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Washington Focus: The Reporters Committee has announced the results of its informal survey of journalists concerning the "release to one, release to all" policy currently being implemented as a test program. Under the policy, records released as a result of a FOIA request would be made publicly available to anyone at the time of release, not just the requester. For journalists, the downside of such a policy has always been that they would be unable to have exclusive use of the documents and thus lose scoring a potential scoop. Announcing the results of its survey, the Reporters Committee indicated that 25 percent of respondents supported unconditional disclosure, but that nearly 60 percent of respondents supported such disclosure only if accompanied by a delay that would allow journalists initial exclusive use for purposes of writing their stories. Noting that there was no clear consensus as to the length of such a delay, the Reporters Committee indicated that a delay between a week to a month seemed to satisfy respondents.

GAO Report Finds Little Data On Government Litigation Costs

A recent report by the General Accounting Office has found that the government fails to keep track of its costs for FOIA litigation and that the lack of recordkeeping is so rampant that GAO, in assessing 112 cases in which the plaintiff substantially prevailed between 2009 and 2014, could verify only $97,000 in costs reported by the Justice Department and an additional $1.3 million in costs incurred by 17 of 28 agencies involved in the suits assessed. The Justice Department's justification for its lack of data was that it was not required to report such data. Agencies told GAO that because DOJ did not require them to report the data as part of their annual FOIA reports they also did not collect such data.

The report was prepared in response to a request by the Senate Judiciary Committee that GAO examine the costs incurred by government agencies in cases in which the plaintiff substantially prevails, making the plaintiff eligible for an award of attorney's fees. Of the 1,672 FOIA cases that resulted in a decision between 2009 and 2014, GAO found

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112 lawsuits where the plaintiff had substantially prevailed. But while the Senate Judiciary Committee's request for the report focused on the effect that the award of attorney's fees may have on government resources, the report concluded that not only was there no data on the effect of those costs, but, further, there was virtually no data on litigation costs at all. Agencies have been required to submit annual FOIA reports to Congress since the 1974 amendments, although the number of data elements has steadily increased beginning with the 1996 EFOIA amendments. Since 1974, the Justice Department has been required to report on "costs, fees, and penalties" assessed as the result of litigation, a process that was spotty at best in the early days.

But GAO could verify only $97,000 DOJ had reported in eight of the 112 cases it examined and told GAO that "the department does not specifically track costs for lawsuits in which the plaintiffs substantially prevailed and that its attorneys are not required to track such costs for individual lawsuits." DOJ told GAO that "there is no statutory requirement for them to [collect] such information." As a result, GAO was left wondering whether adding such additional reporting requirements was worth the incremental cost of collection. The report noted that "although requiring Justice and agencies to report actual cost information could lead to better transparency regarding federal operations, costs would be associated with such reporting. Considering these costs, as well as potential benefits, could help Congress in determining whether such a requirement would be cost-effective for enhancing oversight of FOIA litigation-related operations."

Another problem clouding the value of reporting litigation-related costs uncovered in the GAO report is that the amounts reported by Justice as the result of fee awards sometime differed from those reported by the agencies involved in the litigation. DOJ's explanation for such discrepancies was that fee awards are sometimes adjusted after the time the court publishes its decision containing the award of the fee—so that the bottom line occasionally varies—and cases are sometimes settled, not by court awards but by settlement agreements—which constitute agreements between DOJ and the agencies involved with the plaintiffs to settle the issue of fees without court participation.

One of the most often cited criticisms of FOIA, particularly by agencies, is that FOIA is far more costly than it is worth. Clearly FOIA is much more costly than Congress ever anticipated, but those arguments rarely consider the value of government accountability through presumptive public access to government records. But one way to judge FOIA's costs is to consider the way the government spends money in implementing the law. And pointless litigation would seem like something over which government agencies could exercise a degree of control, particularly the Justice Department. Under FOIA, it is the requester who decides whether or not to sue and the government is statutorily obligated to respond to such litigation. But it is not obligated to prolong litigation or to assume an adversarial role whenever a requester questions the agency's processing of their FOIA request. Instead, government attorneys could take the time to assess the merits of the case and decide whether settling rather than litigating makes more sense from a cost perspective.

While government is not constrained by the same cost considerations common in private commercial litigation, comparing the attitudes of government attorneys with those of private attorneys can be instructive. In the private sector, litigation is expensive and companies often prefer to settle quickly rather than to prolong litigation that will probably be more costly than it is worth. But on the government side, attorneys see their job as defending the government's interests, whether or not those interests make much sense from a cost perspective. There may be a great deal of nobility in defending the government as a general matter, but such attitudes essentially cast aside any consideration of whether those resources are used efficiently or not. One of the more controversial provisions in the 2007 OPEN Government Act amendments was to force agencies to absorb the cost of attorney's fee awards rather than allowing the government to take them out of a general fund for paying judgments against the government. A primary reason for changing the source of funding was to encourage agencies to consider the real costs involved in litigating FOIA cases, hopefully leading to a re-examination of whether or not to pursue a hard-nosed litigation strategy.

The unsurprising finding of the GAO report that the government does not pay much attention to its litigation costs has a special irony in the FOIA context. While government attorneys apparently have no reason to account for their time on specific cases, plaintiffs' attorneys must not only show the court that they have substantially prevailed, but beyond that must provide detailed contemporaneous information justifying the amount of the fees requested. The case law is replete with cases in which courts have reduced or rejected fee requests submitted by plaintiffs' attorneys because they were insufficiently justified. And government attorneys lead the charge in trying to persuade the court to make those kinds of judgments. There is a certain irony in government attorneys showing so much concern about the justification for fee awards to plaintiffs' attorneys while at the same time being oblivious to their own costs and whether those costs are justified.

