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Washington Focus: The Reporters Committee launched its FOIA Wiki Oct. 3. While the FOIA Wiki contains a wealth of information about various aspects of FOIA, it is designed to provide a space for individuals and organizations interested in FOIA and related information policy issues to share information. Announcing the launch, Adam Marshall, the Knight Foundation Litigation Attorney at the Reporters Committee, noted that "this is an exciting first step towards creating a powerful, community-based FOIA resource. Bringing together the expertise of reporters, the open government community, and everyone who is passionate about FOIA benefits all of us who rely on this law to hold the government accountable." The FOIA Wiki includes a link to TRAC's FOIA Project, which annotates complaints and opinions of all FOIA cases filed in district court and provides a wealth of statistical data on plaintiffs and defendants in such cases.

Court Rejects Claims in Multi-Agency Request

Judge Rosemary Collyer has dismissed nearly all the James Madison Project's FOIA claims against a number of agencies for records concerning legal analyses stemming from the release of *No Easy Day*, a book written by a former Navy Seal using the pseudonym Mark Owen, about the killing of Osama bin Laden. The case provides an interesting glimpse at some of the practical difficulties of suing multiple agencies who separately receive the same identical request, including how to keep track of the status of each agency's processing of the request.

The James Madison Project requested legal analyses of Owen's potential liability under any non-disclosure agreement, whether information disclosed in *No Easy Day* remained classified, any harm assessments made as a result of the disclosure of classified information, and the legal viability of taking action against Owen or his publisher Penguin Group. The request was sent to the Executive Office for U.S. Attorneys, the Civil Division at the Justice Department, the Defense Department, the Navy, the Defense Intelligence Agency, and the CIA over a six-month period in 2014.

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EOUSA responded that it had searched the U.S. Attorney's Office for the Eastern District of Virginia and found no records. The Civil Division refused to process those parts of the request concerning Owen without his consent. It further withheld any legal analyses under Exemption 5 (privileges). DIA located two documents and referred one to the National Security Agency and the other to the Navy. The NSA told the James Madison Project that disclosure of the article referred to it would violate its subscription service agreement. The James Madison Project subsequently indicated it was not interested in published press reports and agreed not to pursue the NSA claim. The document referred to the Navy was disclosed in full. The rest of the agencies had failed to respond before the James Madison Project filed suit in August 2015.

The James Madison Project's first hurtle involved its attempt to resurrect its claims against EOUSA and the Navy. In the case of EOUSA, since the James Madison Project had not appealed its no record response, JMP sent the agency another request. The problem it faced in relation to its request to the Navy turned out to be somewhat more complicated. After JMP filed its complaint, the Navy alleged it had no record of receiving the request. JMP insisted that it had sent the request by fax and that it had received a confirmation page on its end that the fax had been successfully sent. But Collyer indicated that "the fax confirmation page is not sufficient evidence to counter sworn evidence that the Navy has no record of receiving the *No Easy Day* request at issue." JMP asked Collyer to grant discovery as to why the Navy did not locate its fax request. Rejecting the request, she noted that "plaintiff does not acknowledge that the Navy never sent a letter confirming receipt of the FOIA request and that Plaintiff never inquired about the status of its request before commencing litigation." As a result, Collyer dismissed the Navy since it had not received the request. She then went on to dismiss EOUSA and DIA after finding that both had conducted adequate searches for records.

Turning to the response of the Civil Division Collyer approved of its use of a *Glomar* response neither confirming nor denying the existence of records, as to those portions of the request pertaining to Owen. JMP argued Owen's public notoriety diminished his privacy interest. Collyer, however, explained that "Mr. Owen's privacy interests in protecting his law enforcement records from disclosure to third parties is not overcome by any public interest and the Civil Division properly withheld records related to [those portions pertaining to Owen]." JMP argued that the Civil Division's categorical descriptions of records the agency claimed were privileged under Exemption 5 was analogous to the "no, number, no list" descriptions that had been criticized by both the D.C. Circuit and the Second Circuit. Collyer rejected the claim, pointing out that "the specificity of Plaintiff's request itself identifies 'whether the *contents*—as distinguished from the *existence*—of the officially acknowledged records may be protected from disclosure. . .' The *contents* were legal analyses of the topics to which the FOIA request was directed and [the agency] described the contents of the records in [its] declaration. In contrast, a 'no number, no list' response declines to describe or enumerate the 'number, types, dates, or other descriptive information about the responsive records.'"

A rarely litigated provision from the 1996 EFOIA amendments requiring agencies to identify the volume of records withheld became an issue in this case. JMP challenged the Civil Division's contention that identifying the volume of records pertaining to the various subsections of JMP's request would reveal privileged information because it would indicate the relative importance DOJ assigned to each issue. Collyer agreed with the agency, noting that "having asked for records concerning three separate issues—legal analyses and assessments of how much of *No Easy Day* remained classified; how much damage or harm might result to the U.S. as a result; and how vulnerable to suit was the book's publisher—the number of records individually responsive to each request could distinctly reveal the emphases (or lack thereof) given to each topic during the lawyers' analyses and assessments."

