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Washington Focus: Two recent stories related to Hillary Clinton's use of a private server for her email while Secretary of State have brought up issues pertaining more to how FOIA works in practice than whether or not her emails were properly preserved. Writing in Politico, Josh Gerstein noted that Clinton's campaign staff urged her to recognize the impact her decision to use a private server had on the availability of agency records under FOIA. Her speechwriter circulated a suggestion that she say: "I wish I had thought more about the public records process and the impact on FOIA requests." However, Gerstein notes, the apology was never considered further. The other incident, involving notes taken by the FBI interviewer of Under Secretary of State for Management Patrick Kennedy suggesting that Kennedy wanted to cut a deal with the FBI concerning the reclassification of a document, brings up questions of exactly who has the authority to classify information in the first place. The Executive Order on Classification places the authority for classifying agency records on the original classifier, not a third party like the FBI. According to Tamara Keith of NPR, State wrote that "classification is an art, not a science, and individuals with classification authority sometimes have different views. There can be applicable FOIA exemptions that are based on both classified and unclassified rules. We have an obligation to ensure that determinations as they relate to classification are made appropriately."

Foreign Students Names Protected by Exemption 6

The Ninth Circuit has reversed a district court's decision finding that the names of foreign students and instructors at the Western Hemisphere Institute for Security Cooperation are not protected by Exemption 6 (invasion of privacy), upholding instead the Defense Department's decision in 2005 that a post-9/11 DOD policy withholding the names of military personnel was appropriate for the foreign students and instructors as well. The decision further punctuates the Ninth Circuit's more protective attitude towards balancing privacy interests and the public interest in disclosure established in

cases like *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 (9th Cir. 2008), and *Lahr v. National Transportation Safety Board*, 569 F.3d 964 (9th Cir. 2009), and serves as another illustration that virtually no public interest argument is likely to convince the Ninth Circuit to disclose information that arguably falls within the parameters of the privacy exemptions.

The case involved a request for records identifying foreign students and instructors at the Western Hemisphere Institute for Security Cooperation at Fort Benning. WHINSEC was the successor of the School of the Americas, which was started after World War II and was operated by the U.S. Army to help train military personnel from Latin America. In 1989, during the Salvadoran civil war, 19 of 26 soldiers implicated in the murders of six Jesuit priests were found to have attended the SOA. As a result, School of the Americas Watch, a human rights and advocacy group dedicated to monitoring SOA graduates and lobbying for closure of the school, was formed. In response to a 1994 FOIA request from SOAW, the Defense Department disclosed the names of graduates dating back to the school's formation in 1946. SOAW used the information to create a database of the names, countries, and courses taken or taught by each attendee. The Defense Department continued to provide such information to SOAW through 2004; it changed its policy in 2005, treating such information as protected by Exemption 6.

In 1997, Congress passed the Leahy Amendment, prohibiting the use of appropriated funds to any unit of a foreign country's security forces if there was credible evidence of human rights abuses. The State Department was tasked with trying to bring responsible members of such security forces to justice. A later amendment required the Defense Department to consider the information supplied by the State Department before providing training or assistance to foreign military units. In 2000, Congress required the SOA to provide training in human rights and principles of democratic government and mandated oversight by a Board of Visitors. In 2001, the school was renamed to distance it from its checkered past.

In 2011, Theresa Cameranesi and Judith Liteky, members of SOAW, requested a list of foreign students and instructors from 2005-2010. The Defense Department denied their request, citing Exemption 6. The agency upheld its decision on appeal and the plaintiffs sued. In district court, the judge found DOD had failed to show why disclosure of the information would constitute a clearly unwarranted invasion of privacy. DOD appealed the district court's ruling to the Ninth Circuit.

In a 2-1 split decision, the Ninth Circuit reversed the district court's ruling, finding DOD had provided sufficient justification for withholding the records. Writing for the majority, Circuit Court Judge Sandra Ikuta faulted the district court for requiring DOD to show a substantial privacy interest in the names and military units, noting that "it should have considered whether *nontrivial* privacy interests, rather than *substantial* privacy interests, were at stake." Ikuta explained that "DOD demonstrated that disclosure of the identities of foreign WHINSEC students and instructors could give rise to harassment, stigma, or violence as a result of their association with the United States—exactly the sorts of risks that courts have recognized as nontrivial in previous cases." Ikuta disregarded the plaintiffs' claim that DOD's claims were speculative, pointing out that "we have never held that an agency must document that harassment or mistreatment have happened in the past or will happen in the future; rather, the agency must merely establish that disclosure would result in a 'potential for harassment.'" Ikuta observed that "because the government's determination that foreign law enforcement and military personnel would face [risks similar to those of U.S. military personnel] if their identities were revealed is logical and plausible, it is sufficient to establish that WHINSEC students and instructors have a nontrivial privacy interest." She also agreed that DOD had treated the identifying information as confidential since it extended the policy to foreign students and instructors in 2005.

SOAW argued that there was a public interest in knowing whether DOD and the State Department were complying with their obligations to monitor human rights abuses committed by foreign students who had

graduated from WHINSEC. Rejecting the claim, Ikuta pointed out that Congress had provided oversight mechanisms requiring a board of visitors and annual reports. She observed that "given the ongoing governmental review of DOD compliance and the absence of a meaningful showing of noncompliance, the disclosure of names of all students and instructors at WHINSEC would not have a significant 'marginal additional usefulness.'" Balancing these elements, Ikuta concluded that "because any incremental value stemming from the disclosure of the identities of WHINSEC students and instructors is small, the public interest in this case is not significant compared to the risk of disclosure."