Views from the States…

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

Florida

A court of appeals has ruled that the Department of Corrections is not required to justify its exemption claims on a redaction-by-redaction basis, but rather on a record-by-record basis. The *Miami Herald* brought suit against the Department after it received a large document that had been heavily redacted with nothing more than a form cover sheet indicating the five exemptions the agency claimed. The trial court initially dismissed the newspaper's complaint, but four months later changed its mind and ruled in favor of the newspaper. The Department appealed and the appellate court reversed. The appeals court noted that "the plain language of the statute does not require the agency to state the basis of the exemption applicable to 'each redaction.' Instead, the statute simply requires the agency to 'state the basis of the exemption that [the agency] contends is applicable *to the record*.' Thus, [this section] plainly requires only record-by-record—not redaction-by-redaction—identification of the exemptions authorizing the redactions in each record." The court observed that "although there may be sound policy reasons for the Legislature to impose such a requirement, the courts do not have the authority to do so. . ." One judge concurred, noting that "this Court's opinion should not foreclose a future challenge to an agency's method of identifying the basis of claimed exemptions in a public records response if it essentially renders the mandates of Florida's Public Records Act meaningless." (*Julie L. Jones and the Florida Department of Corrections v. Miami Herald Media Company*, No. 1D16-1906, Florida District Court of Appeal, First District, Aug. 29)

Illinois

A court of appeals has ruled that the Office of the Comptroller properly rejected a request by For the Good of Illinois for records of all transactions by the state during 2011. After the Comptroller asked FGI to narrow its request, the organization refused and told the Comptroller that it would accept a data dump. The Comptroller eventually denied the request on the basis that it would be unduly burdensome, noting that the state had 16 million transactions each year and that 60 percent of them involved some confidential information. The Comptroller eventually provided two CDs of data for 2012. FGI filed suit and the trial court ruled in favor of the Comptroller. FGI also filed a motion for attorney's fees, which the trial court rejected after finding FGI was not the prevailing party. The court of appeals agreed with the trial court on both counts. Finding FGI's request was unduly burdensome, the appeals court noted that "the fact that the Comptroller did produce documents during the litigation process does not alter our conclusion." The court added that "the fact

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that the Comptroller tendered requested records months after the FGI's request did not alter the fact that compliance at the time of FGI's initial request was unduly burdensome." Rejecting FGI's request for fees as well, the appeals court observed that "although FGI did receive some records, its lawsuit was found to lack merit. Based on those facts, we find that FGI was not a prevailing party under [the attorney's fees provision] of the Act." (*For the Good of Illinois v. State of Illinois, Office of Comptroller*, No. 1-14-3755, Illinois Appellate Court, First District, Third Division, Aug. 24)

Iowa

A court of appeals has ruled that a contract between Sysco Iowa and the University of Iowa Hospitals for food distribution services contains trade secrets that have independent economic value and that the contract should not be disclosed to a reporter who requested it. After receiving the reporter's request, the University initially decided the contract was a public record and indicated that it would disclose the contract. Sysco Iowa filed suit to block disclosure, but the trial court ruled the contract did not contain trade secrets and ordered its disclosure. But at the appeals court, the appellate court concluded that disclosure of the contract would put Sysco Iowa at a competitive disadvantage. The appeals court noted that "if the entire contract is disclosed, information asymmetry will result. Sysco will stand a very real risk of being undercut on future bids because Sysco's competitors know its bid strategy, but Sysco does not know theirs. Observing that Sysco's contract had been the result of a sealed bidding competition, the court pointed out that "given the self-evident nature of the advantage Sysco's competitors would gain by having access to the information, we find the affidavits supplied by Sysco in support of its motion for injunctive relief provided sufficient proof for the relief requested." (*Sysco Iowa, Inc. v. University of Iowa*, No. 15-0999, Iowa Court of Appeals, Aug. 17)

Maryland

A court of appeals has ruled that Prince George's County is not required to disclose a lease between Calvert Tract, a developer of a shopping complex, and Whole Foods, the designated anchor store for the complex, because the lease was voluntarily provided to the county and contains confidential business information that would not normally be disclosed by the company. After the Prince George's County Executive publicly disclosed the existence of the lease as part of the county's justification for moving forward with the development, Jayson Amster requested a copy of the lease. He argued that the lease did not contain confidential business information and that to the extent that it did contain such information any exemption was waived when the county publicly acknowledged that it had a copy of the lease. Calvert Tract intervened to block disclosure, arguing that *Critical Mass v. NRC*, a decision by the federal D.C. Circuit, stood for the proposition that information voluntarily submitted to an agency by a company was exempt if a business would not normally make such information public. The trial court found *Critical Mass* applied, that the county had not waived its exemption claims by publicly acknowledging the existence of the lease, and that it was not qualified to consider whether or not the lease could be segregated and redacted. Amster appealed and the court of appeals agreed with the trial court. The appellate court noted that "because the lease contains 'financial or commercial information provided to the [County] on a voluntary basis,' which would 'customarily not be released to the public by [Calvert Tract],' we hold that the lease is confidential information exempt from disclosure." To the extent information about the lease had been disclosed, the court found its disclosure had been made by Calvert Tract, not the county and that the only information disclosed by the county was the existence of the lease. The court explained that redacting the lease would still not be feasible. The court observed that "if we were to rule that portions of the Whole Food Lease may be severable, and thus *in camera* review is required, it logically follows that Calvert Tract and other commercial developers would cease voluntarily providing their leases to the County to avoid any risk of disclosure. This chilling effect would contravene the legislature's intent to encourage private parties to voluntarily share information that the

government does not have a mechanism to compel." (*Jayson Amster v. Rushern L. Baker*, No. 1801, Sept. Term, 2013, Maryland Court of Special Appeals, Aug. 30)