JMP challenged the CIA's search as well as its exemption claims. Finding nothing wrong with the agency's search, Collyer turned to the exemptions. JMP said it was surprised that there would be classified information in records responsive to its FOIA request for legal analyses. But Collyer observed that "this is not

surprising. Osama bin Laden was in Afghanistan and it took years of effort to pinpoint his location. Divulging the particulars of how that accomplished could reasonably harm the United States." JMP argued the agency had failed to show that records it withheld under Exemption 5 were both predecisional and deliberative. Collyer pointed out that "the [agency's] declaration is extremely clear that the records are drafts used in pre-decisional discussions; draft records have routinely been protected from FOIA using the deliberative process privilege."

The only agency that failed to satisfy Collyer concerning its processing of JMP's request was the Department of Defense. She explained that "DoD has not even indicated that a search was conducted, but instead attempts a *Glomar* response that all records that might be located would be exempt under Exemption 5 or 6." Noting that "DoD's categorical use of [Exemptions 5 and 6 is] inappropriate," Collyer noted that "DoD cannot know, without searching whether some of its responsive records may contain segregable, non-exempt information. . ." She added that "DoD does not argue that all documents responsive to Plaintiff's *No Easy Day* request would contain personally identifying information of DoD personnel and in fact, without searching, DoD cannot aver that any responsive documents contain such information. DoD's categorical use of Exemption 5 and 6 are insufficient responses to Plaintiff's *No Easy Day* request." (*The James Madison Project v. Department of Justice, et al.*, Civil Action No. 15-1307 (RMC), U.S. District Court for the District of Columbia, Sept 22)

Views from the States…

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

Florida

A court of appeals has ruled that the trial court erred in ruling in favor of the University of Florida based on an in camera inspection of records concerning research protocols used in studies using animals. Karen Kline requested the protocols and any images of animals. The university denied the request and when Kline filed suit, the university asked the trial judge to conduct an in camera inspection. Based on that, the trial court ruled in favor of the university. Kline appealed, arguing that the Public Records Act required a hearing. The trial court agreed, noting that "absent waiver, an order issued without the statutorily-required hearing is premature." (*Karen Kline v. University of Florida*, No. 1D15-4216, Florida District Court of Appeal, First District, Oct. 4)

Louisiana

A court of appeals has ruled that the trial court was within its discretion in fining Lafayette City Marshal Brian Pope for his initial failure to disclose emails concerning allegations that his opponent in the marshal's race had suggested that Hondurans immigrate illegally to Louisiana. Christian Mader, a reporter for the Independent Weekly, requested Pope's emails. Pope initially contended he found no emails concerning the allegations. Mader then made a second broader request. The court ordered a technician to search for the records and 588 pages were uncovered. Finding that Pope had acted arbitrarily and capriciously, the appeals court noted that "the trial court did not abuse its discretion in finding that while Mr. Pope responded to both requests within three days, his responses were 'woefully inadequate.' We do not believe that just any answer is sufficient to avoid civil penalties. . .Therefore we find the imposition of civil penalties of $100 per day and attorneys fees for failure to adequately respond to the [two] requests were within the discretion of the trial

ACCESS REPORTS

court." (*Independent Weekly, LLC v. Lafayette City Marshal Brian Pope*, No. 16-282, Louisiana Court of Appeal, Third Circuit, Sept. 28)

Nebraska

The supreme court has ruled that the State Patrol properly withheld records concerning Todd Steckelberg's interview for a lateral transfer. Steckelberg, a state patrolman, applied for the job and was interviewed. However, the State Patrol hired another candidate. Steckelberg requested a copy of his interview and comments about his application. The State Patrol denied the request, citing an exemption for records about job application materials. When Steckelberg sued, the State Patrol abandoned that exemption and cited an exemption concerning personal information about personnel. The trial court found the second exemption applied and the supreme court agreed to hear the case. Steckelberg argued that the State Patrol was estopped from using a new exemption, but the supreme court found that "by the time the State Patrol filed its answer, it cited to [the second exemption]. There is nothing in the record to suggest that during the [trial] court litigation of this matter, the State Patrol argued that the records were exempted under [the first cited exemption]." Steckelberg contended the records were not from personnel files. But the supreme court observed that "the [trial] court found that the information in the records sought did contain personal information. And ther information was about employees, otherwise known as personnel, of the State Patrol." (*Todd Steckelberg v. Nebraska State Patrol*, No. S-15-879, Nebraska Supreme Court, Sept. 23)

New Jersey

A court of appeals has ruled that the Township of Nutley and the Essex County Prosecutor's Office properly redacted records concerning an investigation of an accident in which a vehicle hit an individual fleeing from a security guard who had questioned the individual as to whether he had stolen items from the store. A Nutley police officer witnessed the accident and arrived almost immediately afterwards. The *Nutley Sun*, a weekly newspaper, requested records about the accident. The Essex County Prosecutor's Office released a redacted version of the Crash Investigation Report and indicated that other records were being withheld because they related to an ongoing investigation. When North Jersey Media Group sued Nutley and the Essex County Prosecutor's Office, the trial court found the ongoing investigation exemption in the Open Public Records Act allowed Essex County to withhold the CIR even though accident reports were required to be publicly available, but that both Nutley and the Essex County Prosecutor's Office had failed to account for the absence of 911 or police dispatch records. The trial court ordered both Nutley and the Essex County Prosecutor's Office to pay NJMG's attorney's fees. Nutley and the Essex County Prosecutor's Office appealed. The appellate court agreed with the trial court that OPRA superseded the public availability of accident reports under these circumstances. The court noted that "since the later-enacted statute is the most recent expression of the Legislature's intent regarding public access to records that pertain to an ongoing agency investigation, that statute supersedes the mandate for prompt public access to CIRs tin the earlier-enacted legislation." The court rejected NJMG's claim that the Essex County Prosecutor's Office had made improper further redactions to the CIR. Instead, the court pointed out that "the redaction of the driver's personal information was permissible under OPRA." Finding NJMG had not prevailed, the appeals court reversed the award of attorney's fees. Although it remained unclear whether or not any 911 or dispatch records existed, the appeals court indicated because any such records would have been created at the time the investigation had commenced they could have properly been withheld under the ongoing investigation exemption. (*North Jersey Media Group, Inc. v. Township of Nutley and Essex County Prosecutor's Office*, No. A-3483-14T3, New Jersey Superior Court, Appellate Division, Sept. 30)