Judge Paul Watford dissented, disagreeing with the majority on the value of public disclosure in this case. Rejecting the majority's reliance on the annual reports as a sufficient measure of accountability, Watford indicated that "the reports are utterly useless in this regard. They merely provide general conclusions about the Army's operations of the Institute and the government's vetting of its attendees, not the underlying information necessary to determine whether those conclusions are correct." He observed that "as the majority would have it, the public must simply take the government's word for it that the reform measures mandated by Congress have been effective. This fox-guarding-the-henhouse notion is, or course, completely antithetical to FOIA's core purpose." He added that under *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004), the plaintiff only needed to show a reasonable suspicion of wrongdoing on the part of the agency. Under the circumstances, he noted that "the plaintiffs have easily satisfied that standard by pointing to the troubled history of SOA, which led Congress to acknowledge a need for new vetting and oversight procedures. The majority simply ignores the relevance of this pre-2001 history. Yet it is precisely because of the problems that plagued the Institute's predecessor that the public has such a strong interest in determining whether or not the reforms implemented to correct those problems have been effective." (*Theresa Cameranesi and Judith Liteky v. United States Department of Defense; U.S. Army Training and Doctrine Command*, No. 14-16432, U.S. Court of Appeals for the Ninth Circuit, Sept. 30)

Views from the States…

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

California

In two companion cases, a court of appeals has ruled that Section 27366 of the Government Code, which allows recorders' offices to set fees for recovery of both direct and indirect costs for providing public access to documents, does not require such offices to narrowly construe their fee-setting provisions nor does it violate the constitutional right of access. The cases involved suits brought by California Public Records Research against Yolo County and Sacramento County challenging their fee policies allowing recovery of about $40.00 an hour in costs for production of documents. As the result of a 2009 fee study, Yolo County charged $10 for the first page and $2 for each subsequent page. In response to requests from California Public Records Research, both counties charged $62. CPRR then filed suit against both counties, arguing the fee policy violated the constitutional right of access as well as the common law right of access. The trial court ruled in favor of the counties and CPRR appealed. Upholding the trial court decisions, the appellate court agreed, noting that "the Legislature was aware of the potentially broad meaning of the phrase 'direct and indirect costs' when it amended section 27366." CPRR argued the fee provisions were contrary to those of the California Public Records Act. Pointing out that Section 54985 of the California Public Records Act limited an agency to recovery of costs associated with reproducing the document, the appeals court indicated that

"when the Legislature wants to limit indirect costs, it expressly says so. Despite close parallels to section 54985, section 27366 contains no such limitation. We therefore presume that no such limitation was intended." During the litigation, Yolo County told the court that because of the recent retirement of several long-time employees its hourly rate had dropped to $7.50 instead of the original $10. CPRR argued its lawsuit had caused the county to reduce its rates, entitling CPRR to attorney's fees. The appeals court noted that "CPRR's petition and complaint do not merely seek a reduction in fees; they seek a change in the way the County calculates fees." The court added that "CPRR did not achieve its objective. The County continued to calculate copy fees using the methodology described in the [2009] study. Although the Recorder's Office now charges $7.50/$2.00 for copies, the reduced rate is the result of a change in staff salaries, not a change in the way the County calculates fees. Despite the reduction in fees, CPRR failed to obtain the primary relief sought." (*California Public Records Research, Inc. v. County of Yolo*, No. CO78158, and *California Public Records Research, Inc. v. County of Sacramento*, No. CO79239, California Court of Appeal, Third District, Oct. 14)

Connecticut

A trial court has ruled that John Vivo failed to appeal the FOI Commission's decision finding the Department of Corrections had properly redacted records within the statutory 45 days. The FOI Commission argued its decision was mailed to Vivo on February 29, while Vivo claimed the correctional facility did not provide him a copy of the decision until March 3. The court found that even if Vivo's later date was accepted he still had failed to file his suit within the required 45 days. The court observed that "an administrative appeal must be both filed and served within forty-five days after issuance of the agency's decision. Failure either to file or to serve the appeal within the statutory time limit deprives the court of subject matter jurisdiction over the appeal. Because this appeal was not filed within forty-five days of the issuance of the agency's decision, as extended by the tolling provision, this court lacks subject matter jurisdiction." (*John Vivo III v. Owen P. Eagan, et al.*, No. HHB-CV-16-5017522-S, Connecticut Superior Court, Judicial District of New Britain, Oct. 19)

Pennsylvania

The supreme court has ruled that home addresses are protected by the constitutional right to privacy and are not disclosable under the Right to Know Law. The Office of Open Records had concluded that the supreme court's precedents on privacy had not survived when the legislature overhauled the access statute in 2009. In a case brought by the Pennsylvania State Education Association involving whether school districts were required to disclose the home addresses of teachers, the supreme court had earlier criticized OOR for failing to provide procedural safeguards for protecting the personal information of public employees. In the current decision, the supreme court rejected OOR's claim that the personal security exemption contained in the new statute differed from that contained in the previous access law. Noting the right of privacy was protected by the state constitution, the supreme court pointed out that "constitutionally protected privacy interests must be respected even if no provision of the [Right to Know Law] speaks to protection of those interests." Finding the interpretation of the personal security exemption in the new statute was the same as in the old statute, the supreme court observed that "this Court. . .has developed a body of case law requiring governmental agencies to respect the constitutional privacy rights of citizens when disseminating requested information. In such circumstances, a balancing test is required before the disclosure of any personal information." (*Pennsylvania State Education Association v. Commonwealth of Pennsylvania*, No. 11 MAP 2005 and No. 22 MAP 2015, Pennsylvania Supreme Court, Oct. 18)

