Volume 42, Number 17
August 17, 2016

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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

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ISSN 0364-7625.

Washington Focus: A coalition of open government groups has sent a letter to the Chair and Ranking Minority Member of the House and Senate Armed Services Committees urging them to reject a broad Exemption 3 provision in the National Defense Authorization Act for 2017 (H.R. 4909 and S. 2943) that would allow DOD to withhold records when "public disclosure of the information could reasonably be expected to risk impairment of the effective operation of the Department of Defense." The coalition's letter noted that the proposed exemption "appears intended to effectively overturn the 2011 Supreme Court decision in Milner v. Dept of Navy, which properly narrowed the interpretation of Exemption 2. . . The proposed language is unnecessary and clearly goes against FOIA's originally intended purpose."

Court Finds Submitters Waived Confidentiality by Failure to Object

Judge Colleen Kollar-Kotelly has ruled that the Centers for Disease Control and Prevention properly withheld four of the five categories of information requested by People for the Ethical Treatment of Animals supplied by non-human primate importers under Exemption 4 (confidential business information), but that because three companies did not respond to the agency's pre-disclosure notification those companies effectively waived confidentiality for the same information. While it appears the three companies made a deliberate decision not to respond to the pre-disclosure notification their reasons for not responding are not explicitly spelled out, leaving at least some possibility that they did not receive the pre-disclosure notification or failed to understand its importance. Regardless, Kollar-Kotelly's finding that the companies effectively waived confidentiality for the data suggests that the burden of supporting an Exemption 4 claim lies primarily with the submitter rather than the agency.

The case involved a May 2014 request by PETA for data submitted by importers under CDC regulations. CDC told PETA in August 2014 that Executive Order No. 12600 required the agency to notify submitters and given them an

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opportunity to identify information they believed was confidential. CDC estimated the process would take 36 months. PETA then filed suit. CDC provided pre-disclosure notification to the ten companies that had provided the relevant data. Seven companies responded, while three did not. In June 2015, CDC provided PETA 669 pages of responsive documents. It released another 906 pages a month later. The agency withheld 144 pages in full and made redactions under Exemption 4 and Exemption 6 (invasion of privacy). Although the records contained several dozen categories of information relating to the importation of non-human primates, PETA challenged the agency's withholding of five categories—the species of animals imported, the quantity of animals imported, the descriptions of crates used in shipments, the names of the companies that export the animals, and the names of the airline carriers that transport the animals.

Kollar-Kotelly dispensed with PETA's assertion that the search was inadequate because it failed to uncover registration forms for a number of NHP importers. Instead, she agreed with the agency that PETA's request was for registration forms for *new* importers or companies who were renewing their registration. She indicated that "according to the declaration submitted by CDC, no responsive records were located, as there were no new or renewing applicants for non-human primate importation registrations during this time period."

Because the submitters were required to provide the information to the CDC, Kollar-Kotelly noted that the agency had to show a likelihood of competitive harm if information was disclosed. Relying on affidavits from importers who had responded to the agency's pre-disclosure notification, Kollar-Kotelly found the agency had carried its burden of showing a likelihood of competitive harm for four of the five categories. She pointed out that the agency had not shown that disclosure of the names of species imported would result in competitive harm. She explained that "the 1575 pages of responsive records produced by CDC already contain *extensive* disclosures of the names of the animal species imported by the ten NHP importers at issue during the twelve-moth time period at issue. The records produced by CDC disclose, at least in part, the names of animal species imported by *nine of ten* NHP importers in question. Such extensive disclosure undercuts CDC's argument that the names of the species imported by each individual NHP importer constitute valuable commercial information that can be used by competitors to gain an advantage over the importer submitting that information. CDC's argument is further undercut by Plaintiff's production of evidence demonstrating that in many instances, the names of species imported by NHP are publicly available."

But she agreed the agency had shown that the other four elements – the quantity of animals imported, the description of the crates used in shipments, the names of exporters, and the names of airline carriers—could cause competitive harm if disclosed. Here, she pointed out that "the disclosure of the *names of exporters* and the *names of airline carriers* on a shipment-by-shipment basis for the twelve-month time period at issue would enable competitors to gain an edge in this competitive market by obtaining valuable business data regarding the affected importer's 'supply chains, patterns of importation. . .and business relationships.' Furthermore, the disclosure of the *quantity of species* and the *sizes of crates* used during the importation process, when paired with the names of species, would provide competitors with valuable, detailed business data concerning each importer's capacity to import specific species and each importer's volume of business on a shipment-by-shipment basis. Such a disclosure could provide a competitive advantage to competitors, and enable competitors to interfere with an importer's supply of such species."