New York

A court of appeals has ruled that Putnam County must disclose its list of pistol permit holders to a reporter for the *Journal News* after finding that no exemption applies to the records. In response to Putnam County's refusal in 2013 to disclose the list even though it was a public record, the legislature passed an amendment allowing individual pistol permit holders to opt out of having their names and addresses disclosed. The statute included a 120-day grace period to allow individuals to opt out. After that time, the names and addresses of pistol permit holders who did not opt out became public once again. The *Journal News* requested the lists once again. Westchester and Rockland Counties provided the lists, while Putnam County refused, contending disclosure would be an invasion of privacy. The trial court ordered Putnam County to disclose its list and the county appealed. The appeals court found the trial court had erred in failing to consider if there were any applicable exemptions to the list. But the court went on to note that its review found no applicable exemptions. The appeals court rejected Putnam County's contention that the newspaper planned to use the list for solicitation purposes. Calling the claim "without merit," the appeals court observed that "Gannett's status as a commercial enterprise does not demonstrate that Gannett intends to use the names and addresses to solicit business." (*In the Matter of Gannett Satellite Information Network, Inc. v. County of Puinam*, New York Supreme Court, Appellate Division, Second Department, Sept. 14)

Oregon

The supreme court has ruled that the trial court and the court of appeals erred in failing to take into account the public interest in disclosure of a review of police misconduct by the Eugene Civilian Review Board, improperly shifting the burden to the plaintiffs to show that the public interest in disclosure outweighed the privacy interest. The CRB had been created to review misconduct by Eugene police officers. The case involved allegations of use of excessive force in arresting individuals. The CRB reviewed the case and decided not to take further action. The ACLU of Oregon requested records about the review. Its request was denied because since the police officer was not disciplined, the records fell within an exemption. The ACLU filed suit and the trial court ruled that the CRB was the primary accountability mechanism in such cases and that the public interest in non-disclosure outweighed any public interest in disclosure. The appeals court agreed and the case went to the supreme court. At the supreme court, the court found the lower courts had improperly limited the public interest in accountability. The supreme court noted that "the trial court erred in determining that the creation of the CRB indicates that the public had no cognizable interest in disclosure of the requested CRB records." As to the public interest in disclosure, the supreme court observed that "when it comes to complaints about the use of force and the review of those complaints, the public interest in oversight is particularly strong." On the privacy side, the supreme court pointed out that "the City made no showing that disclosure posed a risk of harm to its employees or operations, and it is not our role to decide whether the public's interest in monitoring the public's business may be satisfied with some quantum of information less than full disclosure. On this record, we conclude that the public interest in transparency requires disclosure of the requested documents." (*American Civil Liberties Union of Oregon v. Civilian Review Board of the City of Eugene*, No SC S063430, Oregon Supreme Court, Sept. 15)

Pennsylvania

A court of appeals has ruled that the Office of Open Records erred when it found that financial information provided by Global Tel Link Corporation for a contract to provide inmate telephone services was required to be disclosed because it had become part of the final contract. Various prison contract information was requested by reporter Paul Wright of Prison Legal News. When Wright appealed the agency's denial to withholding the telephone service information, the OOR ruled the information had become part of the contact and must be disclosed. The appeals court reversed. The appeals court noted that "we agree with GTL that

ACCESS REPORTS

financial information that is submitted by a bidder and is specifically exempt under [the business information exemption] does not automatically become a contract merely because [the Department of Corrections] attaches it to the subsequently executed contract. Although DOC appended GTL's Financial Information to the contract, there is no support for the theory that these appended materials became part of the contract and, thus, a 'financial record.'" (*Global Tel*Link Corporation v. Paul Wright and Prison Legal News*, No. 1678 C.D. 2015, Pennsylvania Commonwealth Court, Sept. 22)

