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Washington Focus: Josh Gerstein reports in POLITICO that Cheryl Mills, chief of staff for former Secretary of State Hillary Clinton, has asked Judge Emmet Sullivan to prohibit Judicial Watch from releasing audio or video recordings of her deposition that Sullivan approved as part of his grant of discovery to Judicial Watch in one of its FOIA suits against the State Department concerning access to Clinton's emails. Mills' motion said she has no objection to disclosing a transcript of her testimony, but feared that video or audio clips could be taken out of context. Both former deputy chief of staff Huma Abedin and computer technician Bryan Pagliano are scheduled to be deposed in the coming weeks. Gerstein observed that "it's unclear whether any limits put on videos of Mills' testimony would be applied to their appearances, but if the judge agrees to Mills' request it seems likely the others would ask for similar treatment."

State OIG Report on Clinton's Email Use Ensures Controversy Will Continue

The Office of the Inspector General at the Department of State has concluded that former Secretary of State Hillary Clinton's use of a private email server which she and her staff used for sending and receiving emails, violated agency policies concerning both the preservation of federal records and the security of electronic communications. But the OIG report provided a modicum of support for Clinton's contention that the rules were not so clear and that former Secretary of State Colin Powell had done some of the same things. What, even at this late date, still remains a complete puzzle is whether and how Clinton's use of a private server was ever approved by the State Department. While Clinton's staff insisted that agency officials understood and approved her use of a private server, the OIG investigation found no evidence that anyone at State had approved the plan. As a matter of fact, the report discussed several incidents in which Clinton's use of unapproved non-government devices were brought to the attention of her staff, but never addressed. Career agency staff also told the OIG that they were uncomfortable broaching subjects about recordkeeping responsibilities with Clinton or her staff. As a result of this discomfort, the report indicated that at least Clinton herself was never required to sign a routine

ACCESS REPORTS

certification that she understood her responsibilities concerning information security policies.

The report makes clear that such policies were not stringently enforced at the State Department, and that when she became Secretary of State in 2009 policies relating to the use and preservation of email were not particularly well-defined. As a result of the *Armstrong v. Bush* litigation on preservation of the White House emails that started in 1989 at the beginning of George Bush's administration, the National Archives and Records Administration had issued government-wide guidance on preservation of emails instructing agencies to print and preserve copies of emails that qualified as federal records under the Federal Records Act. Although that policy was in place at State, the OIG report found the agency had no process for retaining and archiving emails that would realistically capture and index such records. During Clinton's tenure, the agency started using the State Messaging and Archive Retrieval Toolset (SMART) as a first step towards achieving a way to archive emails that should be retained as federal records, but the OIG report indicated that Clinton and her staff did not use the system. The agency added the NARA-approved Capstone program for capturing records of senior officials in 2015.

The report surveys the practices of the four most recent Secretaries of State—Madeline Albright, Colin Powell, Condoleezza Rice, and Clinton—which paints a picture of an agency that is just beginning to emerge from the 20th century as far as its attitudes towards using electronic communications by the time Clinton arrives in 2009. Albright told OIG that her tenure as Secretary predated the common use of email and that because she herself was unfamiliar with the process she did not use it at all.

Upon his arrival in 2001, Colin Powell attempted to introduce email as a preferred method of conducting business. Because he had no way to communicate outside the State Department via email, he arranged to have an Internet connection set up in his office whereby he could communicate with others outside the agency via email. He also took steps to ensure that agency personnel had agency email accounts. While his reliance on his personal email account has been made much of by Clinton supporters, his use of a personal account seems to have more to do with the lack of alternatives than any intent to evade recordkeeping responsibilities. Where Powell's policies do lend some credence to Clinton's claims is that the State Department's archiving practice relied on capturing emails through receipt by other staff rather than by printing them off and filing them. Although the OIG report indicates that this is not adequate, Clinton's staff has continued to insist that the vast majority of her emails were preserved because they were sent to others in the agency.

As to the use of personal email accounts, Rice comes off largely unscathed because the OIG found no evidence that she or staff members used personal or agency email to conduct business. While this exonerates Rice as to any charges of improperly using personal email, it leaves the reader wondering exactly what the agency was doing to develop electronic communications systems during those four years leading up to Clinton's tenure.