PETA argued that much of the information was already publicly available. Kollar-Kotelly disagreed, noting that "PETA's argument is unavailing because none of the publicly available information cited by PETA involves *shipment-by-shipment data* that would reveal details regarding each importer's business relationships, importation capacity, and supply chains. Rather, the publicly available information cited by PETA largely involves generalized industry-wide information—such as an aggregate list of airlines that are legally registered to ship primates for experimentation and a public list of exporters that provide services related to the exportation of primates. Moreover, the fact that there is some publicly available information concerning some

business agreements between NHP importers and exporters does not alter the Court's analysis. If the names of exporters were disclosed in the records at issue, competitors could pair those names with other publicly available information" to reverse-engineer the companies' business models. She rejected PETA's claim that the agency's occasional disclosure of the names of some carriers suggested that their identities were not considered confidential. Pointing out that the disclosures tracked the comments received by submitters, Kollar-Kotelly indicated that "the fact that several individual NHP importers. . .did not object to a handful of references to the exporter names and airline names [being released] does not undermine the collective evidence compelling the conclusion that the general disclosure of such information. . .would cause substantial competitive harm to the NHP importers submitting the information."

But Kollar-Kotelly took a far different approach to the fate of the information from three NHP importers who did not respond to the agency's pre-disclosure notification. She found those three importers had waived their confidentiality by failing to object. She noted that "because these three companies have elected not to object to the disclosure of the requested information—despite having the opportunity to do so—there is a reasonable assumption that these three companies would not face substantial harm by the disclosure of the requested information." Nevertheless, CDC had redacted the disputed information pertaining to the three companies. Kollar-Kotelly ordered the agency to disclose that information because the CDC had not met its burden to show competitive harm as to the three non-objecting companies. She pointed out that "there is a reasonable inference that these three companies have not objected to the disclosure of their records because they do not believe that they will face substantial harm by the disclosure of such records."

PETA argued the disclosure of the four categories of information would not cause substantial harm to any one importer because they would all be impacted equally. CDC argued that the information differed depending on an importer's size of business. Kollar-Kotelly agreed with the agency, observing that "this information can be used by international companies that are also engaged in the importation of NHPs, but have not been required to submit information to CDC because they have not yet entered the United States market." PETA also argued that the disclosure of information about airlines that no longer ship primates to labs could not possibly cause competitive harm. Kollar-Kotelly, however, indicated that "if information concerning the departing airlines were disclosed in the records at issue, the records would reveal which importers maintained relationships with that airline, and the information could provide valuable information to competitors seeking to gain knowledge of which importers were most affected by the airline's departure from the market."

Kollar-Kotelly dismissed the agency's contention that disclosure of the information would impair its ability to obtain similar information in the future. Agreeing with PETA's contention that "in theory, any agency could assert that its ability to obtain information in the future will be impaired because submitters will break the law and withhold information that they are required to provide," Kollar-Kotelly pointed out that "if courts were to permit these arguments, the D.C. Circuit's analytical distinction between information submitted voluntarily and involuntarily would be rendered meaningless." (*People for the Ethical Treatment of Animals v. United States Department of Health and Human Services*, Civil Action No. 15-309-CKK, U.S. District Court for the District of Columbia, Aug. 8)