Michigan

A court of appeals has ruled that the Michigan Catastrophic Claims Association, a non-profit organization created by the legislature to protect automobile insurers from catastrophic loss arising from their obligation to pay lifetime medical expenses under the state's mandated no-fault insurance program, qualifies as a "public body" for purposes of FOIA, even though it is specifically not considered a state agency for purposes of the Administrative Procedure Act. After various advocacy groups requested information from the MCCA, the case went to the Michigan Supreme Court, which remanded the case to the appellate court on the issue of whether MCCA was a public body. On remand, the appeals court concluded that "the MCCA is a public body for purposes of FOIA because it is a body that was created by state authority when the Legislature amended the no-fault act and created the MCAA." The court also concluded that a state constitutional requirement that a law be republished if changed by the legislature did not apply to changes made in the no-fault statute providing that MCAA's records were exempt under FOIA. The appeals court noted that because the change in the no-fault statute "did not alter, amend, change or dispense with any provisions of FOIA, at the time of that statute's enactment, the Legislature was not required to reenact and republish [the] FOIA [statute]." But the court observed that "accordingly, although MCCA is a public body, as we concluded in our prior opinion, its records are exempt from disclosure. . .and the trial court erred in granting summary disposition in favor of plaintiffs and in denying MCCA's motion for summary disposition." (*Coalition Protecting Auto No-Fault, et al. v. Michigan Catastrophic Claims Association*, No. 314310, Michigan Court of Appeals, Aug. 25)

Minnesota

The supreme court has ruled that video recordings of two incidents involving bus drivers for Metro Transit became personnel records once they were downloaded on DVDs and reviewed for potential disciplinary action. Neither driver was disciplined. KSTP-TV requested the two videos. Metro Transit denied its request, claiming the records were personnel records. Both an administrative law judge and the court of appeals ruled against Metro Transit, finding the videos were created for a variety of purposes and not just because the bus drivers were government employees. The supreme court, however, reversed. The supreme court adopted a single-purpose reading for personnel data, meaning that data qualified as personnel data only when it was maintained for personnel reasons. The court noted that "the single-purpose reading [allows] data to be categorized as private or public, but not both, when it is 'maintained' for more than one reason." The supreme court explained that the Metro Transit video recording system was intended to keep videos for 330 hours and then delete them. During that time, videos were public and subject to disclosure. One of KSTP-TV's requests had been made more than 330 hours after the incident while the second request had been made before 330 hours had expired. The two videos had only been retained on DVD because of their use in evaluating the drivers' performance. The court pointed out that "by using the word 'maintained,' rather than 'created' or 'collected,' the personnel-data exception focuses on the 'existing state' of the data—that is the form of the data at the time a request to access it is made" and added that "it is the timing of the request, not the 'data's classification at the time' the data was 'created' that determines the data's classification under the Data Practices Act." Having explained its interpretation of the personnel data exception, the supreme indicated that the ALJ would have to resolve the issue on remand. But the court observed that "if KSTP requested the recordings while they were still stored on the hard drives, then under the single-purpose reading we adopt, it could be entitled to access the data. If, however, KSTP requested the recordings after they were erased from the hard drives and placed on DVDs, then Metropolitan Council could

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successfully argue that the recordings were personnel data maintained only because 'the individual is or was an employee of' Metro Transit." (*KSTP-TV v. Metropolitan Council*, No. A14-1957, Minnesota Supreme Court, Aug. 24)

Mississippi

The supreme court has ruled that the Southern Mississippi Planning and Development District is not a public body subject to the public records law. Henry Kinney argued that the district was created by a 1973 executive order by Governor John Bell Williams. The supreme court disagreed, however, noting that "all of the planning and development districts, including the District, were *created* when they incorporated with the Secretary of State's Office, not when Governor Williams issued the executive order. Further, we do not interpret the executive order to change the status of any of the planning and development districts or to convert them into governmental entities/public bodies. On the narrow issue of whether the District is a public body for purposes of the Public Records Act and the Open Meetings law, we hold that the planning and development districts, specifically the District in the present case, were not created by the Mississippi Constitution, statute, or executive order, and Kinney's argument to the contrary fails. The District was created as a nonprofit corporation in 1966 and has operated continuously as such since that time. Kinney has not produced any evidence that the District's status or activities have changed." (*Henry W. Kinney v. Southern Mississippi Planning and Development District, Inc.*, No. 2015-CA-01177-SCT, Mississippi Supreme Court, Aug. 18)

New Jersey

A court of appeals has ruled that records concerning requests for indemnification by any state employees involved in the controversy over lane closures at the George Washington Bridge are protected by attorney-client privilege and need not be disclosed in response to requests from North Jersey Media Group. The Department of Law and Public Safety refused to disclose the requests for indemnification, citing the attorney-client privilege. However, the department released the names of law firms representing state employees. NJMG sued and the trial court found that, although the identifying information was protected by the attorney-client privilege, the media group's suit had caused the department to release the retainer agreements and awarded NJMG $57,000 in attorney's fees. Upholding the application of the attorney-client privilege, the appeals court noted that "the identity of a client is generally not deemed to be a privileged communication," but in this case the Rules of Professional Conduct "accords confidentiality to any information relating to the representation of a client." But the appeals court disagreed that the department had disclosed the retainer agreements as a result of NJMG's suit. Instead, the court noted the department had actually disclosed that information before suit was filed. As a result, the court concluded NJMG was not entitled to attorney's fees because it was not the prevailing party. (*North Jersey Media Group, Inc. v. State of New Jersey Department of Law and Public Safety*, No. A-o, New Jersey Superior Court, Appellate Division, Aug. 11)