The Federal Courts…

Judge John Bates has ruled that STS Energy Partners is entitled to **attorney's fees** because the Federal Energy Regulatory Commission's failure to segregate non-exempt information from its records until suit was filed outweighed the economic incentives the company had in bringing suit in the first place. FERC had fined Powhatan Energy Fund $16.8 million for sham trading profits. STS Energy Partners Kevin and Richard Gates were primary investors in Powhatan Energy Fund and an editorial in the *Wall Street Journal* used their case to complain about the agency's regulatory practices, leading to congressional queries about FERC's prosecutorial tactics. STS Energy Partners made two FOIA requests for records pertaining to the FERC's prosecutions for sham trading and the Gates brothers made many of the records disclosed during their case publicly available. The agency initially refused to disclose any records, but eventually disclosed portions of 115 documents. Bates found the agency had failed to provide any segregability analysis and ordered the agency to separate and disclose non-exempt information. At this point, the only matter left was whether STS Energy Partners was entitled to attorney's fees. Noting that the Gates brothers had successfully brought their case into the public eye, Bates observed that "this media coverage—even if drummed up by the litigants themselves—demonstrates significant public interest in this action." He added that "the general public has shown an interest in the type of documents sought by this litigation, that is, FERC's records concerning investigation and enforcement actions against commercial energy traders." Bates agreed with the agency that STS Energy Partners had an economic incentive to bring the suit. He pointed out that "whether or not the FOIA request was intended to substitute for discovery otherwise unavailable to Powhatan [and the Gates brothers], the Court finds that they were at least part of Powhatan's litigation strategy including its litigation-driven public relations campaign. As such, the Court finds that the plaintiff's interest in the documents was for its private gain. Powhatan, facing the possibility of millions of dollars in sanctions, undoubtedly had a private incentive to seek disclosure of the records related to its investigation. The Gates brothers cannot hide behind the vehicle of another company to disclaim that private interest." Arguing that its actions were reasonable, FERC indicated that Bates had found its exemptions applicable to some of the withheld records. But Bates observed that "the Court could not discern *which* portions—which is why summary judgment was denied. . .The Court thus finds that FERC's conclusory claim of non-segregability is not a 'reasonable basis in law' for withholding in these circumstances. Nor can FERC prevail on the reasonable basis factor by deciding to release documents only after forcing the requester to sue." Finding that both the public interest in disclosure and the lack of a reasonable legal basis for failing to disclose the records weighed heavily in STS Energy Partners' favor, Bates awarded the company $60,168 in attorney's fees. (*STS Energy Partners, LP v. Federal Regulatory Commission*, Civil Action No. 14-591 (JDB), U.S. District Court for the District of Columbia, Oct. 5)

Judge Rudolph Contreras has ruled that the EPA has so far failed to justify all its claims of the deliberative process privilege and some of its claims of attorney-client privilege under **Exemption 5 (privileges)** for records concerning the agency's involvement in investigating potentially toxic contamination of schools in the Santa Monica Malibu Unified School District. PEER requested the records and the EPA disclosed 451 documents with redactions and withheld 224 documents entirely. While some redactions were made under **Exemption 6 (invasion of privacy)**, PEER primarily challenged the Exemption 5 claims, arguing the agency had failed to provide a sufficient explanation of how the records fit into the deliberative process. Contreras agreed with the agency that it was not required to pinpoint a specific decision to which a document contributed to qualify for the deliberative process privilege. But he pointed out that agencies were required to specifically tie the claims to an identifiable deliberative process and could not just claim as a general matter that the documents were deliberative. Contreras indicated that "although EPA is not required to link each document to a specific action, it must do more to tie the materials to some definable process. Armed only with

these vague descriptions of the deliberative process involved, the Court does not have sufficient detail to determine whether the material withheld in many of the documents at issue is both deliberative and predecisional." Contreras faulted the EPA for routinely justifying the deliberative process privilege by noting the participants did not have decisionmaking authority. He pointed out that "conclusory statements that every author does not have decisionmaking authority—without providing additional context, identifying the authority of the recipient, or tying the record to a particular decisionmaking process—do not give the Court enough information to determine whether the deliberative process applies." PEER complained that the agency claimed that EPA Region 9 Regional Administrator Jared Blumenfeld did not have decisionmaking authority. Contreras observed that "presumably, as head of EPA Region 9, Mr. Blumenfled has some decision-making authority, but the *Vaughn* indices indicate otherwise. In fact, some of the decisions at issue in this case were made under Mr. Blumenfeld's signature." Acknowledging that many of EPA's claims might well be valid, Contreras told the agency to supplement its affidavits. He indicated that "the Court does not dictate the format of EPA's supplemental *Vaughn* indices. However, if EPA provides supplemental declarations or *Vaughn* indices, they must show, at least '(1) the nature of the specific deliberative process involved, (2) the function and significance of the documents in that process, and (3) the nature of the decisionmaking authority vested in the document's author and recipient.'" Contreras agreed with PEER that several email exchanges that did not involve an attorney were not protected by the attorney-client privilege. As to one email, he noted that "the rationale for withholding the language seems to be that it encompasses previously provided legal advice even though it was drafted by a non-lawyer, not that [the employee] was providing information for the purposes of seeking legal counsel. If that is EPA's argument, the agency has put forth no authority in support of its position." Finding that four exchanges qualified for the privilege, Contreras remanded the claims back to the agency to allow it to better justify those claims he had found insufficient. (*Public Employees for Environmental Responsibility v. Environmental Protection Agency*, Civil Action No. 14-2056 (RC), U.S. District Court for the District of Columbia, Sept. 30)