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Views from the States…

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

Connecticut

A trial court has dismissed 11 complaints filed by David Godbout, who has filed more than 385 complaints with the FOI Commission since 2011, for abuse of the commission's administrative process. Godbout alleged that the State Task Force on Victim Privacy had held secret meetings in October 2013 and that the executive director of the FOI Commission had participated in those meetings. Godbout asked the commission to investigate the allegations and to terminate its executive director and staff. Since the task force was no longer in existence, the commission's managing director said the commission would not hold hearings on the complaints. The commission, however, gave Godbout an opportunity to file objections and to provide further evidence that the task force held the alleged secret meetings. Ruling in favor of the commission, the trial court noted that "the commission surely is not powerless to stem this torrent of litigation, particularly over the same issue. Based solely on the sheer volume of complaints filed by this plaintiff, the commission had a strong basis to deny a hearing in this case." Pointing to Godbout's insistence that the commission staff be fired, the trial court observed that "our statutes make clear, however, that the commission need not tolerate the improper use of the act as a means of targeting one of its officer or challenging the commission's very existence. The commission properly denied the plaintiff a forum to further this ulterior motive." The court concluded that "the plaintiff is entitled to petition the legislature to reform the commission, if that is his true intent. But he is not entitled to a hearing on a complaint, such as the present one, that 'would amount to an abuse of the commission's administrative process. . .'" (*David Godbout v. Freedom of Information Commission*, No. HHB CV15-5017046S, Connecticut Superior Court, Judicial District of New Britain, Aug. 9)

Kentucky

The Attorney General has ruled that the University of Kentucky failed to substantiate its claim that an investigation by the Office of Institutional Equity and Equal Opportunity of a tenured professor pertaining to allegations of sexual harassment was predecisional because the Office did not have the authority to make a decision. In response to a request from a reporter for the student newspaper, the University provided no substantive explanation of its decision. In trying to resolve the complaint to the AG, the University further explanation, but still not sufficient for purposes of the AG's consideration. The AG noted that "the University's refusal to honor the Attorney General's requests suggests that it views these requests as either adversarial or a form of 'advocacy for the requester,' or both. The juxtaposition of the assignment of the burden of proof to the agency and the Attorney General's authority to request additional documentation 'for substantiation' establishes the contrary." The AG added that "it is the Attorney General's duty to conduct a meaningful review and issue an informed and reasoned decision, guided by the statutorily assigned agency burden of proof." As a result of the University's failure to provide adequate substantiation, the AG ordered the University to disclose the records with redactions of the personal information of the complainant and witnesses. (Order No. 16-ORD-161, Office of the Attorney General, Commonwealth of Kentucky, Aug. 1)

Minnesota

The supreme court has ruled that officials from the Department of Human Services did not violate the Minnesota Government Data Practices Act when they disclosed the reasons for terminating the employment of

Michael Harlow, a psychiatrist at Minnesota Security Hospital, for improperly restraining a patient who was violent. The Department investigated the incident and concluded Harlow should be terminated. Minnesota Public Radio reported on the incident and Harlow sued for defamation as well as violation of the Data Practices Act. Because the Data Practices Act defines personnel records as not public, Harlow argued the information disclosed to MPR was private and that its disclosure violated the Data Practices Act. The trial court found there were issues of material fact that precluded summary judgment, but the court of appeals ruled against Harlow. At the supreme court, the court sided with the appellate court, finding the information disclosed became public when the Department decided to fire Harlow. The supreme court noted that "the employment investigation and supplement constitute a final decision because they document the specific reasons for the termination and document the basis for the decision to terminate Harlow. The purpose of the employment investigation of Harlow was warranted. The final disposition of the employment investigation occurred when Harlow's employment was terminated on December 20, 2011, which is the date when the DHS made its final decision in the matter. Consequently, the employment investigation report was reclassified from private to public on that date and therefore its disclosure did not violate the MGDPA." Acknowledging that the report included data that was originally non-public, the supreme court pointed out that "it may seem anomalous to have data classified as public data for one purpose, and confidential for another purpose. But we see nothing in the text of MGDPA that prohibits that outcome." (*Michael Harlow v. Department of Human Services*, No. A14-1342, Minnesota Supreme Court, Aug. 10)

New York

A trial court has ruled that while body-camera videos taken as part of a five-week voluntary program of the New York City Police Department are subject to a number of law enforcement exemptions the NYPD cannot charge a local cable station $36,480 to review and redact the videos for disclosure. Courtney Gross, a reporter for Time Warner Cable News, requested the body-camera video recordings taken as part of the five-week program. NYPD estimated the video recordings contained 190 hours of footage showing 1,576 separate incidents. NYPD initially told Gross that reviewing and redacting the video recordings was too burdensome. The agency subsequently estimated that review and redaction would take 2,858 hours and cost $36,480. Time Warner filed suit, arguing that the cost of review and redaction could not be assessed to the requester and that, instead, NYPD was required to absorb those costs. The trial court agreed with the NYPD that there were a number of potentially applicable exemptions that would require review and redaction of the video recordings. The court then found that "there is an issue of fact presented regarding the amount of time it should reasonably take the NYPD to review and redact the video footage. As such, a hearing shall be held forthwith on the issues of the NYPD's current technology, the costs associated with procuring software that would make performing necessary redactions possible and the extent to which that software would decrease the time required to perform the redactions." The court noted that the Committee on Open Government had issued several opinions in which it found agencies could not pass on the costs of reviewing and redacting records. The court indicated that "in the absence of any authority to the contrary, this Court is persuaded by the opinions of the Committee on Open Government, and adopts the reasoning set forth in [those] opinions. The NYPD may not pass the costs associated with reviewing or redacting the footage requested onto petitioner." (*In the Matter of the Application of Time Warner Cable News NY1 v. New York City Police Department*, No. 150305/2016, New York Supreme Court, New York County, Aug. 1)