When Clinton arrived, her staff instituted the elaborate off-premises system that did not become public until after she left office in 2013. Rejecting Clinton's defense that most of her emails were preserved because they were sent to agency staff, the OIG report indicated that "sending emails from a personal account to other employees at their Department accounts is not an appropriate method of preserving such emails that would constitute a Federal record. Therefore, Secretary Clinton should have preserved any Federal records she created and received on her personal account by printing and filing those records with the related files in the Office of the Secretary. At a minimum, Secretary Clinton should have surrendered all emails dealing with Department business before leaving government service and, because she did not do so, she did not comply with the Department's policies that were implemented in accordance with the Federal Records Act." NARA agreed with these findings, but told OIG that Clinton's subsequent production of her emails mitigated her failure to preserve them during her tenure. However, OIG pointed out that the emails Clinton turned over

were incomplete. Missing altogether were emails from January 2009 to April 2009 at the beginning of her tenure. OIG noted that it found 19 emails between Clinton and General David Petraeus during that time. OIG discovered that Clinton's staff had a huge number of emails that had not been previously produced, consisting of 72,000 pages in hard copy.

Perhaps most damning is the report's review the impact of Clinton's use of non-agency devices had on cybersecurity. Noting that cybersecurity policy when Clinton was Secretary of State "was considerably more detailed and more sophisticated" than when Powell was Secretary of State, the report observed that cybersecurity policy during Clinton's tenure stated that "day-to-day operations should be conducted on an authorized [agency device], yet OIG found no evidence that the Secretary requested or obtained guidance or approval to conduct official business vial a personal email account on her personal server." The OIG found that neither Diplomatic Security nor Information Resources Management reviewed Clinton's use of such a system. The report explained that "DS and IRM did not—and would not—approve her exclusive reliance on a personal email account to conduct Department business, because of the restrictions in [agency regulations] and the security risks in doing so." Likewise, OIG found no evidence that anyone officially approved of Clinton's use of her personal server. The report indicated that "these officials all stated that they were not asked to approve or otherwise review the use of Secretary Clinton's use of a personal email account, although many of them sent emails to the Secretary on this account." OIG found evidence, however, that "various staff and senior officials throughout the Department had discussions related to the Secretary's use of non-Departmental systems, suggesting there was some awareness of Secretary Clinton's practices." This included two IRM employees who raised concerns about Clinton's personal server and were told that "the Secretary's personal system had been reviewed and approved by the Department legal staff and that the matter was not to be discussed any further." The report commented, however, that "OIG found no evidence that staff in the Office of the Legal Advisor reviewed or approved Secretary Clinton's personal system." The other IRM staff member was told that IRM's job was to support the Secretary and instructed the staff "never to speak of the Secretary's personal email system again."

The OIG report does not provide a definitive answer to how Clinton's use of a private server evolved, whether there was ever any discussion about the legality or policy implications of such a system, or why it managed to remain a relative secret until after she left office. The whole affair certainly suggests poor management on her part and, indeed, she has publicly acknowledged that the private server was a mistake. But for her, the political consequences of the story will continue to be felt up through November's election and probably beyond.

Views from the States…

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

Florida

A court of appeals has ruled that the trial court did not err when it concluded that Citizens for Awareness was not entitled to attorney's fees its suit against Wantman Group, a contractor responsible for responding to public records requests from the South Florida Water Management District. After Citizens' anonymous email request went unanswered by Wantman Group, Citizens filed suit. Wantman was unaware of the organization's request until it filed suit since it appeared to be spam. Once Wantman was made aware that

ACCESS REPORTS

the email constituted a legitimate request, it immediately complied. Citizens then asked for attorney's fees for prevailing. The trial court found that there was a question as to whether Wantman violated the law in failing to respond to the original request under the circumstances. The appeals court agreed, noting that "the email [request] was directed to an independent contractor and not a governmental agency familiar with fielding public records requests. Appellant waited merely 18 days, without any further inquiry, and then filed suit, claiming a right to attorney's fees." The court added that "the public records law should not be applied in a way that encourages the manufacture of public records requests designed to obtain no response, for the purpose of generating attorney's fees." The court referenced the recent supreme court decision in *Board of Trustees v. Lee*, in which the court found that attorney's fees were mandatory when a an agency violated the public records act. The court noted that "in that case, the trial court found a violation of [the statute]. The denial of fees in this case was based on the conclusion that there was no 'unlawful refusal' by an agency so there was no violation of the Public Records Act that triggered entitlement to statutory attorney's fees." (*Citizens Awareness Foundation, Inc. v. Wantman Group, Inc.*, No. 4D15-1760, Florida District Court of Appeal, Fourth District, May 25)

