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Washington Focus: The Inspector General at the Department of Defense has begun to proactively disclose summaries or redacted versions of reports that were previously withheld because they were classified or marked as "for official use only." Jared Serbu of Federal Radio reported that although the reports were frequently disclosed in response to FOIA requests, the agency had to republish its Privacy Act system of records notice to include proactive disclosure as a routine use. . .British billionaire Gilbert Chagoury has filed suit against the Justice Department, the State Department, and the CIA for improperly disclosing information to a reporter that harmed his financial interests. Chagoury brought suit under the Judicial Redress Act, passed by Congress as part of an agreement to give European citizens the ability to sue the federal government for violations of their informational privacy rights. The statute is something of an anomaly since it provides Privacy Act-like rights to foreign citizens, who are specifically excluded from the Privacy Act.

Court Upholds Remaining Claims In FOIA Processing Case

Judge Beryl Howell has finally wrapped up a five-year FOIA suit brought by National Security Counselors for records concerning FOIA processing at various intelligence agencies. Because the CIA was the primary focus of NSC's litigation, Howell's decision affirms that agency's use of Exemption 3 (other statutes) and Exemption 5 (privileges), although she reiterated in strong terms that the CIA cannot use the CIA Information Act to withhold records about the agency's functions unless disclosure would reveal something about agency employees. She also found that the DIA and the Office of the Director of National Intelligence properly withheld several documents concerning the way referrals would be coordinated between agencies under the deliberative process privilege.

In an earlier 2013 decision in the case, Howell ruled 50 U.S.C. § 3507, which exempts the disclosure of "organizations, functions, names, official titles, salaries or number of personnel employed by the agency," was only

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applicable if the information revealed something about employees. Regardless, the CIA noted that "it respectfully disagrees with this Court's initial determination" and "maintains that, while the [CIA Act] is not without limits, it explicitly allows CIA to withhold information concerning its organization and functions as they relate to the protection of intelligence sources and methods." Howell, however, explained that she earlier "rejected this proposed construction of the relevant statutory language and instead held that the CIA Act exempts from disclosure under FOIA only material that 'would reveal the specific categories of personnel-related information enumerated in the statute. . .'" The CIA had redacted information about the directorates assigned to search for records responsive to FOIA requests, arguing such information would reveal information about the directorates' functions. Howell rejected that argument, noting that "merely describing which directorate is primarily responsible for maintaining general categories of agency records does not identify the organization or function of CIA *personnel* working within each listed directorate, which is the only information the CIA Act specifically exempts from disclosure."

She indicated that "the agency's interpretation of 'functions' is largely a rehash of its effort. . .to conflate the functions of the agency itself with the functions of its individual employees. This effort to cloak nearly all of the agency's operations from scrutiny under the auspices of the CIA Act is a bridge too far. Though certainly keeping with the agency's apparent efforts to seek a wholesale exemption from FOIA's disclosure requirements, the agency's preferred interpretation of the CIA Act 'strips the word "personnel" of any real meaning.' [The redacted information] may be reflective of the function of the *divisions* listed on the chart as maintaining records on certain subjects, but does not indicate the function of any particular agency *employee*."

The agency fared much better in its invocation of 50 U.S.C. § 3024(i)(1) of the National Security Act, which protects intelligence sources and methods. The agency had withheld information about which directorates had been tasked with searching for records, contending disclosure would reveal intelligence sources and methods. Noting that "the agency's reasoning on this front is far from precise," Howell observed that "the agency appears to suggest that information indicating that a particular category of agency records is maintained by a division involved in intelligence gathering, as opposed to a division that merely analyzes information already held by the CIA, provides some indication of the 'intelligence methods' employed by the agency." She pointed out that "the agency's explanation of the link between a directorate's record-keeping responsibilities and the methods used by which the CIA collects intelligence is initially difficult to square with its wholesale redaction in these documents." But she indicated that "nonetheless, it is not illogical to imagine that revelations related to even these seemingly innocuous topics may implicate sensitive intelligence-gathering methods."

A number of redactions made under Exemption 5 remained in dispute. Howell found the CIA's supplemental affidavit was sufficient to carry its burden to show that redactions it made under the deliberative process privilege were appropriate. The agency withheld preliminary search terms. NSC argued that search terms were normally revealed during litigation so they could not be deliberative. But Howell pointed out that "revealing the initial search terms and results used by the agency to guide its subsequent efforts to respond to a particular FOIA request may expose a central element of the agency deliberations in determining how to formulate any final response. Most notably. . .preliminary searches generally dictate whether the agency must neither confirm nor deny the existence of responsive documents."

The DIA had redacted information about coordinating referrals. Howell accepted the agency's explanation that "the decision whether to attribute the processing of a document to a particular intelligence agency is *itself* often subject to debate among interested agencies." She approved redactions made by ODNI as well. She noted that "the redacted material clearly preceded any final agency determination regarding the FOIA request at issue and served to inform the agency's ultimate response." As to another ODNI redaction, she pointed out that "the redacted material, which addressed an 'open and on-going' FOIA request and

comprised internal deliberations regarding the degree to which the ODNI would or would not be responsible for processing the request, is sufficient to justify the agency's decision to withhold this material as privileged." (*National Security Counselors v. Central Intelligence Agency, et al.*, Civil Action No. 11-443, 11-444, and 11-445 (BAH), U.S. District Court for the District of Columbia, Sept. 6)