Tennessee

A court of appeals has ruled that the Tennessee Wildlife Resources Commission did not violate the Open Meetings Act when it issued three proclamations challenged by several commercial fishermen's organizations. The organizations challenged the proclamations on a variety of grounds, but their only allegation under the Open Meetings Act was that the commission had failed to provide adequate notice of the public meetings. Noting that "the burden of proof was upon the plaintiffs, not the defendants, to establish that the notice provided for the TWRC meetings at which proclamations were passed was insufficient or that decisions were made in secret," the appeals court observed that the executive director testified that "his office provided notice, including an agenda, of TWRC meetings on the TWRA website and through press releases to

approximately one hundred media outlets about seven to ten days before a commission meeting." The court added that "we consider this notice to be sufficient to provide the public with reasonable notice of the date, time and location of the meeting so as to give them opportunity to be present." The commercial fishermen's associations argued that the commission had not shown that the notices were actually published, but the court indicated that there was evidence in the record that actual notice did occur since various commercial fishermen attended and spoke at a January 2008 meeting. (*Tennessee Commercial Roe Fishermen's Association, et al. v. Tennessee Wildlife Resources Commission*, No. M2015-01944-COA-R3-CV, Tennessee Court of Appeals, Aug. 30)

Texas

A court of appeals has ruled that the trial court did not err in awarding $92,000 in attorney's fees to Russell Kallinen and Paul Kubosh who had sued the City of Houston over access to a traffic-light camera study commissioned by the City. The City requested an opinion from the Attorney General as to whether it could withhold certain information, but before the Attorney General had responded, Kallinen filed suit against the City. The City argued Kallinen could not sue until the Attorney General had provided his ruling. The trial court agreed, as did the court of appeals, but the supreme court reversed, sending the case back for a ruling on the merits, including Kallinen's request for attorney's fees. When the case returned to the appeals court, the City provided expert testimony contesting the amount of the trial court's award to Kallinen. But the appeals court noted that "this contention misapprehends the nature of appellate review. None of the criticism of the billing practices or legal strategies offered by the City's expert, itemized by the City in its brief, conclusively negates the testimony and evidence supporting the award. The trial court was entitled to give more credit and weight to the testimony of Kallinen's counsel than to that of the City's expert in determining a reasonable fee award." (*City of Houston v. Randall Kallinen*, No. 01-12-00050, Texas Court of Appeals, Houston, Aug. 18)

A court of appeals has ruled that a dashboard recording of the arrest of Randy Travis should be disclosed after redaction of certain offensive portions. Travis was arrested for DWI after his car was involved in a one-car accident. The responding officer found Travis naked and intoxicated. Travis was arrested for DWI and several public records requests were filed for the dashboard recording. Because Travis' trial was still pending, the Department of Public Safety requested an opinion from the Attorney General, who indicated the record could be withheld under the law-enforcement exemption. Travis entered into a plea agreement and the trial court granted Travis' motion for a protective order, finding the dashboard recording was protected by the doctrine of common-law privacy. After Travis' trial, another public records request was received. This time the Attorney General ruled that because the investigation was complete the recording should be disclosed. However, the AG agreed that certain information, such as Travis' image below the waist, should be redacted for privacy reasons. Travis sued to block disclosure. The court rejected his claim indicating that "even if we assume that the contents of the redacted dashboard recording contain information that is highly intimate and embarrassing to Travis, those facts were not private as a matter of law because Travis put himself in public by driving unclothed while intoxicated." (*Randy Travis v. Department of Public Safety*, No. 03-14-00314, Texas Court of Appeals, Austin, Aug. 18)

The Federal Courts…

Judge Ketanji Brown Jackson has ruled that Section 105 of the Animal Drug and Use Fee Amendments of 2008 does not qualify under **Exemption 3 (other statutes)**, but that material facts remain in dispute as to whether **Exemption 4 (confidential business information)** protects data about the volume of

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active ingredients for all antimicrobial drugs sold and distributed in 2009, broken down by market, method of injection, and antimicrobial class. The Government Accountability Project requested the 2009 data. In response, the FDA redacted much of the data under both Exemption 3 and Exemption 4, particularly where the number of companies was small. After GAP filed suit, the Animal Health Institute, a trade association, intervened in support of the agency. GAP challenged the applicability of Section 105 of ADUFA, arguing that it only restricted the content of the Secretary of Health and Human Services' mandatory annual reports and did not serve to limit disclosure in other contexts. Jackson agreed with GAP, noting that "when viewed in context, the limiting provisions on which the FDA relies are most naturally read to relate specifically *to the required annual summary reports*, and they do not constitute blanket restrictions on the disclosure of information in all circumstances, as the agency maintains." She added that "reading subdivisions (E)(i) and (E)(ii) to apply to *all* possible disclosures, as the FDA does, extracts those provisions from the 'summary' context and gives them a life of their own, without any indication that Congress actually meant for these restrictions to have such unbounded significance." The FDA argued that courts had found provisions describing an agency's disclosure obligations through reporting requirements to restrict the agency's ability to disclose the information in other contexts. But Jackson rejected the argument, pointing out that "the enacted text of ADUFA does not contain any express restriction on who may ultimately access the information collected under the statute. And the FDA's suggestion that Congress implicitly intended for Section 105 of ADUFA to be read in conjunction with Exemption 3 to prohibit disclosure of the referenced information to members of the public in the FOIA context, as a means of shielding antimicrobial drug sponsors from 'the harmful effects of public disclosure of their individualized information' appears to be overblown, all things considered." Jackson indicated, however, that although the data was not protected under Exemption 3, it might well qualify for protection under Exemption 4. She found that the affidavits supplied by the agency and the industry intervenors raised an issue about the competitive harm that could flow from disclosure, although GAP's own affidavits supported its contention that disclosure of the old data would not be competitively harmful. She noted that "this genuinely disputed remaining question of fact precludes the granting of summary judgment with respect to the Exemption 4 issue that is presented in this case." (*Government Accountability Project v. Food & Drug Administration*, Civil Action No. 12-1954 (KBJ), U.S. District Court for the District of Columbia, Aug. 26)

