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Washington Focus: The Defense Department has said that a letter sent to the Campaign for Accountability stating that there was insufficient basis for commencing an investigation into Secretary of Defense Ash Carter's use of a personal email account to conduct government business was incorrect and sent by mistake. According to The Hill, Kathy Scarrah, a spokesperson for the Defense Department's Office of the Inspector General indicated that "we have not closed the matter of looking into the secretary's personal email account for official business." Scarrah explained that the OIG will decide whether to investigate Carter's use of the personal email account based on information the agency provides to Congress in response to its questions.

Full Sixth Circuit Rules Mug Shots Protected by Exemption 7(C)

The full Sixth Circuit has reversed its 1996 decision requiring disclosure of mug shots for individuals who had appeared in open court, ruling instead with the Tenth and Eleventh Circuits that disclosure of mug shots are an invasion of privacy and are protected by Exemption 7(C) (invasion of privacy concerning law enforcement records). When the Sixth Circuit agreed to review its 1996 decision in *Detroit Free Press v. Dept of Justice*, 73 F.3d 93 (6th Cir. 1996), it seemed clear that the full court would overturn the original decision. The most surprising aspect of the decision is how close it was. While nine judges joined in the majority opinion overruling the *Detroit Free Press* decision, seven judges joined the dissent, exposing a rift within the Sixth Circuit that has never been evident in other courts that have dealt with this issue. The Tenth Circuit's opinion in *World Publishing Co. v. Dept of Justice*, 672 F.3d 825 (10th Cir. 2012), strongly endorsed the government's position. In affirming the district court's decision in *Karantsalis v. Dept of Justice*, 635 F.3d 497 (11th Cir. 2011), the Eleventh Circuit issued only an unsigned per curiam opinion essentially saying the court agreed with the district court's ruling. But with the existence of two other circuit rulings finding mug shots could be withheld by the U.S. Marshals Service, open-government advocates feared a serious loss if the case went to the Supreme Court.

In its 1996 decision, the Sixth Circuit panel had concluded that disclosure of mug shots were not an invasion of privacy if the individual had already appeared in open court. The *Detroit Free Press* ruling, which was 2-1split, was controversial from the beginning. As the only appellate decision on the disclosure of mug shots, the government decided to contain its impact to only those states within the Sixth Circuit. The Marshals Service continued to refuse as a matter of policy to disclose mug shots in any other part of the country, although it honored FOIA requests filed in the states within the Sixth Circuit for mug shots of individuals who had been processed in other states. Nevertheless, media attorneys were required on at least one occasion to file a motion with the Sixth Circuit to force the agency to disclose mug shots.

With this background, Circuit Court Judge Deborah Cook, writing for the majority, indicated that "booking photos—snapped 'in the vulnerable and embarrassing moments immediately after [an individual is] accused, taken into custody, and deprived of most liberties'—fit squarely within this realm of embarrassing and humiliating information. More than just 'vivid symbol[s] of criminal *accusation* booking photos convey *guilt* to the viewer. Indeed, viewers so uniformly associate booking photos with guilt and criminality that we strongly disfavor showing such photos to criminal juries." She explained that "this alone establishes a non-trivial privacy interest in booking photos."

Cook emphasized that the embarrassment could continue long after the events portrayed had faded. She pointed out that "in 1996, when we decided *Free Press I*, booking photos appeared on television or in the newspaper and then, for all practical purposes, disappeared, Today, an idle internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection. In fact, mug-shot websites collect and display booking photos from decades-old arrests." She noted that "desperate to scrub evidence of past arrests from their online footprint, individuals pay such sites to remove their pictures. Indeed, an online-reputation-management industry now exists, promising to banish unsavory information—a booking photo, a viral tweet—to the third or fourth page of internet search results, where few persist in clicking. The steps many take to squelch publicity of booking photos reinforce a statutory privacy interest."

The Free Press argued that criminal information analogous to mug shots had been traditional publicly available and that states frequently provided disclosure of such booking photos. Cook noted however, that "the common law differentiates between 'facts about the plaintiff's life that are matters of public record,' and matters of public record 'not open to public inspection.' Booking photos, like rap sheets, fit into the latter category, to which the Supreme Court extended privacy protection under Exemption 7(C)." Cook concluded that there were nearly as many states that prohibited disclosure of mug shots as there were that allowed their disclosure. She pointed out that "more important to the FOIA analysis are the *federal* regulations and policies drafted by the U.S. Department of Justice and the USMS. She added that "a mixed bag of state privacy laws cannot extinguish FOIA personal-privacy protections." Cook noted that "the privacy interest in a booking photo is the defendant's, and he or she can waive that interest." This is a somewhat startling admission since it seems to allow the individual to choose whether or not their booking photo becomes public and to supersede the agency's decision to withhold.