Views from the States…

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

Connecticut

The supreme court has ruled that the FOI Commission applied the incorrect standard in assessing whether mixed communications between two attorneys hired by the Connecticut Resources Recovery Authority primarily as lobbyists and agency employees could be withheld under the attorney-client privilege. In hearing Michael Harrington's complaint, the commission recognized that the communications dealt with business matters as well as legal matters, but found on the basis of *Shew v. FOI Commission*, 714 A.2d 664 (1998), the only supreme court decision dealing with the attorney-client privilege, that all the communications were privileged because they were inextricably intertwined with privileged information. However, the supreme court noted that "this court has never indicated that the 'inextricably linked' standard governs a determination whether a communication containing or seeking both business and legal advice would be privileged in its entirety." Instead, the supreme court explained that "there is a broad consensus in other jurisdictions that, 'if the non-legal aspects of the consultation are integral to the legal assistance given and the legal assistance is the *primary purpose* of the consultation, both the client's communications and the lawyer's advice and assistance that reveals the substance of those communications will be afforded the protection of the privilege'" and added that "we now expressly hold that the primary purpose standard governs such inquiries." The supreme court pointed out that "some of the emails exclusively addressed nonlegal matters. . .that could not reasonably be found to have been inextricably connected to legal advice." Remanding the case to the commission for further proceedings, the court indicated that "it is not enough for the party invoking the privilege to show that factual information 'might become relevant to the future rendering of legal advice. Instead, the communication must also either explicitly or implicitly seek specific legal advice about that factual information.'" The supreme court also instructed the commission to consider that advice was not subject to the privilege merely because it came from an attorney and that the privilege could be waived if communications were sent to non-privileged parties. (*Michael C. Harrington v. Freedom of Information Commission*, No. 19586, Connecticut Supreme Court, Sept. 6)

Louisiana

A court of appeals has ruled that the Louisiana Society for the Prevention of Cruelty to Animals is a quasi-public body because it receives nearly $2 million annually from the City of New Orleans to provide mandated animal control services. The New Orleans Bulldog Society, a non-profit organization advocating for dog welfare in New Orleans, requested detailed information about the number of dogs euthanized by LSPCA. LSPCA told the Bulldog Society that it was not a public agency subject to the public records act and that under its Cooperative Endeavor Agreement with the city it filed an annual report that was available from the city attorney. The Bulldog Society filed suit and the trial court sided with the LSPCA, finding it was not a public agency and that its CEA report was the only information that was required to be made public. But the court of appeals reversed, noting that "the old adage about walking and talking like a duck appears applicable

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here: the LSPCA performs municipal functions on behalf of the municipal government and, in so doing, is both compensated by the municipality and acts under the auspices of the municipality. Under these circumstances, the LSPCA is clearly a quasi-public entity subject to the Public Records Law." Having answered the question about LSPCA's quasi-public status, the court indicated LSPCA was required to respond to the Bulldog Society's request. The court observed that "the LSPCA has offered no reason (beyond its failed argument that it is not subject to the Public Records Law) for refusing to provide public access to its records." (*New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*, No. 2015-CA-1351, Louisiana Court of Appeal, Fourth Circuit, Sept. 7)

Maryland

A court of appeals has ruled that the Town of Chevy Chase improperly considered the identity of requester when it denied his request for a fee waiver. The case involved requests from Action Committee for Transit to Chevy Chase for records concerning the construction of the Purple Line, a proposed light rail public transit system. Based on articles in the *Washington Post*, ACT and Benjamin Ross, an author who had written extensively on issues involving the Purple Line, made requests to the Town of Chevy Chase for records concerning the town's relationship with several D.C. law firms that had been hired by the town. After the town indicated it would charge $700 for processing ACT's request, the group asked for a fee waiver. ACT's request for a fee waiver was denied. The town denied ACT's fee waiver requests it made as part of subsequent records requests as well. Ross then made several requests in his own right as a reporter and the town denied those requests as well, alleging Ross's request was made on behalf of ACT. The trial court sided with the town. On appeal, ACT and Ross pointed out that the trial court had indicated the town considered negative comments made by ACT and Ross about the town as a factor in determining whether they were entitled to a fee waiver. The appeals court observed that it was "satisfied that a significant factor, if not the primary factor, in the Town's decision to deny ACT's request for a waiver was that the organization had previously criticized Town officials for their opposition to the Purple Line. . .A decision based upon such unconstitutional considerations is clearly arbitrary and capricious." Turning to Ross's request, the court indicated that "because the Town did not identify any reason for denying Ross's request other than his affiliation with ACT, we hold that the Town's decision to deny his waiver request was also arbitrary and capricious." (*Action Committee for Transit, Inc. v. Town of Chevy Chase*, No. 1204 Sept. Term 2015, Maryland Court of Special Appeals, Sept. 1)

Michigan

A court of appeals has ruled that the Open Meeting Act does not provide for declaratory relief and that the trial court erred in granting Citizens for a Better Algonac Community Schools relief prohibiting the Algonac Community Schools from using email exchanges to deliberate on matters required to be considered at a public meeting. The Algonac Board of Education voted to hire the superintendent of a neighboring district at a special meeting held in April 2014 without any discussion. Four weeks later, the board met again without discussion to approve the terms of the contract. Citizens then filed suit, alleging the board had improperly used email discussions to deliberate on the hiring of the new superintendent rather than meeting and discussing the matter in public. The trial court ruled that the board had violated the OMA through its use of emails, but did not grant Citizens injunctive relief because Citizens had failed to show that the practice of using emails had occurred in the past, continued at the present time, or would persist in the future. As a result, the trial court declined to award attorney's fees. Relying on the Michigan Supreme Court's decision in *Speicher v. Columbia Township Board of Trustees*, 860 NW2d 51 (2014), which limited the remedies under the OMA to injunctive relief, the appeals court found that while the trial court had appropriately found that Citizens was not entitled to injunctive relief, and, hence, attorney's fees, it had erred in providing declaratory relief. The appeals court noted that "it was improper [for the trial court] to issue a judgment that nonetheless awarded

plaintiffs declaratory relief, as it effectively signified that plaintiffs had a recognizable cause of action for declaratory relief, running afoul of the OMA's three-tiered enforcement scheme and *Speicher*. Given that plaintiffs were not entitled to injunctive relief as a matter of law, they had no sustainable cause of action under the OMA; therefore, the suit should have been dismissed." (*Citizens For a Better Algonac Community Schools v. Algonac Community Schools*, No. 326583, Michigan Court of Appeals, Sept. 8)

