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Washington Focus: President Barack Obama signed the "FOIA Improvement Act of 2016" June 30. The new amendments became effective once Obama signed them into law. The White House released a detailed fact sheet at the time emphasizing the Obama administration's advances in transparency. . .Josh Gerstein reports in POLITICO that Judicial Watch has asked Judge Reggie Walton to permit discovery in yet another of the public interest group's multiple FOIA suits pertaining to former Secretary of State Hillary Clinton's emails. The suit involves Judicial Watch's request for records pertaining to a 2012 YouTube video featuring President Obama and Clinton that was aired in Pakistan. In its discovery request, Judicial Watch argues that both Under Secretary for Management Patrick Kennedy and former Legal Advisor Harold Koh should have made certain that Clinton's emails were searched because since they both had received emails from her private clintonemail.com address, they knew of the existence of Clinton's emails.

D.C. Circuit Finds Private Email Account Subject to FOIA

Considering how important electronic records have become in responding to FOIA requests, the D.C. Circuit has rarely addressed an electronic records issue head-on. But now, in a decision overturning a district court ruling that had been relied upon by the government in its arguments concerning former Secretary of State Hillary Clinton's private email server, the D.C. Circuit has ruled that agencies cannot evade searching for and processing electronic records solely because an agency official has used his or her personal email account to conduct government business. The case also nibbles away at some of the most bedrock principles concerning custody and control that came out of the Supreme Court's ruling in *Kissinger v. Reporters Committee* 445 U.S. 136 (1980), in which the Court found the State Department was not required under FOIA to recover transcripts of Henry Kissinger's telephone conversations while he was National Security Advisor and, then, Secretary of State, because by donating the transcripts to the Library of Congress, Kissinger had removed them from the custody and control of the State Department.

The case involved a request by the Competitive Enterprise Institute for emails sent by John Holdren, Director of the Office of Science and Technology Policy, from jholdren@whrc.org, Holdren's email account at his previous employer, Woods Hole Research Center. CEI had discovered through prior litigation that Holdren had sent business-related emails from his Woods Hole email address, and, indeed, the agency found 110 emails sent from Holdren's Woods Hole email account that he had copied to his OSTP account, which under the policy at the time was the recommended way that agency officials should preserve emails sent or received on non-government accounts. But the agency refused to search Holdren's Woods Hole email account, arguing that it had neither custody nor control of those records. When CEI filed suit, Judge Gladys Kessler ruled that *Kissinger* was dispositive because the agency did not have custody or control of the Woods Hole email account.

Writing for the court, Senior Circuit Court Judge David Sentelle noted that "an agency cannot shield its records from search or disclosure under FOIA by the expedient of storing them in a private email account controlled by the agency head. . ." He pointed out that the custody and control language from *Kissinger* "obviously states the law, but is not controlling on the facts before us." He explained that "the records in *Kissinger*. . .were no longer in the custody of the Department of State or under the control of Secretary Kissinger. The documents in question had been donated to the Library of Congress, which was not a party to the action. The Supreme Court unsurprisingly ruled that the Department did not have to produce what it did not have. Again, that does not speak to the question before us." Indeed, Sentelle indicated, the State Department had effectively ceded ownership of the records to Kissinger. He observed that "there is no assertion by the agency before us that it has ceded the relevant records to the Director. . . It is sufficient for us to conclude. . .that *Kissinger* does not control the case before us."

Instead, Sentelle made clear that several D.C. Circuit decisions were considerably more on point than *Kissinger*. He pointed out that *Burka v. Dept of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996), held that "the agency must search and disclose records that were not on its premises but were under its 'constructive control.' This comes closer to the question before us." Even more on point was *Ryan v. Dept of Justice*, 617 F.2d 781 (D.C. Cir. 1980), in which the D.C. Circuit rejected the government's claim that a certain record was in the exclusive possession of the Attorney General and was not in the custody and control of the Department of Justice. Sentelle explained the holding of *Ryan* was that "an agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door or because he is the head of the agency."

