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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: Alino Semo has been named executive director of the Office of Government Information Services, filling a vacancy left by the resignation of James Holzer to return to the Department of Homeland Security. Holzer had replaced Miriam Nisbet, the first executive director who ran OGIS for five years before her retirement. Semo has served as NARA's director of litigation since March 2014. She previously directed FOIA litigation at the FBI. . . In its suits against the State Department for access to records pertaining to former Secretary of State Hillary Clinton and her staff, Judicial Watch continues to press the district court judges hearing its cases to disclose more information. Writing in Politico, Josh Gerstein noted that Judicial Watch asked Judge James Boasberg to order the State Department to process emails that the FBI announced it would be sending to State. Ordering the State Department to notify him once it received the records, Boasberg noted that "the difficulty is the posture of the case. The suit is against the State Department for documents in its possession. I'm not sure if it doesn't have them that it has any obligation to harry the FBI for their return." In the other case, Judicial Watch has requested Judge Emmet Sullivan unseal the video depositions taken of Clinton staffers Cheryl Mills and Huma Abedin. Noting that the reason Sullivan cited for sealing the video of the depositions originally was how disclosure might affect the election, Judicial Watch observed that the issue is now moot.

Court Finds Food Stamp Sales Not Protected by Exemption 4

After failing to convince the Eighth Circuit that data showing food stamp purchases at grocery stores was protected by Exemption 3 (other statutes), the Department of Agriculture has struck out once again in its attempt to claim the data was protected by Exemption 4 (confidential business information). Although the agency provided the district court in South Dakota plenty of industry affidavits testifying to the potential effects of disclosure on grocery stores' razor-thin profit margins, Judge Karen Schreier concluded the agency had not shown that data about food stamp purchases would cause competitive harm.

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Although food stamp purchase data could contribute to a number of analyzes of how the food stamp program works and whether or not it is effective, it has been the Sioux Falls *Argus Leader* that has carried the fight on this issue and Schreier's opinion is the newspaper's second victory. The *Argus Leader* requested data on the Supplemental Nutrition Assistance Program (SNAP) administered by the Agriculture Department's Food and Nutrition Service, including yearly spending totals at individual retail locations. The agency provided some records, but withheld most of the data under Exemption 3 and Exemption 4. In her first ruling, Schreier upheld the agency's Exemption 3 claim. However, on appeal, the Eighth Circuit reversed, finding that 7 U.S.C. § 2018(c) did not apply to the data being withheld. The Eighth Circuit sent the case back to Schreier to consider whether Exemption 4 might apply. After reviewing affidavits from both sides on the issue of competitive harm, Schreier concluded the agency had not shown a likelihood of competitive harm from disclosure.

The government provided testimony from Joey Hays, owner of Dyer Foods, a small supermarket chain headquartered in Dyer, Tennessee, said he would not disclose SNAP data because his competitors could use it against him. However, he admitted that SNAP data would not disclose a store's total profits, that most of his stores' business was already in plain sight, and that Wal-Mart had already saturated his market. Andrew Johnstone, associate general counsel for Sears Holdings Management, testified that profit margins in the grocery business were small, that disclosure of SNAP data could affect sales at K-Mart stores, and that landlords might not renew lease agreements for stores that had a large number of food stamp users. Peter Larkin, president of the National Grocers Association, testified that disclosing SNAP data might cause competitors to target areas with high SNAP volume, but admitted that disclosing SNAP data would not be the same as disclosing a store's profits or net sales. The government's last witness was Gwen Forman, senior vice president of marketing at Cumberland Farms. She testified that disclosure of SNAP data could allow competitors to gauge how successful a store's advertising strategy was, but admitted that SNAP data alone would not determine a store's future plans or business strategy.

The *Argus Leader*'s testimony was provided by Richard Volpe, an assistant professor in the Agribusiness Department at California Polytechnic State University. Volpe testified that an array of store data was already publicly available and that analyzing SNAP data over a period of years had limited value. Ryan Sougstad, associate professor of Business Administration at Augustana University, also testified. He noted that SNAP data for individual stores would be of limited value in making decisions about where to locate new stores. The government called Bruce Kondracki, vice president of Market Insights and Consumer Research at Dakota Worldwide Corporation, as a rebuttal witness. Kondracki testified that grocery stores use model forecasts to determine where to add new stores and that SNAP data could improve the accuracy of these models.