Montana

The supreme court has remanded journalist Jon Krakauer's request to the Commissioner of Higher Education for records identifying the University of Montana quarterback as the defendant in a sexual assault case brought by a female student. Krakauer based his access claim on records that had been unsealed as part of a suit brought in federal court in Montana by the unidentified defendant trying to block the University from pursuing disciplinary proceedings against him. The unsealed records indicated that a female student alleged she had been raped in an off-campus apartment, that the Dean of Students and the University Court had upheld the complaint and recommended the defendant be expelled, that the University President agreed with the recommendation, and that the defendant had appealed that decision to the Commissioner of Higher Education. Krakauer argued that the federal Family Educational Rights and Privacy Act did not prohibit disclosure, and, in the alternative, that the exceptions for final disciplinary action or records disclosed by judicial order were applicable. The Commissioner argued that Krakauer was ineligible to sue under the Montana public records act because he was not a citizen. The supreme court, however, found that the statute allowed any person denied access to records to sue and that there was no citizenship requirement. The court found Krakauer's argument that FERPA did not require educational institutions to withhold student-identifying information, but only threatened funding to be "delusional." The supreme court explained that "whether or not FERPA explicitly prohibits state action, the financial risk it imposes upon [the university] for violation of the statute is a real one." Pointing out that the final disciplinary action exception applied only where disciplinary action was final, the supreme court observed that "the record before us here does not indicate whether the Commissioner ultimately held that a violation occurred, and thus, we are unable to now determine whether this exception authorized release of limited information related to Krakauer's request. However, upon remand and after conducting an *in camera* review of the records, the [trial] court may consider the applicability of this exception. . ." The supreme court found student records could be disclosed pursuant to a court order, but noted that "merely filing a lawsuit and requesting records without the court's consideration of a student's privacy interests would fail to satisfy the statute's requirement that student privacy be protected and that release of records be prohibited until a court or tribunal conducts that legal process." The supreme court sent the case back to the trial court for *in camera* review and consideration of the balance between the student's privacy interest and the public interest in disclosure. (*Jon Krakauer v. State of Montana, Commissioner of Higher Education*, No. 2016 MT 230, Montana Supreme Court, Sept. 19)

New Jersey

A court of appeals has ruled that the Bergen County Prosecutor's Office properly invoked a *Glomar* response to neither confirm nor deny the existence of records for an individual who had not been charged with any crime. In refusing to respond to the request, BCPO told North Jersey Media Group that disclosing any information would imply or confirm that the individual had been a subject of investigatory interest. The trial court rejected BCPO's contention that such records would be protected by the criminal investigation exemption, but agreed that confirmation would be an invasion of privacy. Although the *Glomar* response stems from federal FOIA law, the court, noting that the federal Second Circuit had accepted its use in *Wilner v. NSA*, 592 F.3d 60 (2d Cir. 2009), found no reason why it could not apply to the Open Public Records Act as well. The court explained that "before OPRA was enacted, judicial decisions recognized the need to maintain

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'a high degree of confidentiality' for records regarding a person who had not been arrested or charged. The confidentiality accorded such information promotes both the integrity and effectiveness of law enforcement efforts for the benefit of the public at large. In addition, the grant of confidentiality protects the privacy interest of the individual. . ." The court found that the confirmation would cause irreparable harm to an individual who had been the subject of unproven allegations of criminal wrongdoing. However, the court found the privacy exemption did not apply, noting that under the privacy exemption "the protected information is personal in the sense that it provides identifying information about a person that originates with the individual and is 'entrusted' to the government. We therefore conclude that the basis for withholding the records sought here does not logically fall within [the privacy] exemption." (*North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office*, No. 2393-13, New Jersey Superior Court, Appellate Division, Aug. 31)

Texas

A court of appeals has ruled that a confidentiality provision pertaining to audits by the Office of the Inspector General at the Department of State Health Services is limited to audits pertaining to fraud and abuse and does not apply to employment-related misconduct. One employee at the agency filed a grievance against a fellow employee. OIG investigated the misconduct, but found the allegations could not be substantiated. Both employees filed open records requests for the findings, but the agency withheld the report on the basis of a provision that made records compiled by the OIG in connection with an audit or investigation confidential. The agency asked the Attorney General for an opinion supporting its position, but the AG found the provision was limited to investigation of Medicaid and healthcare–related fraud. The agency brought suit against the Attorney General. The trial ruled in favor of the agency, but the appellate court reversed, finding the provision was limited to cases of healthcare-related fraud and abuse. The court observed that "to the extent that the Department is suggesting that the OIG is authorized to conduct employee-misconduct investigation that do not implicate fraud and abuse. . .the scope of the OIG's investigatory authority. . .is not before us. What is before us is the scope of the confidentiality granted by [the provision] and we disagree that the Legislature intended the grant to be limitless. . ." (*Ken Paxton v. Texas Department of State Health Services*, No. 03-14-00594-CV, Texas Court of Appeals, Austin, Aug. 31)

Washington

The supreme court, sitting en banc, has ruled that plaintiffs must bring suit for violations of the Public Records Act within a year of a final agency action, not the two year general statute of limitations. Mike Belenski, a frequent requester, submitted a request to Jefferson County for internet access logs. The county told him it had no records, but he later discovered the county did have such records but had decided not to disclose them because it would be too complicated. Belenski filed suit two years later. The court of appeals found his suit satisfied the two-year general statute of limitations. But the supreme court reversed, noting that the PRA required suit be filed within one year of a final action. The supreme court pointed out that "the PRA contains its own statute of limitations in a section titled 'Judicial review of agency actions,' along with a provision stating that the PRA governs in the event it may conflict with any other acts. Therefore, we adopt the one year statute of limitations for causes of action under the PRA." The supreme court observed that the ability to file suit under the PRA began when a requester received a final response. The supreme court noted that "Belenski received a response [indicating the county had no records] via email on October 5, 2010. Regardless of whether this answer was truthful or correct, the country's definitive, final response to Belenski's PRA request was sufficient to put him on notice that the County did not intend to disclose records or further address this request." (*Mike Belenski v. Jefferson County*, No. 92161-0, Washington Supreme Court, Sept. 1)

