Volume 42, Number 2
January 20, 2016

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: The House of Representatives Jan. 11 once again passed a package of FOIA amendments (H.R. 653). The House bill is essentially the same bill that passed the House in the last session of Congress. At the end of that session, the Senate passed its own bill, which was never reconciled with the House bill. Instead, sponsors in both chambers urged the other body to accept their version. The end result was that the session ended before any action was taken. The House bill includes the presumption of openness language that appears in the 2009 Holder memo. Agencies have strongly opposed adding the language because it would make the openness policy mandatory rather than discretionary as it is now. The House bill also included a last-minute amendment clarifying that the amendment's provisions would not require disclosure of classified information or information that "would adversely affect intelligence sources and methods" protected under the current version of FOIA. So far, Sen. Charles Grassley (R-IA), chair of the Senate Judiciary Committee with jurisdiction over FOIA, has not indicated when or whether the Senate will consider FOIA amendments. . .Steve Aftergood has reported in Secrecy News that the Defense Department plans to reintroduce a FOIA exemption that would protect "military tactics, techniques, and procedures." The agency requested the exemption in the FY 2015 defense authorization act, but it did not appear in the final legislation.

Court Orders Disclosure of Video After Finding Exemption 7(E) Inapplicable

A federal court in New York has rejected the DEA's attempt to withhold under Exemption 7(E) (investigative methods and techniques) large portions of a video of a drug operation in Honduras involving both DEA agents and Honduran National Police taken by a U.S. Customs and Border Protection surveillance plane because the agency has not shown that the video contains any methods or techniques that are not already publicly known.

ACCESS REPORTS

Mattathias Schwartz, an investigative journalist freelancing for the *New Yorker*, requested records about the Ahuas Incident, particularly a surveillance video taken of the operation. In 2012, at the request of the Honduran government, the DEA and the Tactical Response Team of the Honduran National Police commenced Operation Anvil, a joint operation aimed at disrupting and interdicting drug traffickers in northeastern Honduras. On the night of May 11, 2012, a small aircraft suspected of carrying drugs was detected in rural Honduras. A team of DEA agents and Honduran police took off in helicopters to intercept the aircraft. The entire operation was tracked covertly by a CBP surveillance plan. In the early morning hours, the small aircraft landed at an airstrip near the village of Ahuas. Its cargo, which was later confirmed to be cocaine, was loaded into trucks. The trucks then went to the nearby Patico River, where the cargo was re-loaded onto a motorized canoe. As the DEA agents and Honduran police came into sight, the drug traffickers fled and abandoned the canoe. While the officers were attempting to start the motor on the canoe, it was struck in front by a larger riverboat. Thinking they were under attack, officers on the canoe and in the helicopters fired at the boat. It later turned out that the boat belonged to local villagers, four of whom were killed. The operation prompted 58 members of Congress to call for an investigation. The DEA told them it had conducted an internal review and concluded none of the American agents were involved in the shooting. The DEA screened the Ahuas video for members of Congress. Two reporters for the *New York Times* also saw a version of the video and wrote a story about the raid.

Schwartz originally requested records on the entire incident, but subsequently narrowed his request to only that portion of the video that took place after the aircraft touched down on the airstrip. The DEA claimed the video was protected by Exemption 7(E), but Schwartz argued that much of the information about how such operations were conducted and the capabilities of the agency to react in unforeseen circumstances were already publicly known through a variety of sources, including a CNN report on DEA operations in Honduras called "Narco Wars." As Schwartz continued to narrow his request, District Court Judge Carol Bagley Amon, after reviewing the video *in camera*, became convinced that the DEA had failed to show how disclosure of the disputed portions of the video would reveal investigative methods and techniques that were not already publicly known.

Schwartz argued that "objective fact evidence"—facts surrounding the application of a known technique—were not protectable. The DEA, by contrast, argued that "the unknown circumstances surrounding the application of a known technique are protectable. Amon noted that "both arguments fail from an oversimplification of the issue. Presenting new or unique facts alone does not make information protectable, but information that would disclose an unknown technique or procedure or unknown aspect thereof—including objective, factual information—may be withheld." She pointed out that "contrary to Schwartz's argument, the *type* of information is not relevant. What is relevant is only the effect of producing that information. But contrary to the DEA's argument, only previously unknown 'techniques or procedures' are exempt. Previously unknown circumstances are not." She observed that the analysis depended on the specific facts and explained that "the same well known technique may have previously unknown aspects exposed by some facts, but not others. Courts apply the text of Exemption 7(E) to the particular facts before them to make these determinations."