Applying the holding of *Ryan*, Sentelle observed that "if the agency head controls what would otherwise be an agency record, then it is still an agency record and still must be searched or produced. The agency's claim before us simply makes little sense. That argument relies on the proposition that the emails in question are under the control of a private entity, not the government." He added that "it is not apparent to us that the domain where an email account is maintained controls the emails therein to the exclusion of the user, in this case Director Holdren, who maintains the account." Sentelle indicated that it was contrary to the intent of FOIA to provide public access to government records to allow an agency to avoid disclosure by maintaining the records on a non-government email domain. Analogizing the claim to paper records, he pointed out that "it would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming they are under her control."

Circuit Court Judge Sri Srinivasan concurred in the court's ruling, but focused on distinguishing *Kissinger* from the situation in the OSTP case. He observed that in *Kissinger* Kissinger had obtained an opinion from the State Department's Legal Advisor that the transcripts were his personal records and then had removed them to the Library of Congress under a claim of right. Srinivasan explained that "in this case, there

is no comparable indication (at least at this stage) that Holdren holds any agency records in his private email account under a claim of right. To be sure, he retains possession over the contents of the account. But there is no indication he has asserted control over agency records in the account in a manner inconsistent with agency control." He added that "I see no basis for concluding that Holdren holds any agency records in his private email account under a claim of right, such that the agency would lack the requisite control over the records for a withholding." He pointed out that on remand the agency could still argue the emails were not agency records and support that argument by providing evidence that Holdren had a claim of right. Having clarified that, Srinivasan observed that in his concurrence he agreed that "a current official's mere possession of assumed agency records in a (physical or virtual) location beyond the agency's ordinary domain, in and of itself, does not mean that the agency lacks the control necessary for a withholding." (*Competitive Enterprise Institute v. Office of Science and Technology Policy*, No. 15-5128, U.S. Court of Appeals for the District of Columbia Circuit, July 5)

Views from the States…

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

Alabama

The supreme court has ruled that a trial court erred when it found that disclosure of heavily redacted financial aid forms for Alabama State University football players whose student aid had been revoked would not violate the federal Family Educational Rights and Privacy Act because the redacted forms would provide no more information than the kind of directory information required to be made available under FERPA. When Alabama State refused to disclose the records, the *Montgomery Advertiser* filed suit, arguing that the data constituted only student directory information. Finding that the forms should be redacted, the trial court agreed that disclosure of the redacted information would not violate FERPA. The supreme court reversed. The court noted that "even as heavily redacted as the requested financial-aid forms would be under the trial court's judgment, the very nature of the financial-aid form would provide the Advertiser with information related to the student's financial aid—specifically, that the student referenced on the form had his or her athletic financial aid reduced or canceled. Information regarding a student's financial aid is not 'directory information' subject to disclosure under FERPA, rather, it is the very type of information FERPA was implemented to protect from disclosure." (*Kevin Kendrick v. Advertiser Company*, No. 1150275, Alabama Supreme Court, June 24)

Connecticut

The supreme court has ruled that the University of Connecticut Health Center and the FOI Commission applied the correct standard of review in relying on a security assessment of potential threats caused by the disclosure of the names of individuals who had violated protocols for the use of animals in experiments to determine that disclosure could cause harm to the individuals. People for the Ethical Treatment of Animals argued that under the Freedom of Information Act agencies had the burden of showing that an exemption applied and that deference to a security assessment was inappropriate. The supreme court noted that "the safety assessment must be performed by the department in the first instance, after consulting with the head of the relevant state agency, and that both the commission and the trial court should defer to the department's assessment unless the party seeking disclosure establishes that the determination was frivolous, patently unfounded or in bad faith." Having rejected PETA's argument challenging the standard of review,

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however, the supreme court indicated that "the fact that the commission, in effect, applied the proper standard does not necessarily mean, however, that it properly determined that the standard was satisfied. Because the trial court concluded that the commission had applied the wrong standard, the court had no reason to address that issue." As a result, the supreme court sent the case back to the trial court to determine if the commission had properly applied the standard in finding that the records could be withheld. (*People for the Ethical Treatment of Animals v. Freedom of Information Commission*, No. 19593 and No. 19594, Connecticut Supreme Court, June 28)