The Federal Courts…

The Eighth Circuit has ruled that the American Farm Bureau Federation and the National Pork Producers Council have **standing** to bring a **reverse-FOIA** suit on behalf of their members against the EPA to block disclosure of identifying information about concentrated animal feeding operations and that the EPA's decision to release personally identifying information was arbitrary and capricious under the APA because it was contrary to **Exemption 6 (invasion of privacy)**. As the result of a 2008 GAO recommendation that the EPA compile a national inventory of CAFOs with system permits allowing CAFOs to discharge pollutants under the Clean Water Act, the EPA published a proposed rule requiring CAFOs to provide contact and location information. After the proposed rule was challenged, the EPA decided to collect the data primarily through state agencies. While this collection process was ongoing, several public interest organizations requested the EPA inventory data. The agency disclosed data from 28 states, but did not disclose data from seven other states that came in after the FOIA requests. In response to concerns raised by the Farm Bureau and the Pork Producers Council, the agency considered whether the data was subject to Exemption 6. It decided that data from 19 states was publicly available, but that other data from CAFOs without permits should not be disclosed. The EPA asked the FOIA requesters to return that data, which they did. At the time the Farm Bureau and the Pork Producers Council brought suit, none of the disputed data had been disclosed. The district court found that the trade organizations did not have standing and dismissed their case. But the Eighth Circuit reversed, finding that because individual members could have sued, the trade associations had standing to sue on their behalf. Turning to the question of whether the data was protected by Exemption 6, the EPA argued that the data came primarily from public sources. But the court pointed out that "the EPA here is more than simply a second source for identical, publicly available information. The agency has aggregated vast collections of data from the majority of States—much of it obtained through state-specific information requests—and provided it to requesters in a single response." Citing *Reporters Committee*, the court noted that "CAFO owners still have a privacy interest in preventing the mass aggregation and release of their personal information by the government. The agency's own extensive collection efforts and advocacy groups' multi-year effort to obtain the data show that the EPA has consolidated information that would otherwise exist in considerably greater obscurity." The court added that "the agency's release of the complete set of data on a silver platter, so to speak, eliminates the need for requesters and others to scour different websites and to pursue public records requests to create a comprehensive database of their own." But the court indicated that "the disputed spreadsheets themselves could be disclosed in redacted form and still inform the public about the agency's collection efforts." The EPA argued that Congress had established a public interest in disclosure of such data under the Clean Water Act. The court, however, pointed out that "that the requesters may seek to vindicate policies underlying the Clean Water Act does not affect the FOIA analysis under Exemption 6." (*American Farm Bureau Federation and National Pork Producers Council v. U.S. Environmental Protection Agency, et al.*, No. 15-1234, U.S. Court of Appeals for the Eighth Circuit, Sept. 9)

The Ninth Circuit, sitting en banc, has adopted the **de novo review** standard for FOIA cases already accepted by the majority of the circuits, abandoning the antiquated clearly erroneous standard the Ninth Circuit had used since 1979. In a per curiam decision, the court noted that "in reviewing our precedents, as well as those of our sister circuits, we conclude there is no principled distinction to be drawn between our usual summary judgment standard and the standard to be applied in FOIA cases." Describing how the change would be applied, the court observed that "consistent with our usual procedure, if there are genuine issues of material fact in a FOIA case, the district court should proceed to a bench trial of adversary hearing. Resolution of factual disputes should be through the usual crucible of bench trial or hearing, with evidence subject to scrutiny and witnesses subject to cross-examination. The district court must issue findings of fact

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and conclusions of law. Our review remains the same as in all civil cases: we review the findings of fact for clear error and the conclusions of law *de novo*." (*Animal Legal Defense Fund v. U.S. Food & Drug Administration*, No. 13-17131, U.S. Court of Appeals for the Ninth Circuit, Sept. 2)

Judge Ketanji Brown Jackson has ruled that the Justice Department may withhold under **Exemption 7(A) (ongoing investigation or proceeding)** an audio recording made by a confidential source pertaining to an investigation of Reliance Medical Systems for fraud, even though portions of the transcript of the recording were publicly disclosed as part of a False Claims Act suit brought against Adam Pike and Bret Berry. However, Jackson found the government had **waived** its ability to claim a FOIA exemption for those portions of the transcript that had been made public. Pike and Berry learned of the existence of the audio recording and transcript as a result of the FCA suit. They requested a copy of the audio recording and the transcript, arguing the agency had waived its ability to withhold the records by making portions of the transcript public. The Civil Division found both the audio recording and the transcript and withheld them under Exemption 7(A) as well as **Exemption 7(D) (confidential sources)**. Since Jackson found Exemption 7(A) covered the records, she did not address the 7(D) claim. Finding the records qualified as law enforcement records, Jackson noted that "the record evidence plainly establishes that there is a connection between these plaintiffs and a possible violation of federal law, which is all that is required to support DOJ's assertion that the law-enforcement-purposes requirement has been met." Pike and Berry's primary objection was that the agency had waived its right to withhold any of the records because it had publicly disclosed portions of the transcript. Rejecting the claim, Jackson observed that "this contention is unavailing as a matter of pure logic: the mere fact that the government has chosen to release some parts of a protected document—and bear the brunt of the harm that results—does not *a fortiori* mean that releasing the entire document would not be harmful." But she agreed with Pike and Berry that the government had waived any FOIA claim to withhold the exact portions of the transcript that had already been made public. However, she concluded the waiver applied only to the published portions and to nothing else. She explained that "plaintiffs have not shown that the government has released from the transcript of the audio recording any publicly available information other than the excerpts quoted in the FCA complaint and press release. And nowhere in the FOIA statute or in related case law is the government required to produce otherwise-exempted information on the ground that withholding it would allegedly result in unfairness or disadvantage to the requesting party." Jackson found the waiver did not apply to the audio recording either. She noted that "although the transcript excerpts that have been publicly quoted contain words that are identical to the words spoken in the audio version of those same excerpts, DOJ asserts that the voice inflection in the audio version reveals additional information; specifically the *identity* of the individual who created the recording. This information is entitled to be withheld under Exemption 7(A) and no part of the audio version of the recorded conversation has ever been publicly disclosed, which means that the government has not waived its right to continue to withhold the information that the audio recording conveys pursuant to Exemption 7(A)." (*Adam Pike, et al. v. United States Department of Justice*, Civil Action No.15-0301 (KBJ), U.S. District Court for the District of Columbia, Sept. 20)

