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Washington Focus: A deposition given by Karin Lang, director of the State Department's Executive Secretariat Staff since July 2015, provides some support to explanations given by aides of former Secretary of State Hillary Clinton that her use of a personal email account was not unusual, but also questions the extent to which agency FOIA staff were aware that she communicated via email while she was Secretary of State. Writing in the Washington Post, Spencer Hsu indicated that Lang, in her deposition in a FOIA suit brought by Judicial Watch, explained that the head of the FOIA unit grew curious about Clinton's apparent lack of emails "when Mrs. Clinton's photo appeared in the media with her using, appearing to use some sort of a mobile device." However, after the unit chief followed up with the secretary's information technology office, he was told Clinton did not have a departmental email account. Lang also dispelled a statement made by Cheryl Mills, Clinton's former chief of staff, in which Mills assumed the agency captured Clinton's emails because they were sent to others at State. Lang told Judicial Watch that "it would not be possible to do that except by searching individual. . .by individual, which would not be reasonably possible."

Congress Passes New FOIA Amendments

Congress passed the Senate version of the "FOIA Improvement Act of 2016"June 13 and sent it to President Barack Obama for signature. The compromise breaks the logjam created last session when both chambers passed separate bills amending FOIA but failed to reconcile them before the session ended. The current session began with both chambers again passing their own set of FOIA amendments early in the session that largely mirrored the previous session's bills, setting up the same political dynamic that ended in failure in 2014 when the two bodies could not reconcile their differences. This time, however, Rep. Jason Chaffetz (R-UT), chair of the House Oversight & Government Reform Committee, and Ranking Member Rep. Elijah Cummings (D-MD), after meeting with staff and some open-government advocates, accepted the Senate bill. Once that hurdle was out of the way, the House passed the Senate bill.

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While large portions of the amendments deal with expanding the role of positions first established in the 2007 OPEN Government Act, like the Office of Government Information Services, Chief FOIA Officers, and public liaisons, there are some substantive changes as well. The most controversial change is the codification of the foreseeable harm test that originally appeared in the Reno Memo during the Clinton administration and was resurrected in the Holder Memo issued by the Obama administration. When it first appeared in the Reno Memo, the foreseeable harm test instructed agencies to disclose records where the harm from disclosure primarily protected a government interest rather than a third-party interest. At that time, the foreseeable harm test was applied primarily to Exemption 2 (internal practice and procedures) and Exemption 5 (deliberative process privilege). Under the Bush administration, the Ashcroft Memo emphasized protecting government records over disclosure and the foreseeable harm test temporarily disappeared. The foreseeable harm test was restored by the Holder Memo under the Obama administration, but agencies' reluctance to use it disappointed both open-government advocates and member of Congress, who decided to codify its application to all exemptions except Exemption 3 (other statutes).

As it appears in the new amendments, the foreseeable harm standard requires that: (8)(A) An agency shall—(i) withhold information only if –(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law; and (ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and (ii)(II) take reasonable steps necessary to segregate and release nonexempt information; and (B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3). The policy intent behind including the foreseeable harm standard in the statute was to force agencies to apply the standard routinely rather than as a matter of agency discretion. Unfortunately, the language "reasonably foresees that disclosure would harm an interest protected by an exemption" can easily be interpreted to mean that if records fit within the parameters of an exemption, then they can be withheld, which is essentially the standard today. It will be interesting to see if courts in the future interpret the codification as requiring anything more.

The new amendments also include a compromise intended to get at the overuse of the deliberative process privilege to protect records that are frequently the essence of how government decisions are made. The set of amendments that failed in the last Congress originally inserted a public interest test for use in balancing whether to disclose records that qualified under the deliberative process privilege. That test was discarded and replaced with a 25-year rule, requiring agencies to disclose records that could be withheld under Exemption 5 after they were 25 years or older. That rule was watered down yet again so that "the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested." Any solution that chips away at agencies' ability to claim the deliberative process privilege for records in perpetuity is worthwhile, but the 25-year rule—modeled after the 25-year automatic declassification standard and considerably less generous than the 12-year rule contained in the Presidential Records Act—is probably going to benefit researchers and historians much more than requesters interested in current government decision-making.