A trial court has ruled that the FOI Commission did not err in concluding that the Department of Emergency Services and Public Protection properly responded to James Torlai's requests for arrest records made by Connecticut State Police Troop L in June 2012. Torlai argued that the state police had improperly excluded some records subject to erasure. Finding the agency had not intentionally delayed compliance in order to avoid disclosing arrest records subject to erasure, the court noted that "under these circumstances, ordering disclosure of erased records would do no good and instead would cause harm. . .[T]here is no wrongful agency conduct for the commission to deter." Torlai argued that breathalyzer strips disclosed by the state police were illegible. But the court pointed out that "the law cannot expect an agency to do something impossible and make legible copies from illegible copies. In this situation, the commission had discretion as to whether to find a violation of the act and what remedy to impose. Here the department, rather than adopting an attitude of defiance or indifference, acknowledged the problem and agreed to take steps to remedy it. . . Given these circumstances, the commission did not abuse its discretion in declining to find a violation of the act and instead encouraging the department to do better in the future." The court agreed with the commission's decision that the state police had responded promptly. The court indicated that "complying with the plaintiff's current request was in itself a large undertaking. But the plaintiff filed an astonishing 42 other records requests with the department during that two year period. This sort of deluge cannot help but overwhelm a state agency." The court added that "the plaintiff cannot expect a state agency to ignore all its other important functions and cater to his own requests, especially when the plaintiff expresses no valid reason for more immediate compliance." (*James Torlai v. Freedom of Information Commission*, No. HHB CV15-5016760S, Connecticut Superior Court, Judicial District of New Britain, June 27)

Illinois

A court of appeals has ruled that the Illinois High School Association, a non-profit organization that oversees interscholastic athletic competitions for its member schools, is not a public body for purposes of the Illinois FOIA. The Better Government Association requested contracts from the IHSA, but was told by the organization that it was not subject to FOIA. BGA also requested similar information from District 230, a public school member of the IHSA. District 230 also refused to respond to BGA's request based on its contention that IHSA was not a public body. BGA then filed suit. The trial court sided with IHSA and BGA appealed. Based on case law precedent, the court of appeals indicated that to find that a non-governmental entity was covered by FOIA courts were required to consider whether the entity had a legal identity independent of government, the nature of the functions performed by the entity, and the degree of government control. Examining these three factors, the court of appeals found IHSA had an independent existence. As to the degree to which it performed a government function, the court indicated that "unlike education, participation in athletics is voluntary. Moreover, no matter the potential exclusion from elite competitions governed by IHSA, participation by member schools in the IHSA also is voluntary." The court added that "the mere fact that a private company may be connected with a governmental function does not create a public body where none existed before." The court found the IHSA was not controlled by government. The court noted that "as a not-for-profit association, ISHA does not have owners. Rather, the IHSA is controlled by its board members." (*Better Government Association v. Illinois High School Association*, No. 1-15-1356, Illinois Appellate Court, First District, Fifth Division, June 24)

Missouri

The supreme court has ruled that trial court did not err in finding that the City of Arnold did not act either purposefully or knowingly in violating the Sunshine Law. Rachal Laut and John Soellner requested records concerning the investigation of their complaint that Arnold police officers had accessed confidential records from the Regional Justice Information System. The police department conducted an internal affairs investigation, but refused to disclose any records under the personnel records exemption. After reviewing the records *in camera*, the trial court concluded that the records were personnel records except for an internal affairs report, which the trial ordered disclosed. Rather than request attorney's fees as the prevailing party, Laut and Soellner filed under a separate fees provision which provided for $5,000 in fees for a purposeful violation of the statute or $1,000 for a knowing violation. The trial court then ruled the police department's decision to originally withhold the records as personnel records was neither purposeful nor knowing and refused to award fees. The supreme court agreed that the police department's decision not to disclose records did not constitute a purposeful or knowing violation of the Sunshine Law. The supreme court noted that "a knowing violation requires that the public governmental body has actual knowledge that the Sunshine Law required production but did not produce the document. A purposeful violation involves proof of intent to defy the law or achieve further some purpose by violating the law." The supreme court explained that the "the legislature allowed such fees to be awarded based on proof by a preponderance of the evidence, a lesser standard than that required by the criminal law. It balances this lesser standard of proof, however, by expressly predicating liability on a finding of something *more* than merely showing one knew what one was doing; it requires proof that the alleged violator *knew that the conduct in question violated the Sunshine Law*." (*Rachal Laut and John M. Soellner v. City of Arnold*, No. SC 95307, Missouri Supreme Court, June 28)