The Seventh Circuit has ruled that a list of Tier III organizations regarded as terrorist organizations by the Department of Homeland Security are protected by **Exemption 7(E) (investigative methods and techniques)**. The Heartland Alliance National Immigrant Justice Center requested the list of Tier III organizations from Homeland Security, which denied them under 7(E), claiming they were guidelines. The district court agreed with the agency. On appeal, Heartland Alliance's primary argument was that the list did not qualify as a guideline. Writing for the court, Circuit Court Judge Richard Posner observed that it really didn't make much difference whether or not the list qualified as a guideline since the list clearly qualified as an investigative technique. Posner pointed out that "if the alien doesn't know that a terrorist organization that he has belonged to, been affiliated with, or maybe simply has provided supplies or money to, has been identified by our government as a terrorist organization, he is likely to be less guarded in answering questions about his activities in or associations with the organization. But if he knows that the organization he belonged to or was associated with is deemed a terrorist organization, he is likely to deny having ever had *any* connection to it or even having ever *heard* of it." Posner noted that "the withholding of the name of a terrorist organization from an alien who is being questioned is thus a technique of a law enforcement investigation that is squarely within the 7(E) exemption." The Heartland Alliance suggested that many groups on the Tier III list did not belong on the list. But Posner indicated that Heartland Alliance "does not explain what the government would gain by pretending that harmless organizations are actually terrorist groups. The government makes mistakes, but the Center has not shown that they're willful, or that Exemption 7(E). . .is either invalid. . .or inapplicable to the withheld names." Circuit Court Judge Daniel Manion concurred, but complained that the court's decision had not provided much guidance on what qualified as a guideline or a technique under Exemption 7(E). He suggested that the non-public nature of the Tier III organizations might be one of the reasons why so few Christians from Syria had been granted asylum by the U.S. and argued that Congress should look into the question more closely. (*Heartland Alliance National Immigrant Justice Center*

v. U.S. Department of Homeland Security, No. 16-1840, U.S. Court of Appeals for the Seventh Circuit, Oct 21)

After reviewing the redactions *in camera*, Judge James Boasberg has ruled that the Justice Department's Office of Professional Responsibility properly withheld personally-identifying information in records concerning the investigation of former AUSA Lesa Gail Bridges Jackson for continuing to practice law after her license was suspended under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Although he also found that OPR's **referral** of some records to EOUSA was proper, he agreed with Lonnie Parker that OPR was required to make a determination as to the applicability of EOUSA's exemption claims. Pursuant to news reports, Parker found out that Bridges Jackson had been investigated and dismissed as a result of not having a valid state license. He requested the investigation from EOUSA and OPR. EOUSA provided some records, but OPR initially issued a *Glomar* response neither confirming nor denying the existence of records. However, after OPR realized EOUSA had confirmed the existence of the investigation, it processed the records as well, locating 251 pages of potentially responsive records. OPR released 18 pages in full and withheld 20 pages in part and 149 pages in full under **Exemption 5 (privileges)** as well as the two privacy exemptions. OPR also referred 64 pages to EOUSA, the Justice Management Division, and the Office of Information Policy. Parker did not challenge the Exemption 5 claims, but did challenge the application of the privacy exemptions as well as the referral process. After his *in camera* review, Boasberg agreed with OPR that Bridges Jackson and other identified third parties had a privacy interest in the redacted information. He observed that "courts must distinguish between the public interest that can generally exist in a subject related to a FOIA request and the public interest that might or might not be served by disclosure of the *specific* records that are responsive to a given request. The key consideration is whether disclosure of the records at issue would serve an identified public interest and therefore warrant the overriding of personal privacy." Here, Boasberg was satisfied that the privacy interests outweighed any public interest in disclosure. Parker contended that OPR was responsible for ensuring that referred records were processed by the agency to which they were referred and that the referring agency had a legal obligation to review the exemption claims made by the agency to which the records were referred. Parker cited *McGhee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983), to support his position, but Boasberg noted that a more recent decision, *Sussman v. U.S. Marshals Service*, 494 F.3d 1106 (D.C. Cir. 2007), had clarified *McGhee*. He observed that "contrary to Parker's position, a component need not necessarily follow up on or independently review the disclosure decision of the component, agency, or office to which it referred the records for decision. Whether the referring agency retains a duty to act depends on whether the referral resulted in an improper withholding." Since EOUSA had withheld records, Boasberg indicated OPR had an obligation to review those claims. He pointed out that "OPR never provided a description of the specific legal bases for EOUSA's withholdings beyond the general citations to exemptions given in the form letter that accompanied EOUSA's production. The *Vaughn* Index supplied by OPR discusses the pages *it* withheld; it does not address EOUSA's withholdings. An agency, however, has the burden to establish that a claimed exemption applies." (*Lonnie J. Parker v. United States Department of Justice, Office of Professional Responsibility*, Civil Action No. 15-1070 (JEB), U.S. District Court for the District of Columbia, Oct. 12)

Judge Amy Berman Jackson has ruled that a 96-page memo by the Assistant U.S. Attorneys considering whether to prosecute Secret Service agents and Capitol Police officers in the shooting death of Miriam Carey after her car was chased down in a restricted area near the Capitol is protected by **Exemption 5 (deliberative process privilege)**. Worldnetdaily.com had requested records on the Carey shooting and decided to challenge only the declination memo. Worldnetdaily.com insisted the memo was the final decision and thus could not be considered predecisional. However, after reviewing the memo *in camera*. Jackson

indicated that "it is unambiguously predecisional and deliberative in nature." Rejecting Worldnetdaily.com's assertion that it was the final decision, Jackson noted that "the document reveals that plaintiff is incorrect: the Declination Memo does not reflect a *determination* to decline to prosecute, but a *recommendation* that the United States Attorney decline to do so, along with the evidence and analysis supporting that recommendation." She observed that the memo "contains the recommendation of the investigating AUSAs as to what final decision should be reached by their supervisors in the future. The recipients of the Declination Memo could have agreed, disagreed, or called for further investigation or analysis." Worldnetdaily.com argued that it was not seeking the back and forth of deliberations, but Jackson explained that "that is precisely what the Declination Memo contains: the investigating AUSAs' frank assessment of the witnesses, the physical evidence, and the applicable law, as well as their ultimate recommendation as to the appropriate course of action." (*Worldnetdaily.com, Inc. v. U.S. Department of Justice*, Civil Action No. 15-0549 (ABJ), U.S. District Court for the District of Columbia, Oct. 19)