The agency argued that the public domain doctrine---which requires that the government has already officially acknowledge information—applied here. But Amon pointed out that "Schwartz is not asserting waiver, as he has repeatedly stated. By importing the waiver standard of official disclosure into Exemption 7(E), the DEA conflates two distinct legal doctrines. Publicly available information does not justify a withholding under Exemption 7(E) because 'Congress did not intend that Exemption 7(E) apply to routine techniques and procedures which are generally known outside the Government. By contrast, 'when information has been "officially acknowledged," its disclosure may be compelled even over an agency's otherwise valid exemption claim.'" Amon observed that "Exemption 7(E) does not justify withholding

publicly known information about techniques and procedures simply because such information has not been officially acknowledged. To the contrary, the cases interpreting Exemption 7(E) have required that such information be disclosed without considering whether it became public through official channels."

Amon admitted that the DEA was in a better position than her to know whether techniques were sensitive and needed protection. But she pointed out that "despite [numerous] opportunities and prompting, however, the DEA has not been able to identify to the Court what protected techniques or procedures the Video could reveal, even if only to an expert. FOIA does not permit the Court to rely on the DEA's unsubstantiated assertion that some such technique or procedure might be in some way discernible. Instead, the Court must conduct *de novo* review, and in doing so, the Court—even with the DEA's expert guidance—cannot identify any protectable techniques or procedures." In a redacted portion of her opinion, Amon discussed the various techniques the DEA claimed were protectable, but remained unconvinced. She ordered the agency to disclose the portion of the video that Schwartz had requested. (*Mattathias Schwartz v. United States Drug Enforcement Administration*, Civil Action No. 13-5000 (CBA) (RML), U.S. District Court for the Eastern District of New York, Jan. 12)

Views from the States…

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

Arizona

A court of appeals has ruled that redacted records about how the Tucson Police Department used Stingray cell phone tracking technology should be disclosed because the public interest in disclosure outweighs any state interest in non-disclosure. Beau Hodai of the ACLU requested records of communications between the police department and Harris Corporation, the manufacturer of Stingray technology, which Hodai indicated had been purchased with a federal grant, as well as information showing how the technology was used by the police. After the police department had disclosed only a handful of documents, Hodai filed suit. The police department submitted an affidavit from an FBI agent explaining why disclosure of information about how the Stingray technology operated would not be in the state's interest, identified four closed and one current operation in which Stingray technology had been used, and provided several hundred pages of records under seal. The sealed documents included training materials, a "data dump" of raw data received from the equipment during an investigation, and five police reports from the closed and current investigations. The trial court found all the records had been properly withheld and Hodai appealed. On appeal, the appellate court first found the FBI affidavit sufficiently justified withholding training materials. The court noted that "that a person experienced with the technology believes it could be 'easily' thwarted if the information was released is not merely a possible harm based on a hypothetical situation, but one rooted in experience." But the appeals court also found that a PowerPoint presentation that included more general information about Stingray could be disclosed once redacted. The court pointed out that "the unredacted information addresses the specific public policy rationales that the [trial] court found legitimate and important, but does not compromise the ability of the government to keep secret the technical information about Stingray." The court agreed that the data dump could also be withheld. The court explained that "even in its rawest form, many lines of output contain date and address information that can be linked to details of the ongoing investigation." Hodai challenged the trial court's conclusion that it was too burdensome to require the Tucson police to search for communications with the FBI about the Stingray technology. Upholding the