Illinois

A court of appeals has ruled that Eric Puryear failed to show that the Village of Prairie Grove acted in bad faith when it was unable to provide a video recording of a traffic stop in which Puryear received a ticket for not wearing a seat belt because the video equipment malfunctioned. Puryear was issued a ticket by Officer James Page. Puryear requested the video recording of the incident as well as other records related to Page's contemporaneous traffic stops. The Village was able to provide much of the information but found that an equipment malfunction apparently prevented Puryear's stop from being recorded. Puryear sued, alleging bad faith and attempted to introduce video of Page's other citations as well as his personal testimony as to why the incident involving himself was not recorded. The trial court found that the other videos were not relevant to whether the Village had responded to Puryear's requests and that Puryear was not qualified to testify as an expert witness. The appeals court agreed. The court noted that "quite simply, the video of Officer Page's other traffic stops is not probative as to whether defendant willfully and intentionally violated the FOIA or otherwise acted in bad faith in responding to his first FOIA request." The court indicated that Puryear had no personal knowledge concerning the Village's inability to produce the video of his traffic stop and that for such expert opinion to be allowed "required specialized knowledge or experience with computers and the appropriate operating system." (*Eric Puryear v. Village of Prairie Grove*, No. 2-15-0378, Illinois Appellate Court , Second District, May 16)

Ohio

The supreme court has ruled that the City of Avon Lake properly withheld information on invoices from an outside law firm defending the City in litigation against James Pietrangelo describing individual cost items because it was privileged. Pietrangelo requested the invoices and the City disclosed costs but claimed that descriptions of various cost elements were privileged. The trial court agreed, as did the court of appeals. The supreme court noted that "to the extent that Pietrangelo requests the dates, hours, and rates not identified in the professional-fee summary, they are inextricably intertwined with the narratives of services that are privileged material. Such information is exempt from disclosure." Two justices concurred in the result, but dissented to the extent they believed the court permitted Avon Lake to withhold non-exempt information. (*James Pietrangelo v. City of Avon Lake*, No. 2015-0495, Ohio Supreme Court, May 17)

Pennsylvania

A court of appeals has ruled that Pennsylvanians for Union Reform is not entitled to insist that the Department of State process its request for voter registration information under the Right to Know Law rather than under the Voter Registration Act, which contains its own disclosure provisions for voter registration records. PFUR requested voter registration records and insisted the agency process its request solely under RTKL. Because the RTKL does not apply to records that are covered by separate disclosure provisions, the Department of State processed the request under the Voter Registration Act, which included a requirement that requesters provide verification of identity. PFUR complained to the Office of Open Records that the agency had failed to process its request as written. OOR, however, agreed with the agency. The appeals court agreed that the Voter Registration Act qualified as a separate disclosure scheme and that as a result the records did not fall under the RTKL. The court noted that "the RTKL provisions conflict with the access provisions of the Voter Registration Act and the Department's regulations, and therefore, the RTKL's access provisions do not apply to PFUR's request for voter registration information. Moreover, the Department's regulations expressly establish the manner and medium in which the public information lists may be made available for public inspection and copying to those who request access to it." The court added that the agency "attests to the fact that PFUR would be able to access all the information it sought from the full voter export, or public information list, a fact that PFUR acknowledged at oral argument." (*Pennsylvanians for Union Reform v. Pennsylvania Department of State*, No. 1852 C.D. 2015, Pennsylvania Commonwealth Court, May 23)