A federal court in New York has declined to reconsider its previous decision finding that the United States' original negotiating positions for the Trans Pacific Partnership treaty were confidential. Intellectual Property Watch argued that now the negotiations were complete disclosure would not impair the government's ability to get information from third parties in the future. Judge Edgardo Ramos disagreed, finding that Section 2155(g) of the Trade Act of 1974 protected "information or advice 'submitted in confidence'" and "to determine whether a document is properly withheld by asking whether the information or advice contained therein was submitted with the expectation that it would be treated confidentially," a test drawn from the Supreme Court's decision in *Dept of Justice v. Landano*, 508 U.S. 165 (1993), which dealt with assurances of confidentiality under Exemption 7(D) (confidential sources). The U.S. Trade Representative told Ramos that the records were still protected by **Exemption 1 (national security)** because disclosure of negotiating positions could still cause harm to foreign relations. Intellectual Property Watch argued disclosure would not hamper future negotiations now that the full text of the agreement had been released. Ramos pointed out, however, that "the mere fact that the final agreement may constrain future U.S. positions does not preclude the possibility that disclosure of earlier positions may do so as well. To the contrary, USTR makes sufficiently logical representations that future trade negotiations may become more difficult if other countries know that all of the U.S.'s interim positions and proposals made during future negotiations will be disclosed to the public once a final agreement is locked in." Ramos rejected IPW's claim that disclosure of the final agreement waived Exemption 1. Instead, Ramos noted that "release of the final TPP agreement discloses only the fact that the final text was eventually agreed to by all twelve countries; it does not disclose which country or countries proposed which provisions, when those proposals were made, and evolving iterations of each

proposal throughout the negotiations." (*Intellectual Property Watch v. United States Trade Representative*, Civil Action No. 13-8955 (ER), U.S. District Court for the Southern District of New York, Aug. 31)

A federal court in Massachusetts has ruled that the FBI **conducted an adequate search** for records concerning the operation of the Joint Terrorism Task Force in Massachusetts and the number and types of investigations conducted by the FBI Boston Field Office since 2011, but that the U.S. Attorney's Office for the District of Massachusetts has failed to justify its claim that a search of its office would yield no records other than those produced by the FBI. The court also found that the FBI's **Exemption 7(E) (investigative methods and techniques)** claim applied to certain data about specific investigations, it did not apply to general data the agency had withheld. The ACLU of Massachusetts filed identical requests with the FBI and the U.S. Attorney's Office. While the FBI processed the request and provided records, the USAO told the ACLU that a search would be too burdensome. The ACLU did not challenge the FBI's search, but questioned its application of Exemption 7(E). The FBI withheld information about the number of agents assigned to the JTTF and administrative budget information. The court noted that "the FBI has not made the threshold showing that the withheld information, none more recent than 2014, would disclose 'techniques and procedures' for law enforcement investigations or prosecutions. The historic, generic staffing and budget information withheld by the FBI, such as the number of parking sports allocated to the Massachusetts JTTF or the maximum overtime pay, does not disclose how the Massachusetts JTTF actually goes about investigating crimes." The agency had also withheld information about open investigations." Distinguishing the level of detail, the court pointed out that "the FBI may not use Exemption 7(E) to withhold the total number of active/open investigations. . .but it may use Exemption 7(E) to withhold more granular data. . .The total number of open investigations is, again, too generic to constitute a technique or procedure of law enforcement; it does not disclose how the FBI's Boston Field Office investigates crimes or disclose any investigative trends. The more specific data. . .however, does disclose how the FBI's Boston Field Office goes about investigating crimes. The information redacted [in the document] shows what activities trigger a full investigation as opposed to a preliminary investigation assessment, as well as what types of cases the FBI is focusing on." The court found USAO was required to conduct its own independent search. The court observed that "while it may be true that the responsive records are most likely to be located in the FBI's files, the [USAO's affidavit] does not show that they are so unlikely to be found in the USAO's files that no search is required." The court added that "the [agency affidavit] does not sufficiently explain the burden that a search would impose on the USAO. . .The USAO cannot avoid a search simply because the documents are hard copy and may be located in different locations." (*American Civil Liberties Union Foundation of Massachusetts v. Federal Bureau of Investigation and Carmen Ortiz, United States Attorney for the District of Massachusetts*, Civil Action No. 14-11759, U.S. District Court for the District of Massachusetts, Aug. 17)

Noting the novelty of the issue, Judge Amit Mehta has ruled that the Mutual Legal Assistance Treaty between the United States and the Republic of Korea qualifies as an **Exemption 3 (other statutes)** provision for purposes of FOIA. The case involved a Request for Assistance letter sent by the Korean Ministry of Justice to the U.S. Department of Justice for information about alleged gambling by Sae-Joo Chang, the former head of Dongkuk Steel Mill Company, at several casinos in Las Vegas. Chang was convicted in Korea of habitual gambling and sentenced to 42 months in jail. During his trial, evidence produced as a result of the RFA letter was introduced to support Korea's charges against Chang. The existence of the letter was publicly acknowledged by Korean prosecutors, but the letter itself was never made available to Chang's Korean defense counsel. Attempting to get Chang's sentence reduced, his attorneys made a FOIA request to DOJ for a copy of the RFA letter. After DOJ failed to respond, Chang's attorneys filed a motion for a preliminary injunction to force DOJ to provide the letter, but by the time Mehta ruled, the parties had agreed the only issue was whether the letter should be disclosed under FOIA. Mehta found the treaty qualified under Exemption 3.