Pennsylvania

A court of appeals has ruled that the Chester Housing Authority is required to disclose records to Chester Township showing where tenants participating in the Housing Choice Voucher Program funded by the federal Department of Housing and Urban Development live because there is no exemption applicable to the

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list. Stephen Polaha, Chester Township solicitor, requested the list so that Chester Township could ensure the properties were inspected yearly. The Authority provided a chart showing 74 properties, but the chart did not identify the properties where the HCVP participants lived. Polaha appealed to the Office of Open Records, which found the records were subject to the Right to Know Law and should be disclosed. The Authority then appealed. The appeals court found disclosure of the list of properties would not identify the names of HCVP participants. The Authority argued that the federal Privacy Act protected the records, but the court rejected that claim. The court noted that the Privacy Act "allows an agency, upon receipt of a written request, to disclose a record to another agency or local government for a civil or criminal law enforcement activity. Here, Polaha sought the addresses to ensure that HCVP properties had been inspected and have current certificates of occupancy." (*Chester Housing Authority v. Stephen Polaha*, No. 2391 C.D. 2015, Pennsylvania Commonwealth Court, Aug. 11)

Virginia

The FOI Advisory Council has responded to a query submitted by Kevin Martingayle, an attorney representing former University of Virginia Board of Visitors' Member Helen Dragas, concerning whether a recent meeting of the board included an improper discussion of a new fund. Based on the facts presented, the FOI Advisory Council noted that "it would be a violation to hold a closed meeting to discuss a fund when the motion to convene the closed meeting was for the purposes of discussion of personnel, legal matters and litigation." The FOI Advisory Council added that "there is no exemption in FOIA for the purpose of discussing general budget matters in closed meetings." The gist of the allegations, however, seemed to concern whether the board was required to take remedial action to change the meeting minutes to reflect that a board member did not agree to certify adjournment of the meeting, although the member did not make that clear at the time. The FOI Advisory Council observed that "in the situation you describe, it appears that the board may have misconstrued a member's silence for tacit agreement and the member may have failed to correct that misunderstanding until some later time. Such facts emphasize the importance of complying with the statutory directive to state any such concerns prior to voting and demonstrate the value of taking a roll call when certifying a closed meeting." (AO-02-16, Virginia Freedom of Information Advisory Council, Commonwealth of Virginia, Aug. 12)

The Federal Courts…

The D.C. Circuit has ruled that the district court erred in finding records withheld by the FBI under **Exemption 3 (other statutes)** actually qualified under the provisions cited, but has ruled in favor of the government as to claims made under **Exemption 7(D) (confidential sources)** and whether the agency withheld any records under the **exclusion** contained in (c)(1) covering records of a pending criminal investigation that is unknown to the subjects of the investigation. Jeffrey Labow requested records from the FBI about himself after being identified as a known extremist by an FBI agent during a deposition in a suit brought against the government for its investigation of an incident in which the Four Seasons hotel in Washington was vandalized during a protest against the World Bank. The agency initially told Labow that it had no responsive records, but after he amended his complaint to include a request for records about Lawrence Kuhn, another target of the FBI's investigation of the vandalism at the Four Seasons, the agency located several hundred pages concerning Labow and more than a thousand pages about Kuhn. The agency disclosed some records, but withheld others under Exemption 3 and Exemption 7(D). The district court ruled in favor of the government on all its claims and Labow appealed. The D.C. Circuit, however, while agreeing that both the Pen Register Act and Rule 6(e) on grand jury secrecy qualified as Exemption 3 statutes, found that some of the information the agency had withheld under both statutes did not fall within the terms of the exemption.