Judge Beryl Howell has ruled that the Administration for Children and Families conducted an **adequate search** for the remaining subparts of Chris Wright's multi-part request for records concerning a grant to Baptist Children and Family Services for the provision of residential shelter services for unaccompanied alien children and that it properly withheld some records under **Exemption 5 (privileges)**. Howell had previously ruled in favor of ACF on most other counts, but in this ruling addressed Wright's remaining allegations concerning the search and the Exemption 5 claims. Wright argued the agency had failed to search certain locations. Howell noted however that "the plaintiff has not pointed to any 'positive indications of overlooked materials,' nor has he shown that the 'agency had reason to know that certain places [not searched] may contain' additional documents responsive [to Wright's request]." For several other subparts of his request, the agency had told Wright it did not collect the information he was requesting. The agency identified those files it deemed most likely to have responsive records if the information existed, but found no records. Approving of the agency's processing, Howell observed that "having attested to the unlikelihood of the existence of any responsive agency records, [the agency] was not required to perform the more exhaustive search the plaintiff apparently demands. On the contrary, an agency is only required to search record systems 'likely' to yield responsive documents." Wright questioned the search of various staffers' email accounts, arguing that the agency should have searched personal accounts to determine if agency staff had used their individual email accounts to correspond with the grantee. Howell agreed that the recent decision in *Competitive Enterprise Institute v. Office of Science and Technology Policy*, 827 F.3d 145 (D.C. Cir. 2016), found that agencies were required to process records from personal accounts when they were used to conduct agency business, but that "the presumption applies that agency employees comply with applicable law and, consequently, that agency records responsive to a FOIA request would unlikely be located solely in their personal email accounts, rendering such a search of those accounts unnecessary." She pointed out that "the requester bears the burden of rebutting the presumption of good faith required to be accorded to the agency's declarations, and the plaintiff has not overcome the presumption that agency records are unlikely to exist on the agency employees' personal accounts." Howell rejected Wright's contention that the misconduct exception to legal privileges applied to the agency's deliberative process privilege claims. Instead, she found the exception did not apply in the Exemption 5 context because "Exemption 5's protection of privileged materials is not subject to the same exceptions to which the common law privilege is susceptible." She added that such common law exceptions "cannot overcome an otherwise valid withholding pursuant to Exemption 5." (*Chris Wright v. Administration for Children and Families*, Civil Action No. 15-218, U.S. District Court for the District of Columbia, Oct. 4)

Judge Reggie Walton has ruled that the National Archives and Records Administration properly withheld two draft indictments of Hillary Clinton that were prepared during the Whitewater investigation

under **Exemption 3 (other statutes)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Judicial Watch requested the draft indictments, which were never issued, arguing that the existence of the indictments had become publicly known through the publication of the special counsel's final report. After reviewing the documents, NARA concluded that their disclosure would violate Rule 6(e) on grand jury secrecy by revealing information occurring before the grand jury and because Clinton's privacy interest under **Exemption 6 (invasion of privacy)** and Exemption 7(C) outweighed any public interest in disclosure. Walton agreed with the agency. NARA contended that the draft indictments were inevitably tied to the grand jury proceedings. Walton noted that "the Court finds that the drafts of the proposed indictment would disclose the identity of individuals who actually testified before the grand jury and who the independent counsel considered calling as witnesses, as well as the inner workings of the federal grand jury process that would necessarily show the potential direction of the grand jury proceedings, given that the independent counsel likely drafted the document based on testimony and other information presented to that body." He pointed out that the draft indictments "were prepared as a direct result of the ongoing grand jury investigation." Walton rejected Judicial Watch's attempt to show that the information contained in the draft indictments had been publicly disclosed in the final report and accompanying documents. Instead, he observed that "while these efforts may provide some support, the plaintiff has not pointed to specific items of information in the public domain that sufficiently demonstrate that the information contained in the drafts of the proposed indictment are publicly available to warrant disclosure." The parties agreed that Hillary Clinton's privacy rights were the only ones at play here. Judicial Watch argued that because she was a well-known public figure, her privacy interest was substantially diminished. Walton indicated that "the plaintiff has not shown that the information contained in the drafts of the proposed indictments are widely available to the public, let alone to the extent that the privacy interest Mrs. Clinton has in the drafts is extinguished." Walton noted that "disclosure of the drafts of the proposed indictment would not shed light on any agency's performance of its statutory duties, but potentially shed lightly solely on the character of Mrs. Clinton, independent to her position as a public official, which is not the objective of the FOIA." Walton pointed out that he was satisfied with NARA's claim that no **segregable portions** of the indictments could be disclosed, Noting that "the segregability analysis under Exemption 3 differs from other FOIA exemptions, he observed that "the scope of the exemption Is not determined by FOIA itself, but by the protective statute that is being invoked under Exemption 3." (*Judicial Watch, Inc. v. National Archives and Records Administration*, Civil Action No. 15-1740 (RBW), U.S. District Court for the District of Columbia, Oct. 4)