The newspaper argued that the data did not meet the threshold for coverage by Exemption 4 because it had not been obtained from a person. The newspaper contended that "because SNAP is a government program, the requested SNAP data is obtained from inside the government. The government is giving SNAP benefits to qualifying households, and the government then tracks where the SNAP households are spending their benefits." The *Argus Leader* pointed out that "the government is essentially keeping data on its own spending." Schreier rejected the claim, noting that the Eighth Circuit had already ruled that the data came from third-party processors "who verify whether the SNAP household has available SNAP benefits and that the third-party processor submits the redemption data to the Food and Nutrition Service."

Having found the data was obtained from a third-party, however, Schreier concluded that it was neither privileged nor confidential. She noted that competitive harm was defined as harm caused by the use of proprietary information by a competitor, not because information might be embarrassing and harmful to a company's reputation. She found the agency had shown that actual competition existed in the grocery industry. But she observed that much of the data about store operations was already public and pointed out

that "while SNAP data may be beneficial, it would not add significant insights into the grocery industry." She added that "any potential competitive harm from release of the requested SNAP data is speculative at best." She found the government had not shown that SNAP data would have any effect on the decision where to locate a store. She indicated that "although a high volume of SNAP sales might encourage a competitor to enter [a] geographical market, an equally compelling conclusion is that the competitor may decide to stay away from that market. Another equally compelling conclusion is that SNAP sales will have no or little effect on a store's decision to expand into new sites" because of a variety of other factors. Finding the agency had not shown a likelihood of substantial competitive harm, she concluded that "the requested SNAP data does not provide. . .insights into store profitability. SNAP sales are merely a part of the store's total revenue. SNAP data does not disclose a store's profit margins, net income, or net worth." (*Argus Leader Media v. United States Department of Agriculture*, Civil Action No. 11-04121-KES, U.S. District Court for the District of South Dakota, Southern Division, Nov. 30)

How FOIA Policy Might Change Under Trump

Now that Donald Trump has been elected President, there is no way yet to know what his personal attitude may be about FOIA and government information policy more broadly. It is hard to imagine that he has ever thought about these issues, or that he knows anything about them in detail. But because of his background and personality, some things are more likely to happen than others. There is essentially nothing on the record reflecting Trump's attitudes towards FOIA, but Sen. Jeff Sessions (R-AL), his nominee to become Attorney General, did weigh in on the sanctity of legal privileges, writing a dissent to the Senate report on the FOIA amendments that failed in 2014. Further, Republican administrations tend to emphasize FOIA exemptions over disclosure, and Trump's own background in business, where lack of transparency is a hallmark, suggests that he is probably disdainful of public disclosure.

Historically, every Attorney General appointed by a Republican President since the 1974 amendments became law has emphasized the importance of the FOIA's exemptions over the value of public disclosure. Edward Levi, who was Attorney General under President Gerald Ford, generally interpreted the recently passed 1974 amendments to favor the government's position. But starting with the AG's memo issued by William French Smith under the Reagan administration, Republican administrations has consistently emphasized the exemptions to the expense of public disclosure. Janet Reno, President Bill Clinton's Attorney General, reversed the Republican emphasis on use of the exemptions and introduced the foreseeable harm test that was recently codified in the 2016 FOIA amendments. However, her successor under the Bush administration, Attorney General John Ashcroft, changed direction once again, emphasizing that the Justice Department would defend agency decisions to withhold records. Eric Holder, the Attorney General in the Obama administration, reversed course once again, emphasizing that disclosure should be the default position unless there was a clearly articulated foreseeable harm in disclosure. Holder's memo was, for the first time, accompanied by a pro-disclosure Executive Order from President Barack Obama. Because of this clearly delineated history, it seems almost inevitable that a Trump administration will revert back to a FOIA policy that emphasizes the exemptions over disclosure.

The behavior of past Republican administrations may well also hold several lessons pertaining to two related open government statutes – the Sunshine Act and the Presidential Records Act. During the Reagan administration, business executives appointed to regulatory commissions like the Nuclear Regulatory Commission showed great impatience with the idea that they were required to hold public meetings under the Sunshine Act. There was an attempt to redefine the parameters of what it meant to deliberate to allow staff to

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privately brief commissioners, which ultimately failed but reflected the attitude that public meetings were a nuisance rather than a measure of government accountability. Although not exactly a public access issue, both the Reagan and Bush administrations attempted to neutralize the ability of agencies like the Consumer Product Safety Commission and the Federal Elections Commission to act by intentionally failing to fill vacancies on such commissions so that they would not have the necessary quorum to conduct agency business. The National Labor Relations Board, which decides labor issues that are directly relevant to Trump's hotel business, is certainly a potential target for this kind of neglect. As to the Presidential Records Act, during the Bush administration, White House Counsel Alberto Gonzales authored an Executive Order reinterpreting the Presidential Records Act to include a number of privileges that are not in the statute. The Obama administration quickly rescinded the Bush Executive Order, but it is probable the Trump administration will restore the Bush interpretation.