ACCESS REPORTS

trial court's finding that because the potentially responsive records were in hardcopy and could not be searched electronically, the appeals court indicated that "the [trial] court did not err in suggesting that Hodai's request would require the city to perform a time-intensive and costly manual search of all paper records produced or received by TPD during the relevant time period to locate the requested records." The court found the police department had violated its statutory obligation under the public records law to respond to respond to Hodai's request promptly. The court noted that "without explanation from the city regarding the facts of the delay. such as the time needed to redact or difficulty in locating the documents, eight to ten months is not prompt." (*Beau Hodai v. City of Tucson*, No. 2 CA-CV 2015-0018, Arizona Court of Appeals, Division 2, Jan. 7)

California

Based on its recent ruling in a nearly identical case involving the Los Angeles County Sheriff's Department, in which the court ruled that vehicle ownership data used by the Sheriff's Department to tow illegally parked vehicles was protected by both the federal Drivers Privacy Protection Act and the state statute implementing the DPPA, an appeals court has found that the same kind of vehicle ownership data is equally protected when used by the California Highway Patrol for the same purposes. The appeals court found the records were also protected by another state statute requiring the justice department to maintain a database of stolen vehicles which was used for official purposes only. (*State of California v. Superior Court of Los Angeles County; Colleen Flynn, Real Party in Interest*, No. B265930, California Court of Appeal, Second District, Division 5, Jan. 20)

Colorado

A court of appeals has ruled that records showing the names of staff members at four Jefferson County high schools who took sick leave as part of a "sick out" in September 2014 must be disclosed because they do not qualify as personnel records. When the school union learned that the school district planned to disclose a list of names of staff who took sick leave during the "sick out," it filed suit to block disclosure. The trial court ruled against it and the union appealed. The court noted that "we must decide whether the [sick leave list] is of the 'same general nature'—personal demographic information—as the teacher's home address, telephone number, or financial information. We conclude that the records in this case are not of the same general nature because a teacher's absence is directly related to the teacher's job as a public employee. The fact of a teacher's absence from the workplace is neither personal nor demographic; it is conspicuous to coworkers, to students, and to parents. The basic reason given for the absence—the teacher is sick—is often equally conspicuous." Although the union had argued only that the sick leave records qualified for protection under the personnel files exemption, the court decided to assess whether or not there was an expectation of privacy in such records. The court found that there was not, observing that "as a public employee, a teacher should expect that basic information about his or her work attendance would be open to public inspection." (*Jefferson County Education Association v. Jefferson County School District R-1*, No. 15-CA-1066, Colorado Court of Appeals, Division A, Jan. 14)

Connecticut

A trial court has ruled that the Wilton Board of Education violated the Freedom of Information Act when its agenda notice for three meetings included the fact that it anticipated going into executive session to discuss matters that were covered by attorney-client privilege. When Marissa Lowthert filed a complaint with the FOI Commission challenging the description of the reason for going into executive session, the commission concluded that the memorandum discussed by the board at each meeting did involve properly privileged attorney material. Lowthert then filed suit. Finding that the board had not provided an adequate explanation for why its description was so vague, the trial court noted that "at no point did the witness [for the

board] state that identifying the subject matter of the memorandum would disclose confidential attorney-client communications. Although the commission claimed at oral argument that it was a 'reasonable inference' from this testimony that disclosure of the subject matter would also reveal the communications, it is entirely possible to describe the subject matter of a communication—e.g., 'legal claim of John Smith'—without disclosing the communication itself. In any event, because the commission refused to examine the memoranda in camera, the commission could not have known for a fact whether disclosure of its subject matter would have revealed confidential communications. Hence, the commission's finding that disclosure of the subject matter of the memorandum would reveal its contents lacked evidentiary support and was thus unreasonable." The court pointed out that "an agency should provide an agenda and notice that, absent some overriding concern, has at least some significance to the public and that provides at least some level of meaningful disclosure about the subject matter of a public agency meeting." The court noted that "the board of education here does not meet this standard." The court added that "there is neither an evidentiary foundation nor a legal basis for concluding in this case that disclosure of the general subject matter of the attorney-client memorandum would reveal its contents." (*Marissa Lowthert v. Freedom of Information Commission*, No. HHB CV15-6028902S, Connecticut Superior Court, Judicial District of New Britain, Jan. 15)