Judge Tanya Chutkan has ruled that the Department of Justice's Office of Information Policy and Civil Rights Division properly concluded that a request from Landmark Legal Foundation for records reflecting the use of personal email accounts to conduct government business does not sufficiently describe records subject to a search. OIP told Landmark that it could not search for the records requested and Civil Rights told Landmark that the request did not describe agency records. Chutkan noted that "the Plaintiff's request for 'records evincing the use of' personal email accounts and other electronic communication and social median platforms to conduct government business does not enable a professional DOJ employee to determine what records are being sought. Plaintiff does not define 'evince,' nor explain how a record can 'evince' the use of personal email or social media accounts. Plaintiff's request does not ask for specific records, but rather for any records that might suggest that *other* records exist. While the object of Plaintiff's requests may be to determine whether Department of Justice employees are using personal email accounts to conduct government business, Plaintiff cannot force the Department to answer that question through a FOIA request." She added that "Plaintiff may want a list of DOJ employees who use personal email for Department business, but FOIA only entitles it to such a list if the Department already has one—it does not require the Department to create one." Landmark argued that it was only requesting the Department to ask the employees whether they had conducted public business on their personal email accounts, search those accounts, and provide the results to

the Department. Chutkan found such a search impractical. She observed that "an employee cannot search their personal email for 'instances in which I used my personal email to conduct government business'—such a search would not only be difficult to formulate, but would also likely not uncover responsive records—rather, they would need a concrete and specific search term." Landmark claimed OIP had misunderstood its request and had improperly narrowed it. But Chutkan pointed out that "ultimately, regardless of whether Defendant misunderstood Plaintiff's intent in narrowing the scope of the search, Plaintiff has not made a request that adequately describes the records sought. Plaintiff's 'good faith effort' cannot convert an invalid and unreasonable request into a valid and reasonable one." (*Landmark Legal Foundation v. Department of Justice*, Civil Action No. 15-1698 (TSC), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in Indiana has ruled that the Defense Department may blur the identities of military personnel appearing in three training videos requested by Harry Tunnell under **Exemption 6 (invasion of privacy)**. Tunnell, a military historian, was the sole commander of the Stryker Brigade, which served in Iraq and Afghanistan, from April 2006 until July 2010 when the unit was deactivated. He requested three videos of the Stryker Brigade recorded at Joint Base Lewis-McChord. The Defense Department initially withheld the records under **Exemption 3 (other statutes)**, citing 10 U.S.C. § 130(a), which allows the agency to withhold certain technical data with military applications. The decision was upheld on administrative appeal. After Tunnell filed suit, DOD agreed to disclose the videos with the identities of military personnel blurred, citing Exemption 6 as the basis for its claim. Tunnell objected, arguing that photographs of the brigade's personnel had been published previously and that blurring identities would diminish the usefulness of the videos as part of the historical record. In court, Tunnell initially questioned the agency's decision to change its exemption claim. The court pointed out that both exemptions had been alluded to in the agency's memo denying Tunnell's request, explaining that "the fact that the DoD cited only the first of the two reasons in the memo when initially withholding the videos does not doom its defense of this case in federal court." DOD argued that a memo written shortly after 9/11finding that the identities of deployable troops should not normally be disclosed reflected the agency's current policy as well. Tunnell claimed the troops in the video were no longer deployable, but the court pointed out that "the [agency's memo] explains how the recent rise of domestic supporters of terrorism presents a security risk to anyone who was involved in operations in Iraq and Afghanistan." Finding that Exemption 6 allowed DOD to blur the images, the court rejected Tunnell's argument that the agency had waived any privacy in the images by previously publishing pictures of brigade members. Contrasting the difference in the images, the court noted that "the videos at issue contain live interviews with military personnel discussing military tactics, techniques, and procedures relating to U.S. combat operations in Iraq and Afghanistan. In contrast, the printed history of the Stryker Brigade contains photographs of military personnel [contained] in media packets primarily related to the U.S. military's role in the governance, reconstruction, and development of Afghanistan, and as such, are not of the same inflammatory nature as the training videos, which feature military strategies." (*Harry Tunnell v. U.S. Department of Defense*, Civil Action No. 14-00269-SLC, U.S. District Court for the Northern District of Indiana, Sept. 30)

Judge James Boasberg has ruled that the Office of the Solicitor General has not yet shown that it conducted an **adequate search** for records concerning changes to Supreme Court opinions after they have been announced. Based on a *New York Times* article discussing a Harvard Law Review article concerning revisions made by the Supreme Court in its opinions, researcher Ryan Shapiro requested any records concerning the practice from the Office of the Solicitor General. OSG searched is database and found no records. Current OSG attorneys were asked if they knew of any such cases, which resulted in several letters that were disclosed to Shapiro. Shapiro argued the agency's search was insufficient because it had not described the terms used and had not shown why it could not contact former OSG attorneys as well as current

attorneys. Boasberg initially indicated that because the agency had not stated that it had searched all files likely to contain responsive records its search on its face was not adequate. Addressing Shapiro's two specific objections, Boasberg pointed out that while OSG had originally failed to identify the search terms it used, it had now done so in its supplemental declaration. Boasberg found this sufficient, noting that "although Shapiro expresses his disdain for the search terms used, he never offers others that he prefers." He agreed with OSG that it could only search the data entry field because it did not have the actual records once a case was completed. As a result, Boasberg explained, "the work would have to be done by hand in each of the agencies to which the records were returned. Plaintiff, moreover, has not even identified a single case by name or date that he wishes targeted. In these circumstances, the Court believes the [database] search adequate." Shapiro argued that in *Leopold v. NSA*, 2016 WL 3747526 (D.D.C. July 11, 2016), the court had ordered the Office of Legal Counsel to use DOJ's Clearwell electronic discovery software to search for records of former OLC attorneys and that such a method could be used here as well. OSG replied that such a search would likely reveal a number of documents that would most likely be non-responsive. Ordering the agency to conduct the search, Boasberg observed that "this may be true, but Plaintiff. . .sensibly offers more targeted terms that would appear to avoid this dilemma." (*Ryan Noah Shapiro v. Department of Justice*, Civil Action No. 16-592 (JEB), U.S. District Court for the District of Columbia, Oct. 11)