Labow argued that 18 U.S.C. § 3123(d), the prohibitory provision in the Pen Register Act, only applied to sealed pen register orders and not information pertaining to the order contained in other documents. Writing for the D.C. Circuit, Circuit Court Judge Sri Srinivasan agreed, noting that "by its terms, the statute provides for sealing of a pen register order itself, not sealing of any and all information the order may contain even if appearing in other documents." The D.C. Circuit remanded the issue back to the district court for further determination. Srinivasan observed that "if the government withheld information found in other responsive documents on the ground that a pen register order also contained the same information, the potential applicability of the Pen Register Statute (and hence of Exemption 3) would be far less clear." The agency had withheld documents subpoenaed by the grand jury under Rule 6(e) on grand jury secrecy. Noting Rule 6(e) only protected matters occurring before a grand jury, Srinivasan indicated that "subpoenaed documents would not necessarily reveal a connection to a grand jury. After all, Labow did not request documents related to a grand jury; he sought documents about particular people. The *government* revealed the existence of a grand jury by withholding documents under Rule 6(e)." The FBI told the court that documents obtained independently of the grand jury had not been withheld under Exemption 3. Srinivasan noted that "but we do not know why documents obtained *through* the grand jury's subpoenas would necessarily reveal that connection. . . The mere fact the documents were subpoenaed fails to justify withholding under Rule 6(e)."' Sending the issue back to the district court, Srinivasan pointed out that "of course, if the documents are now belatedly released, it might be apparent that they had been subpoenaed by a grand jury given that the potential connection with a grand jury is now known. That fact, however, should not bar disclosure. As we have previously held, the relevant question is whether the documents would have revealed the inner workings of the grand jury had they been released in response to the initial FOIA request." Labow challenged the FBI's claims that information that predated the Four Seasons incident was confidential. Srinivasan explained, however, that "the government need not provide justifications specific to a particular group of offenders when inference can reasonably be drawn from the type of crime committed." Labow argued that the district court should have required the FBI to justify its use of an exclusion by providing affidavits explaining why the exclusion, if used, would be justified. Srinivasan noted Labow's proposal had been rejected previously in *ACLU of Michigan v. FBI*, 734 F.3d 460 (6th Cir. 2013) and *ACLU of New Jersey v. FBI*, 733 F.3d 526 (3d Cir. 2013). He observed that under Labow's proposal "district courts would be in the business of considering and deciding abstract questions about the theoretical applicability of a FOIA exclusion in circumstances in which the government might have never relied on the exclusion in the first place." (*Jeffrey Labow v. United States Department of Justice*, No. 14-5220, U.S. Court of Appeals for the District of Columbia Circuit, Aug. 5)

Judge Beryl Howell has ruled that the CIA conducted an **adequate search** for records concerning Erich Mielke, the former head of East German State Security, and properly withheld records under **Exemption 3 (other statutes)**. LOOKS Filmproduktionen, a German documentary film production and distribution company, requested records about Mielke for a documentary. The agency initially issued a *Glomar* response neither confirming nor denying the existence of records about Mielke. After the agency upheld its *Glomar* response on appeal, LOOKS complained to OGIS. OGIS advised LOOKS to submit a new request focusing on a historical event rather than a specific individual. LOOKS submitted two new requests to the CIA—one for records about Mielke created by the CIA's Medical and Psychological Analysis Center or its predecessor Office of Leadership Analysis, and the other for records about Mielke excluding those from the MPAC or OLA. LOOKS specifically indicated that it did not want the CIA to combine the two requests. Nevertheless, the CIA combined the two requests. The agency dropped its previous *Glomar* response and located 27 documents. The agency withheld 14 documents entirely and redacted information from 13 documents, claiming **Exemption 1 (national security)** and Exemption 3. LOOKS challenged the adequacy of the agency's search. It argued that the agency should have used Stasi, the name commonly used to refer to East German State Security. Rejecting the claim, Howell noted there was implicit evidence that some CIA offices