Wisconsin

The supreme court has ruled that Albert Moustakis, the Vilas County District Attorney, is not an employee for purposes of the Wisconsin public records law, and was not entitled to notice from the Department of Justice before the agency disclosed complaint records pertaining to him in response to a request from the Lakeland Times. Before it responded to the Lakeland Times' request, DOJ contacted Moustakis to let him know that it planned to disclose the records. Moustakis instead decided to file suit to block the disclosure. Under the public records law, certain categories of public employees have the right to bring suit to block disclosure of personal information. Both the trial court and the court of appeals found Moustakis, as an elected official, was not an employee under the public records law. However, the supreme court decided to review the case to clarify what constituted an employee under the public records law. The majority agreed with the lower courts, finding Moustakis could not establish that he was an employee for purposes of the public records law. Moustakis's argument was that, although he did not qualify as an employee under the first section of the definition because he was an elected official, he qualified under the second part, which defined an employee as someone who did not work for an authority. Moustakis argued he did not work for the Vilas County District Attorney's Office, but, instead, was an employee of the State of Wisconsin. The majority rejected that claim. The majority noted that "although Moustakis is excluded from the first part of the definition of 'employee' by the statutory language excluding an individual holding a state public office as an employee, the first part of the definition of 'employee' makes clear that Moustakis is not an individual employed by an employer other than an authority. Accordingly Moustakis is not employed by an employer other than an authority under the second part of the definition of 'employee' [in the public records law]." Three justices concurred in the conclusion that Moustakis was not an employee, but dissented on the issue of whether DOJ was obligated to provide notification to Moustakis before disclosing the records rather than providing them as a matter of courtesy. If so, the dissenting justices noted, the agency did not have the legal authority to disclose the records. (*Albert C. Moustakis v. State of Wisconsin Department of Justice*, No. 2014AP 1853, Wisconsin Supreme Court, May 20)

ACCESS REPORTS

The Federal Courts…

The D.C. Circuit has rejected 30 years of agency interpretation of the **educational institution fee category** in ruling that students are eligible for reduced fees if they are enrolled at an educational institution. In a case brought by University of Virginia Ph.D. student Kathyrn Sack against the Department of Defense, the court concluded that if teachers were considered to be eligible under the educational institution category there was no principled reason why students did not qualify. Saying that "the Government's reading makes little sense at all," Circuit Court Judge Brett Kavanaugh noted that "it would be a strange reading of this broad and general statutory language—which draws no distinction between teachers and students—to exempt teachers from paying full FOIA fees but to force students with presumably fewer financial means to pay full freight." The OMB Fee Schedule and Guidelines, issued in 1987 after OMB was instructed in the 1986 amendments to provide guidance on fees for the newly created categories of requesters, specifically distinguished between teachers, who would qualify for the educational institution category if they made FOIA requests in furtherance of research rather than for their personal interests, and students, who would not be eligible for such a fee reduction. Like all other agencies, DOD incorporated the OMB Guidelines into its regulations. But Kavanaugh pointed out that "the Government's reliance on the OMB Guideline just begs the question of whether the Guideline itself is consistent with the statute." He added that "in our view, OMB's rule for student requests is inconsistent with the statute. FOIA refers broadly to an 'educational institution.' As we have explained, we see no good basis in the text or context of FOIA to draw a line here between the teachers and students within the educational institution." Hinting at what he perceived as the real reason for the distinction, Kavanaugh indicated that "we recognize that OMB may (for good reason) want to help fill and replenish the Government's coffers. And OMB therefore may want to extract as much money as possible from those who make FOIA requests. OMB may also want to discourage further FOIA requests to alleviate the burden on already grossly overburdened FOIA offices in the Executive Branch. But this statute, as we read it, does not empower the Government to pursue fiscal balance or provide relief for the FOIA bureaucracy on the backs of students. The statutory text and context lead us to the simple conclusion: If teachers can qualify for reduced fees, so can students." Noting that "the [educational] requester may not seek the information for personal or commercial use," Kavanaugh explained that agencies could require reasonable identification that the requester was a student. He pointed out that "a copy of a student ID or other reasonable identification of status as an enrolled student in the school—together with a copy of a syllabus, a letter from a professor, or the like—should suffice. To be clear, we do not intend that list as exhaustive." But he cautioned agencies not to require "hard-to-obtain verifications that will have the practical effect of deterring or turning away otherwise valid student FOIA requests." DOD had also withheld records concerning its use of polygraph tests under **Exemption 7(E) (investigative methods and techniques)**. He found the polygraph tests qualified as law enforcement records that described investigative techniques and that their disclosure could risk circumvention of the law. He indicated that the district court had conducted an appropriate **segregability analysis** in agreeing with the agency that there was no non-exempt information that could be disclosed. He observed that "our case law is not crystal clear on our standard of review of a district court's substantive segegability determination. But regardless of whether our review here is deferential or de novo, we would reach the same result because we agree with the District Court's segregability determination." (*Kathryn Sack v. United States Department of Defense*, No. 14-5039, U.S. Court of Appeals for the District of Columbia Circuit, May 20)