New Jersey

A court of appeals has ruled that the ongoing criminal investigation exemption does not protect mobile vehicle recordings made by the Barnegat Township police of a traffic stop involving a driver who failed to stop when signaled by a Tuckerton Borough police officer. The MVR recording showed the driver being pulled over in a public parking lot in Barnegat Township. At the time the MVR recording was made, the Barnegat Township Chief of Police had issued an order requiring the recording of any traffic incidents involving the police. When John Paff, operator of a website, requested the recordings, the Ocean County Prosecutor's Office denied his request under a variety of claims, including the ongoing criminal investigation exemption. The trial court ruled in favor of Paff and Ocean County appealed. Ocean County argued that case law recognized that a law with statewide application could require the creation of such records, but that here the only law was a local order. The court found that "that is, in our view, a distinction without a difference. The chief had statutory authority to issue the order, and it is clearly binding and enforceable on the members of the department. We do not consider that simply because the order does not have statewide application, it is not 'required by law.'" Finding the recording was not made as part of a criminal investigation, the court noted that "the MVR recordings were made before there was any contemplation of a criminal investigation concerning the Tuckerton police officer. Further, given the mandate of the general order of the Barnegat Police Chief, it is abundantly clear that the MVR recordings were not initiated as part of an investigation into a suspected [failure to stop], but rather the recordings commenced simply because the Barnegat officers activated their overhead lights." (*John Paff v. Ocean County Prosecutor's Office*, New Jersey Superior Court, Appellate Division, June 30)

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Pennsylvania

A court of appeals has ruled that the Office of Open Records properly found that 14 broad requests submitted to the State System of Higher Education Universities by the Association of Pennsylvania State College and University Faculties for records related to its member institutions financial and budget reporting were sufficiently specific to qualify as requests under the Right to Know Law. After the requests were submitted, the institutions failed to respond within 30 days. The Association then complained to OOR. The State System claimed the requests were too broad to be considered legitimate requests. The court explained that "while the OOR cannot refashion a request, if from the context of the request the agency can reasonably discern that a request is for a specific time-period, the OOR can find the request sufficiently specific." Reviewing the requests, the court indicated that "because [the request] is so limited, [it] provides a sufficiently narrow subject matter and scope that identifies a discrete group of documents by both type and recipients." The court then looked at the institutions' claim that it could not respond within 30 days. The court noted that "just because an agency claims it neither has the time nor resources to conduct a document-by-document review within the time-period required by the RTKL, does not make it so. The agency making such a claim has to provide the OOR with a valid estimate of the number of documents being requested, the length of time that people charged with reviewing the request require to conduct this review, and if the request involves documents in electronic format the agency must explain any difficulties it faces when attempting to deliver the documents in that format. Based on the above information, OOR can then grant any additional time warranted so that the agency can reasonably discern whether any exemptions apply." The court sent the case back to OOR to determine how much time to allow the agencies in which to respond. (*Pennsylvania State System of Higher Education v. Association of State College and University Faculties*, No. 2016 C.D. 2015, et al., Pennsylvania Commonwealth Court, July 6)

Washington

A court of appeals has ruled that Arthur West has standing to bring suit against the Ports of Seattle and Tacoma for violating the Open Public Meetings Act when they closed meetings pursuant to the Federal Shipping Act, but that because allowing the public to attend such meetings might conflict with the purposes of the Federal Shipping Act, the federal statute preempts the state statute. West became aware of a series of confidential meetings being held by the port commissioners between May and September 2014. He tried to attend the September meeting, but was told the Federal Shipping Act permitted the confidential meetings and that the OPMA did not apply. He then filed suit. The Port of Tacoma argued he did not have standing under the OPMA and the Port of Seattle argued that application of the requirements of the OPMA were preempted by the federal law. The trial court ruled in favor of the Ports on both counts. The appeals court noted the standing argument relied on the jurisdictional requirements under the federal constitution. Under the federal system, a federal court does not have jurisdiction if the parties do not have standing. But the appellate court noted that "state courts are not bound by this requirement because they do not rely on the federal constitution for their authority. The Ports do not suggest that standing is a constitutional issue in Washington." The court explained that "the standing requirements in the OPMA are very broad" and added that "in short, the Ports have not shown that West lacks standing under the OPMA." Turning to the preemption argument, the court noted that the fact that the Federal Shipping Act provided an exemption from FOIA disclosure was not in and of itself dispositive. But the court pointed out that more broadly "allowing the public, including possible competitors, access to the Ports' meetings on [operational] matters would make it far more difficult for the Ports to develop competitive approaches. . .Congress's decision to exempt the records filed with the [Federal Maritime Commission] from disclosure requests under FOIA is consistent with the Ports' argument." (*Arthur West v. Seattle Port Commission, Tacoma Port Commission*, No. 73014-2-I, Washington Court of Appeals, Division I, July 5)