Judge Rosemary Collyer has ruled that the Department of State conducted an **adequate search** for records concerning telephone and email conversations received by former Secretary of State Hillary Clinton at the time of the attack on the U.S. Consulate in Benghazi and that the agency properly withheld some of the responsive records under **Exemption 1 (national security)**. Veterans for a Strong America requested the records and the State Department located 112 responsive records, releasing 25 in full and 85 in part, and withholding two in full. Veterans for a Strong America challenged the agency's search, contending that it had not located any records showing Clinton used a non-government device to receive or send calls, emphasizing that there were no records pertaining to contacts between Clinton and Phillippe Reines, her primary spokesperson related to a public statement that had been released at the time and that there was no indication of how and when Clinton was informed of the attacks. Collyer dismissed the claim that State did not search for telephone calls on non-government devices. She noted that "consistent with its obligations under the Federal Records Act, but *not* FOIA, State did the same thing regarding telephonic records that it did regarding emails that may have been retained by Secretary Clinton: it asked for them by letter. State obtained the Secretary's emails through this request. Plaintiffs offer no basis to require additional efforts to obtain telephonic records, about which they speculate, since State has no FOIA obligation to make that attempt." Collyer scoffed at the claims that Clinton had not explained when and how she was informed, pointing out that the transcript of her congressional testimony, in which she answered those questions, was available online. She indicated that "Plaintiffs' failure to find transcripts of Secretary Clinton's testimony discredits any suggestion that Plaintiffs have searched everywhere 'within the publicly-available record.'" She added that "as demonstrated by Secretary Clinton's testimony, communications occur in a variety of ways, not all of which can be found in government documents." Collyer found the agency's detailed explanations for its Exemption 1 claims provided a sufficient basis for showing that the agency had complied with the requirements of the Executive Order on Classification. (*Veterans for a Strong America v. Department of State*, Civil Action No. 15-464 (RMC), U.S. District Court for the District of Columbia, Sept. 30)

Judge Tanya Chutkan has ruled that EPIC is not entitled to **attorney's fees** because its suit against the Justice Department for a draft agreement between the European Union and the U.S. pertaining to transferring personal information in transatlantic criminal and terrorism investigations did not cause the agency to disclose the record. EPIC requested the Umbrella Agreement on September 10, 2015 and asked for expedited

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processing. The Criminal Division denied the request for expedited processing on October 8. EPIC appealed the denial of expedited processing on October 16 and filed suit on November 4 after DOJ had not responded. EPIC was granted a default judgment against DOJ on January 6, 2016. DOJ asked the court for additional time until January 29, and disclosed the record to EPIC on January 25 after concluding the draft version was publicly available on the EU website. EPIC then filed for attorney's fees, arguing that its lawsuit had caused the agency to disclose the agreement. Chutkan found that EPIC's suit had not caused the agency to disclose the record. Instead, she pointed out that "the FOIA Unit was not notified of this lawsuit until January 8, 2016, approximately three months after it was assigned the request, identified the document, and began the process of consulting with other agencies and divisions to determine whether to release the document, since it was a draft version of an international agreement. These facts, without more evidence from EPIC, fail to establish that DOJ delayed or refused to provide the requested document, nor that this litigation was a catalyst for the January 25 document production in any way." (*Electronic Privacy Information Center v. U.S. Department of Justice*, Civil Action No. 15-1955 (TSC), U.S. District Court for the District of Columbia, Oct. 5)

Judge Rudolph Contreras has ruled that the U.S. Tax Court is not an **agency** for purposes of FOIA. Ronald Byers sent a FOIA request for records to the Tax Court, relying on the D.C. Circuit's decision in *Kuretski v. Commissioner*, 755 F.3d 929 (D.C. Cir. 2014), in which the court found the Tax Court was part of the executive branch for purposes of separation of powers. Byers argued that if the Tax Court was part of the executive branch, rather than the judicial branch, it must be an agency subject to FOIA. Byers relied primarily on *Washington Legal Foundation v. U.S. Sentencing Commission*, 17 F.3d 1446 (D.C. Cir. 1994), finding the Sentencing Commission qualified as part of the judicial branch. Finding little support in the *Washington Legal Foundation* decision, Contreras noted that "even if the court had decided that the term 'the courts of the United States' encompasses the entire Judicial Branch, it would not necessarily follow that the definition *excludes* any other entities outside of the Judicial Branch. The court did not address that issue, and it would seem strange if *Washington Legal Foundation*, which expanded the FOIA exemption beyond Article III courts alone, would be used in this case to limit the scope of the same exemption." Contreras rejected Byers' claim that *Kuretski* changed the definition of the Tax Court. He pointed out that "the Court is not convinced that the [APA'] definition [of an agency] is limited only to Article III courts. Thus, FOIA's exemption for courts should apply here as well. Second, the root of Mr. Byers' argument—that all Executive Branch entities are subject to FOIA—is overbroad. Many parts of the Executive Branch, notably entities within the Office of the President, are exempt from FOIA." As a result of the *Kuretki* decision, Congress had passed a short piece of legislation confirming that the Tax Court was a court. Accepting its plain meaning, Contreras pointed out that "the Court finds that Congress's clarification that the Tax Court is 'not an agency' provides further support for the conclusion that the Tax Court should be considered a court, not an agency, for the purposes of FOIA." (*Ronald E. Byers v. United States Tax Court*, Civil Action No. 15-1605(RC), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in Indiana has ruled that the Department of Homeland Security conducted an **adequate search** for records concerning its reasons for denying Alison Mazinda's application for naturalization and that Mazinda's claim that neither U.S. Citizenship and Immigration Services nor U.S. Customs and Border Protection had responded to his request became **moot** once the agency provided responsive records. Mazinda was interviewed at the USCIS field office in Indianapolis. During the interview, the interviewer asked Mazinda to explain why information collected at his port of entry indicated that he was an executive director with the Sudan People Liberation Movement. Mazinda insisted he had been in South Sudan as a volunteer aid worker and was not a member of the SPLM. He suggested the information must have come from the Sudanese government. But when pressed to explain why the CBP agent believed he was a member of the SPLM, Mazinda indicated he could not recall the conversation. As a result of the interview, his application