Kentucky

A court of appeals has ruled that because the Board of Education of Martin County violated the Open Meetings Act by deliberating on a new contract for the superintendant in a closed session and then approving it in an open session the contract was null and void and could not be enforced by Superintendant Mark Blackburn. The board went into closed session at it public meeting in July 2012 and agreed on a new four-year contract with Blackburn. The board then went into public session and ratified the contract by a 3-1 vote. A local citizen complained to the Attorney General that the board's actions violated the Open Meetings Act. The Attorney General found the closed session violated the OMA. The board then rescinded the contract at its next public meeting in August 2012. The terms of three members of the board expired in December 2012 and two new members were elected in November 2012. In January 2013, at its first meeting with its new membership, the board voted not to renew Blackburn's contract. Blackburn then informed the board that he believed the contract signed in 2012 was valid. The board filed suit for declaratory judgment and the trial court found that because the 2012 contract was adopted in violation of the Open Meeting Act, it was not valid. Blackburn then appealed arguing that the board was required to indemnify him. The appeals court also ruled against Blackburn. It noted that "to embrace Blackburn's argument would be to sanction the Board's conduct; we can [not do so] without ignoring the spirit and fundamental object of the OMA. And that we cannot do." The court pointed out that "we think it contrary to the OMA to adopt a resolution in an open meeting that resulted from deliberations and discussions that wrongly occurred in closed session." The court added that "in all respects, the Board's conduct violated the letter and spirit of the OMA." (*Mark Andrew Blackburn v. Board of Education of Martin County*, No. 2014-CA-000516-MR, Kentucky Court of Appeals, Jan. 8)

New York

A court of appeals has ruled that once records qualify as trade secrets, the submitter is not required to show that disclosure would cause competitive harm. As part of a regulatory proceeding concerning Verizon's request to change its land line transmission to cellular transmissions, the company submitted records on its Verizon Voice Link wireless network to the Public Service Commission. The Public Service Commission received a FOIL request for the records and the agency decided that while some of the records qualified as trade secrets, the agency planned to disclose them because Verizon had not shown how disclosure would cause competitive harm. Verizon filed suit to block the disclosure and the trial court found that all but three of the

ACCESS REPORTS

records were protected as trade secrets. The appeals court agreed with the trial court that the confidential business information exemption created two separate categories of records. The court noted that "the Legislature intended to create two separate FOIL exemptions in the same statutory provision, one that exempts all records proven to be bona fide trade secrets, and another that requires a showing of substantial competitive injury in order to exempt from FOIL discovery all other types of confidential commercial information imparted to an agency." Rejecting the agency's argument that prior precedent supported the requirement to show competitive harm as being inapplicable because those cases did not deal with records that were trade secrets, the court observed that "it is wholly unnecessary and overly burdensome to require the entity to then make a separate showing that FOIL disclosure of the trade secret would cause substantial injury to its competitive position." (*In the Matter of Verizon New York, Inc. v. New York State Public Service Commission*, No. 00239, New York Supreme Court, Appellate Division, Third Department, Jan. 14)

A trial court has ruled that the New York City Police Department must disclose records of internal investigations that involved retired Police Sergeant Charles Gallogly with identifying information about third parties redacted. The police department denied Gallogly's request, claiming the records were protected by the criminal investigation exemption. After Gallogly filed suit, the police department said it had found three investigations involving only Gallogly and three investigations involving Gallogly and other officers. The police department claimed that the investigations involving other officers were protected by the "broad rule of confidentiality" and that disclosure of investigations involving only Gallogly risked revealing criminal investigative techniques. The court rejected the criminal investigation exemption, noting that the police "did not establish that there was any *criminal* investigation here or that *criminal* non-routine investigative techniques and procedures were employed. Nor have they shown that disclosure of the materials would 'provide a step-by-step guide' to evade *criminal* detection, as required." The court observed that " here, however, Sergeant Gallogly only requested records related to himself. He does not seek information related to any other police officer. Therefore, NYPD must produce the materials and redact the name and any identifying information of all other officers." The court added that "the possibility that Sergeant Gallogly may figure out the identity of other officers that were subject to investigation does not justify denial of access as the agency has not shown 'a substantial and realistic potential' that the requested material could be used abusively against the officers." (*In the Matter of the Article 78 Proceeding of Charles Gallogly v. City f New York*, New York Supreme Court, New York County, Jan. 8)