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may have used the term where appropriate. She added that "whether 'Stasi' was used as a search term does not raise substantial doubt as to the reasonableness of the CIA efforts, particularly were 'Stasi' is merely the abbreviation of the German word Staatssicherheit, which translates to state security, a search term that was used by the CIA." LOOKS contended the agency's decision to not consider records that merely mentioned Mielke with nothing further as responsive impermissibly narrowed the scope of its request. Howell disagreed, observing that "documents 'about' a certain subject must have information regarding that subject, rather than just a mention of the word." She also rejected LOOKS' claim that the CIA Information Act required the agency to prove that records were truly operational before declining to search them. Howell found instead that LOOKS had chosen not to make a claim that the agency improperly withheld operational files that should be searched under the CIA Information Act. While the agency claimed both Exemption 1 and Exemption 3, Howell found that since Exemption 3 covered all the records there was no reason to analyze the Exemption 1 claims. She found the agency had properly claimed that the sources and methods prohibition in the National Security Act covered the withheld records. She noted that "by breaking down 'intelligence methods' into four specific sections, the CIA fairly communicated that the intelligence methods information withheld in these particular documents fell within one of those four categories." In a separate claim under the APA, LOOKS argued the agency had improperly aggregated its two requests. Howell noted, however, that "since the filing of the plaintiff's [amended complaint] the CIA has withdrawn its initial *Glomar* response to the plaintiff's requests, performed an adequate search, found twenty-seven responsive documents, sixteen of which were either released in full or redacted form. In view of these events and the Court's grant of summary judgment to the CIA in the first claim [pertaining to the search and exemption claims], the plaintiff's second claim is now moot." (*LOOKS Filmproduktionen GMBH v. Central Intelligence Agency*, Civil Action No. 14-1163 (BAH), U.S. District Court for the District of Columbia, Aug. 5)

A federal court in Idaho has ruled that former Idaho Governor Cecil Andrus is entitled to review under the Administrative Procedure Act as to whether the Department of Energy failed to consider CFR § 1004.1, which requires the agency to disclose records in the public interest. Andrus requested records regarding a possible waiver of the 1995 Batt Agreement, governing the treatment and disposal of nuclear waste in Idaho at the Idaho National Laboratory. The agency informed Andrus that four of five offices had been searched, yielding 41 documents, which contained redactions under **Exemption 5 (privileges)**. Andrus appealed the disclosures, which were upheld on appeal. After he filed suit, the fifth office responded, disclosing another 38 documents with redactions made under Exemption 5. Andrus did not separately appeal the second disclosure, but amended his complaint to include those documents. The agency argued Andrus had **failed to exhaust his administrative remedies** as to the second batch of documents. Agreeing with the D.C. Circuit that the exhaustion requirement was jurisprudential rather than jurisdictional, the court noted that "the underlying policy of exhaustion—to provide the agency an opportunity to review its own decisionmaking process before judicial intervention—must still carry the day." The court added that "because the agency has not yet had the opportunity to implement a review of its FOIA redactions pertaining to [the second disclosure], the Court must. . .dismiss Andrus's FOIA claims. . ." Turning to the 41 redacted documents for which Andrus had filed an appeal, the court found the agency's *Vaughn* index insufficient and ordered an *in camera* review. Pointing to an email that was sent to Sen. Mike Crapo (R-ID) and others, the court noted that "although the 'update' is exactly what one would expect—an entirely factual summary of the Batt Agreement negotiations as of January 15, 2015—the emails were originally redacted in their entirety. Not only is factual information not protected under the Deliberative Process Privilege, the privilege does not apply because it was sent to a Congressional Delegation." The court found the agency had violated its regulation requiring consideration of the public interest in making a disclosure determination. Rejecting the agency's argument that Andrus had an adequate remedy under FOIA, the court observed that "there is no provision under FOIA that requires the agency to consider the genral public interest, whereas that is the gravamen of § 1004.1. In this particular instance, FOIA alone does not provide 'special and adequate review procedures' by which Andrus could ensure documents in

the public interest should be released. For example, there could be information properly redacted under a FOIA exemption which includes information that the public has such a high interest in. In those circumstances, the DOE would be required to disclose under 10 C.F.R. § 1004.1." (*Cecil D. Andrus v. United States Department of Energy*, Civil Action No. 15-453-BLW, U.S. District Court for the District of Idaho, Aug. 8)