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He noted that "there can be little doubt that the U.S.-Korea MLAT is a self-executing treaty, and that, upon ratification by the Senate, it became binding domestic law and thus equivalent to an act of the legislature. The MLAT therefore qualifies as a 'statute' for purposes of FOIA Exemption 3." Chang's attorneys argued that, according to statistics in the annual FOIA reports, agencies had not invoked Exemption 3 to protect a Request for Assistance letter since 2009. But Mehta observed that "the fact that, since 2009, DOJ has invoked Exemption 3 to withhold only [other sorts of] evidence subject to an MLAT tells the court nothing about whether *Congress* intended for the U.S.-Korean MLAT to enable DOJ to withhold other information pertaining to the MLAT." Mehta indicated that "the RFA Letter at issue in this case is the very type of 'request' document that the United States must use its 'best efforts' to keep confidential pursuant to Article 5, paragraph 5. The court, therefore, holds that DOJ has properly invoked Exemption 3 to withhold the RFA Letter." Mehta rejected the plaintiffs' contention that the letter had been publicly acknowledged in the Korean courts. He pointed out that "our Court of Appeals has said unequivocally: '[A] foreign government cannot waive a federal agency's right to assert a FOIA exemption.' Thus, the Korean Ministry of Justice's representation to the Korean courts cannot constitute a waiver of DOJ's right to invoke Exemption 3." (*Dongkuk International, Inc. v. U.S. Department of Justice*, Civil Action No. 16-01584 (APM), U.S. District Court for the District of Columbia, Aug. 31)

Judge Beryl Howell has ruled that the FBI properly responded to two FOIA requests filed by attorneys Kel McClanahan and Cori Crider concerning contacts McClanahan had with the FBI after they came into possession of records they suspected contained classified information. As a result of his suit against the CIA, McClanahan received a redacted copy of the table of contents for the CIA in-house journal, *Studies in Intelligence*. After posting the redacted copy on his website, McClanahan was contacted by a third party who gave him an unredacted copy. Suspecting that copy contained classified information, McClanahan contacted a DOJ attorney for guidance. He was interviewed twice by the FBI in conjunction with the classified indices. Crider, a human rights attorney from the United Kingdom, asked McClanahan to represent Sharif Mobley, an American citizen detained in Yemen on murder charges, in FOIA litigation. While litigating the murder charges in Yemen, Crider received an unredacted copy of the FBI's interview report. Realizing that report might contain classified information, Crider forwarded it to McClanahan. Both documents were discussed during McClanahan's interviews with the FBI. McClanahan and Crider submitted separate FOIA requests to the FBI for records concerning McClanahan's interviews pertaining to the classified information. Both requests were denied under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. Crider submitted another request for records about herself. McClanahan and Crider sued and the FBI, concluding its investigation had ended, processed the requests, disclosing 76 pages in full, 14 pages in part, and withholding 24 pages entirely in response to McClanahan's request, and disclosing 153 pages in full, 101 pages in part, and withholding 27 pages in full in response to Crider's request. McClanahan and Crider requested the agency search a number of locations, but the FBI relied primarily on searches of its Central Records System and its Electronic Surveillance Index. The agency also searched the email accounts of the two employees McClanahan was in contact with, yielding an additional 90 pages from their email accounts. McClanahan and Crider argued the agency had failed to **conduct an adequate search** because it had not explained why it chose to limit its search. Howell noted that "far from undermining the reasonableness of its searches, as posited by the plaintiffs, the FBI's searches only underscore the fact that the FBI reasonably set the scope of the search and pursued 'clear and certain' leads. The plaintiffs' requests for searches of other specific record systems were 'mere fiat' without explanation as to why those specified record systems would reasonably contain responsive records." Howell found the FBI's use of the same date as the cut-off date for subsequent searches was appropriate. Howell then approved the agency's use of **Exemption 3 (other statutes)**, **Exemption 5 (attorney work-product privilege)** and **Exemption 7(E) (investigative methods and techniques)**. McClanahan and Crider argued that while some of the records the agency claimed were privileged under the attorney work-product privilege, some of them might not qualify for the privilege.

Howell pointed out that "that agency attorneys would discuss and share, among themselves and with FBI agents, factual developments, legal opinions and theories crucial to the legal defense in connection with the [related] FOIA cases is both logical and plausible. Furthermore, as the D.C. Circuit has explained, once 'a document is fully protected as work product, segregability is not required.'" The FBI had cited Exemption 7(E) to protect certain databases. McClanahan and Crider argued non-federal members of FBI task forces were able to access such databases, suggesting they were known to the public. Howell indicated that "merely because deputized non-federal members of the FBI task forces may be authorized to access a database does not somehow render the database public. The databases are plainly neither accessible nor known to the public at large." McClanahan and Crider suggested the FBI may have used an exclusion under Section (c). Howell, however, observed only that if an exclusion had been warranted it had been properly applied. (*Kelly McClanahan, et al. v. U.S. Department of Justice*, Civil Action No. 14-483 (BAH), U.S. District Court for the District of Columbia, Sept. 1)