Pennsylvania

A court of appeals has ruled that the trial court had jurisdiction to consider the Township of Worcester's challenge to the Office of Open Records' decision to review disputed records *in camera*, but that OOR had authority to order an *in camera* review to facilitate its ability to resolve the complaint in which the township was claiming records were protected by the deliberative process privilege. James Mollick appealed Worcester's refusal to disclose some of the records he had requested to OOR and asked for an *in camera* review. OOR decided to review the records *in camera* and ordered the township to provide them for review. Instead, the township filed suit to prevent the *in camera* review from taking place. The trial court sided with the township and OOR appealed. OOR argued that the *in camera* review order was not ripe for adjudication, but the appeals court found otherwise. The court noted that "because a decision delineating OOR's authority to require *in camera* inspection of records has the potential to extend well beyond the confines of this particular case, the right involved is too important to be denied review." After finding OOR's decision to require *in camera* review was appealable, the appellate court found in favor of OOR. The court pointed out that "OOR's appeals officer was within his authority to direct the Township to produce the records at issue for *in camera* inspection and, at a minimum, an *in camera* inspection or 'privilege log.' We defer to OOR's appeals officer, the initial fact-finder, on this procedural issue rather than second-guess his attempt to adequately develop a record beyond the intertwined assertions of fact and law set forth in the Township's

verified memorandum of law on issues such as the predecisional deliberative exception." (*Township of Worcester v. Office of Open Records*, No. , Pennsylvania Commonwealth Court, Jan. 8)

Washington

A court of appeals has ruled that since the supreme court reversed the trial court's finding that text messages sent on Pierce County Prosecutor Mark Lindquist's personal cell phone were public records to the extent that they pertained to public business the trial court's dismissal of Gloria Nissen's 2013 complaint for the same records is no longer subject to issue preclusion. Nissen filed suit against Pierce County in 2011 for Lindquist's personal cell phone records to the extent that they involved public business. The trial court found the cell phone records were not public records and dismissed Nissen's suit as well as her 2013 suit for the same records because the issue had already been litigated. But the appeals court noted that "there is no longer a final judgment on the merits of [the 2013 complaint]. We reversed the trial court's dismissal of Nissen's 2011 complaint and the Supreme Court affirmed that reversal. Thus, the trial court's order in *Nissen* has no preclusive effect on Nissen's 2013 complaint." The appeals court refused to consider Nissen's request for sanctions against Pierce County, noting that "the present case, rather, deals with whether Nissen's 2013 complaint is precluded by the trial court's dismissal of her 2011 complaint. Having agreed with Nissen that her 2013 complaint is not precluded, the Public Records Act does not provide a statutory basis in the present case to warrant penalizing Pierce County." (*Gloria Nissen v. Pierce County*, No. 45039-9-II, Washington Court of Appeals, Division 2, Jan. 19)

The Federal Courts...

Judge Amit Mehta has declined to reconsider his September 2015 ruling requiring the FBI to search for records concerning a member of the U.S. House of Representatives and intermediaries who allegedly tried to bribe House candidate James Jett from running against the incumbent member. Based on Jett's allegations that he had been approached to accept a bribe, the FBI asked Jett to record further phone conversations, which he did. The agency also asked Jett to wear a wire to record his meeting with the intermediaries. Instead, Jett accused his opponent of trying to bribe him, a charge the opponent denied. Jett then issued a press release accusing the FBI of trying to coerce him into wearing a wire, which led the FBI to close the investigation. Jett then requested records of the investigation. While the agency searched for records under Jett's name, it refused to search for records of the other parties involved, claiming that would violate their privacy. Under these unique circumstances, Mehta ruled that the FBI was required to search using the names of the other parties involved, although he stressed that any records found as a result of such a search might well still be exempt under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Mehta had based his previous ruling on *CREW v. Dept of Justice*. 746 F.3d 1082 (D.C. Cir. 2014), in which the D.C. Circuit ruled that the FBI could not rely on a *Glomar* response neither confirming nor denying the existence of records in response to CREW's request for the agency's reasons for not prosecuting former House Majority Leader Tom DeLay (R-TX) even though DeLay had publicly acknowledged the existence of the investigation. Here, by contrast, the FBI insisted that *CREW* did not apply. But Mehta explained that "the court clarifies further here why it did not find the factual distinctions between this case and *CREW* to be material. The Court of Appeals in *CREW* did not say, as the FBI suggests, that the involvement of a *high-ranking* government official is the critical element that tips the private-public balance against allowing an agency to categorically withhold information. Indeed, the history books, newspapers, and—in today's world—blogs are replete with stories and commentary about investigations and prosecutions of public officials, including those who may be characterized as 'obscure.' " He added that "public accountability surely is not restricted to high-ranking