Judge Colleen Kollar-Kotelly has declined to reconsider her earlier ruling finding that OMB was entitled to an ***Open America*** **stay** in processing a request from the Energy Future Coalition that required the agency to review 4900 emails. Kollar-Kotelly found that the agency could not process the request more quickly than the rate of 500 emails per month to which the agency had originally committed itself. The Energy Future Coalition argued that Kollar-Kotelly had not taken into account OMB's failure to follow up on a phone conversation its staff had had with the Coalition's counsel. But Kollar-Kotelly noted that neither side had followed up on the conversation and that "the 2015 phone call appears to be nothing more than a good-faith mistake in communication, insufficient to alter the Court's finding that OMB has met its burden of showing that it has exercised due diligence in responding to Plaintiffs' FOIA request." The Future Energy Coalition also insisted that OMB's FOIA staff had since doubled. But Kollar-Kotelly pointed out that the agency's full-time staff remained the same. Instead, the agency had hired a contractor to work on reducing its backlog of requests from 2013-2014. Because the contractor was not working on requests received during the time period of the Coalition's request, his efforts were not relevant to the agency's ability to respond to the Coalition's request more rapidly. However, Kollar-Kotelly noted that the contractor's efforts to clear up earlier cases might ultimately affect the staff's ability to process the Coalition's request more rapidly. She pointed out that "there is a reasonable expectation that in the upcoming months, the number of 'complex' requests pre-dating Plaintiffs' FOIA request will decrease, which could enable the agency to dedicate more resources to responding to Plaintiffs' request." (*Energy Future Coalition, et al. v. Office of Management and Budget*, Civil Action No. 15-1987 (CKK), U.S. District Court for the District of Columbia, Aug. 19)

Judge Emmet Sullivan has ruled that U.S. Immigration and Customs Enforcement properly issued a *Glomar* response neither confirming nor denying the existence of records under **Exemption 7(E) (investigative methods and techniques)**. In response to a request b Jeffrey Myrick, a special agent working in the Homeland Security Investigations division of ICE, for records about an undercover operation at the Fairfax Cyber Crimes Center, the agency issued a *Glomar* response, citing not only Exemption 7(E), but also **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Sullivan found the agency's use of Exemption 7(E) as the basis for its *Glomar* response was appropriate. Myrick argued the agency had not shown how acknowledgment of the existence of the operation would risk circumvention of the law. Sullivan noted, however, that "Defendant's *Glomar* response is authorized under Exemption 7(E) because an undercover operation is not known to the public and acknowledging its existence or non-existence would therefore increase the risk of circumvention of the law." Finding Myrick had provided no evidence to rebut ICE's claims, Sullivan pointed out that "Exemption 7(E) only requires a logical demonstration of the *risk* that the law would be circumvented, and Defendant has met this standard." (*Jeffrey Myrick v. Jeh Charles Johnson*, Civil Action No. 15-1451, U.S. District Court for the District of Columbia, Aug. 4)

In yet another of his numerous opinions resolving issues remaining in Jeremy Pinson's multiple FOIA requests to the Department of Justice, Judge Rudolph Contreras has ruled that the Bureau of Prisons conducted **adequate searches** for four of five requests and properly claimed **Exemption 7(F) (harm to a person)** for records concerning potential violence in prison, but rejected the agency's claim that it did not have public comments submitted in response to several proposed rules published in the Federal Register. The agency

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withheld the central files of two identified prisoners, claiming disclosure could result in physical harm. Contreras observed that "the DOJ claims that disclosing inmates' Central Files through FOIA could result in a threat to these inmates' respective safety, the safety of other inmates, and to those BOP staff committed to their confinement and protection. In light of the DOJ's representations—and Pinson's failure to contest them—the Court agrees that release of these inmates' Central Files 'could reasonably be expect to endanger the life or physical safety of any individual.'" Finding that none of the files could be **segregated**, he explained that "disclosure of a Central File that includes even limited redactions might imply that an inmate has cooperated with government officials or does possess ample financial resources. A FOIA requester's ability to draw those types of inferences would likely exacerbate the very endangerment the BOP seeks to prevent." BOP told Pinson that it did not have the public comments from the Federal Register notices because they were the records of the Federal Register. Contreras pointed out that "the Court seriously doubts the BOP's contention that it does not maintain the particular comments at issue in Pinson's request. The federal register notices for the proposed or interim version of each regulation at issue listed the BOP Office of General Counsel as the relevant agency to contact in order to comment on the proposed rule or interim regulation. These notices listed a BOP email address, a mailing address, or both, as methods to comment. And they each list a particular individual in the BOP's Office of General Counsel's Rules Unit as the individual to contact for further information. As a result, the Court doubts the BOP's contention that the comments Pinson seeks are not BOP agency records." (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, Aug. 10)