Wisconsin

A court of appeals has ruled that the public interest in disclosure of former teacher Thomas Woznicki's personnel file outweighs Woznicki's privacy interests. Woznicki was employed as a school teacher in New Richmond from 1987 to 1997. He was accused of having consensual sex with a minor over the age of 16. The county district attorney later dismissed the criminal case against Woznicki. However, his personnel file included information relating to an investigation of a disciplinary matter. Woznicki's personnel file was requested by Citizens for Responsible Government and the school district informed Woznicki that it intended to disclose his personnel file with his home address redacted. Woznicki then filed for an injunction to block disclosure. The trial court ruled against him and the appeals court affirmed that decision. The appeals court rejected Woznicki's claim that the school district had violated its retention policy by failing to destroy his 18-year-old personnel file. The appellate court noted that "nothing in the District's records retention policy required the District to destroy its records. The District's retention policy is consistent with state law, which permits—but does not require—school districts to destroy obsolete records, as long as certain procedures are followed. Furthermore, even assuming the District violated its own retention policy, or violated Wisconsin's retention law, it is irrelevant to our analysis under Wisconsin's public records law." Woznicki argued that disclosure would cause harassment. The court observed that "mere embarrassment from the disclosure of a public record is not sufficient, especially in this case, when truly private information, such as Woznicki's address, will be redacted." In contrast, the court found that "there is a significant public interest supporting disclosure." (*Thomas Woznicki v. Jeff Moberg,* No. 2015-AP-1883, Wisconsin Court of Appeals, Oct. 4)

The Federal Courts…

A federal court in New York has ruled that the Justice Department did not **waive the attorney work-product privilege** for records concerning the use of evidence obtained by warrantless surveillance cases. In a case brought by the ACLU, Judge Gregory Woods had previously ruled that by reading the word "governing" into the ACLU's request DOJ had improperly limited its search. He ordered a broader search of the National Security Division and EOUSA. The second search yielded no further records. DOJ withheld a number of records under **Exemption 5 (privileges)**, primarily citing the attorney work-product privilege, but also claiming the deliberative process privilege. The ACLU argued the records were not protected under the attorney work-product privilege to the extent they constituted the working law of the agency. The ACLU relied on *New York Times v. Dept of Justice*, 138 F. Supp. 3d 462 (S.D.N.Y. 2015), in which the district court had found that an agency's adoption by reference acted as a waiver of the attorney work-product privilege. While Woods agreed that *New York Times* was a reasonable extension of Second Circuit precedent on waiver of privilege like *National Council of La Raza v. Dept of Justice*, 411 F.3d 350 (2d Cir. 2005), and *Brennan Center for Justice v. Dept of Justice*, 697 F.3d 184 (2d Cir. 2012), he explained that the adoption by reference exception was different than the working law exception. Woods noted that "the public adoption of documents by an agency is akin to the waiver of a privilege. Documents that constitute an agency's working law, however, unlike those adopted by an agency, are not pointed to publicly, or relied upon by the agency to assert a claim or defense. The working law doctrine, unlike adoption, simply does not present a cognate to the

waiver of the attorney-client or work product privileges. The ACLU has *not* argued that DOJ expressly adopted any of the documents at issue and thereby waived any privilege applicable to them." The ACLU argued the agency had not shown that the records were created in anticipation of litigation. Here, however, Woods cited to *National Association of Criminal Defense Lawyers v. Dept of Justice*, a 2016 D.C. Circuit decision on the attorney work-product privilege, to conclude that the records in dispute were created specifically to be used in litigating cases involving evidence obtained from warrantless surveillance. Woods found that NSD had conducted a sufficient **segregability** analysis for one document, but ordered NSD and EOUSA to review all other documents for segregability and provide supplemental affidavits. (*American Civil Liberties Union v. United States Department of Justice*, Civil Action No. 13-7347-GHW, U.S. District Court for the Southern District of New York, Sept. 27)

Judge Richard Leon has ruled that Judicial Watch has not provided evidence that the Department of Homeland Security has a **policy and practice** of failing to respond to the organization's requests for travel-related documents within a reasonable amount of time. While Judicial Watch alleged a violation of FOIA, it included a second claim alleging that the agency had a pattern and practice of refusing to respond to its requests on time. Explaining that the D.C. Circuit had recognized an equitable claim in *Payne Enterprises v. United State*, 836 F.2d 486 (D.C. Cir. 1988), for agency policies and practices that consistently violated FOIA, Leon pointed out that "Judicial Watch has failed to allege sufficient facts to state a 'policy and practice claim.'. . .In support of its claim, Judicial Watch alleges that, at the time it filed its Complaint in November 2015, DHS had yet to make a determination on 19 FOIA requests that were submitted between July 2014 and August 2015. Taken by itself, this allegation is insufficient to show DHS 'adopted, endorsed, or implemented' a policy of violating FOIA's requirements. Judicial Watch points to no fact or statement to establish *why* the requests were delayed or *how* the delays were the result of an either formal or informal DHS policy or practice to violate FOIA's requirements, rather than an inevitable, but unintended delay attributable to a lack of resources. Rather than allege facts that, if true, would establish a policy or practice of violating FOIA, Judicial Watch simply jumps to the ultimate legal conclusion and asserts that such a policy exists." He added that "Judicial Watch does not allege any agency policy or practice, either formal or informal, that rises to the level recognized in *Payne*, and cannot rest on the mere fact of delay alone to establish a claim." Turning to the remaining FOIA claim, Leon found it was now **moot**. He noted that "neither DHS nor Judicial Watch has formally moved to dismiss or withdraw Count I, but the parties have jointly represented to the Court 'that Count I of the complaint has been satisfied by the DHS's production of all of the requested, responsive non-exempt records.'" (*Judicial Watch, Inc. v. United States Department of Homeland Security*, Civil Action No. 15-1983 (RJL), U.S. District Court for the District of Columbia, Sept 29)