ACCESS REPORTS

elected officials." The FBI also argued that DeLay's privacy interest was diminished because he had publicly acknowledged the existence of the investigation. But Mehta noted that "once an investigation of a sitting Congressman accused of misusing his office emerges into the public realm, the citizens, particularly his constituents, acquire a substantial interest in learning how federal law enforcement handled his investigation, especially if no prosecution results." The FBI also argued that *Blackwell v. FBI*, 646 F.3d 37 (D.C. Cir. 2012), in which the D.C. Circuit found the agency did not have to search for records pertaining to third parties when any such records would be exempt, supported its position. Mehta pointed out that Jett had only asked for records about third parties to the extent that they were involved in his investigation. He noted that "here, it is not hard to imagine that a search using the Opponent's and the Intermediaries' names could produce additional responsive, non-duplicative records about the investigation, similar to the records the FBI already disclosed. Such records, unlike *Blackwell*, would not be protected from disclosure in their entirety under Exemption 7(C)." Mehta emphasized the limits of his decision, noting that "the court held only that the FBI's categorical refusal to search for the names provided by Plaintiff was improper. The applicability of FOIA exemptions to any additional responsive information is a question left for another day," (*James B. Jett v. Federal Bureau of Investigation*, Civil Action No, 14-00276 (APM), U.S. District Court for the District of Columbia, Jan. 8)

The D.C. Circuit has ruled that as long as an organization has any established identity different from that of its in-house attorneys, the attorneys are eligible for **attorney's fees** when representing the organization in FOIA litigation. Reversing a decision by Judge Rosemary Collyer in which she found that the public-interest group National Security Counselors was essentially nothing more than an alter-ego for its primary attorney, Kel McClanahan and was, thus, not eligible for attorney's fees because of the Supreme Court's decision in *Kay v. Ehrler*, 499 U.S. 432 (1991), in which the Supreme Court found that an attorney who represented himself under a federal civil rights statute was not eligible for attorney's fees, the D.C. Circuit concluded that any degree of separation between an organization and its attorney was sufficient to make the attorney eligible to request a fee award. Writing for the court, Circuit Court Judge Cornelia Pillard noted that "while individuals who represent themselves may not recover fees, organizations that represent themselves may so recover. The question here is whether NSC's characteristics, including its small size and McClanahan's large role within it, warrant treating NSC like an individual rather than an organization. We think they do not." Relying heavily on *Baker & Hostetler v. Dept of Commerce*, 473 F.3d 342 (D.C. Cir. 2006), in which the D.C. Circuit concluded that *Kay* did not preclude a fee award for attorneys representing their law firm, Pillard pointed out that "a *bona fide* corporation with a legally recognized, distinct identity from the natural person who acts as its lawyer is eligible for attorney's fees under FOIA provided it substantially prevails. Even a small corporation like NSC is generally eligible for fees under FOIA." She added that "the relevant doctrinal line is between a natural person going it alone, who is ineligible, and a person or organization who is represented by counsel and thus eligible for attorney's fees." Pillard noted that "even a lawyer for an organization he founded and runs must fulfill his professional lawyering responsibilities to that organization. He may not merely serve his own preferences, moods, or tastes. He is legally and ethically required to be loyal to client interests, as distinct from his own." Pillard concluded that "it makes sense to respect the corporate form and the distinctness of the lawyer from the organization, and to hold *Kay*'s *pro se* litigant exception inapplicable in cases of corporate self-representation." (*National Security Counselors v. Central Intelligence Agency and United States Department of Defense*, No. 14-5171, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 15)