A federal court in Virginia has awarded the Virginia-Pilot $100,000 in **attorney's fees** for its suit against the FBI to disclose records concerning its investigation of the deaths of several agents in an accident. The agency initially disclosed 29 pages, but after the Virginia-Pilot filed suit the agency located 889 responsive pages, of which the agency disclosed 10 pages in full and 83 pages in part. The Virginia-Pilot initially requested $86,260 in fees, but added an additional $39,504 for the additional attorney's fees litigation. The court found the Virginia-Pilot was not entitled to fees for time spent on administrative proceedings before it filed suit. The court noted that "while it may be necessary for Plaintiffs' attorneys to review actions taken during the administrative proceedings for litigation purposes, tasks completed during administrative proceedings are not compensable under FOIA." The court indicated that the litigation on the issue of attorney's fees was not particularly complicated and that the Virginia-Pilot's claimed hours were excessive. The court pointed out that "the issue of a proper award of attorney's fees is not complex, especially in contrast to the previous contentions in this case." The court agreed that the Virginia-Pilot was forced to litigate further to establish that it had substantially prevailed for purposes of eligibility. The court also found that the Virginia-Pilot could claim time spent consulting with the New York Times and the Media Law Resource Center. The court rejected the FBI's contention that the Virginia-Pilot had not succeeded on many of its claims. The court, instead, noted that "the degree of success in this matter is not purely indicated by the total number of documents disclosed. This suit was successful in procuring Defendant's compliance with FOIA pursuant to the statute's requirements and provision approving litigation for this purpose." (*Virginia-Pilot Media Companies v. Department of Justice*, Civil Action No. 14-577, U.S. District Court for the Eastern District of Virginia, Norfolk Division, Aug. 10)

A federal court in West Virginia has ruled that U.S. Customs and Border Protection so far has failed to justify its response to Dennis Murphy's request for records concerning an EEO complaint he filed against the agency. More than ten months after requesting the records, Murphy filed suit. The agency located 146 documents, but withheld 116 pages entirely and heavily redacted many of the remaining pages. Ordering the agency to provide a *Vaughn* index explaining its decision to withhold records, the court observed that "here, the Plaintiff has yet to be provided with any explanation for why information was redacted or withheld. The letter the Defendant claims provided such an explanation is far from sufficient, stating only that a specialist reviewed the responsive documents and deemed 116 of them (together with portions of the remaining 30)

subject to one of four exemptions." The court added that "in this case, the Defendant has not submitted the subject documents for review and has provided a single declaration devoid of detail. Because the Defendant has provided only conclusory and generalized allegations of exemptions, without any supporting information, the Court cannot find that the Defendant is entitled to summary judgment in its favor. For the same reasons, the Court finds that the Defendant must submit a *Vaughn* index." (*Dennis Finbarr Murphy v. U.S. Customs and Border Protection*, Civil Action No. 15-133, U.S. District Court for the Northern District of West Virginia, Martinsburg, Aug. 5)

After initially finding the Secret Service had failed to show why 29 pages of records should be withheld, a federal court in Montana has now ruled that the agency properly explained that all the documents fell under **Exemption 3 (other statutes)**. The Secret Service claimed the records contained information provided to the grand jury and were protected by Rule 6(e) on grand jury secrecy. Deanna McAtee argued she was not interested in finding out about matters occurring before the grand jury but was instead interested in the contents of the records provided to the grand jury. Rejecting McAtee's attempt to distinguish the records from matters before the grand jury, the court noted that "McAtee seeks the records of private entities not directly from the private entities but instead from the Secret Service, which has the records as a result of a grand jury investigation. McAtee cannot use FOIA in this way to obtain the records she seeks in her case against Whitefish Credit Union." (*Deanna McAtee v. United States Department of Homeland Security*, Civil Action No. 15-84-M-DWM, U.S. District Court for the District of Montana, Missoula Division, Aug. 10)

Editor's Note: *Access Reports* will take a summer break after this issue. The next issue of *Access Reports* will be dated Sept. 14, 2016, v. 42. n. 18.