The Federal Courts…

The D.C. Circuit has ruled that Florent Bayala's obligation to appeal his original denial became **moot** once the Department of Homeland Security released a number of previously withheld records after Bayala had filed suit and provided a significantly revised explain for its withholding of other records. Bayala had requested records concerning his interview for asylum, including the asylum officer's notes and his assessment. The agency withheld a number of records, but provided no detailed explanation for its decision. As a result, Bayala filed suit, arguing the paucity of the agency's explanation made it impossible for him to challenge its denial. The agency then disclosed more records and provided a revised explanation. The district court found Bayala had **failed to exhaust his administrative remedies** by not filing an administrative appeal. At the D.C. Circuit, the agency argued Bayala's request was now moot. However, the D.C. Circuit noted that "while the Department is correct that any dispute over the earlier withholding of the documents that the Department has now turned over is moot, the entire FOIA case is not moot because Bayala has *not* received all of the documents that he requested. . .As of this date, Bayala has not yet received [the assessment recommendation] and, accordingly, there is still a live controversy over whether the Department may lawfully withhold that document." The D.C. Circuit pointed out that "while the FOIA case itself is not moot, the dispute over administrative exhaustion is." The D.C. Circuit explained that "the Department's argument that exhaustion of its original administrative decision was required, however, became moot once it chose to abandon its previous determination, make a *sua sponte* disclosure of documents, and craft a new-five-page-long explanation for this different withholding decision in the district court, the content and specificity of which went far beyond the original, perfunctory administrative decision. That new FOIA determination rendered the propriety of the original agency decision—and any administrative challenges to it—an entirely academic question." The court observed that "there is no required administrative exhaustion process for [an] in-court litigation decision. Tellingly, FOIA's text provides only for administratively exhausting an 'adverse determination' made by the agency within its statutorily required administrative process. The government, for its part, cites no authority—and we can conceive of none—for compelling a FOIA claimant to administratively exhaust a decision that the agency no longer stands by and that has been overtaken by new and different in-court disclosures and explanations. Nor can Bayala be compelled to administratively exhaust this new agency decision because that decision was a byproduct of litigation, not of the pre-litigation administrative decision-making process to which FOIA's exhaustion requirement textually applies." (*Florent Bayala v. United States Department of Homeland Security, Office of the General Counsel*, No. 14-5279, U.S. Court of Appeals for the District of Columbia Circuit, June 28)

Judge Emmet Sullivan has ruled that the DEA conducted an **adequate search** for records concerning its use of a database known as the Hemisphere Project, an AT&T-operated database that collects data on billions of phone calls daily and allows agencies like the DEA to have access to the calls for use in combating illegal drug activity. Sullivan also found the agency had properly withheld records under **Exemption 5 (privileges)**, but that it had not yet shown that its claims under **Exemption 7(D) (confidential sources)** and **Exemption 7(E) (investigative methods and techniques)** were appropriate. EPIC requested records about the privacy implications of the Hemisphere Project. The agency found 319 responsive documents, 39 of which were released in full, 176 in part, and 104 were withheld in full. EPIC's challenge to the agency's search consisted solely of the allegation that more records must exist based on the far-reaching privacy implications of such a program. Sullivan noted, however, that "based on the legal standard for what constitutes a reasonable search, arguments that certain documents 'should' or 'must' exist are consistently rejected." DEA had withheld a draft memorandum analyzing the legal issues involved in obtaining the data