The amendments also contain some changes that will affect the way agencies respond to requests. When an agency extends the time limits by more than ten working days, its letter "must notify the requester of their right to seek dispute resolution services from the Office of Government Information Services." When making a determination on a request, agencies must notify the requester of their right to seek assistance from the agency's FOIA Public Liaison; and for adverse determinations, their right to seek dispute resolution from the FOIA Public Liaison or the Office of Government Information Services. Further, agencies must allow requesters a minimum of 90 days in which to file an administrative appeal. Agency appeal deadlines vary, but are typically no longer than 60 days. By extending the statutory deadline to 90 days "after the date of such

adverse determination," Congress is attempting to fix an irritating procedural problem that allows agencies to argue in court that a requester has lost his or her right to pursue the request any further by failing to exhaust their administrative remedies.

Another fix involving fees prohibits agencies from charging fees when, after providing timely notice to the requester that the agency is extending the response time by 10 days, the agency then fails to respond within 10 days. Agencies are excused from this prohibition when unusual circumstances apply and "more than 5000 pages are necessary to respond to the request." In such cases, agencies may still charge fees if timely written notice has been made to the requester and "the agency has discussed with the requester via written mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request." Further, an agency's failure to comply with the time limits is excused if a court determines that exceptional circumstances exist "for the length of time provided by the court order."

Agencies are required to review their FOIA regulations within 180 days after enactment and to "issue regulations on procedures for disclosure of records under [the FOIA] in accordance with the amendments." Two more data elements are added to the annual report requirements—the number of times "the agency denied a request for records under subsection (c)" (the exclusions) and "the number of records that were made available for public inspection in an electronic format under subsection (a)(2)" (the affirmative disclosure section).

An online requesting portal similar to FOIA Online is created by the amendments. OMB and the Attorney General are tasked with establishing a consolidated online request portal that allows requesters to submit a request to any agency from a single website. Agencies are allowed to have their own independent portals, but OMB will be charged with establishing standards for interoperability between the consolidated portal and agency case management systems.

The amendments continue to expand and solidify the role of OGIS in FOIA oversight. The amendments allow OGIS to issue advisory opinions and report to Congress and the President annually. To resolve an issue in which OGIS was prohibited from providing its annual report to Congress until approved by OMB, the amendments make clear that OGIS is not required to obtain prior approval before reporting to Congress with the caveat that "such submission include a statement that the views expressed are those of the OGIS Director and not necessarily the views of the President."

This is the sixth set of amendments to FOIA since it was signed into law by President Lyndon Johnson in 1966. This set of amendments is not as ambitious as those originally passed by the House last session, but that failed experiment has resulted in the House becoming more realistic concerning what might or might not survive the final cut. This current legislation also reflects a Congress that is more willing to address what it perceives as FOIA's problems more frequently than every decade. As Rep. Darrell Issa (R-CA), a sponsor of the House bill, told *The Hill*: "When this bill becomes law and is signed by the president, there will be enough left for a new bill to start again."

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Views from the States…

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

Arizona

A court of appeals has ruled that the trial court erred in finding that the Department of Child Safety did not have to search its database for statistical information in response to two multi-part requests submitted by the ACLU of Arizona because that would constitute creation of a record. But the appeals court agreed with the trial court that DCS was not required to provide analytical data pertaining to the statistical information because that did constitute creation of a record. The agency responded to a number of the ACLU's requests but contended that it was not required to respond to others because doing so would constitute creation of a record. The trial court agreed with the agency and the ACLU appealed. The appeals court sided with the ACLU on the obligation to conduct a search of the database. The appeals court noted that "because DCS uses [its database] to maintain and collect the records it needs to do its job, it must query or search [the database] to comply with its obligations under Arizona's public records law." But that did not mean the agency was required to recompile data in response to the ACLU's requests. The court indicated that "the ACLU's outstanding requests sought information about information—information that DCS had not previously compiled. Arizona's public records law does not, however, require an agency to create a new record that compiles information about information maintained electronically or, indeed, in paper. We acknowledge that distinguishing between searching an electronic database and creating a new record that compiles previously un-compiled information about information may be a difficult task. But on this record, we agree with the [trial] court that DCS was not 'legally required' to respond to the outstanding requests." The appeals court agreed with the ACLU that the trial court had not considered whether or not the agency was dilatory as a legal matter in its earlier responses. The appeals court sent that issue back to the trial for further consideration. It also found that since the ACLU had prevailed on some issues the trial court should reconsider awarding fees to the ACLU, including any fees for litigating the case on appeal. (*American Civil Liberties Union of Arizona v. Arizona Department of Child Safety*, No. 1CA-14-0781, Arizona Court of Appeals, Division 1, June 9)