The D.C. Circuit has ruled that the CIA is not required to disclose a copy of the Senate torture report since it is not an **agency record** because the Senate Select Committee on Intelligence made clear at the beginning of its 2009 investigation of the CIA's interrogation practices that the final report would remain a congressional record. As such, the D.C. Circuit rejected the ACLU's contention that the Intelligence

Committee's 2014 decision to share the full report with the President and the intelligence community implicitly gave the executive branch permission to disclose the final report. Writing for the court, Senior Circuit Court Judge Harry Edwards noted evaluation of whether or not a record was an agency record normally would be analyzed under *Dept of Justice v. Tax Analysts*, 492 U.S. 136 (1989), but pointed out that "when an agency possesses a document that it has obtained from Congress, the answer to the question whether the document is an 'agency record' subject to disclosure under FOIA 'turns on whether Congress manifested a clear intent to control the document.'" Reviewing the case law, Edwards explained that "in sum, if 'Congress has manifested its own intent to retain control, then the agency—by definition—cannot lawfully "control" the documents.' Conversely, if Congress intends to relinquish its control over documents, then the agency may use them as the agency sees fit." Turning to the 2009 letter from the Senate Intelligence Committee to the CIA outlining the security measures to be taken so that committee staff could view and use CIA records, Edwards noted that "the Letter, in straightforward terms, makes it plain that the Senate Committee intended to control any and all of its work product, including the Full Report, emanating from its oversight investigation of the CIA." The ACLU argued the letter only dealt with security matters concerning the use of CIA records during the investigation. Edwards disagreed, pointing out that the letter covered any reports prepared as a part of the investigation. He observed that "the Full Report is a 'final. . .report.' Therefore, the language of the Letter unambiguously includes the Full Report. . .The Full Report and the other specified documents were to 'remain congressional records in their entirety. . .even after the completion of the Committee's review.' The Letter's expansive language is clear on this point." Edwards rejected the ACLU's argument that the 2014 Committee transmittal letter allowing the intelligence community to use the report "as you see fit" vitiated the intent expressed in the 2009 letter to control the report. But Edwards observed that "the December 2014 Letter undoubtedly gives the Executive Branch some discretion to use the Full Report for internal purposes. However, the December 2014 Letter does not override the Senate Committee's clear intent to maintain control of the Full Report expressed in the June 2009 Letter." (*American Civil Liberties Union v. Central Intelligence Agency, et al.*, No. 15-5183, U.S. Court of Appeals for the District of Columbia Circuit, May 13)

Clarifying his previous holding, Judge Randolph Moss has ruled that the FBI may assert claims made under **Exemption 7(A) (interference with ongoing investigation or proceeding)** and **Exemption 7(E) (investigative methods and techniques)**, as well as claims of attorney-client privilege and attorney work-product privilege under **Exemption 5 (privileges)**, but has waived its ability to claim that the deliberative process privilege applies to other records. Dealing with a number of requests from researcher Ryan Shapiro, reporter Jeffrey Stein, National Security Counselors, and Truthout for records pertaining to the agency's processing of FOIA requests, Moss previously ruled the agency could not claim such records were categorically exempt under **Exemption 2 (internal practices and procedures)** or Exemption 7(E). When the FBI asked Moss if it could make other claims, he next ruled that *Maydak v. Dept of Jusice*, 218 F.3d 760 (D.C. Cir. 2000), and *August v. FBI*, 328 F.3d 697 (D.C. Cir. 2003), prevented agencies from bringing up exemptions not claimed originally unless the failure to do so was clearly a matter of human error. Moss found that was not the case here, but, in line with *Maydak* and *August* allowed the agency to make additional exemption claims where they pertained to matters of national security or privacy. The FBI asked for reconsideration, arguing this time that *Maydak* and *August* only applied where an agency asserted a new claim at the appellate level, not at the district court level. Moss indicated that "the Court agrees with both parties that the D.C. Circuit has not explicitly addressed the principles that should govern a district court's consideration of such an untimely assertion—that is, an assertion of a FOIA exemption that is made after the parties have filed comprehensive cross-motions for summary judgment and the district judge has adjudicated those cross-motions." Finding recent case law suggested that district court judges should retain discretion in deciding whether to accept new exemption claims, Moss observed that "basic principles of fairness, efficiency, and finality, moreover—principles inherent in the rules of civil procedure that apply with extra force in the