Judge Rudolph Contreras has ruled that the Department of State has not yet shown that it conducted an **adequate search** in response to requests from Lawrence Davidson, but that it has shown that it properly redacted records under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. Davidson, the sole proprietor of Export Strategic Alliance, a company trying to collect on an unpaid invoice for services rendered to the former Libyan government, initiated attempts to collect a $28 million debt from Libya by contacting the Libyan embassy in Washington. Unable to make contact with Libyan authorities, Davidson turned to the State Department for assistance, requesting commercial diplomacy or a formal diplomatic communication. However, Davidson had little luck with that approach either. He then made a FOIA request for records about himself and his company from June 2009 to the present. However, the agency refused to process his request unless he got consent from various third parties he had identified in his request. Davidson made another FOIA request to the Office of Inspector General, which responded to his request by telling him it had found no records. The State Department eventually accepted a third request from Davidson and processed it. The agency found 157 responsive documents, disclosing 34 in full, 100 in part, and withholding 23 in full. Besides Exemptions 5 and 6, the agency also claimed certain information was exempt under Section (d)(5) of the **Privacy Act**, which exempts information compiled in anticipation of litigation. Davidson questioned the agency's failure to find certain records from the U.S. Embassy in Libya. On that score, Contreras noted that "the Department's bald statements do not *explain* why no other record system was likely to produce responsive documents." He added that "because Mr. Davidson identified other potential sources of responsive records, the Department must explain why those sources would not produce additional responsive records." Contreras also concluded that the agency's *Vaughn* index was inadequate because it did not provide him "with a description of each of the responsive records that the Department contends that it found through its searches." While the agency indicated it had released 135 records in full or in part and withheld 23 records, Contreras was able to account for only 72 documents the agency had released and 13 documents it had withheld. Denying summary judgment as to the *Vaughn* index, Contreras pointed out that "in any renewed motion for summary judgment, the Department must produce a Vaughn Index that accounts for *all* of the documents withheld in part or in full and that describes the exemptions claimed for those withholdings." Approving the agency's invocation of (d)(5) of the Privacy Act, Contreras noted that "where the Department's Exemption (d)(5) withholdings relate to Mr. Davidson's request for commercial advocacy and his subsequent communications with the Department about that issue, the withheld material involves discussion of litigation to which the Department reasonably anticipated it might become a party." Contreras found the agency had properly applied the deliberative process privilege in withholding draft communications. The agency had used Exemption 6 primarily to redact identifying information about its employees. Davidson argued that the names of some attorney's had been disclosed in the context of Exemption 5. But Contreras pointed out that "even if, in the context of Exemption 5 withholdings, an agency chooses to release the names of its attorneys, the

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agency's choice does not mean that the agency *must* release its attorneys' names; the agency can still invoke Exemption 6 to withhold the attorneys' names if the attorneys' privacy interests outweigh any countervailing public interests." (*Lawrence U. Davidson, III v. United States Department of State*, Civil Action No. 14-1358 (RC), U.S. District Court for the District of Columbia, Sept. 2)

Judge John Bates has ruled that the Department of State conducted an **adequate search** and that the FBI properly withheld records from Edmon Felipe Yunes, a citizen of the Dominican Republic, concerning the reasons his visa was revoked. The State Department searched its Visa Office as well as the U.S. Embassy in the Dominican Republic. Yunes challenged only the search of the Embassy. Bates agreed with the agency that there was no reason why the Embassy would likely have more responsive records than those found by the Visa Office. Rejecting Yunes' challenges to the search, Bates observed that "there is no requirement that the Department's search description address its search at the level of detail that Yunes wants, i.e. to explain how its search was designed to encompass a specific document as opposed to responsive documents generally." Yunes argued that case initiation forms withheld under **Exemption 7(E) (investigative methods and techniques)** by the FBI on behalf of the Organized Crime Drug Enforcement Task Forces did not adequately describe what laws might be circumvented by their disclosure. Bates agreed generally, but noted that disclosure of the forms themselves could provide insight into investigative methods and techniques. The FBI withheld a Financial Crimes Enforcement Network report, citing the Bank Secrecy Act as the basis for its **Exemption 3 (other statutes)** claim. Bates rejected the claim, noting that "the FBI's invocation of Exemption 3 is insufficient here because it does not specify that the withheld information is derived from BSA reports or records of reports. The fact that the information was 'obtained through the BSA' does not affirmatively prove that the information is derived from BSA reports." Bates found that *in camera* affidavits filed by the FBI for other withholdings were sufficient to explain the basis of those claims. (*Edmon Felipe Elias Yunes v. United States Department of Justice, et al.*, Civil Action No. 14-1397 (JDB), U.S. District Court for the District of Columbia, Aug. 26)

Judge James Boasberg has finally resolved the multiple FOIA claims made by Gregory Bartko, who was convicted of mail fraud and selling unregistered securities, ruling that the SEC conducted an **adequate search** in response to Bartko's revised request for records concerning its investigation of the Capstone Fund. Boasberg had earlier declined to grant the agency summary judgment because of confusion about what files it had pertaining to Bartko and which files might have records responsive to his request pertaining to Capstone Fund. Boasberg was convinced that the agency had now searched the appropriate files and that it had found no records pertaining to an investigation of Capstone Fund. Bartko argued the agency had failed to find records that were responsive to his request. But Boasberg pointed out that "Bartko, however, tells the Court nothing about how the documents listed in his table are or might be responsive to his *narrowed* request." He observed that "that Bartko has identified other information of interest to him that the SEC did not produce does not render the agency's FOIA search inadequate, especially where he has not shown that such material is responsive to his request. After all, the agency's obligation was not to search for records related to Capstone Fund generally, but rather to locate a smaller subset of those records, as specified by Bartko's own request. The Court, therefore, is not persuaded that Bartko has identified any responsive documents the SEC should have located and produced; even if he had, such documents alone would not necessarily render the SEC's search inadequate." (*Gregory Bartko v. United States Department of Justice, et al.*, Civil Action No. 13-1135 (JEB), U.S. District for the District of Columbia, Aug. 26)