used in the Hemisphere Project, but had withheld it under the deliberative process privilege. EPIC argued that to withhold a draft memo the agency was required to identify a final decision to which it contributed. Calling this claim "incorrect," Sullivan sharply criticized EPIC for arguing the point because it had been rejected in previous litigation brought by EPIC. He explained that "EPIC's insistence that the draft memorandum here be treated as a final policy. . .ignores the reality of how government policies evolve." Sullivan indicated that the memo was deliberative because it was prepared by an attorney for superiors and "includes comments by the attorney who prepared the document, reflecting the deliberative posture of the memorandum." DEA had also withheld an email chain under the attorney work-product privilege. Sullivan agreed. He noted that "the nature of the Hemisphere program, which clearly implicates controversial law-enforcement techniques and privacy rights as evidenced by this lawsuit, satisfies the Court that it is objectively reasonable for the government agencies involved to hold a subjective belief that litigation was and is a real possibility. The Court therefore concludes that the email at issue is protected by the work product doctrine because it was prepared in anticipation of litigation." DEA claimed that the names of private companies involved in the Hemisphere Project were protected under Exemption 7(D). But Sullivan agreed with EPIC that the agency so far had failed to show that the companies received either explicit or implicit assurance confidentiality. Ordering DEA to supplement the record or disclosure the identities, Sullivan indicated that "the DEA cites no authority for the proposition that potential retaliation against a private company is sufficient to justify a finding of implied confidentiality." DEA also claimed that records concerning how it interacted with the companies constituted investigative methods and techniques under Exemption 7(E). Again, Sullivan agreed with EPIC that the agency had not yet made its case. He rejected the agency's claim that disclosing the identities of cooperating companies would put their corporate facilities at risk. He observed that "although not confirmed by the government, the cooperation of Verizon Communications Inc. and AT&T in government data collection has been publicly reported for years. Publicly available information about such telecommunication companies' facility locations is as available now as it would be were the DEA to disclose the identities of the companies assisting with Hemisphere." He told the agency to either disclose the identities or supplement the record to justify its withholding claims. (*Electronic Privacy Information Center v. United States Drug Enforcement Agency*, Civil Action No. 14-317 (EGS), U.S. District Court for the District of Columbia, June 24)

A federal court in New York has granted the Justice Department's motion to reconsider the court's earlier ruling concerning the **segregability** of information in the comments column of the Historical Communications Management Unit Spreadsheet pertaining to inmates incarcerated on terrorism-related charges at federal prisons in Marion, Illinois and Terre Haute, Indiana, and after reviewing the records *in camera* has agreed with the Bureau of Prisons that the information cannot be segregated. Judge Paul Oetken had concluded, based on the government's affidavits, that some information was likely non-exempt. But after his *in camera* review, Oetken agreed with the government that "this information also implicates more than a *de minimis* privacy interest. Detailed information regarding offense conduct has a significant risk of being identifying, and the remaining information—especially sexual misconduct and post-incarceration misconduct—is information in which inmates have a pronounced interest in remaining private even if the risk of linking that information to them is small." Oetken found that "there is a set of information as to which the risk of identification is great, but the public interest is also significant. This information largely pertains to the movement of inmates—the kinds of facilities in which they were housed before they arrived at CMUs, and the kinds of facilities to which they went after leaving CMUs. For this information, the Court concludes that the generalized portions of these comments is reasonably segregable and not exempt. For example, the Government could release the portion of the comment indicating that a CMU inmate was released to the general population, but it need not identify a specific date or facility." (*Human Rights Watch v. Department of Justice Federal Bureau of Prisons*, Civil Action No. 13-7360 (JPO), U.S. District Court for the Southern District of New York, June 23)

