number of Pinson's requests to the Bureau of Prisons for **failure to exhaust administrative remedies** and has found that BOP's exemption claims are generally appropriate. However, because the agency failed to provide proof that Pinson had failed to exhaust his administrative remedies as to several requests, Contreras allowed Pinson to continue to contest those requests. Contreras quickly dispensed with 19 requests Pinson claimed he had sent to BOP but had never received a response. BOP indicated it had no record of having received the requests. Contreras noted that "in order to create an issue of material fact, a prisoner must offer evidence that the requests were received by the agency, rather than merely stating that the requests were placed in the mail." While Contreras admitted that the evidence presented by both Pinson and BOP regarding the responses to a number of requests was thin at best, he found that in some instances Pinson's evidence was sufficient to allow him to continue. He noted that "because the Court is unable to determine whether any of the response dates listed in Mr. Pinson's complaint post-date BOP's acknowledgment letters, and because at summary judgment the Court must view facts in the light most favorable to the non-movant, and cannot make credibility determinations, the Court must accept as true Mr. Pinson's declaration that he only received an acknowledgement letter and never received BOP's final response as to [several contested requests]." But as to others, Contreras found Pinson contradicted himself, saying that he had not received a response and then later indicating that the agency had responded, to such an extent that Contreras was able to accept the agency's explanation as sufficient. Several of Pinson's requests had been held in abeyance because he had outstanding fees associated with another request. However, while Pinson had now paid the outstanding fees, the agency had administratively closed his requests. Contreras found BOP had not told Pinson that his requests would be closed if he failed to pay outstanding fees, but had indicated that requests "will not be processed *until* your payment." He pointed out that "this open-ended language lends the impression that the BOP would continue to process Mr. Pinson's requests automatically once his payment was received. Nowhere with respect to most of these requests did BOP advise Mr. Pinson that his requests would be administratively closed or that he must request that the BOP reopen the requests or submit a new request altogether." Contreras accepted the agency's exemption claims, many of which Pinson had not bothered to challenge. Pinson contested the agency's redaction of staff names under **Exemption 6 (invasion of privacy)**, arguing that staff names were not protected. Contreras observed that on some occasions BOP had disclosed staff names, but that it seemed to depend on the context of the records requested. However, he rejected Pinson's claim, noting that "with respect to the specific records at

issue in this case, Mr. Pinson has failed to identify any particular release with which he takes issue. It is not this Court's role to comb through DOJ's filings and the accompanying *Vaughn* indices to determine which releases Mr. Pinson contests." (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, Jan. 4)

A federal court in California has dismissed Richard Snyder's remaining claims for access to various DOD databases by finding that prior transmission problems have been resolved as to one database and that the agency properly withheld access to the other database under **Exemption 3 (other statutes)**. Snyder routinely accessed the Commercial and Government Entity Code File via File Transfer Protocol from the Defense Information Systems Agency. For some reason, the agency's ability to transmit the files via FTP to Snyder's computer stopped functioning and no matter how frequently the agency tried the previous transmission process, the file transfer cut off after only a few megabytes of data. Snyder insisted the problem was in the agency's security codes and told the agency to fix the problem, suggesting at various times that the agency hire an outside contractor to resolve the problem or create an outside computer link. The agency rejected both solutions as too expensive and eventually determined that Snyder could obtain the exact same files from the agency's electronic reading room. Although Snyder insisted the reading rooms files were not the same, the court agreed with the agency, finding Snyder's claim **moot** as a result. The court pointed out that "defendants have offered to provide the CAGE File on CD, and the file is available from the eFOIA Reading Room. In fact, Plaintiff has already accessed the eFOIA Reading Room and FTP'd the file to himself. At the hearing, Plaintiff suggested that he would have done so sooner had he known that the information he seeks was contained in more than one file on the eFOIA Reading Room. Now that [the agency's affidavit] informs him of this fact, he may retrieve any information he may be missing. Under these circumstances, FOIA does not require more." Snyder has also requested the agency's Defense Activity Address Code File, which is contained in the DoDAAD, a database that had been exempted by Defense because it contained critical infrastructure information. Snyder argued the agency could extract the files he wanted without revealing exempt information from the larger database. But the court observed that "Plaintiff would have Defendants manually sort through the massive DoDAAD database, pull individual DoDAACs, and create an entirely new document. FOIA, however, imposes no such requirement on an agency." (*Richard Snyder v. Department of Defense*, Civil Action No. 14-01746-KAW, U.S. District Court for the Northern District of California, Dec. 18, 2015)