A federal court in Connecticut has ruled that the FDA is not entitled to an *Open America* **stay** because the Center for Drug Evaluation and Research has been able to manage its backlog of FOIA requests despite an increase in the number of requests. The Treatment Action Group, an AIDS research and policy think tank, and the Global Health Justice Partnership, a non-profit connected to Yale Law School and Yale School of Public Health, requested records on the drug applications for Sovaldi and Harvoni, two drugs approved for treating Hepatitis C. The organizations also requested **expedited processing**. The FDA denied the request for expedited processing, but did not indicate how long it would take to process their request. TAG and GHJP appealed the denial of expedited processing, but the agency upheld its initial decision on appeal, explaining that the organizations had not shown a compelling need. The organizations filed suit and the FDA filed a motion requesting a 14-month stay. Addressing the denial of the organizations' request for expedited processing, the court observed that there was no case law regarding the imminent threat to life or safety for purposes of showing a compelling need for disclosure. The court examined whether TAG or GHJP were

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primarily involved in disseminating information, concluding that neither organization qualified. The court also rejected the organizations' claims of an urgency to inform the public, pointing out that the two drugs were approved in December 2013 and October 2014 and that "by the time the Plaintiffs made their initial request for expedited processing, in December 2014, there was no longer any sense of urgency or urgent need to information the public regarding the FDA's actions from two months to a year before the Plaintiffs made their initial request." Turning to the FDA's request for a stay, the court noted that stays could be granted where an agency was deluged by an unanticipated volume of requests, existing resources were inadequate to met the deluge, and the agency had exercised due diligence in processing the requests. However, the court found the FDA did not qualify under the circumstances. Instead, the court observed that the Center for Drug Evaluation and Research had gained seven full-time employees while its number of requests remained more or less consistent. Further, the FDA's statistics showed the Center had been able to respond to more requests than it received. The court found that "the FDA is unable to show that its existing resources are inadequate. . ." The agency had begun processing the organizations' request during the pendency of the litigation. As a result, the court ordered the FDA "to immediately produce all responsive records gathered so far and report back to the Court. . .as to the responsive records yet to be produced and when the Plaintiffs could expect to receive any documents outstanding. . ." (*Treatment Action Group and Global Health Justice Partnership v. Food and Drug Administration*, Civil Action No. 15-976 (VAB), U.S. District Court for the District of Connecticut, Sept. 20)

A federal court in New York has ruled that the Department of Homeland Security has not yet conducted an **adequate search** for records concerning entries, arrests, or other enforcement actions carried out at homes or residences. The Immigrant Defense Project, the Hispanic Interest Coalition of Alabama, and the Center for Constitutional Rights filed a joint request. The agency produced 8,500 pages of responsive records on a rolling basis. Dealing only with the adequacy of the search of multiple components of the agency in this opinion, Judge Paul Oetken found that many components had justified the search terms used, while others had not. The plaintiffs argued the components had failed to use generic terms listed in their search request. Oetken, however, noted that "Courts in this District have found that agencies fulfilled their obligation under FOIA even where the agency failed to search certain terms listed in a FOIA request or emphasized by a plaintiff, so long as the agency provided an explanation as to why the search term was not used (such as, the futility of the terms to narrow the field of documents, or an office's failure to use the term in question in its records or recordkeeping)." The plaintiffs also challenged the use of different search terms by different components. Rejecting the claim, Oetken pointed out that "Defendants' use of varied search terms does not *per se* undermine the adequacy of the search, so long as Defendants offer an account of its search strategy in each location. Here, Defendants have provided an account for how each office or component was searched and have offered some explanation of why." Oetken faulted the agency for its use of plural rather than singular nouns. He observed that "Defendants fail to provide an explanation that would justify conducting searches using the plural form only. Without explanation, such searches do not appear to be calculated to produce all responsive records." The plaintiffs argued that a report of investigation generated by the Office of Professional Responsibility and uncovered during the FOIA search constituted a new lead that the agency was required to explore. Oetken disagreed, noting that "where Plaintiffs directed their FOIA request to multiple agencies—which carried out separate searches by different personnel—the document allegedly requiring follow-up would have subjected Defendant-agencies to an unduly burdensome 'cross-review' of their independent production." Oetken found that the Office of Public Affairs at Immigration and Customs Enforcement and ICE's Law Enforcement Systems and Analysis had improperly narrowed their interpretation of the plaintiffs' request. LESA claimed it could not search for data on home enforcement operations because it did not track such data by address. Noting the plaintiffs indicated they were willing to accept LESA's data in its current form, Oetken observed that "Defendant's chief reason for failing to search LESA is not valid under FOIA. . .'Narrowing' a FOIA request to assist Plaintiffs in obtaining responsive records is part of an

agency's obligation to 'assist' the requester. The proposed narrower request at issue here is not unreasonable or overly burdensome, as it describes records held by LESA." (*Immigrant Defense Project, et al. v. United States Immigration and Customs Enforcement, et al.*, Civil Action No. 14-6117 (JPO), U.S. District Court for the Southern District of New York, Sept. 23)