A federal court in California has ruled that Renewal Services **failed to state a claim** showing that the Patent Office has improperly withheld address information when it discontinued providing the information in its Patent Application Information Retrieval database. Renewal Services complained that because the information is publicly available in individual patent applications, FOIA required the Patent Office to make it available online as well. Rejecting Renewal Services' allegations, the court explained that "5 U.S.C. § 552(a)(3) specifically provides that the agency need not respond to a § 552(a)(3) request for information when the same information is indexed and made public pursuant to the guidelines of § 552(a)(2). Since the allegations of the Complaint in this case establish that Defendant has made the requested records publicly available and indexed, through electronic means, there are no facts alleged which would support the claim that the requested information is 'improperly withheld' pursuant to 5 U.S.C. § 552(a)(3). Plaintiff has failed to allege facts or law which would support a claim that Defendant has improperly withheld bulk data information under the FOIA. The Complaint alleges facts which establish that the correspondence addresses are publicly available under § 552(a)(2), and the Complaint fails to allege facts which support a claim that the correspondence addresses in the bulk data information is 'improperly withheld' pursuant to 5 U.S.C. § 552. Plaintiff's contention that privacy exemptions cannot justify the withholding of the addresses and zip codes from the bulk data is not applicable under the facts alleged in this Complaint. Exemptions only apply when there is a withholding of information. In this case, the facts alleged do not support a claim that the information is improperly withheld. When the requested materials are made publicly available by the agency itself, the information is not withheld." (*Renewal Services v. United States Patent and Trademark Office*, Civil Action No. 15-1779 WQH, U.S. District Court for the Southern District of California, June 29)

Judge Christopher Cooper has ruled that the Executive Office for U.S. Attorneys has not yet shown that it conducted an **adequate search** for copies of the indictment, requests for subpoenas, and authorization for wiretaps related to Bryan Wilson's conviction in the District of Columbia. Once Wilson told EOUSA the District in which he was convicted, the agency searched for records and produced nine pages with redactions made under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. EOUSA filed an affidavit explaining its search, but Cooper indicated that he still had concerns about its adequacy. While the agency had provided some explanation of its search, Cooper pointed out that the affidavit had not "represented that all areas likely to contain responsive records, were in fact searched. [The] blanket assurance that EOUSA's search was 'systematic,' hardly remedies this crucial defect. The Court can only speculate about the FOIA contact's methodology—the number and location of any physically searched files, why those files alone were searched, why some staff were deemed 'appropriate' email recipients, and whether any physical searches resulted from those emails." Cooper also questioned whether the EOUSA staffer who signed the affidavit had actually reviewed the responsive records. He observed that "the Court cannot determine whether records maintained by the U.S. Attorney's Office for the District of Columbia qualify as 'official files and records of EOUSA' (as opposed to those of the originating office), and even if they do, it is unclear whether [the FOIA staffer] has ever seen the records that were produced to Wilson. He at no point claims familiarity with records responsive to any one FOA request." (*Bryan Wilson v. U.S. Department of Justice*, Civil Action No. 15-1149 (CRC), U.S. District Court for the District of Columbia, June 28)

Judge Richard Leon has ruled that the CIA and the Department of Defense conducted an **adequate search** for records concerning the shoot-down of a military helicopter in Afghanistan that resulted in the deaths of 38 individuals. He also agreed that the agencies had properly invoked **Exemption 1 (national security)**, **Exemption 3 (other statutes)**, **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)** in disclosing more than 535 pages with redactions. Freedom Watch argued the agency's search was

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insufficient. Leon pointed out, however, that "plaintiff wholly fails to present any evidence rebutting the agency's showing of a good faith search. Rather than provide any facts that create a genuine issue regarding the adequacy of the search, plaintiff asserts without support that it is 'common sense that documents clearly exist' beyond those produced." Freedom Watch questioned the agencies' reliance on keyword searches. Referring to *Freedom Watch v. NSA*, 783 F.3d 1340 (D.C. Cir. 2015), a recent D.C. Circuit opinion which rejected the identical argument, Leon noted that "agencies routinely rely upon keyword searches to locate responsive electronic documents. Moreover, the searches here encompassed far more than inputting keywords." The Defense Department withheld records concerning discussions of congressional testimony under Exemption 5. Leon approved the redactions, observing that they all "fit comfortably within the exemption." Leon also found the agencies had appropriately considered the **segregability** of the records. He indicated that a sampling of DOD's redactions "underscore the best efforts used to redact narrowly and only where specific information qualifies for withholding under Exemptions 1, 5, and 6." (*Freedom Watch, Inc. v. National Security Agency, et al.*, Civil Action No. 14-1431, U.S. District Court for the District of Columbia, July 6)