ACCESS REPORTS

context of FOIA litigation—counsel in favor of requiring the government to make some threshold showing of good cause to avoid a finding of forfeiture. Such a showing need not be an onerous requirement." But, he noted, "what the government cannot argue is that it is permitted to assert additional FOIA exemptions absent any showing of good cause whatsoever. That rule would sweep too broadly." He added that "to the extent that the FBI argues that the D.C. Circuit's caselaw permits it to advance a FOIA exemption now that it did not advance previously *absent* a showing of good cause, it is wrong." Clarifying his earlier ruling, Moss permitted the FBI to assert exemption claims under Exemption 7, indicating that "such documents may implicate *both* national security and privacy issues. . .In any event, the FBI has represented that the records at issue here could, if revealed, jeopardize ongoing FBI investigations." By contrast, Moss pointed out that the agency's Exemption 5 claims did not implicate national security or privacy issues. However, he permitted the agency to assert attorney-client privilege and attorney work-product privilege to a handful of records there were sufficiently similar to other disputed records the agency had claimed were privileged. But Moss rejected the agency's attempt to assert the deliberative process privilege. He explained that "to the extent the FBI's present argument is *not* a categorical one, but instead turns on a case-by-case application of the deliberative-process privilege to the records it now seeks to withhold, such an argument presents a substantial risk of expanding the scope and duration of the present litigation. The FBI appears to have asserted the deliberative process privilege to protect information contained in over 450 pages of records. . .[which] significantly increases the likelihood that the present litigation will be prolonged." The FBI had requested a stay until a final judgment, but, while agreeing with the need for a stay, Moss sided with the plaintiffs in giving the agency a 60-day stay. (*Ryan Noah Shapiro; Jeffrey Stein; National Security Counselors; Truthout v. U.S. Department of Justice*. Civil Action No. 13-555 (RDM), U.S. District Court for the District of Columbia, May 25)

A federal court in Washington has ruled that the U.S. Army Corps of Engineers properly withheld the current draft of its Programmatic Biological Assessment for Shellfish Activities in Washington State Inland Marine Waters from the Pacific Coast Shellfish Growers Association under **Exemption 5 (privileges)**. The PBA was required by both the Clean Water Act and the Endangered Species Act and included consultation with other agencies like the EPA and the Fish and Wildlife Service. The Shellfish Growers Association requested the draft, which the agency withheld because it had not yet been completed. While there was no argument that the PBA was predecisional, the Shellfish Growers Association questioned whether it was deliberative, arguing that two earlier district court rulings had found that Endangered Species Act consultations were not always deliberative. In this case, however, the court disagreed, noting that "the Shellfish PBA at issue relates to the *programmatic* biological assessment by the Corps. Rather than making specific scientific findings related to a single permit application, the Shellfish PBA covers general categories of future work activities. In this sense, even discussing specific facts or scientific findings may reveal internal deliberative processes (and policy judgments) that reflect the categories of conduct the Corps seeks to regulate and how it proposes to do so in accord with the ESA. In other words. . .the Shellfish PBA here *is* 'open to discretionary decisionmaking.'" The court added that "the inclusion or exclusion of activity categories necessarily entails some give and take as to what types of activities may be accommodated in a programmatic manner, especially when paired with the informal participation of the Services. In fact, comparing earlier drafts of the Corps' Shellfish PBA and the Corps' pronouncements on the subject matter of the Shellfish PBA suggests that priorities may have shifted during the course of internal deliberations." The Shellfish Growers Association argued the process contemplated input from groups like it. But the court explained that "whether the Pacific Growers or its members have other rights of access to the Shellfish PBA is irrelevant to the Court's FOIA inquiry." The Shellfish Growers argued the agency had waived the privilege by disclosing portions to Indian tribes. The court responded that "waiver of a FOIA exemption as to one document does not extend to other documents. It is undisputed that the Corps has never revealed the [most recent] draft of the Shellfish PBA to any non-governmental entity." (*Pacific Coast Shellfish Growers Association v. United States Army*