Judge Amy Berman Jackson has ruled that the IRS conducted an **adequate search** for records concerning the Sea Shepherd Conservation Society, except for its Exempt Organizations Examination function, that it properly withheld records under **Exemption 3 (other statutes)** and **Exemption 7(D) (confidential sources)**, but that it cannot rely on a *Glomar* response neither confirming nor denying the existence of records for records from its Whistleblower Office. Sea Shepherd Conservation Society, a tax-exempt organization, requested all IRS records concerning itself. In a prior opinion, Jackson approved of some exemption claims, but found, generally, that the agency had not justified the searches it conducted. She ordered the agency to conduct further searches and to provide justification for some of its Exemption 3 claims. This time, Jackson found that, except for the Exempt Organizations Examination function, the agency had now

conducted an adequate search. Sea Shepherd contended that the searches of two components were inadequate because the agency staffer who signed the affidavit did not have personal knowledge of the records. Jackson disagreed, upholding one search by noting that "the agency has explained that responsive documents would have come from one or two databases. It searched both databases using a search term that it knows would return relevant information, and it found no records. Because [the agency's affidavit] provided a rationale for [its] search, and the search terms used. . .the Court finds that the search of [the component] was reasonably calculated to find all responsive documents." By contrast, she found the search of the Exempt Organizations Examination function inadequate because of a difference in search terms used. She indicated that "the varying search terms call into question whether defendant implemented a rational search methodology of the Exempt Organizations Examination function." The agency's Exemption 3 and Exemption 7(D) were interrelated. The agency claimed two sources had provided it with information pertaining to Sea Shepherd's clashes with Japanese whaling activity. Jackson had previously questioned the agency's 7(D) claim because it had not described the level of confidentiality involved. But this time she noted that "the Court is satisfied that the government has met its burden to show that the [first] source 'spoke with an understanding that the communication would remain confidential' and that the source received express assurances that its statements would be kept confidential." However, the only evidence the agency produced as to the second source was that the individual had been aware of the IRS policy on confidentiality for whistleblowers as it appeared on the agency's website. Although that was insufficient to show explicit assurances of confidentiality, Jackson found the agency had shown an implicit assurance of confidentiality. She observed that "the source provided information about serious crimes and that its repeated expressions of a need for confidentiality were made in the context of the agency's publicly announced policies." Satisfied that the two sources had been given assurances of confidentiality, Jackson was now able to find that disclosure would harm tax administration for purposes of §6103. She noted that "the Court agrees with the IRS, then, that it would have a serious chilling effect on the use of confidential informants if that information were revealed." As a result of her first order requiring the agency to search more thoroughly, the agency had searched the Whistleblower office, but had issued a *Glomar* response as to whether it had found any records. Jackson found a *Glomar* response was inappropriate under the circumstances. She pointed out that "even if one were to defer to the agency's judgment on this issue in the ordinary situation, the Court concludes that the defendant cannot justify its *Glomar* response under the unique circumstances of this case, where the fact of the existence of whistleblowers and informants has already been made public by the defendant in response to a FOIA request lodged by the taxpayer itself." (*Sea Shepherd Conservation Society v. Internal Revenue Service*, Civil Action No. 13-1422 (ABJ), U.S. District Court for the District of Columbia, Sept. 20)

Judge Royce Lamberth has ruled that the Department of the Air Force conducted an **adequate search** for records concerning the termination for convenience of a contract with Virginia Dominion Power pertaining to a utility privatization contract that included Fort Monroe, which was scheduled to close in 2011, and that most of the remaining redactions made under **Exemption 5 (deliberative process privilege)** were appropriate. The law firm of Blank Rome made a multi-part request for records concerning the termination of the contract. The agency assigned the request to Technical Sergeant Bradley Benedictus, who had handled the contract. Benedictus searched his records and identified five other employees who were involved and whose email accounts should be searched. Several of those employees were no longer with the Air Force and their accounts were no longer accessible. The request was also referred to the Department of the Army and GAO. After Blank Rome appealed the agency's failure to respond, the agency disclosed 82 documents with redactions under Exemption 5. Blank Rome appealed that decision and then filed suit. The agency disclosed another 200 documents, some with redactions made under Exemption 5. Six months later, the agency produced a Rule 4 file, concerning an appeal of the agency's decision to terminate the contract, which contained 128 documents responsive to Blank Rome's request, although most of them had already been