District of Columbia

A court of appeals has ruled that the Legislative Privilege Act, based on the federal Constitution's Speech or Debate Clause prohibiting legislators from being questioned for actions taken in their legislative capacity, does not qualify as an exempting statute under the D.C. FOIA. In response to a request by Kirby Vining for records about the proposed development of McMillan Park, the D.C. government disclosed nearly 1,000 pages, but withheld 149 pages under the exemption for legal privileges as well as the Legislative Privilege Act. The trial court sided with the D.C. government, but on appeal, the court of appeals reversed. The appeals court noted that that "as amended in 2000, D.C. FOIA requires the D.C. Council to fulfill its open-government objectives. To allow the Council to invoke the Legislative Privilege Act. . .and withhold all information related to its legislative activities would permit the Council to withhold swaths of public documents in direct conflict with FOIA's open-government objectives." The court rejected the Council's argument that it had disclosed a number of pages regardless of the Legislative Privilege Act. Instead, the court pointed out that "this argument suggests that the Council wants to retain unfettered administrative discretion to decide when to make disclosures under FOIA. But broad administrative discretion is exactly what the Council sought to remove from public bodies when it first passed D.C. FOIA forty years ago, and broad administrative disclosure is exactly what the Council surrendered when it chose to subject itself to FOIA." The appeals court indicated that the federal prohibitions in the Speech or Debate Clause were not analogous to the D.C.

Council's situation because Congress was not subject to FOIA and the D.C. Council was. The court pointed out that "in other words, we are confronted with an entirely different legal landscape—one in which the Council has chosen to accord itself a statutory privilege to protect itself, like Congress, from executive and judicial meddling, but unlike Congress, has also chosen to subject itself to an open-government law. The federal cases interpreting the Speech or Debate Clause simply do not speak to this situation." (*Kirby Vining v. Council for the District of Columbia*, No. 14-1322, District of Columbia Court of Appeals, June 9)

Georgia

A court of appeals has ruled that records pertaining to the death of an inmate at the Chatham County Detention Center are exempt because they are being used in a pending prosecution against two deputies at the Chatham County Sheriff's Office and an employee at the detention center. After an investigation, the Chatham County District Attorney filed charges against the three former employees. Media General requested video and related records concerning the inmate's death, but the Chatham County Sheriff's Office refused to disclose them, claiming they fell under the second prong of the ongoing investigation exemption. Media General argued the exemption did not apply to instances in which an agency was the subject of the pending prosecution. The appeals court found that was not the case here, noting that "the CCSO itself was not the subject of the pending investigation and prosecution; instead, *individuals* were." The appeals court added that "there is no evidence in the record that either the Sheriff himself or the CCSO as a whole was the subject of the investigation or prosecution." The appeals court observed that "under the circumstances of this case, the agency was not the subject of the prosecution. In fact, agency personnel requested criminal investigations of the individuals involved in [the inmate's] death, conducted internal investigations of the individuals for possible violations of agency policies, fired several of those individuals, and referred the matter to the district attorney for possible prosecution." (*Media General Operations, Inc. v. Al St. Lawrence*, No. A16A0280, Georgia Court of Appeals, June 15)