Corps of Engineers, Civil Action No. 16-193RAJ, U.S. District Court for the Western District of Washington, May 25)

A federal court in Pennsylvania has ruled that the FBI must **search** for records in its file on convicted murderer Odell Corley that no longer pertain to the question of Corley's guilt and provide an index to the counsel for Jessica Leigh Johnson, an investigator for the Federal Community Defender Office in Philadelphia, which is representing Corley in his federal appeal of his state conviction. The court had previously agreed with the FBI that Corley's post-conviction appeal meant the FBI records pertained to an ongoing investigation for purposes of **Exemption 7(A) (ongoing investigation or proceeding)**. But the court also told the FBI to disclose all records that had been disclosed to Corley as part of discovery during his original trial After having done so, the agency contended that it had no practical way to determine if any other materials had been made public through the trial and asked the court to dismiss the case. Johnson argued the FBI had not met its burden of showing that all other records remained exempt. The court agreed, noting that while the FBI contended that its files consisted of those records that had been released to Corley in discovery and those records that were not made public. But the court indicated that it "foresees an third category of documents—documents that were not disclosed at Mr. Corley's trial and were not included in the Discovery File, but have not the 'connective tissue' between the document and the claimed exemptions due to the information that *was* disclosed through discovery and during Mr. Corley's trial." The court observed that "as Ms. Johnson points out, the FBI is the sole party in possession of both the Discovery File and its own investigative file. Consequently, the FBI is the only party capable of comparing the two sets of documents and determining whether portions of its files are segregable and nonexempt. In this instance, the agency asks that the Court 'listen to reason' by listening only to what the agency has to say on the matter. The assertions in the [FBI] Declaration that the task of comparing the two sets of documents would be unduly burdensome do not justify the FBI's failure to compile a *Vaughn* index with particular details connecting each withheld document to the claimed exemptions as well as sufficient detail to allow the Court to determine whether all segregable nonexempt portions have been disclosed." But the court indicated that it would "limit disclosure of the requested documents to only Ms. Johnson's counsel. After reviewing the documents, counsel may propose a schedule to the Court for the disclosure of documents to others, including Ms. Johnson. The FBI will then have an opportunity to submit specific objections to the proposed schedule." (*Jessica Leigh Johnson v. Federal Bureau of Investigation*, Civil Action No. 14-1720, U.S. District Court for the Eastern District of Pennsylvania, May 12)

After previously ruling that National Security Counselors was not eligible for **attorney's fees** because it was little more than an alter ego for its attorney, Judge Rosemary Collyer has awarded NSC $55,000, a 40 percent reduction of its $91,750 request. NSC had requested fees for four FOIA requests, two to the CIA and two to the Defense Department, claiming that they substantially prevailed. Instead, Collyer had decided NSC was not eligible at all, a ruling that was overturned by the D.C. Circuit. On remand from the D.C. Circuit, Collyer found that NSC had not prevailed as to one of its requests to the CIA, but grudgingly admitted that NSC had prevailed on the other three requests. DOD argued that merely because it had responded to a 13-year old request seven months after NSC had filed suit concerning the agency's processing of the request, was not sufficient evidence that the NSC suit caused the agency's actions. Collyer noted that "in light of the timing of the release of the documents, this suit can reasonably be regarded as causing the release of records." DOD also argued that the heavily redacted documents released did not shed light on government activities or operations. Collyer observed that "defendants cite no legal authority to support this proposition" and indicated that "the Court declines to adopt this reasoning as it would encourage heavy redaction." NSC urged Collyer to accept a revised version of the *Laffey* matrix from determining hourly rates, which NSC argued was more

current and took into account their attorneys' specialized expertise. Choosing instead to accept the traditional *Laffey* rates, Collyer noted that "the problem for NSC is that this was a typical FOIA case that was not complex. It did not require the skills of a specialist in national security or privacy law. In fact, the bulk of the work for which fees are requested was not even FOIA litigation, it was uncomplicated fees litigation." Finding that the hours NSC claimed were duplicative in some respects and did not reflect contemporaneous recordkeeping, Collyer lowered the requested award by 40 percent, allocating 33.5 percent of the costs to the CIA and 66.5 percent of the costs to the Defense Department. (*National Security Counselors v. Central Intelligence Agency, et al.*, Civil Action No. 11-442 (RMC), U.S. District Court for the District of Columbia, May 25)