Finding that the photos were routinely protected by Exemption 7(C), Cook observed that "in 1996, this court could not have known or expected that a booking photo could haunt the depicted individual for decades. Experience has taught as otherwise. As the Tenth and Eleventh Circuits recognize, individuals have a privacy interest in preventing disclosure of their booking photos under Exemption 7(C). Of course, some public interests can outweigh the privacy interest but *Free Press I* wrongly set the privacy interest at zero."

Writing for the dissent, Circuit Court Judge Danny Boggs surveyed the historical public availability of mug shots. He noted that 'rejecting the notion that arrestees have a legitimate privacy interest in their photographs after indictment, courts have explained that, once indicted, individuals become figures of public

interest. Publishing their photographs is thus not an invasion of privacy." Boggs found considerably more support for disclosure in state laws. He also noted that the government had published booking photos whenever it suited its purposes and complained that "DOJ's own actions undercut its position that individuals have a strong privacy interest in their booking photographs." Boggs criticized the majority's worries about the ability to find such information on the internet. He observed that 'that is undoubtedly true. But the same could be said of any of the now-digitized information that was once hidden away in the dusty basements of courthouses and libraries." He added that "if anything, the ease with which a third party today can find an individual's indictment and arrest would seem to cut against finding a cognizable privacy interest in booking photographs."

He pointed out that "an individual who has already been indicted, and who has appeared in open court, has no cognizable privacy interest in his booking photograph because neither he nor society expects that it will remain hidden from public view." Boggs faulted the majority for failing to recognize any public interest in the routine disclosure of mug shots. He complained that the majority "ignores these benefits and omits the question of balancing altogether, leaving it to DOJ to make a case-by-case determination of whether it believes that the release of a particular booking photograph serves its own purpose. That decision undermines FOIA's goal of disclosure by effectively making DOJ the arbiter of whether a booking photograph will be made public. Under FOIA, the burden of justifying *non*disclosure should always fall on the government."

The question of whether mug shots should be routinely available under FOIA certainly has parallels to the criminal history records at issue in *Dept of Justice v. Reporters Committee*, 489 U.S. 749 (1989), since both kinds of records were readily available, or, at the least, described publicly known events. But while the Supreme Court in *Reporters Committee* relied in part on the so-called "practical obscurity" theory to find that criminal history records were often not as easily obtained as claimed, the consistent basis for finding a privacy interest in mug shots has been the level of embarrassment inherent in such pictures. The government has not claimed that being arrested and/or convicted is inherently embarrassing, although it is difficult to see why such an event would not be considered embarrassing by the individual arrested or convicted. Instead, the government has consistently claimed that the unflattering nature of a mug shot photo reaches a legal level of embarrassment that should be recognized as protectable under Exemption 7(C). However, both the Obama and Holder memos emphasize that embarrassment is not a sufficient reason for withholding information. One can argue over whether embarrassment derived from agency records that make someone look bad is somehow different in kind than an unflattering picture memorializing a public event, but it is really difficult to see how mug shots constitute an unwarranted invasion of personal privacy. (*Detroit Free Press, Inc. v. United States Department of Justice*, No. 14-1670, U.S. Court of Appeals for the Sixth Circuit, July 14)

Views from the States…

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

Illinois

A court of appeals has ruled that the trial court erred in granting the Fraternal Order of Police an injunction blocking disclosure of complaints filed against individual Chicago police officers since 1967 because it would violate provisions of the Illinois Personnel Record Review Act that requires agencies to purge personnel records older than four years. After securing the injunction preventing disclosure, the police

officers' union filed a complaint against Chicago, arguing it had violated the collective bargaining agreement by failing to properly purge the personnel records. A state arbitrator agreed with the police officers' union, but the appeals court found the remedy was unenforceable. The court of appeals noted that "an arbitration order directing the destruction of the requested records as a result of a breach of the CBA would be unenforceable to the extent it would prevent disclosure under the FOIA. Therefore, there was no legal basis for the [trial] court to enjoin defendants from releasing the requested records in order to allow plaintiff to pursue a legally unenforceable remedy at arbitration." The court of appeals pointed out that complaint files "are not personnel files in any sense because they pertain to the 'initiation, investigation, and resolution of complaints of misconduct made by the public against police officers.'" (*Fraternal Order of Police v. City of Chicago*, No. 1-14-3884, Illinois Appellate Court, First District, Sixth Division, July 8)