was denied for containing false statements. Mazinda then filed FOIA requests for the records showing where the information had come from. The agency disclosed his alien file as well as five pages pertaining to his exchange with CBP agents at his port of entry, but withheld some information under **Exemption 7(E) (investigative methods and techniques)**. Mazinda filed suit under FOIA and the Administrative Procedure Act, alleging the agency's regulations were arbitrary and capricious. The court dismissed both claims. The court agreed that once the agency had responded to Mazinda's FOIA requests his delay complaint became moot. Finding the agency' search was adequate, the court noted that "as Defendants point out, the only document that fits the description of Mazinda's FOIA request is the five-page document Mazinda received. FOIA does not require Defendants to produce records Mazinda did not request." The court added that "in light of Mazinda's narrow and well-defined FOIA request, there are no indications of overlooked materials that would be responsive." *Alison S. Mazinda v. United States Department of Homeland Security*, Civil Action No. 15-00752-SEB-TAB, U.S. District Court for the Southern District of Indiana, Sept. 29)

Judge James Boasberg has ruled that locating new emails pertaining to former Secretary of State Hillary Clinton as part of the FBI's investigation does not entitle Freedom Watch to **discovery** in its suit against the State Department involving its request for waivers of sanctions against doing business with Iran. Boasberg had previously concluded that State conducted an **adequate search**, although it had found no records. During Freedom Watch's appeal, the original discovery of Clinton's private email server became publicly known and the D.C. Circuit found Freedom Watch was entitled to another search including the emails. The State Department conducted a search of the emails and still found no records. However, the FBI subsequently located new emails and Freedom Watch once against argued it should be granted discovery and a new search. This time Boasberg decided enough was enough. Rejecting Freedom Watch's contention that Rule 60(b) applied, Boasberg pointed out that "because Defendant's adequate search revealed no responsive records, it is clear that documents given to State by the FBI after the Court's April 2016 judgment would not 'have changed the outcome' of the prior proceedings." He added that "Plaintiff has presented absolutely no evidence of fraudulent activity related to State's searches, let alone the requisite 'clear and convincing evidence.' In addition, there is no evidence that State had possession of any of the emails recently provided to it by the FBI at the time of its earlier searches." (*Freedom Watch, Inc. v. United States Department of State*, Civil Action No. 14-1832 (JEB), U.S. District Court for the District of Columbia, Oct. 21)

Judge Ketanji Brown Jackson has ruled that the FBI conducted an **adequate search** for records concerning Robert Hedrick's conviction for child pornography. The agency initially found no records, but conducted a second search and located two pages of a Form 302 interview with Hedrick and disclosed it with redactions. Hedrick complained the agency had not searched the Brownsville, Texas field office, contended the document contained false information, and insisted the FBI should disclose the rest of the file that contained the Form 302. Upholding the agency's search of its central records system, Jackson noted that "this Court is persuaded that the FBI's index searches of the CRS using variations of Hedrick's name and identifying information about him were reasonably calculated to locate any information indexed to Hedrick, and in fact, actually encompassed the locations that Hedrick says were not searched." She added that "Hedrick has provided nothing beyond speculation that additional documents exist or were destroyed." (*Robert L. Hedrick v. Federal Bureau of Investigation*, Civil Action No. 15-06548 (KBJ), U.S. District Court for the District of Columbia, Oct. 24)

A federal court in California has ruled that a challenge brought under the **Federal Advisory Committee Act** by Physicians Committee for Responsible Medicine alleging that the Dietary Guidelines

Advisory Committee was unduly influenced by members representing egg producers is not justicable because there are no meaningful legal standards by which to judge whether the membership was unfairly balanced under FACA. After the Department of Agriculture and the Department of Health and Human Services issued new dietary guidelines in 2015 finding that the recommended level of cholesterol could be increased, the Physicians Committee sued, alleging the agencies had failed to maintain a fairly balanced committee in violation of FACA. The court found two cases, *Center for Policy Analysis on Trade and Health v. Office of U.S. Trade Representative*, 540 F.3d 940 (9th Cir. 2008), and *Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221 (10th Cir. 2004), supported its conclusion. In both cases, the appeals courts ruled that there were no legal standards by which to judge whether advisory committees involved in both cases met the balance requirement in FACA. Noting that *Wenker* had dealt with the specific provision in FACA involved in this case, the court pointed out that "no operative distinction—for present purposes—separates *Wenker* from this case. Here, too, the relevant laws offer no 'guidance or standards' by which this court might assess whether the challenged scientists' presence on the DGAC amounts to inappropriate influence. Maybe so, maybe not. The court has not been given the minimal tools it would need to say. The question must thus be deemed a political one better committed, in fact committed, to the discretion of the legislative and executive branches." (*Physicians Committee for Responsible Medicine v. Thomas J. Vilsack, et al.*, Civil Action No. 16-00069-LB, U.S. District Court for the Northern District of California, Oct. 12)

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