A federal court in New York has ruled that the National Security Agency properly redacted information from several Inspector General reports pertaining to bulk collection of metadata under **Exemption**

1 (national security). *New York Times* reporter Charlie Savage had requested the IG reports and had used information he received to write several stories. By the time the court ruled he was challenging only a handful of redactions. As to one redaction, Savage argued that the information was too general to suggest harm to national security. The court sided with the government, noting that "the level of detail contained in the redacted passage [is] not so general that the harm anticipated in the [agency's affidavit] becomes illogical or implausible. The disclosed passage describes how certain NSA programs developed over time to capture particular forms of information and meet particular goals. Although these are not highly technical details, they are certainly at a level that provides insight and clarification about NSA practices and capabilities, precisely the kind of damage [the agency] invoked in its explanation that the redacted limitations are properly classified at the Top Secret level." (*New York Times Company and Charlie Savage v. National Security Agency*, Civil Action No. 15-2383 (KBF), U.S. District Court for the Southern District of New York, Aug. 25)

A federal court in Maine has ruled that various components of the Justice Department properly applied, with some exceptions, a variety of exemptions to withhold records from David Widi concerning his conviction. Widi requested records from the Bureau of Alcohol, Tobacco and Firearms, which referred many of the records to the Executive Office for U.S. Attorneys and the Office of Information Policy. While upholding most of the exemption claims, the court was concerned about the agencies' lack of description of 85 pages of exhibits provided to a grand jury. Widi challenged the agency's withholding of eight of those exhibits. Rejecting the agencies' claim that the exhibits could be withheld under **Exemption 3 (other statutes)** on the basis of Rule 6(e) on grand jury secrecy, the court noted that it "is unable to [discern whether release would implicate grand jury secrecy] when the extent of the information is the bare claim that the records comprise '85 pages of grand jury exhibits.'" The court also rejected the agency's claim that the exhibits were protected by **Exemption 7(D) (confidential sources)**, observing that "the Court is without grounds on which to decide that the Government elicited the information underlying all eighty-five pages of grand jury exhibits on an inference of confidentiality. Once again, EOUSA does not make this assertion; instead, it cites Exemption 7(D) only 'to the extent that' it might apply." The agency also claimed that a psychiatric evaluation of Widi should be withheld under **Exemption 7(F) (harm to any person)** because disclosure to the prison population could result in such harm. The court pointed out that "the index entry prepared by EOUSA proclaims concerns about Mr. Widi's safety, not that of others. . .The Court does not understand how release of this document to Mr. Widi could endanger Mr. Widi's safety." (*David J. Widi, Jr. v. Paul McNeil*, Civil Action No. 12-00188-JAW, U.S. District Court for the District of Maine, Aug. 16)

A federal court in Louisiana has ruled that U.S. Citizenship and Immigration Services properly **referred** records to U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection in processing a request from immigration attorney Michael Gahagan pertaining to his client, but that none of the components has adequately explained why they withheld certain records. The court rejected "Gahagan's contention that the practice of referral constitutes a per se violation of FOIA when the referred materials are not processed within the FOIA's twenty-day mandate." In this case, the court noted, "there was no significant delay involved in obtaining the records." But the court found that neither ICE nor CBP had explained the reasons for withholding certain records. Turning to USCIS's own processing of Gahagan's request, the court affirmed the ruling in a previous case filed by Gahagan that an agency could not withhold records merely because they were **duplicates**. Here, the court pointed out that the agency "surely had laudable motives in culling out what it believed to be duplicate documents but if Gahagan wants them the Court can discern no justification for withholding them." (*Michael W. Gahagan v. United States Citizenship and Immigration Service, et al.*, Civil Action No. 15-6218, U.S. District Court for the Eastern District of Louisiana, Aug. 19)

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A federal court in Ohio has ruled that prisoner Orlando Carter has not shown that EOUSA received his FOIA request sent to the U.S. Attorney's Office in Cincinnati for records concerning his conviction. Carter sent his request certified, but when he filed suit after the agency failed to respond, the agency told the court it had no record of receiving the request. Carter produced a copy of the certified mail receipt, but the court noted that Carter had chosen not to get a return receipt. Carter argued that tracking information on the U.S. Postal Service's website indicated his letter had been delivered. The court, however, noted that "this is insufficient to establish that the agency actually received plaintiff's request. The tracking information shows only that the item was delivered to somewhere in 'Cincinnati, OH 45202,' not the specific address of the Cincinnati office of the United States Attorney." (*Orlando Carter v. United States of America*, Civil Action No. 16-cv-530, U.S. District Court for the Southern District of Ohio, Aug. 16)

A federal court in Arizona has ruled that the Department of Veterans Affairs conducted an **adequate search** for Jose Zaldivar's claims file and properly redacted personally-identifying information under **Exemption 6 (invasion of privacy)**. Zaldivar's main allegation in his suit was that the agency refused to provide contact information and the social security number for his ex-wife, which Zaldivar indicated he required for divorce proceedings. Finding the information was protected by the **Privacy Act**, the court noted that "plaintiff does not argue that the information withheld under the PA pertains to him and not to his wife, or that she has consented to such disclosure. The Court accordingly will grant summary judgment to Defendants on the withholding of the information relating to Plaintiff's former spouse under the Privacy Act." (*Jose Adalberto Zaldivar, Sr. v. United States Department of Veterans Affairs*, Civil Action No. 14-01493-PHX-DGC (DMF), U.S. District Court for the District of Arizona, Aug. 22)