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disclosed. By the time Lamberth decided the case, only three documents redacted under Exemption 5 remained in dispute. Blank Rome argued the search was inadequate because the agency had failed to uncover several types of records, had improperly delayed in referring the request to other agencies, and had failed to search the records of other agency employees Blank Rome contended were involved with the contract termination. As to Blank Rome's claim that the search did not uncover certain categories of documents, Lamberth indicated the law firm had provided nothing but speculation. He added that "plaintiff appears to be seeking documents that may be in the possession of the four agencies named, not the Air Force. The Air Force, as the recipient of the FOIA request, was under an obligation to search its own records or records in its possession for responsive documents. It was under no obligation to search for documents within the custody of other agencies. If plaintiff seeks records in the possession of other agencies, its remedy lies with them." As to the records uncovered as a result of the Rule 4 file, Lamberth explained that "if an agency uncovers previously unreleased responsive documents, and then releases them, the search is not deemed inadequate." Lamberth expressed sympathy with Blank Rome over their allegations of delay in referring their request, but noted that "because defendant has demonstrated that it conducted a reasonable search and produced responsive documents, it is irrelevant that it delayed in referring the search to other agencies and in producing documents." Lamberth reviewed the three documents *in camera*, finding three improper redactions, but approving the rest. Describing the improper redactions, he noted that "although they were generated before the Air Force's final decision regarding the Fort Monroe termination settlement proposal. . .and were therefore predecisional at that time, the material in these redactions lost their predecisional status when they were adopted in the Air Force's final memorandum." Upholding other redactions, he explained that "changes to wording that give insight into the agency's decisionmaking process and discourage candid discussion may be deliberative in nature." He also found that cost calculations could be withheld. He pointed out that "not only was this information not included in the final agency letter, any calculations or estimates were used in the Air Force's decision regarding whether to accept DVP's settlement proposal and its own calculation of settlement amount owed to DVP." (*Blank Rome LLP v. Department of the Air Force*, Civil Action No. 15-1200-RCL, U.S. District Court for the District of Columbia, Sept. 20)

A federal court in Texas has ruled that the Department of Housing and Urban Development failed to show that **Exemption 6 (invasion of privacy)** applies to data pertaining to families in the Housing Choice Voucher Program in the Dallas area where there are less than 11 families in a zip code. The data was requested by the Inclusive Communities Project. HUD was willing to disclose much of the data, but insisted on redacting data that might be used to identify individuals in zip codes with less than 11 families. The ICP and HUD were unable to agree to the extent of redactions and ICP filed suit. HUD argued that individuals familiar with the zip code areas could use the redacted data to identify individuals, while ICP claimed that possibility was remote at best. In assessing the applicability of Exemption 6, the court indicated that it would consider the derivative use of the data, noting that "under the derivative-use theory, an invasion of privacy occurs upon the release of non-private information that might nevertheless be used to uncover private information." The court rejected HUD's potential chain of events, noting that "HUD has *explained* how disclosure could lead to discovery of individual names and addresses, but it has not *demonstrated* that it would." Having concluded the agency had not proven its case, the court nevertheless decided to balance the privacy interests against the public interest in disclosure. The court acknowledged that under *Reporters Committee* the public interest in disclosure was limited to showing what the government was up to. The court found the disputed information pertained to government operations. The court pointed out that "HUD-50058 contains information that directly relates to questions about HUD's administration of the HCVP. Therefore, the Court concludes that release of this information, including the Withheld Information, would shed light on HUD's performance of its statutory duties." The court further noted that ICP could not analyze the data without access to the zip code information that HUD wanted to withhold. Balancing the interests, the court observed that "the Court recognizes HUD's serious and legitimate privacy concerns over the release of the

Withheld Information that might allow requesters to discover HCV holders' names and addresses; however, HUD has not shown a sufficient casual nexus between such release and discovery. Even if it had, the public's interest in more easily monitoring HUD's administration of the HCVP—especially its distribution and management of more than $200 million in subsidies—along with FOIA's strong presumption in favor of disclosure, leads to the conclusion that the public interest in disclosure outweighs the HCV holders' privacy interest." (*Inclusive Communities Project v. United States Department of Housing and Urban Development*, Civil Action No. 14-3333-B, U.S. District Court for the Northern District of Texas, Dallas Division, Sept. 13)

A federal court in Rhode Island has ruled that the DEA must disclose exhibits introduced at the criminal trial of Dr. Paul Volkman, who was convicted and given a life sentence in 2011 for overprescribing pain pills that led to the death of 14 patients, to journalist Philip Eil, who became interested in Volkman's case because the doctor had been a college and medical school classmate of Eil's father. To explore how Volkman became an alleged mass murderer, Eil requested the exhibits from the Southern District of Ohio and the Sixth Circuit. The exhibits, totaling more than 15,000 pages, had never been redacted nor sealed by the court. Eil was told he should request the records under FOIA and he submitted a request to the Executive Office for U.S. Attorneys, which referred the request to the DEA. The agency disclosed 3,813 pages with redactions, about 25 percent of the pages admitted as full exhibits, and withheld the rest, primarily under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Noting generally the importance of public judicial proceedings, the court pointed out that "the records at issue in this case are not simply records 'accumulated in various governmental files;' they are the very records that the government relied upon to prosecute Dr. Volkman and the jury used to convict him." Saying that "it is hard to take the government's vehement arguments asserting the strong privacy interest of the third parties here too seriously," the court observed that "the government introduced unredacted copies of previously private medical records into a public trial. . .The government to this date has not sought an order from the trial court or the Sixth Circuit seeking to seal any of the private medical records that were trial exhibits. Moreover, it has allowed the trial transcript containing all of the names of the third parties and discussion of their medical conditions to remain available to the public." However, the court noted that "regardless of the government's prior failure to take measures to protect the privacy interest of these third parties, it is this Court's obligation to make a determination of the privacy interests involved." Balancing the privacy interests against the public interest in disclosure, the court indicated that "it can protect most of the privacy interests of the third parties by excluding personally identifiable information in the exhibits." The court added that it would "minimize the invasion of privacy by ordering the DEA to redact highly personal information of no consequence to the trial or conviction of Dr. Volkman." (*Philip Eil v. U.S. Drug Enforcement Administration*, Civil Action No. 15-99-M-LDA, U.S. District Court for the District of Rhode Island, Sept. 16)

Judge Christopher Cooper has ruled that the DEA has not yet shown that it conducted an **adequate search** for Privacy Impact Assessments required under the E-Government Act because it has failed to explain why it did not expand its search to locate four PIAs that were unaccounted for after EPIC had found evidence of such PIAs in final determination letters from the Justice Department's Office of Privacy and Civil Liberties. EPIC sent a request to the DEA for all PIAs for agency information collection systems that were not available on its website and all initial privacy assessments conducted by the DEA since 2007. OPCL assists Justice components like the DEA to assess the need for PIAs. If OPCL determines a PIA is required, the agency must submit the assessment to OPCL for final approval and post it publicly as long as the system continues in use. The agency searched its Chief Information Officer Support Unit, which acts as a liaison between OPCL and DEA's Senior Component Office for Privacy. SCOP is responsible for approving PIAs before CIOSU submits them to OPCL for final authorization. CIOSU conducted the search for records responsive to EPIC's request.