Hawaii

The supreme court has resolved a 20-year-old dispute over whether police disciplinary records that do not result in discharge are exempt under the Uniform Information Practices Act by ruling that because the UIPA was amended subsequent to the 1996 supreme court decision in *State of Hawaii Organization of Police Officers v. Society of Professional Journalists*, 927 P.2d 386 (1996), to recognize a significant privacy interest in police disciplinary records, the holding in *SHOPO* that there was no privacy interest in such records is no longer applicable. As a result, the supreme court found that police disciplinary records that do not result in discharge can be withheld unless the public interest in disclosure outweighs the privacy interest. Ruling in a case brought by *Civil Beat* pertaining to disciplinary actions taken against 12 Honolulu Police Officers from 2003 to 2012, the supreme court indicated that it did not have enough information to determine if disclosure of the records would be in the public interest and remanded the case back to the trial court for a determination. The 1996 *SHOPO* decision had as much to do with politics as it did with the UIPA and when the police officers' union lost, it lobbied the state legislature to amend the UIPA to provide it with an exemption. However, in a compromise solution, the legislature created a statutorily recognized significant privacy interest in police disciplinary records, which was to be weighed against the public interest. When *Civil Beat* filed suit against the Honolulu Police, the trial court found that because of *SHOPO* police disciplinary records were not considered private. The police officers' union intervened on appeal, arguing that the subsequent legislative amendment exempted disciplinary records. The supreme court agreed with the police officers' union that *SHOPO* was no longer the appropriate standard for assessing police disciplinary records since the legislature had added the significant privacy interest standard when it amended the UIPA. But the supreme court disagreed with the police officers' union that the new standard was meant to create a per se exemption for

police disciplinary records. Instead, the supreme court noted that the significant privacy interest standard was seen as "requiring a balancing of the individual officer's privacy interests against the public interest in disclosure. Instances of less serious police officer misconduct, even those resulting in suspension, would likely not be subject to disclosure because the officers' significant privacy interests would outweigh the public's interest in knowing about the misconduct. The more egregious the misconduct, the more likely the public interest would outweigh the individual privacy interest." Because there was insufficient evidence in the record concerning the 12 incidents of misconduct to assess the public interest in disclosure, the supreme court sent the case back to the trial court for further proceedings. (*Peer News LLC v. City & County of Honolulu*, No. SCAP-14-0000889, Hawaii Supreme Court, June 9)

Kentucky

The Attorney General has found that the Secretary of the Kentucky Personnel Cabinet and the Governor's Chief of Staff violated the Open Meetings Act when they threatened to arrest Tommy Elliott, chair of the Kentucky Retirement Board, for disrupting a public meeting if he insisted on participating as a board member at the Retirement Board's May 2016 meeting. Gov. Matthew Bevin had attempted to remove Elliott from the board before his statutory term expired. In an earlier opinion, the Attorney General had found the governor did not have the authority to remove Elliott before his term expired. As a result, Elliott participated in the Retirement Board's April 2016 meeting. But at the May meeting, the Secretary of the Personnel Cabinet and the Governor's Chief of Staff, accompanied by several state police officers, threatened to arrest Elliott if he participated. Elliott attended the May meeting, but did not participate. The Attorney General received a complaint about the meeting asking if such threats constituted a violation. The Attorney General found that they did, noting that "the indication of [Elliott's] arrest if he tried to participate, and the presence of law enforcement officers prior to the meeting and standing in the room during the meeting, created an atmosphere that chilled or confined the public's right to freely attend the public meeting. The condition also chilled or confined the public's concurrent right to freely express their approval or disapproval of any action the Board may have taken. Would a member of the public feel free to attend a public meeting of a public agency where multiple law enforcement officers are standing by the doors to the room where the meeting is held, and a Board member has been informed that he faces arrest if he attempts to participate in the meeting? This office does not believe so." (Order No. 16-OMD-124, Office of the Attorney General, Commonwealth of Kentucky, June 13)

Pennsylvania

A court of appeals has ruled that the Office of Open Records did not err when it declined to allow Ralph Duquette to revise his original claims against the Pennsylvania Historical and Museum Commission for records pertaining to a proposed shale gas pipeline. Duquette submitted an open-ended request for records pertaining to the proposed pipeline. The Commission located 4,620 pages of records, granted access to 2,154 pages, and withheld 2,466 pages. The Commission told Duquette that it was allowed to charge 50 cents a page under the History Code. Duquette appealed to OOR, challenging the reasonableness of the copying fees and requesting a fee reduction or waiver. With respect to the withheld records, Duquette indicated that he "did not ask for these specific documents," but that to the extent they were responsive to his request he asked OOR to order the Commission to disclose them. OOR ruled against the Commission on the matter of fees, indicating that OOR had the statutory authority to set copying fees and had done so by setting copying fees at 25 cents a page. OOR rejected Duquette's attempt to modify his request on appeal, noting that its review was confined to the request as written, but that Duquette could submit another request to the Commission if he wanted more records. Duquette then filed suit challenging OOR's decision. Upholding OOR's decision, the court of appeals noted that Duquette "did not request the undisclosed documents. Therefore, OOR properly limited its review to the original request as written." The court added that "moreover, because [Duquette] admits that he