Judge Christopher Cooper has ruled that the EPA properly claimed **Exemption 5 (privileges)** to withhold factual findings written by agency investigators to agency attorneys in order to secure legal advice regarding the criminal liability of an outside party. PEER requested records of an OIG report on revolving-door allegations against a former member of the U.S. Chemical Safety and Hazard Investigation Board. OIG located nearly 900 pages of responsive records. The agency made redactions on 57 pages and withheld 86 pages entirely, including 23 pages withheld under the attorney-client privilege. PEER contested only portions of the records withheld under the attorney-client privilege, arguing that the privilege applied only "when agency communications concern 'the legal ramifications of [the agency's] action.' Since 'the EPA-OIG's investigation did not involve the conduct of any agency employee, but rather, an outside third party', PEER contends the withheld communications 'had no bearing on EPA's legal rights or responsibilities' and therefore the attorney-client privilege has no proper application." Indicating that "this argument rests on false premises," Cooper explained that "by seeking legal advice regarding the potential federal criminal liability of a former CSB member, the OIG investigators were acting in direct furtherance of the agency's statutory mandate." He pointed out that "courts have applied the attorney-client privilege in the FOIA context to protect legal advice from agency attorneys to agency investigators concerning the legal parameters of third-party conduct." PEER relied on *Coastal States Gas Corp. v. Dept of Energy*, 617 F.2d 854 (D.C. Cir. 1980), for the proposition that the attorney-client privilege did not apply when legal advice is used as the working law of the agency and is available widely throughout the agency. But Cooper pointed out that "*this* is a 'different case.' [T]he EPA-OIG has tagged the relevant records with 'restricted' and 'official use only' labels, and has stored them in a database accessible only to authorized EPA-OIG employees." PEER also argued that factual findings could be segregated from privileged material. Rejecting the claim, Cooper noted that "the attorney-client privilege protects not only legal *advice*, but the confidentially conveyed *facts* upon which that advice is based. Attorney-client communications are a two-way street." (*Public Employees for Environmental Responsibility v. U.S Environmental Protection Agency – Office of the Inspector General*, Civil Action No. 15-1012 (CRC), U.S. District Court for the District of Columbia, Sept. 30)

Judge Tanya Chutkan has ruled that the State Department has now sufficiently justified its **search** for records concerning Joan Wadelton, a retired Foreign Service officer litigating her non-promotion, as well as its claims of **Exemption 5 (privileges)** for seven memos prepared by the Legal Advisor. Chutkan previously found that the agency had not explained why it limited its search of the Bureau of Human Resources and the Office of the Under Secretary for Management, but agreed that the agency's supplemental explanations were sufficient. Chutkan was troubled by the agency's inability to find several DVDs containing emails pertaining to Wadelton's case, but she disagreed that the missing DVDs undercut the agency's search, pointing out that "State's only obligation is to conduct a reasonable search, and the court has no reason not to credit [the agency's] assertion that the search for the DVDs was 'extensive.' Furthermore, according to State's described policy, it appears that the emails contained on the DVDs would be copies of the same 'record' emails saved in Wadelton's paper file." Wadelton contested the claim of attorney work-product to protect the seven memos from the search of Legal. One document Wadelton challenged was an unsigned handwritten note. Wadelton argued that "the document cannot be exempt work product if neither the recipient nor the author are known." State explained the note pertained to a timeline created by the Office of Special Counsel and that "communications between the Office of Special Counsel and other offices and divisions are handled by Legal

ACCESS REPORTS

attorneys and the document is a note describing such a communication." Wadelton claimed that one memo describing a meeting should be subject to a **segregability analysis** because the agency claimed a Privacy Act exemption as well. Chutkan pointed out that "defendant's invocation of the Privacy Act as well as the work-product exemption does not make a segregabiility analysis necessary. Even if Plaintiffs were correct that the Privacy Act exemption (k)(2) requires an agency to segregate non-exempt portions of a document from exempt portions, or explain why all parts are exempt, the four documents described here would nonetheless be fully protected y Exemption 5. Defendants are not required to demonstrate that the material was not segregable." (*Joan Wadelton v. Department of State*, Civil Action No. 13-412 (TSC), U.S. District Court for the District of Columbia, Sept. 22)

Judge Tanya Chutkan has ruled that Hall & Associates is not entitled to **attorneys fees** for its litigation against the EPA because it did not substantially prevail. Hall represented a coalition of municipalities in New Hampshire that discharged into the Great Bay Estuary. Hall made a total of eight requests to the EPA for records disproving a statement Hall had made in an earlier letter to the EPA. The agency decided those requests did not properly describe records and rejected them. In an earlier ruling in the case, the court concluded that even though it agreed with the agency that the requests did not describe records the agency regulations required EPA to allow Hall to restructure its requests in such a way as to qualify. The EPA provided Hall with an opportunity to clarify its requests, but Hall continued to insist on the original language. At that point, Chutkan used language from Hall's request to EPA Region 1—to which the agency had responded—as the basis for acceptable language. The agency accepted the new request and located 40 responsive documents, which it disclosed with redactions. Hall then filed for attorney's fees, including fees for the additional time spent in litigation. Hall insisted that it had substantially prevailed by forcing the agency to conduct a new search that yielded responsive records. Chutkan, however, noted that Hall was largely at fault for prolonging the litigation. Denying Hall's motion for attorney's fees, Chutkan pointed out that "there is no basis for the court to conclude that Hall, before commencing this suit three years ago, could not simply have offered the same clarification it did to EPA Region 1 and thus attained the requested documents without the involvement of this court. . .[H]ere it appears that 'no small part of the delay in this case' was the result of Hall's own intransigence. . ." (*Hall & Associates v. U.S. Environmental Protection Agency*, Civil Action No. 13-0823 (TSC), U.S. District Court for the District of Columbia, Sept. 27)