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It found only one non-public PIA, which was released to EPIC. The agency told EPIC that initial privacy assessments were essentially working drafts and that the final approval determination letters from OPCL represented the final product. EPIC agreed to accept the 13 OPCL determination letters, which were reviewed and released by OPCL. The OPCL determination letters revealed that OPCL had requested four PIAs from the DEA that were not available online and had not been uncovered in the DEA's initial search. As a result, the DEA re-ran its initial search and still came up with nothing. EPIC made three challenges to the adequacy of the agency's search. Cooper rejected EPIC's claim that DEA had improperly narrowed its search to CIOSU. Cooper accepted the agency's explanation, noting that "the DEA, not its FOIA requestors, is charged with determining the most effective way to search its records." He also dismissed EPIC's claim that inserting the word "final" into the search had improperly limited the search, pointing out that "the CIOSU conducted specific searches based on program names provided by EPIC without adding 'final' as a search term. These searches yielded no additional results." But he agreed with EPIC that once the four unaccounted for PIAs came to light as a result of the OPCL determination letters the agency was required to pursue such a lead. He observed that "if the SCOP had reviewed and approved a final PIA without returning it to the CIOSU, a final version of the PIA might remain with the SCOP. The CIOSU did not explain why searching the SCOP, once EPIC presented evidence of potential [additional] PIAs, was not likely to uncover responsive records. The OPCL letters provide a 'lead' that the CIOSU failed to reasonably follow." (*Electronic Privacy Information Center v. United States Drug Enforcement Administration*, Civil Action No. 15-00667 (CRC), U.S. District Court for the District of Columbia, Sept. 13)

Judge Paul Friedman has ruled that the FBI has now conducted an **adequate search** for records concerning FOIA requests the agency received pertaining to Aaron Swartz, but that it has not sufficiently explained claims under **Exemption 3 (other statutes)** and **Exemption 7(E) (investigative methods and techniques)** the agency made in regard to 32 of 68 pages newly processed as a result of Friedman's previous order. In a suit brought by researcher Ryan Shapiro, Friedman had previously told the agency to consider whether responsive records might exist outside its Central Records System and to disclose third-party FOIA requests processed after the original search cut-off date. In conducting the second search, the FBI found another third-party FOIA request it had processed containing the 68 previously unprocessed records. The agency processed those records and claimed the privacy exemptions as well as Exemption 3 and Exemption 7(E). Shapiro challenged the agency's search. Friedman noted, however, that "Plaintiff's argument that the indexing system of the FBI's CRS is flawed may be true, but ultimately is irrelevant because the government need only conduct a 'good faith effort to produce the information requested.' The government need not conduct an exhaustive search, nor must it use only the best technology available to it. . ." Shapiro had not challenged the application of the privacy exemptions, but argued the agency's Exemption 3 and Exemption 7(E) claims were conclusory. Friedman agreed. As to Exemption 7(E), he noted that "the government's only explanation [for withholding records compiled from non-public databases] is that those 'non-public databases serve as repositories for counterterrorism and investigative data' and that they are 'one-stop shops' for law enforcement to 'query information and develop investigative leads.' These threadbare statements fall far short of meeting the government's burden to 'demonstrate logically how the release of [the requested] information might create a risk of circumvention of the law,' as required by Exemption 7(E)." (*Ryan Noah Shapiro v. Department of Justice*, Civil Action No. 13-0729 (PLF), U.S. District Court for the District of Columbia, Sept. 7)

The Ninth Circuit has ruled that a district court judge erred by failing to consider the prevailing market rates for **attorney's fees** in the Northern District of California and instead granting the Military Law Task Force fees based on the organization's then current $200 an hour fee. MLTF requested records from the Department of Defense about several incidents that took place in Iraq. As a result of litigation, MLTF was

found to have substantially prevailed and to be eligible for attorney's fees. MLTF had suggested initially that it was entitled to at least its $200 an hour rate, but instead requested the prevailing market rate in its fees motion, asking for a total of $381,633. The district court, however, concluded MLTF was only entitled to the $200 rate and awarded them $180,520. MLTF requested the court reconsider the judgment and a second district court judge agreed with the original reduction. MLTF then appealed. A majority of the Ninth Circuit panel found the district court had erred in not considering the prevailing market rates. Noting that MLTF had provided evidence indicating fee awards at a higher market rate, the appeals court noted that "the Government asks us to impose an additional limitation on fee applicants; namely, that they are foreclosed from pointing out a misapplication of a historical rate calculation if they only requested current rates in an initial application." The court added that "a fee applicant's decision to request a higher rate does not permit a court to disregard different rates if the evidence in the record supports them." Sending the case back to the district court for a determination of fees in accordance with its opinion, the appeals court also indicated that MLTF was eligible for fees for its appeal as well. (*Marguerite Hiken, Military Law Task Force v. Department of Defense*, No. 13-17073, U.S. Court of Appeals for the Ninth Circuit, Sept. 6)