Maryland

The Court of Appeals has finally resolved the lengthy dispute between tracer Henry Immanuel and the Comptroller of Maryland concerning whether Immanuel is entitled to a list sorted to show the 5,000 top claims under the Abandoned Property Act, which requires the Comptroller to publish annually a list of names and addresses of individuals to whom the state owes more than $100, or whether such sorting would implicitly reveal financial information exempt under the Maryland Public Information Act. Both the trial court and Court of Special Appeals found that sorting the list by the value of claims would improperly disclose individual financial information. The Court of Appeals agreed. The court noted that "while the public policy of the MPIA favors disclosure, the purpose of the Act reveals a legislative goal other than compete *carte blanche*, unrestricted disclosure of public records." The court observed that "the legislative intent in enacting the MPIA is to allow Marylanders to learn about what their government is doing, not to permit unfettered access to information that the State holds about individual citizens. . .Information about the value of individual accounts, even incremental information deduced from an ordered list, does not offer the citizen a better understanding of how the government of the State of Maryland is functioning or what it is up to. Such information offers no discernible insight into governance that would warrant overcoming the individual privacy interest in personal financial information. . ." The court indicated that "were it not for the publication requirement in the Abandoned Property Act, conceivably, the information the Comptroller holds about the individual abandoned property accounts might be exempted from disclosure under the MPIA. . .The publication requirement in the Abandoned Property Act, however, is an exception [to non-disclosure of personal information]. The Comptroller must publish certain limited information about the abandoned property accounts." (*Henry Immanuel v. Comptroller of Maryland*, No. 87, Sept. Term 2015, July 12)

New Jersey

A court of appeals has ruled that the trial court erred in finding that Outside Activity Questionnaires that indicated whether a state employee had asked to participate in outside political activities could be disclosed to New Jersey Public Radio once the forms were redacted to leave only the name of the individual and the outside political activity request and that a Town Priority List, used by the Governor's Office to assess towns where support for the governor might grow, was not protected by the deliberative process privilege. The appeals court found that individuals' confidentiality in the OAQs was significant and that the public interest in disclosure was slight. The court observed that "state employees presumably submit OAQs with the understanding that they will remain private. They do not shed their right to privacy by merely asking for permission to engage in outside activities on their own time." As to the Town Priority List, the court noted that "the TPL in this case represents the deliberative process of a government agency. The TPL does not

represent basic numerical figures and statistics; it represents quite a bit more. It is a list of strategically-chosen locations that could be utilized in community-outreach efforts to maximize efficiency." (*New York Public Radio d/b/a New Jersey Public Radio v. Office of the Governor*, New Jersey Superior Court, Appellate Division, July 13)