A federal court in New Hampshire has ruled that Citizens for a Strong New Hampshire is not entitled to **attorney's fees** because it did not substantially prevail in its suit against the IRS. Citizens made a FOIA request to the IRS for correspondence between the agency and Sen. Jeanne Shaheen (D-NH) and Congresswoman Carol Shea-Porter (D-NH). About two months later the agency had located and processed responsive records, which were caught up in a queue for review by the Office of Chief Counsel. The IRS staffer responsible for the request contacted Citizens two months later in October 2014, indicating the responsive records were being reviewed, but could not provide any estimate as to when the records would be disclosed. Citizens filed suit a week later and the IRS disclosed 45 pages in full or in part, withholding 51 pages, a month after the suit was filed. The court ruled in favor of the agency's exemption claims, but ordered the agency to conduct a second search. The IRS conducted a second search but found no more records. Citizens then filed a motion for attorney's fees, claiming it had substantially prevailed. Finding Citizens did not substantially prevail, the court noted that "by producing evidence of the actions it took in response to Citizens' request, before Citizens filed suit, the IRS has demonstrated that Citizens' suit did not cause it to release the documents it provided Citizens. That means that the IRS's release of information did not make Citizens a prevailing party for purposes of [the statute]." Citizens contended that it had succeeded in forcing the agency to conduct a second search. Rejecting that claim, the court pointed out that "the IRS's supplemental search in this case resulted in the identification of no responsive documents, which militates

against a conclusion that the IRS's initiation of that search made Citizens a substantially prevailing party. . . [B]ecause the IRS's supplemental search did not result in the production of any records beyond those identified by its initial search, the mere fact that the IRS conducted the supplemental search does not make Citizens a prevailing party for purposes of [the statute]." (*Citizens for a Strong New Hampshire, Inc. v. Internal Revenue Service*, Civil Action No. 14-487-LM, U.S. District Court for the District of New Hampshire, Sept. 20)

Judge Rosemary Collyer has ruled that Lesley Scholl, a federal prisoner convicted of illegal possession of machine guns, **waived** his right to make FOIA and Privacy Act requests for records concerning his conviction as part of his two plea agreements. Although Scholl's plea agreement clearly included a waiver of any access rights, he made requests to multiple law enforcement agencies for his records to prove his innocence. All the agencies, with the exception of the FBI, declined to respond to his request because of the waiver provision in his plea agreements. In the case of the FBI, the agency found records referencing him in another context and released 69 pages. Collyer agreed that Scholl had willingly waived his right as part of his plea agreements. She noted that "there is no indication that Mr. Scholl's plea agreements have been invalidated." She added that "as a result of his legally binding agreements, none of the Defendants had an obligation to disclose those records and no improper withholding has occurred." (*Lesley Marlin Scholl v. Various Agencies of the Federal Government and Project Disarm Task Force Entities*, Civil Action No. 14-1003 (RMC), U.S. District Court for the District of Columbia, Sept. 22)

A federal court in Pennsylvania has ruled in favor of the FBI after the agency requested the court reconsider its earlier ruling requiring the agency to disclose to Jessica Johnson's counsel all records for which it had not provided sufficient justification for its exemption claims. Johnson, an investigator for the Federal Community Defender Office in Philadelphia, requested records on the murder conviction of Odell Corley as part of a bank robbery in Indiana. The Defender's Office was representing Corley in his post-conviction appeal. The FBI found 5,827 pages of potentially responsive records, ultimately disclosing 180 pages with redactions made primarily under **Exemption 7(A) (interference with ongoing investigation or proceeding)** and **Exemption 7(E) (investigative methods and techniques)**. Johnson challenged the processing of the request, pointing out that many records were disclosed to Corley during discovery in his trial. The court agreed that Johnson, as Corley's representative, was entitled to the entire discovery file. The agency disclosed the entire file, all of which originated with the U.S. Attorney's Office for the Northern District of Indiana. Johnson questioned the disclosure, noting that the FBI should also have responsive records. The court found the FBI had not justified many of its exemption claims and ordered the agency to disclose those records to Johnson's counsel. The FBI then asked the court to reconsider that decision. After a third round of affidavits, the court agreed with the agency, finding that all its exemption claims were appropriate. Upholding the agency's 7(A) claims, the court observed that "anything contained within its investigative file that would have entered the public domain during the prosecution of Mr. Corley has been provided to Ms. Johnson in the Discovery File, [which] is sufficient for the FBI to meet its burden under FOIA." The court rejected Johnson's public domain claim, pointing out that "the Court concludes that the FBI has provided Ms. Johnson with all documents she has proved were in the public domain." The court added that "Ms. Johnson has not provided a legal basis to conclude that the FBI must produce duplicative or redundant materials beyond or in addition to what the FBI has already provided in the Discovery File." (*Jessica Leigh Johnson v. Federal Bureau of Investigation*, Civil Action No. 14-1720, U.S. District Court for the Eastern District of Pennsylvania, Sept. 21)