Judge Beryl Howell has ruled that the FBI properly issued a *Glomar* response neither confirming nor denying the existence of records concerning Peter Caporino, an associate of mobster Louis Manna, who was convicted in 1989. Caporino testified at the 2006 trial of Michael Crincoli that he had provided information to the government concerning Manna prior to his prosecution. Manna then requested all information Caporino had given law enforcement agents. The FBI issued a *Glomar* response and its decision was upheld by OIP on appeal. Howell first dismissed Manna's claim that the agency had acted arbitrarily and capriciously under the APA. She noted that "there exists in the FOIA an adequate remedy for the complained-of agency action, and thus the plaintiff has failed to state a claim for relief under the APA." She found the FBI had three categories of records that might be responsive to Manna's request, but concluded that Manna had not shown any public interest in disclosure that would outweigh the invocation of a *Glomar* response. She rejected Manna's contention that Caporino had waived his privacy interests by testifying in public. Instead, she pointed out that "in this case, Caporino's disclosure consisted only of the fact that, prior to 2002, he had served as a confidential informant to the FBI for a period of more than fifteen years and assisted in the plaintiff's prosecution. Even assuming Caporino's disclosure would otherwise qualify as 'officially acknowledged' information, the plaintiff 's request for 'any information provided by Peter Caporino from the outset of his opening as an informant for the government up to an including [2014] ' far exceeds the scope of that disclosure." (*Louis Manna v. United States Department of Justice*, Civil Action No. 15-794 (BAH), U.S. District Court for the District of Columbia, Sept. 15)

Judge Rosemary Collyer has ruled that the FBI, EOUSA, and the Criminal Division of the Justice Department conducted **adequate searches** and properly withheld records requested by Vincent Marino. Marino had been convicted of racketeering and conspiracy to murder. He made a number of requests for records related to *U.S. v. Salamme*, as well as records about himself. Marino provided a variety of aliases for search purposes. Both the FBI and the Criminal Division found no more than a handful of records, but because Marino had been tried by the U.S. Attorney for the District of Massachusetts, that office found several filing cabinets of potentially responsive records. The agency told Marino he would need to pay $8,960 in fees to cover the costs of the request; Marino eventually paid the requested fees after the agency denied his request for a fee waiver. Marino argued that the search of USAO-MA was inadequate because so few responsive records had been found. But Collyer noted that "because Defendants have asserted in a sworn affidavit that a reasonable search was conducted of files where responsive records would most likely be located, Defendants are entitled to a presumption of good faith." She added that "Mr. Marino's argument that the limited number

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of pages actually produced demonstrates the search was unreasonable and inadequate is a mere conclusion without support and does not overcome the presumption of good faith." Accepting the agencies' privacy claims, Collyer pointed out that "the Court cannot set aside the 'substantial' privacy interest of third parties without actual evidence of misconduct by the government that demonstrates a strong public interest in disclosure Mr. Marino's allegations alone do not 'warrant a belief by a reasonable person that the alleged Government impropriety might have occurred,' and the only tangible interest Mr. Marino has identified is his own interest in the records to use to appeal his conviction." (*Victor Michael Marino v. Department of Justice*, Civil Action No. 12-865 (RMC), U.S. District Court for the District of Columbia, Sept. 6)

Judge Amit Mehta has ruled that the FBI conducted an **adequate search** for records concerning journalist Sharyl Attkisson. Attkisson and Judicial Watch requested her records from the FBI. They filed suit before the agency had responded. The agency responded during the pendency of the litigation, disclosing six redacted pages released to Attkisson as part of a previous request, and, five months later, an additional unredacted page. Attkisson challenged the adequacy of the agency search, claiming that it had failed to use phonetic variations of her name and that based on her experience the agency should have more records. Indicating that the FBI had not explained its use of phonetic variations of Attkisson's name until its supplemental affidavit, Mehta observed that "because a phonetic name search in this case yielded a small number of records, the court finds that it was reasonable for the FBI not to rely on the requestor's date of birth and social security number to identify responsive records." Finding the agency's affidavit explaining its search sufficient, Mehta pointed out that "[the agency's] affidavits are afforded 'a presumption of good faith, which cannot be rebutted by purely speculative claims,' such as Plaintiffs' contention that certain records *should exist*." (*Sharl Attkisson, et al. v. U.S. Department of Justice*, Civil Action No. 14-01944 (APM), U.S. District Court for the District of Columbia, Sept. 7)

A federal court in New York has accepted a magistrate's recommendation finding that the Treasury Department did not improperly assess **fees** for searching for records responsive to Daniel Lorber's requests under FOIA instead of the **Privacy Act**. Lorber's requests would have required the agency to search more than 750,000 emails. The agency assessed fees for the searches, but Lorber argued that the cost of the searches could not be assessed to him because he had made his request under the Privacy Act as well. Rejecting the claim, the court noted that "the Privacy Act does not apply to Plaintiff's requests. Plaintiff's requests do not fall within the scope of the Privacy Act because Plaintiff's requests are not about Plaintiff, but relate to whether Defendant's hiring practices reference Plaintiff. Furthermore, there is no evidence that the emails at issue are part of the 'system of records' because the emails are kept in separate offices, rather than in any filing system that is retrievable and indexed under an identifier such as Plaintiff's name." (*Daniel A. Lorber v. U.S. Department of Treasury*, Civil Action No. 14-675 (WFK)(VMS), U.S. District Court for the Eastern District of New York, Sept. 2)

A federal court in New York has ruled that the Department of Education has failed to show that federally-guaranteed loan records pertaining to Francis Brozzo that are held by the New York State Education Services Corporation are not in its constructive control for purposes of qualifying as **agency records** under FOIA. Brozzo requested his student loan records from the agency, which found records concerning his aggregate student loan history, including several default bank judgments against him, but indicated that it did not have the NYSESC records. The court noted that "when agencies have access to records for auditing and supervision purposes, those records are still considered agency records even when they are created and maintained elsewhere." The court observed that "given that [a DOE] regulation appears to signal a degree of control over lender records. . . and given that Defendant's generation or possession of those documents does

not alone determine whether the records are agency records, Defendant has not met its burden of showing that the requested records are not agency records." The court allowed the agency and Brozzo an additional 90 days to supplement the record to resolve the agency records issue. (*Francis Brozzo v. United States Department of Education*, Civil Action No. 14-1584 LEK/TWD, U.S. District Court for the Northern District of New York, Sept. 9)