did not request those records, he cannot credibly claim that [the Commission] improperly withheld them." (*Ralph Duquette v. Pennsylvania Historical and Museum Commission*, No. 1511 C.D. 2015, Pennsylvania Commonwealth Court, June 21)

The Federal Courts…

Judge Randolph Moss has ruled decisively in favor of the State Department's use of 8 U.S.C. § 1202(f) of the Immigration and Nationality Act to withhold records pertaining to the revocation of visas under **Exemption 3 (other statutes)**, finding that § 1202(f) covers information pertaining to both issuing and revoking visas. The case involved a request by Mauricio Rojas Soto, a Colombian citizen, for records concerning the agency's decision to deny Soto a non-immigrant visa to enter the United State based on allegations that he had been involved in drug trafficking. At the same time, State denied visas to Amalia Sierra Correal and Isabella Rojas Sierra, and revoked a student visa previously issued to Nathalia Rojas Sierra, apparently on the ground that the spouse, son, or daughter of anyone involved in drug trafficking was also inadmissible. The family filed suit and in August 2015 Moss ruled against them on the visa application records, but asked for further briefing on the issue of whether § 1202(f) also protected the revocation of Nathalia's student visa. Several recent district court decisions, particularly *Darnbrough v. Dept of State*, 924 F. Supp. 2d 213 (D.D.C. 2013), had concluded that because § 1202(f) appeared in a section of the INA dealing with issuing visas, it did not reach revocation of visas. However, the State Department's argument has remained consistent—that the agency used the same kinds of records to revoke a visa that it used to issue a visa and, thus, there was no legal distinction between them. Agreeing with the agency's position, Moss noted that "the language of the statute, standing alone, is sufficiently capacious to encompass this result. Indeed, although the Court previously withheld judgment on the issue, it now holds that this statutory language is best read to reach visa revocations, which 'pertain' to the 'issuance or refusal of visas or permits to enter the United States.' That is, as a textual matter, a decision to revoke a visa relates to, has a bearing on, or concerns the issuance of a visa—it nullifies that action." Moss observed that "it is difficult to understand why Congress would have intended to treat documents related to the issuance or refusal of a visa as confidential, while declining to protect similar (if not identical) documents that relate to the revocation of a visa." He added that "the revocation of a visa also, as the Department explains, involves *either* revisiting the information relied upon in the initial issuance of the visa *or* considering new information that would usually be made available in an application for the issuance of a new visa. In either situation, the Department's decision to revoke a visa is essentially the same as its decision whether to issue a visa in the first instance." Soto had asked Moss to reconsider his original decision accepting the State Department's finding that he had been involved in drug trafficking. As new evidence to support the motion for reconsideration, Soto explained that he had made a FOIA request to the DEA, which responded that it had no records on him. Moss was not convinced by the DEA response, noting that "the [State] Department did not decline to provide records to the plaintiffs because none existed; indeed, it told them that it had identified over 400 pages that might be responsive to their request." Moss pointed out that "the fact that a different agency failed to identify responsive documents does not undermine the Department's assertion that it located responsive documents, nor is it evident how such a suggestion would support the plaintiffs' efforts to *obtain* documents from the Department." Soto argued State should have processed his request under the **Privacy Act** as well, since he had cited the Privacy Act in his complaint. But Moss indicated that "the only claim alleged [under the Privacy Act]—and the only relief sought—relates to the plaintiffs' demand that the Department 'immediately release the requested records to the plaintiffs.' Likewise, in their prior briefing, Plaintiffs did not raise this issue—or even hint at it. In light of their failure to raise any claim for correction of agency records or damages under the Privacy Act until now,