The Federal Courts…

The D.C. Circuit has ruled that **Exemption 5 (attorney work product privilege)** applies to the Justice Department's Federal Criminal Discovery Blue Book because the guide was created to aid government attorneys in dealing with issues pertaining to criminal discovery occurring during litigation. Because the D.C. Circuit has previously ruled the requirement to **segregate** and disclose non-exempt information does not apply to the attorney work product privilege, the panel further concluded that none of the information was segregable. But in an unusual concurrence joined by two of the three judges, Senior Circuit Judges David Sentelle and Harry Edwards noted that the line of cases covering guidance used for litigation purposes but not actually created in anticipation of litigation was wrongly decided and should be overturned by the full D.C. Circuit. The case involved a request from the National Association of Criminal Defense Lawyers for the Criminal Discovery Blue Book. The agency withheld the Blue Book entirely under Exemption 5 and the trial court agreed. At the D.C. Circuit, the NACDL argued that the Blue Book did not qualify for the attorney work product privilege because it was not created in anticipation of litigation. Writing for the court, Circuit Court Judge Sri Srinivasan first indicated that "in ascertaining whether a document was prepared in anticipation of litigation, we have applied a 'because of' test, asking whether, in light of the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.' For that standard to be met, the attorney who created the document must have 'had a subjective belief that litigation was a real possibility,' and that subjective belief must have been 'objectively reasonable.'" He noted that "in contrast to the publicly-available documents like the United States Attorneys' Manual, which set out statements of agency policy, the Blue Book is an internal manual containing litigation strategies. It gives 'practical "how-to" advice' to federal prosecutors about 'how to handle different scenarios and problems.'" Srinivasan explained that in cases like *Schiller v. NLRB*, 964 F.2d 1205 (D.C. Cir. 1992), and *Delaney, Migdail & Young v. IRS*, 826 F.2d 124 (D.C. Cir. 1987), the D.C. Circuit had found that documents created to help the agency litigate cases qualified for the attorney work-product privilege even though they did not relate to a specific litigation claim. Here, he pointed out, "a specific-claim requirement would make like sense in the context of the Blue Book. . . Its disclosure risks revealing DOJ's litigation strategies and legal theories regardless of whether it was prepared with a specific claim in mind. It was prepared with the litigation of *all* charges and *all* cases in mind." He added that "the Blue Book was undoubtedly created in anticipation of—and for use in—foreseeable litigation." Srinivasan rejected NACDL's claim that the Blue Book was created as an educational tool rather than for litigation purposes. But Srinivasan noted that "any educational or training function the Blue Book might serve would not negate the document's adversarial use in (and its preparation in anticipation of) litigation." Relying on *Schiller*, Srinivasan dismissed NACDL's claim that the Blue Book was more akin to a legal treatise replete with citations. Instead, he observed that "disclosure of the publicly-available information a lawyer has decided to include in a litigation guide—such as citations of (or specific quotations from) particular judicial decisions and other legal sources—would tend to reveal the lawyer's thoughts about which authorities are important and for which purposes." Although the D.C. Circuit had ruled previously in *Judicial Watch v. Dept of Justice*, 432 F.3d 366 (D.C. Cir. 2005), that because the work-product privilege applied to all documents qualifying for the privilege agencies were not required to consider whether any segregable portions could be disclosed, Srinivasan observed that in cases involving large numbers of pages

agencies should consider segregability. He pointed out that "there may also be cases in which a record containing some amount of work product also contains—or at least appears to contain—segregable, non-exempt material subject to disclosure. In that circumstance, a court presumably would require the agency to provide [some description as to the segregability of the records]." Sentelle and Edwards made clear in their concurrence that they thought the public interest in disclosure of the Blue Book outweighed the ability to claim the attorney work-product privilege, but felt bound by the precedent established in *Schiller* to rule in favor of the Justice Department. Sentelle noted that "the conduct of the U.S. Attorney must not only be above board, it must be seen to be above board. If the people cannot see it at all, then they cannot see it to be appropriate, or more is the pity, to be inappropriate. I hope that we shall, in spite of *Schiller*, someday see the day when the people can see the operations of their Department of Justice." (*National Association of Criminal Defense Lawyers v. United States Department of Justice*, No. 15-5051, U.S. Court of Appeals for the District of Columbia Circuit, July 19)

In a 2-1 decision, the Second Circuit has ruled that declassified FBI records that revealed the agency's intelligence interest in Armando Florez, a Cuban diplomat who defected to the United States in 1968, which were shared with other U.S. intelligences agencies, are relevant to whether the CIA properly invoked a *Glomar* response to Sergio Florez's FOIA request. Sergio Florez, Armando's son, requested records about his father from the CIA and the FBI. The CIA issued a *Glomar* response, neither confirming nor denying the existence of records pertaining to Florez. The CIA upheld its *Glomar* response on appeal. Florez then filed suit. The district court ruled in favor of the CIA and Florez appealed to the Second Circuit. During the pendency of the appeal, the FBI disclosed several documents about Florez in response to a separate request. Florez asked the CIA to review its response in light of the FBI disclosures, but after reviewing the FBI records the CIA declined to alter its position. The issue before the Second Circuit was whether the FBI documents brought into question the appropriateness of the CIA's *Glomar* invocation. The majority concluded the FBI documents were relevant to that issue and remanded the case back to the district court to consider the new evidence. The majority noted that "though the FBI Disclosures do not reveal the CIA's activities or involvement, they appear to suggest that multiple government departments and agencies were investigating, monitoring, and had an intelligence interest in Dr. Florez, and that the FBI cultivated informants to gather information about him. This now-public information may bear on the CIA's position that the mere acknowledgement that it does or does not have possession of documents that reference Dr. Florez would harm the national security, or otherwise disclose Agency methods, functions, or sources." The dissent argued that disclosure of records from another agency did not constitute public acknowledgement by the original agency. But the majority pointed out that "this conclusion confuses the act of waiver—which we uniformly recognize as a privilege reserved to the agency asserting a *Glomar* response—with an agency's independent obligation to 'carry its burden by submitting declarations giving reasonably detailed explanations why any withheld documents fall within an exemption.'" The majority added that "we do *not* impute the FBI's decision to disclose information about Dr. Florez to the CIA, or suggest that the FBI Disclosures necessarily preclude the CIA's right to assert a *Glomar* response. Rather, we simply conclude that the FBI Disclosures are relevant evidence—unavailable to the District Court at the time of its initial decision—bearing upon the sufficiency of the justifications set forth by the CIA in support its *Glomar* response." The appeals court remanded the case to the district court, but indicated that it would restore jurisdiction to consider the district court's subsequent determination upon request by letter to the Clerk of the Court from either party. (*Sergio Florez v. Central Intelligence Agency*, No. 15-1055, U.S. Court of Appeals for the Second Circuit, July 14)