In two consolidated cases brought by Judicial Watch and Cause of Action, Judge James Boasberg has ruled that the organizations' claims that the Department of State and the National Archives and Records Administration failed to request that the Attorney General initiate action under the **Federal Records Act** to recover the Clinton emails is **moot** because the State Department has already taken sufficient steps to recover

the records. Boasberg first observed that "the core of the parties' dispute here is precisely what enforcement obligations the FRA imposes on Defendants and when private litigants can compel remedial action." Here, Judicial Watch and Cause of Action argued the FRA required the State Department and NARA to ask the Attorney General to initiate action to recover the records, while the agencies claimed the steps they had already taken were sufficient under the FRA. Boasberg agreed with the agencies. The agencies had raised both standing and mootness as defenses. Boasberg explained that "although Defendants discuss mootness primarily in terms of redressibility, the Court believes their arguments are better characterized as addressing the question of whether any injury still exists." Judicial Watch and Cause of Action argued that once an agency discovered a potential violation of the FRA, it was required to take action through the Attorney General to recover the records. But Boasberg noted that "while the FRA does require agencies to take *some* enforcement action, it does not require them immediately to ask the Attorney General to file a lawsuit." He indicated that "the mere fact that federal records were removed from the State Department in contravention of the FRA, therefore, does not automatically entitle a private litigant to a court order requiring the agency to involve the Attorney General in legal action to recover the documents." Instead, an agency could first take internal remedial steps to recover the records without any involvement of the Attorney General. Boasberg pointed out that "Defendants have taken a number of significant corrective steps to recover Clinton's emails." These included a letter to Clinton requesting copies of her emails, which had yielded 55,000 pages, informing NARA, and acting to secure Clinton's electronic records by obtaining a copy of her server, which was turned over the FBI to see if any deleted records could be retrieved. Boasberg observed that "these are hardly the actions of a recalcitrant agency head or an uncooperative Archivist. Rather, they reflect a sustained effort on the part of State and NARA, after the agencies had learned of the potential removal of federal records from the government's possession, to recover and preserve all of those records." Boasberg concluded that "taken together, all of the recovery efforts initiated by both agencies up to the present day cannot in any way be described as a dereliction of duty. In light of this, Plaintiffs cannot establish an ongoing injury actionable under the FRA; as such, their cases are moot." (*Judicial Watch, Inc. v. John F. Kerry*, Civil Action No. 15-785 (JEB) and *Cause of Action Institute v. John F. Kerry and David Ferriero,* Civil Action No. 15-1068 (JEB), U.S. District Court for the District of Columbia, Jan. 11)

A federal court in New York has ruled that the Department of State conducted an **adequate search** for records related to the 2012 death of Ghais AbdulJaami in Cologne, Germany and that it properly withheld records under **Exemption 1 (national security), Exemption 3 (other statutes), Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records),** and **Exemption 7(E) (investigative methods and techniques)**. The State Department searched the U.S. Consulate in Frankfort, the U.S. Consulate in Dusseldorf, the Bureau of Diplomatic Security, the Office of Overseas Citizens Services, and its Central Foreign Policy Records. AbdulJaami's estate filed suit before the agency responded. The agency located 49 responsive documents, releasing 33 in full and nine in part. It withheld documents in full under a variety of exemption claims. It also referred five documents to the U.S. Army Europe, which withheld all of them under Exemption 1 and Exemption 3. The court found the State Department's search was adequate. It noted that "when assessing which locations and records systems within the State Department are reasonably likely to contain the information requested, IPS relies on the knowledge and expertise of the employees of each search location, as they are in the best position to know how their files are organized." The majority of the documents located were found in the search of the U.S. Consulate at Frankfort. AbdulJaami argued the search was inadequate because it did not use keywords such as " suicide." But the court noted that "the State Department's decision not to perform searches using the term 'suicide' does not render its search inadequate. The term 'suicide' does not appear anywhere in the request." AbdulJaami claimed the agency's search was undermined by the fact that it had failed to locate a German death certificate. However, the court observed that "a document meeting that description was released as part