A federal magistrate judge in California has tentatively found that identifying information about DEA informant Gordon Skinner should be disclosed to William Pickard because Skinner was publicly identified as a confidential informant at Pickard's trial. The magistrate judge's recommendation brings the decade-old case closer to resolution. The Ninth Circuit previously ruled that because Skinner was identified at Pickard's trial the agency could not refuse to confirm his identity. The government has continued to lose in regard to various aspects of the case in both the Ninth and Tenth Circuits. Finding that the government had provided no better explanation for why information about Skinner should be withheld, the magistrate judge noted that "because the government has failed to do anything to bolster the arguments Judge Breyer rejected at summary judgment, this Court's tentative ruling is to release documents in the three categories of materials [currently being considered by the court]: Skinner's name, information Skinner has voluntarily disclosed to the public, including information released in the federal court proceedings in Kansas, and Skinner's NADDIS number." (*William Leonard Pickard v. Department of Justice*, Civil Action No. 06-00185 CRB (NC), U.S. District Court for the Northern District of California, Dec. 24, 2015)

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Judge Randolph Moss has ruled that because various motions filed by pro se litigant Sai are premature, he is not entitled to compel TSA to disclose orders it may rely on to support its characterization of surveillance footage as sensitive security information, he is not entitled to attorney's fees, and he is not entitled to add 14 other FOIA requests to the current complaint. Noting that the case was nearly ready for consideration of the merits, Moss pointed out that Sai had peppered the court with motions, most of which were unnecessary. Moss indicated that Sai was apparently concerned that he would miss his deadline to appeal the agency's SSI order to the D.C. Circuit, which has original jurisdiction over TSA's orders. Acknowledging Sai's concerns, Moss noted that "but, as to the substance of [a motion to the D.C. Circuit], the Court remains convinced that resolution of any potential issues relating to SSI is premature. The Court does not yet know what information, if any, TSA will contend should be withheld and it does not know what dispute may exist with respect to the designation of any such SSI. . .It is important, however, to recall that this is a FOIA and Privacy Act case relating to specific requests for records. Before the Court can adjudicate this case, it needs to know what specific requests remain unanswered, what specific exemptions TSA invokes and the basis for its determinations, and why Plaintiff disputes those determinations." Although the agency had already disclosed some 3,000 pages, Moss explained that Sai's motion for attorney's fees was also premature. He noted that "it is too early to assess even whether [any] particular order will result in any 'relief' to Plaintiff, much less whether Plaintiff will *substantially* prevail in this case." Because Sai was proceeding pro se, he was not entitled to attorney's fees, only costs. Moss indicated that "in light of the Court's holding that Plaintiff has no and cannot, demonstrate 'eligibility' or 'entitlement' to fees and costs at this stage of the litigation, it need not consider whether he would be entitled—if and when he does substantially prevail—to costs and/or a nominal award of attorney's fees as he asserts." Moss rejected Sai's motion to add the additional FOIA requests, noting that "the addition of fourteen additional FOIA/Privacy Act requests to this case would merely result in undue delay in the disposition of this case and would not enhance judicial efficiency." (*Sai v. Transportation Security Administration*, Civil Action No. 14-403 (RDM), U.S. District Court for the District of Columbia, Jan. 6)