A federal court in New York has ruled that bed-day rates and staffing plans for detention facilities run by private contractors on behalf of U.S. Immigration and Customs Enforcement are not protected by either **Exemption 4 (confidential business information)** or **Exemption 7(E) (investigative methods and**

techniques) and must be disclosed in response to a request from the Detention Watch Network and the Center for Constitutional Rights. Since 2009, Congress has appropriated money to ICE conditioned on maintaining 34,000 detention beds per day. In response to Detention Watch Network's request, ICE withheld bed-day rates and staffing plans for private contractors under Exemption 4. The court found that under Second Circuit case law, the bed-day rates were not "obtained from a person" as required under Exemption 4. The court noted that "plaintiffs do not seek the initial bid documents, they seek documents that show the ultimate terms of the government contracts, including the contracts themselves, The terms of those contractors are not 'obtained from' the contractors." The court added that "even if the bed-day rates and unit prices were not negotiated but merely adopted. . .the contracts and their terms did not come into existence until each party to the contract—the private party and the Government—took 'executive action' to enter into the contract." The court found the bed-day rates were also not confidential. The court indicated that "merely showing that competition exists or that contractors may face greater competition is inadequate to show that the information is confidential." Dismissing the agency's claims of competition, the court noted that "the record shows a limited competitive market for detention services and does not show that prices, or more importantly, profit, could be derived with the specificity needed to meet Defendants' burden of showing competitive harm." The agency argued that competitors could reverse-engineer the pricing structure of companies with current contracts. The court found that unlikely because pricing structures would vary based on the geographic location of a detention center. The court pointed out that "while a detailed staffing plan may aid in estimating past labor costs at one facility, it is unclear how helpful that information would be in bidding on a future contract, possibly in a different geographical location, in the midst of an ever-changing labor market." The court indicated that there was a significant public interest in knowing the price paid by the government for services. The court observed that "at issue in this case is the disclosure of financial information underlying government policy regarding immigration detention and incarceration, a controversial area of public debate where the public has the right to be informed." The court rejected the agency's claim that the staffing plans were investigative records protected by Exemption 7(E). The court noted that "the Government does not even attempt to show what investigations or prosecutions are occurring within the detention centers or how a staffing plan constitutes a technique or procedure used for law enforcement investigations or prosecutions." (*Detention Watch Network, et al. v. United States Immigration and Customs Enforcement*, Civil Action No. 14-00583-LGS, U.S. District Court for the Southern District of New York, July 14)

Judge Tanya Chutkan has ruled that the Office of Legal Counsel at the Justice Department must conduct a search of email accounts of departed OLC attorneys for draft memoranda and legal opinions related to surveillance of federal and state judges. In response to reporter Jason Leopold's request for records going back to 1933, OLC had consulted several senior attorneys who indicated they were unaware of any legal analysis of surveilling judges. As a result, OLC asked for summary judgment. Chutkan agreed with Leopold that OLC's consultation with the senior attorneys was not sufficient to show it had conducted an **adequate search**. Chutkan pointed out that "despite the long tenures of the two senior OLC attorneys who were asked about potentially responsive records, and their familiarity with OLC's work on national security and surveillance matters, merely asking these two individuals about their personal knowledge does not, in the court's view, sufficiently demonstrate that responsive documents do not exist or would not be found by a more in-depth search." Rejecting Leopold's request that OLC be required to conduct a broader search as too burdensome, Chutkan agreed that a search of the email accounts of departed attorneys was feasible. She noted that "given that these emails and their attachments can be searched using an eDiscovery tool without needing to open each email and its attachments individually, and in the absence of any representation from [the agency] regarding the burden associated with running such searches separate and apart from searching OLC's paper files and hard drives, Defendants have not demonstrated that doing so would constitute an undue burden." Chutkan indicated that "the burden of the email search to be conducted here can nonetheless