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the Court declines to reconsider its opinion on this basis." (*Mauricio Rojas Soto, et al. v. U.S. Department of State*, Civil Action No. 14-604 (RDM), U.S. District Court for the District of Columbia, June 17)

A federal court in Arizona has ruled that the FDA has not yet justified its claims that records about ZMapp, currently being considered for approval under an Investigational New Drug application, are protected by **Exemption 4 (confidential business information)** or **Exemption 6 (invasion of privacy)**, but that because the Goldwater Institute requested records about deliberations during the approval process such records are protected by **Exemption 5 (deliberative process privilege)**. Based on press reports that Dr. Kent Brantly and Nancy Writebol, two health workers who contracted the Ebola virus while working in Africa, had been flown to the United States and treated successfully with ZMapp, the Goldwater Institute requested the agency's records on ZMapp, arguing that the existence of the IND application had been publicly acknowledged. After learning that Brantly and Writebol had disclosed in a report that they received three doses of ZMapp, the FDA disclosed two emails authorizing Brantley and Writebol's expanded access to ZMapp to proceed. The agency, however, insisted that the rest of the documents were protected by Exemption 4, Exemption 5, and Exemption 6. Faulting the agency for not providing an index of the records it claimed were exempt, the court noted that "it is unclear to the Court, which if any, responsive documents would fall under [Exemption 4]. Defendant has not provided a catalog of the documents in their supporting memorandum." The court added that it "cannot conclude that Defendant's assertion that trade secrets and [confidential commercial information] are 'inextricably intertwined' alone is sufficient to meet its burden. Therefore, the Court reserves judgment on whether Defendant lawfully denied Plaintiff's request based on FOIA Exemption 4." The court was considerably more certain as to Exemption 5. "Plaintiff's FOIA Request expressly asked for documents reflecting the FDA's 'deliberations made during [the authorization] process.' By the very nature of the documents sought, the Court concludes that Defendant lawfully withheld at least some documents under Exemption 5." The court found the agency had not sufficiently explained its claims under Exemption 6. The court noted that "it is unclear to the Court what personal information Plaintiff seeks that would fall under this Exemption. Like Exemption 4, the Court is left without a description or index of the documents to determine if Defendant has met its burden particularly when Dr. Brantly and Ms. Writebol both disclosed their participation in ZMapp INDs." The court observed that "defendant identified nine volumes of responsive records in its initial denial. Because the Court is unable to determine if the exemptions apply based on the generalizations given in [the agency's affidavit], the Court orders Defendant to submit a *Vaughn* index within 60 days of the date of this Order." (*Goldwater Institute v. United States Department of Health and Human Services*, Civil Action No. 15-01055-PHX-SRB, U.S. District Court for the District of Arizona, June 16)

A federal court in Connecticut has ruled that while some components of the Defense Department have shown that they conducted an **adequate search** for records concerning Cheryl Eberg, a female Army veteran who received disability compensation after her retirement due to her experience of military sexual trauma while serving under Lt. Col. William Adams at Fort Dix, and complaints against Adams, but that 10 other components have failed to justify their searches. The court also found the agency improperly invoked a *Glomar* response neither confirming nor denying the existence of records concerning complaints against Adams because the public interest in disclosing the records outweighed Adams' privacy interest. The court's primary concerns about those components whose affidavits were deemed inadequate was their failure to explain the records systems searched and the reasons for searching those record systems while not searching others. Addressing the affidavit of the Army Deputy Chief of Staff, which told the court it had only searched under Eberg's identifying information even though its database did not contain personally identifying information, the court indicated that "the use of such search terms in [the database] thus appears unlikely to yield responsive records. [The Army Chief of Staff's affidavits] are therefore also inadequate in that they

provide no explanation why other search terms would not have been more likely to capture responsive documents." Turning to the agency's use of a *Glomar* response to deny records concerning Adams, the court observed that "the information requested by [Eberg] does not seek 'to obtain personal information about government employees,' but rather, 'relates to the employee's performance of his public duties,' leading subordinates under his command." The court granted limited discovery pertaining to the adequacy of the agency's search. (*Cheryl Eberg v. U.S. Department of Defense*, Civil Action No. 14-01696 (VAB), U.S. District Court for the District of Connecticut, June 16)