ACCESS REPORTS

Judge Beryl Howell has ruled that the FBI and the EOUSA properly responded to John Ford's multiple requests for records concerning his conviction for bank robbery, withholding records under **Exemption 3 (other statutes)** and **Exemption 7 (law enforcement records)**. Ford challenged EOUSA's decision to withhold the testimony of a witness who testified before a grand jury. Howell noted that "regardless of whether grand jury testimony might support the plaintiff's claim of innocence, the EOUSA adequately demonstrates that release of the grand jury transcripts impermissibly would reveal the identity of a witness, evidence before the grand jury and the source of that evidence. Its decision to withhold grand jury information under Exemption 3 is proper." She approved the FBI's decision to withhold information provided by a local law enforcement agency under **Exemption 7(D) (confidential sources)**, observing that "based on the [agency's] explanation of the cooperative arrangements the FBI maintains with local law enforcement agencies, and this local law enforcement agency's specific request that the information it provided not be disclosed, the FBI adequately demonstrates that its reliance on Exemption 7(D) is proper." Ford insisted that disclosure of the video recording from the bank's cameras would support his innocence, but Howell agreed with the FBI that the recording was protected by **Exemption 7(E) (investigative methods or techniques)**. She pointed out that "even if some cameras are 'visible' as a deterrent, other cameras may be placed at angles or in areas unknown to the public and disclosure of this information could" risk circumvention of bank surveillance systems. (*John A. Ford v. Department of Justice*, Civil Action No. 15-0808 (BAH), U.S. District Court for the District of Columbia, Sept. 21)

A federal court in Pennsylvania has ruled that the FBI properly issued a *Glomar* response neither confirming nor denying the existence of records on Victor Berrios and William Rosa, who Steven Lazar suspected had murdered Dario Gutierrez. Lazar had been convicted in state court of murdering Gutierrez and sentenced to life in prison. After exhausting his state appeals, Lazar requested records about Berrios and Rosa from the FBI. The agency indicated that it would not confirm the existence of records without consent or a sufficient public interest in disclosure. Referencing the existence of Philadelphia police records on Berrio and Rosa, Lazar argued there was a public interest in freeing an innocent man, but the court was unpersuaded. Rejecting the claim, the court noted that "the police report itself stated that the two men were the subjects of a federal investigation unrelated to the murder. Therefore, as the FBI observes, it is unlikely based on the Philadelphia police report that FBI documents exist relating to the Gutierrez murder; it is much more likely that any documents, if they exist, would concern unrelated federal investigations." (*Steven Lazar v. Federal Bureau of Investigation*, Civil Action No. 15-3648, U.S. District Court for the Eastern District of Pennsylvania, Sept. 13)

Judge Richard Leon has ruled that the Executive Office for U.S. Attorneys conducted an **adequate search** for records concerning Gregory Burwell's conviction in the Eastern District of Virginia and that it properly withheld records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Burwell seemed to argue that the agency's search was inadequate both because it did not find records and because records did not exist. Leon noted that "Plaintiff cannot have it both ways. His inconsistent arguments simply fail to create a materially factual dispute about the reasonableness of the search or to call into question the sufficiently detailed declarations describing the search." Leon found the redaction of the names of a Special Assistant U.S. Attorney and the foreman of a grand jury was appropriate. He dismissed Burwell's claim that since he already had a copy of the indictment the agency could no longer withhold it. Leon observed that "the right to assert an exemption lies with the agency possessing the requested record, and EOUSA retained the right to assert an applicable FOIA exemption whether or not the plaintiff obtained an unredacted copy of the indictment elsewhere." (*Gregory Wayne Burwell v. Executive Office for United States Attorneys*, Civil Action No. 15-1515 (RJL), U.S. District Court for the District of Columbia, Sept. 27)

A federal court in Indiana has ruled that the Bureau of Prisons properly withheld records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)** concerning Marvin Gabrion's time as an inmate at the federal prison in Terre Haute. Gabrion's counsel requested his files and BOP located nearly 5,000 pages of responsive records, redacting third-party personal information. Gabrion argued that because the records were included in his Central File, they must relate to him for purposes of Privacy Act disclosure. But the court agreed with the agency that the privacy interests of third parties outweighed any interest Gabrion might have in disclosure. One group of records concerned correspondence between BOP and third-party non-inmates. Gambrion argued the records dealt with individuals who wanted to contact him. But the court found that "the correspondence was related to the third parties' concerns regarding Gabrion's communication and visition. Moreover, the Defendants argue that, even if names and addresses were redacted, Gabrion would be able to tell the identities of those parties." The court found several categories of documents protected by Exemption 7(E). The court noted that "disclosure of classification and monitoring techniques could allow inmates to use the information in a way that could threaten the safety of guards and other prisoners." BOP withheld a video recording under **Exemption 7(F) (harm to person)**. Gabrion argued the video recording included his attorney, but the agency explained that "the video reveals the BOP's ability to monitor the visiting rooms, including camera placement and blind spots." The court sided with the agency, observing that "disclosure of the video would present clear risks to law enforcement officials." (*Marvin Gabrion v. United States Department of Justice*, Civil Action No. 14-24-WTL-DKL, U.S. District Court for the Southern District of Indiana, Sept. 21)