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certainly be minimized by well-crafted search terms and reasonable limitations on dates and custodians." She noted that "the court is also hopeful that the parties can further limit the number of custodians whose emails will need to be searched by excluding attorneys who worked in areas where the topic of surveilling federal and state judges would not have arisen." She added that "an email-only search would, by definition, be limited to attorneys who have worked at OLC since the advent of email, whereas searches of emails, paper files, and hard drives would presumably go back much further, and thereby encompass more custodians." (*Jason Leopold v. National Security Agency, et al.*, Civil Action No. 14-804 (TSC), U.S. District Court for the District of Columbia, July 11)

A federal court in Arkansas has ruled that Atlasware does not have **standing** to bring a lawsuit against the Social Security Administration because the request was made by its attorney, who never identified Atlasware as his client until he sought mediation services from OGIS. Ed Goldner made a FOIA request to the SSA for records of all attorneys currently representing clients in ongoing social security disability claims and all non-attorney representatives representing clients in ongoing social security disability claims that were not eligible for direct payment. The request was typed on Goldner's letterhead. The agency disclosed 1,221 pages, redacting some information. Goldner appealed the redactions and the agency disclosed more information. Goldner then appealed to OGIS and told the mediator there by email that "my client, Atlasware, LLC, has been waiting for this information for years." Atlasware then filed suit in the Western District of Arkansas. The agency defended the suit by arguing that Atlasware did not have standing because it was not the requesting party. Atlasware argued that the disclosure of its role as the client was sufficiently revealed in the email sent to OGIS. Finding Atlasware did not have standing, the court noted that "Mr. Goldner sent the email after he had already filed his initial FOIA request and appealed the partial denial of that request. Thus irrespective of the passing mention of Atlasware in Mr. Goldner's *ex post facto* email, it was Mr. Goldner, not Atlasware, who made the 'request for information under the FOIA' and it was Mr. Goldner's, not Atlasware's, request that 'the petitioned agency denied.'. . .Mr. Goldner alone 'has standing to pursue this case.'" In an attempt to cure this problem, Atlasware asked the court to amend its complaint to include Goldner as a plaintiff. The court rejected the attempt to amend, noting that "Atlasware seeks leave not to cure a defective allegation of jurisdiction, but instead to cure a defect in the jurisdictional facts themselves; namely, to create subject-matter jurisdiction where none otherwise exists by adding a plaintiff with standing." Although it acknowledged that Atlasware's lack of standing was sufficient to dismiss the case, the court went on to address Atlasware's contention that Goldner, whose office was located in the Western District of Texas, could refile the case in the Western District of Arkansas because the SSA had offices in the Western District and because the records were accessible through cloud computing their location was no longer a determinative factor. Pointing out that venue under FOIA was appropriate either where the plaintiff was located, where the records were located, or in the District of Columbia, the court explained that "the relevant part of this section [on jurisdiction] was undoubtedly included to inform courts and litigants where causes of action under the FOIA could be brought. . .Atlasware's conception of where electronically stored agency records are 'situated' would completely defeat this statutory role." The court indicated that the SSA and many other agencies had multiple offices throughout the country and observed that "Atlasware's construction in light of this fact would transform [FOIA's jurisdictional requirements] from a provision instructing courts and litigants that their FOIA venue options are limited, to one that opens the doors to nearly every district court in the country. Moreover, it would render [FOIA's jurisdictional provision's] other three venue clauses—the residency, place of business, and District of Columbia clauses—largely superfluous." (*Atlasware, LLC v. Social Security Administration*, Civil Action No. 16-05063, U.S. District Court for the Western District of Arkansas, July 7)