of the State Department's initial response to the request on October 2, 2014. Therefore, AbdulJaami's allegations of bad faith predicated on the supposed failure to locate or release this document are insufficient to impugn the good faith presumption accorded the State Department's declarations." AbdulJaami challenged the agency's withholding of information in an email chain under Exemption 6. Upholding the agency's use of Exemption 6, the court noted that "this withholding is characteristic of personal information routinely withheld under Exemption 6. The release of this information without authorization by the individuals identified could subject the individuals to unwanted public attention, and there is no public interest in the disclosure of the names or other identifying information regarding these individuals." (*Estate of Ghais AbdulJaami v. U.S. Department of State*, Civil Action No. 14-7902 (RLE), U.S. District Court for the Southern District of New York, Jan. 7)

Judge William Orrick has resolved the remaining issues left over in a **pattern and practice** case against the National Marine Fisheries Service by the retirement of Judge Samuel Conti. Conti had ruled previously that NMFS has failed to respond to a series of complex requests submitted by Our Children's Earth Foundation and that as a result, the agency appeared to have a pattern and practice of routinely delaying responses by months. But in his last opinion in the case, Conti had been largely satisfied that the problems had been cleared up, that the agency was making progress in clearing out its backlog, and that, therefore, there was no reason to penalize the agency for its previous behavior. Finding the agency had resolved the problems, Orrick noted that "the hard evidence provided about [the agency's] elimination of its backlog and the actual hiring of additional staff (as opposed to the mere promise or expectation of hiring additional staff), lead me to conclude that further injunctive relief is not warranted and that this case should, finally, come to its conclusion. It is apparent—as Judge Conti found—that NMFS was at one time routinely failing to obey FOIA's deadlines. It is also apparent that NMFS has made significant improvements and structural changes (in technology and staffing) that are to continue in the future. For purposes of these cases, that is enough." (*Our Children's Earth Foundation v. National Marine Fisheries Service*, Civil Action No. 14-01130-WHO and No. 14-04365-WHO, U.S. District Court for the Northern District of California, Jan. 20)

A federal court in Alaska has ruled that a discretionary release of documents by the EPA that the agency claimed were protected by **Exemption 5 (deliberative process privilege)** has skewed a representative sample of records provided for *in camera* inspection as to throw into question whether the sample is still sufficiently representative. In a FOIA suit filed by Pebble Limited Partnership, which is challenging the EPA's decision to assert its authority under the Clean Water Act in such a way as to make mineral extraction at the Pebble Mine impossible, the agency withheld a number of documents concerning plans to develop the Pebble Deposit. Pebble Limited Partnership had already filed suit against the EPA for violating the **Federal Advisory Committee Act** by improperly creating and using several advisory groups. The court had ordered the EPA to provide a random sample of 50 percent of the 130 documents it claimed were exempt for *in camera* review. But instead of providing 65 documents, the agency provided only 40 documents after it made a discretionary release of the other 25 documents. Pebble Limited Partnership argued the EPA had cherry-picked the documents to remove those documents it knew were not exempt. Rather than decide whether the sample was still representative, the court noted that the agency had disclosed 11 of the 40 documents in redacted form. After reviewing 22 other documents that had been redacted in the sample, the court concluded that they should have been released in redacted form as well. The court pointed out that "the problem here is not that the redacted parts of the documents are not pre-decisional and deliberative. The problem is that the defendant withheld documents in full that it should have released in redacted form. It is thus reasonable for the court to assume that defendant has improperly withheld other non-sample documents in full." Turning to the 28 documents being withheld in the FACA case, the court observed that "the issue in plaintiff's FACA case is whether defendant improperly formed and utilized advisory committees, which might mean that plaintiff's

need for deliberative materials could override defendant's need for non-disclosure. But here, because the 28 documents do not have anything to do with whether defendant improperly formed or used advisory committees, there is simply no need for plaintiff to have unredacted versions of these deliberative materials," (*Pebble Limited Partnership v. United States Environmental Protection Agency*, Civil Action No. 14-0199-HRH, U.S. District Court for the District of Alaska, Jan. 12)