A federal court in New York has ruled that the CIA, the NSA, and the FBI properly invoked a *Glomar* response for records requested by Henry Platsky about himself from 2000-2010 and that he lacks standing to pursue his challenge to whether or not he is on the no-fly list because he has shown no evidence that his ability to fly had been curtailed. Platsky had previously requested records about himself from 2005-2010. That case had also involved a *Glomar* response which was upheld on appeal to the Second Circuit. In this case, Judge Loretta Preska dismissed the case after concluding that Platsky had already litigated the issue. But on appeal to the Second Circuit, the appellate court remanded the case because of the difference in the time period requested. Nevertheless, when the case was remanded, Judge Andrew Carter found all three agencies had properly based their *Glomar* responses on **Exemption 3 (other statutes)** for the CIA and the NSA, and **Exemption 7(E) (investigative methods and techniques)** for the FBI's refusal to confirm whether Platsky was on the no-fly list. Carter observed that "that the existence of the No Fly List is public knowledge and that some people on the No Fly List come to know of their presence on it does not change the Court's analysis, contrary to Platsky's arguments." Carter also dismissed Platsky's constitutional challenge to the No Fly List because it had already been implicitly rejected by the Second Circuit in his previous cases. (*Henry Platsky v. National Security Agency, et al.*, Civil Action No. 15-1529 (ALC), U.S. District Court for the Southern District of New York, July 1)

A federal court in Tennessee has adopted a magistrate judge's recommendation finding that the EEOC properly responded to Rodney Harper's request. The agency found 354 pages, disclosed 100 pages with minor redactions made under Exemption 5 (privileges) and assessed Harper $38.70 for the remaining 254 pages. The agency acknowledged receiving Harper's appeal, but after he filed suit the agency discovered it had inadvertently closed his administrative appeal. It reopened the appeal and partially granted Harper's appeal. The magistrate judge found the agency had acted appropriately and recommended ruling in its favor. Harper made a variety of procedural challenges. The court noted that "taken as a whole, Plaintiff's brief amounts to a general objection to the Magistrate Judge's recommended disposition." The court indicated that "Plaintiff has largely failed to present specific objections to the Magistrate Judge's legal conclusions, that Plaintiff's claim is moot, and that Defendant has complied with FOIA." The court added that "the Magistrate Judge concluded that there was no further relief for the Court to grant Plaintiff. Nothing in Plaintiff's objections has shown why the Court should reject this conclusion." (*Rodney Harper v. U.S. Equal Employment Opportunity Commission*, Civil Action No. 15-2629-STA-cge, U.S. District Court for the Western District of Tennessee, June 30)

Judge Rosemary Collyer has ruled that the Social Security Administration, the IRS, and Rural Development, a component of the Department of Agriculture, properly told James Reedom this his multiple separate requests to the agency could not be processed without further information. Reedom asked for records about his SSA earnings, as well as requesting records about discrimination complaints filed against the agency. For the request for his SSA earnings, Reedom was told that he had to fill out an authorization form, which the agency sent him. Reedom did not return the authorization form. He also asked the agency to tell him if fees would be more than $25. The agency told him the fee would be $102 and sent him a form to fill out, but, again, he failed to respond. For another request he asked for a fee waiver, but never identified the records he was requesting. At Rural Development, he requested records about loans to African Americans and a named non-profit organization. The agency told him it did not have such records. He appealed, but the appeal contained no further information relevant to the request. Four of his requests to the IRS were rejected because they asked for taxpayer information about third parties. To a fifth request for records about himself, the agency provided him with the forms needed to proceed with such a request. Reedom then filed suit. Collyer observed that "plaintiff has submitted seemingly random collections of exhibits and citations to legal authority, and none sheds light on the actual FOIA requests to which the complaint purportedly refers." Collyer found all three agencies had responded appropriately. Referring to the SSA, she noted that "defendants have demonstrated that Plaintiff failed to **exhaust his administrative remedies** with respect to his FOIA requests for earnings records and other information from SSA." (*James Patrick Reedom v. Social Security Administration, et al.*, Civil Action No. 15-0406 (RMC), U.S. District Court for the District of Columbia, June 27)