Judge Tanya Chutkan has ruled that the FBI properly invoked **Exemption 7(D) (confidential sources)** in withholding some records concerning the late British journalist Christopher Hitchens, but that its claim that

it properly closed a separate request submitted by journalist Jeffrey Stein because he had failed to pay assessed fees is still in dispute because the agency likely lost its ability to charge fees by missing the statutory deadlines. In an earlier decision involving Stein's requests, Chutkan had ruled that the FBI had not shown that information from foreign governments pertaining to Hitchens had been given with an implicit assurance of confidentiality. This time, the FBI explained that its Foreign Government Information Classification Guide presumed that if a foreign government requested that information it provided should be classified it was treated as being confidential. Finding this additional explanation satisfied the agency's burden, Chutkan noted that "plaintiff concedes that, based on this new evidence, the court must find that the information at issue [here] was provided under an implicit assurance of confidentiality." Stein had also requested records concerning a visit by FBI agents to Australian Gwyneth Todd's home. The FBI had previously denied Stein's request for a fee waiver and had indicated there were more than 10,000 pages of potentially responsive records. The agency estimated the fees at $290 and required Stein to pay a 25 percent partial payment of $72.50 within thirty days. As it began processing the records, the agency found the number of potential records actually was 20,000 pages and that the fee estimate would be increased to $610, requiring a $146.25 partial advance payment. When Stein and the FBI could not resolve the fee dispute, the agency closed the request after thirty days. The agency argued Stein had **failed to exhaust his administrative remedies** because had not paid the assessed fee estimate. Stein responded that the FBI had lost its ability to assess fees because it missed its statutory deadlines. The agency did not address Stein's allegation at all. Ruling in favor of Stein, Chutkan pointed out that "because Defendant has ignored Plaintiff's argument that the FBI's delay in responding to the FOIA request at issue [here] triggers § 552(a)(4)(A)(viii)'s prohibition on the assessment of duplication fees, the court will deem Defendant to have conceded the point." (*Jeffrey Stein v. U.S. Department of Justice*, Civil Action No. 13-571 (TSC), U.S. District Court for the District of Columbia, July 18)

Judge James Boasberg has ruled that while EPIC is entitled to **attorney's fees** for its litigation against the Department of Homeland Security for access to Standard Operating Procedure 303, a document describing DHS protocols for shutting down wireless networks during a national emergency, its limited success called for a significant reduction from the $81,223 EPIC requested to the $20,145 Boasberg awarded. The agency originally told EPIC it could not find the document. EPIC filed an administrative appeal, but decided to file suit before its appeal was resolved. The agency located the document, but released only a heavily redacted version, claiming the rest was protected by **Exemption 7(E) (investigative methods and techniques)**. Boasberg ruled in favor of EPIC, but on appeal, the D.C. Circuit reversed, finding the record qualified as a law enforcement record because it dealt with security matters. On remand back to the district court, the agency disclosed a second version of SOP 303 with fewer redactions. After reviewing the new version *in camera*, Boasberg agreed with the agency that no further information could be disclosed. EPIC then filed for attorney's fees, including a request for $26,000 for time spent on the fee litigation. The parties agreed that the Legal Services Index of the National Consumer Price Index should be used as the basis for calculating fees. The agency argued that EPIC's fee request was replete with overbilling, but Boasberg noted that "the Court takes up Defendant's proposal to factor in these inefficiencies when considering how to discount the overall fee request. In other words, the Court will write off a percentage of EPIC's bill 'to reflect attorney inefficiency and other considerations.'" To account for overstaffing, Boasberg indicated that he would start by reducing the request by 35 percent. Boasberg further reduced EPIC's fee request for that portion of the litigation dealing with the exemption claims by 76 percent for lack of success. He then noted that because EPIC had initially tried to settle the question of fees unsuccessfully by dealing directly with the agency, much of its time spent on the issue of its entitlement to fees was unnecessary. He observed that 'while the Court encourages parties to resolve their differences without motions, here EPIC's exorbitant demands seem to have unnecessarily prolonged this case. The Court will thus only access as potentially recoverable the time spent

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after settlement talks fell through. . ." (*Electronic Privacy Information Center v. Department of Homeland Security*, Civil Action No. 13-260 (JEB), U.S. District Court for the District of Columbia, July 18)

Dealing with another in a handful of recent prisoner cases requesting wiretap authorization letters and memoranda supporting those requests, Judge Randolph Moss has joined other judges on the D.C. Circuit district court to find the Justice Department properly withheld those records under a combination of **Exemption 3 (other statutes)** and **Exemption 5 (privileges)**. In this case, Erin House requested the wiretap authorization records pertaining to the wiretapping of a phone involved in his drug trafficking conviction. The Criminal Division denied House's request under Exemption 3, citing Title III, which authorizes wiretaps. After House filed suit, the agency searched its database of archived emails as well and claimed Exemption 5 as another basis for withholding records. Based on the record before the court, Moss found the agency had not yet accounted for a handful of potentially responsive documents. He indicated that "the Court cannot determine on the present record whether additional potentially responsive records exist and, if so, the Department's rationale for omitting them from its *Vaughn* index or for withholding them." But in all other respects, Moss found the agency had conducted an **adequate search** and properly invoked the exemptions claimed. House argued that the wiretap authorizations had become public at his trial. Moss pointed out, however, that House's allegations did not "meet his burden of showing that 'the *specific* information sought by the plaintiff [is] already in the public domain by official disclosure.'" DOJ had invoked the attorney work product privilege as the basis for withholding memos. House argued that some of the records were administrative, but Moss indicated that "this Court, however, has consistently held that these types of materials are covered by Exemption 5 when they are created in anticipation of a specific criminal prosecution and would not have been created in its absence." As in the other similar prisoner cases, House argued he was entitled to emails pertaining to the wiretaps about him under the **Privacy Act**. But Moss noted that the archived emails did not qualify as a system of records because information was not retrieved by personal identifier. (*Erin D. House v. U.S. Department of Justice*, Civil Action No. 14-20 (RDM), U.S. District Court for the District of Columbia, July 14)

Wrapping up a case in which she found the Justice Department had properly withheld a disciplinary letter concerning an Assistant U.S. Attorney who was later terminated under **Exemption 6 (invasion of privacy)**, Judge Ellen Segal Huvelle has ruled that signatures of DOJ criminal investigators on witness testimony agreements are protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Howard Bloomgarden had requested records about his criminal conviction and DOJ employees who were involved in his case. Huvelle found the only issue remaining was Bloomgarden's contention that disclosure of the signatures on proffer agreements would not constitute an unwarranted invasion of privacy. Huvelle disagreed, noting that "he ignores the fact that the content of the proffer agreements has already been disclosed to him, and thus the public has already received the relevant information. Nothing in the investigators' redacted identities would further inform the public on that score." Bloomgarden suggested the signatures might be forged. But Huvelle remained unconvinced, pointing out that "the former AUSA's disciplinary letter offers no indication that these signatures were forged or unauthorized. Thus, even if plaintiff were correct that the former AUSA did forge signatures or sign documents without authorization, the information withheld here by DOJ does nothing to prove it." (*Howard Bloomgarden v. Unites States Department of Justice*, Civil Action No. 12-0843 (ESH), U.S. District Court for the District of Columbia, July 19)

The Ninth Circuit has ruled that an *in camera* affidavit, accompanied by a heavily redacted public affidavit, was sufficient to meet the FBI's burden to show that records requested by Truthout were protected

under **Exemption 7(E) (investigative methods and techniques)**. But the court faulted the district court for not allowing Truthout to file an opposition challenging the agency's exemption claims. The court noted that "this is the rare occasion where disclosure of further facts 'would undermine the very purpose of [the government's] withholding.'" The court added that "on *de novo* review, we agree with the district court's legal conclusion that there is no genuine issue of material fact as to whether the withheld documents met the criteria of FOIA Exemption 7(E)." But the court observed that "while we agree that the district court erred by ruling on the government's summary judgment motion without allowing Truthout to file an opposition, any error was harmless." (*Truthout v. Department of Justice*, No. 14-16288, U.S. Court of Appeals for the Ninth Circuit, July 13)

A federal court in New York has ruled that Dr. Chinwe Offor's FOIA suit against the Equal Employment Opportunity Commission for records concerning her employment complaint against Mercy Medical Center is **moot** because the agency disclosed everything in her file with minor redactions on three pages. The court noted that "the Plaintiff does not object to the completeness of the production, nor to the modest redactions by the EEOC to three pages of the materials. Under these circumstances, there is nothing of the underlying dispute left for the Court to adjudicate because the EEOC has already produced what it can, and the Court lacks jurisdiction to compel the EEOC to do anything further." Offor argued that her case was not moot because she had requested **attorney's fees**. But the court noted that "here, the Plaintiff did not obtain her EEOC case through a 'judicial order,' a 'written agreement,' a "consent decree,' or a 'unilateral change in position by the agency.' Rather, she obtained her case file because the EEOC was able to locate the file and voluntarily decided to furnish the case file to the Plaintiff. Thus, she has not 'substantially prevailed' within the meaning of FOIA and is not entitled to attorney's fees." (*Dr. Chinwe Offor v. Equal Employment Opportunity Commission*, Civil Action No. 15-03175, U.S. District Court for the Eastern District of New York, July 11)

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