Aside from his businessman's natural distrust of transparency, Trump's behavior during the campaign has provided other insights into how he views public disclosure. He is the first party nominee in a number of years to refuse to disclose his tax returns. His personal conflicts of interest with his constitutional duties as President are incomprehensibly immense, but it now seems probable that he will never tell the public how he will shield himself from such conflicts of interest. Trump also learned the lesson of just how devastating public disclosure could be to Hillary Clinton. Her mismanagement of her private email server while Secretary of State dominated the news cycle for months. For someone like Trump, the takeaway must surely be that disclosure of information is nearly always harmful.

Most of these policies will evolve with time and it seems highly unlikely that Trump will address FOIA on the first day he becomes President. But agency staff who work with FOIA can take some comfort that because FOIA implementation is both cumbersome and bureaucratic, there is unlikely to be dramatic changes in the way agencies process FOIA requests.

Views from the States…

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

Missouri

A court of appeals has ruled that the trial court did not err when it found that the Department of Corrections had knowingly violated the Sunshine Law when it redacted personal information from records pertaining to applications from non-employees to witness executions. The ACLU of Missouri requested the applications and the department's deputy counsel eventually disclosed redacted records, citing an exemption protecting social security numbers and a second exemption protecting the right of privacy. The ACLU sued and two days before trial the department disclosed more records, some of which were still heavily redacted while others were unredacted. The trial court found the department had applied the privacy exemption as an afterthought and had knowingly violated the Sunshine Law. The trial court awarded the ACLU $5,145 in attorney's fees and fined the department $500. The department appealed, claiming the trial court had improperly applied a strict liability standard. The appeals court disagreed, noting that "the trial court did *not* apply a strict liability standard for imposing an award of costs and attorney's fees; instead, the trial court's judgment contains numerous references to facts reflecting the trial court's weighing of the evidence to support its ultimate conclusion that the Department's violation was 'knowing,' expressly noted in the judgment by the trial court as 'by a preponderance of the evidence.'" The department argued that its deputy counsel had

testified that he did not know that he was violating the Sunshine Law, but the appeals court observed that "simply put, the trial court was under no obligation to believe [the deputy counsel] and it is clear that the trial court did not." The court explained that "the question before us is not whether the evidence *could* support a determination that the Department's failure to produce requested records was *not* 'knowing,' but instead 'whether the trial court committed reversible error in weighing the evidence, making credibility determinations, and determining to the contrary.' We conclude that it did not." (*American Civil Liberties Union of Missouri Foundation, et al. v. Missouri Department of Corrections*, No. WD 79619, Missouri Court of Appeals, Western District, Nov. 22)

New Jersey

The supreme court has ruled that video footage taken by a surveillance camera mounted on the Bloomfield Township municipal building is categorically exempt from disclosure under the security exemptions in the Open Public Records Act, although specific footage might potentially be available under the common law right of access. Patricia Gilleran requested five days of footage from the solitary security camera to see who was coming to and going from the municipal building. The township said five days worth of footage was too burdensome and Gilleran narrowed her request to a single day. Nevertheless, the township denied the request, claiming that two exemptions protecting emergency or security information or security measures and surveillance techniques that might be revealed if disclosed applied. The trial court ruled in favor of Gilleran, as did the court of appeals. However, a majority of supreme court justices reversed, finding the security exemptions protected any information that might reveal security vulnerabilities. The majority pointed out that "information that reveals the capabilities and vulnerabilities of surveillance cameras that are part of a public facility's security system is precisely the type of information that the exceptions meant to keep confidential in furtherance of public safety." The majority observed that "that the video may contain depictions of otherwise non-confidential views of an area outside a public building or may capture persons moving in a public area is not a complete way in which to access the security worth of this requested government record. Such analysis provides a stunted review for addressing the purpose underlying the security exemptions." The majority added that "when the public-security concern is that access to the videotape product of the surveillance medium itself reveals security-compromising information, then the exemptions can be relied on to bar, categorically under OPRA, a security system's otherwise confidential surveillance product." The majority indicated, however, that an individual's common law right of access might outweigh the security exemptions under appropriate circumstances, but that issue was not present here. One justice dissented, noting that "courts must be guided by the Legislature's policy choices, which appear in the words of the relevant statutes." The dissent pointed out that the security exemptions were limited by the modifier "if disclosed" and that Bloomfield Township had not shown that disclosure would satisfy the terms of the exemptions. The dissent suggested the case be sent back to the trial court to allow Bloomfield Township to provide sufficient evidence that disclosure would harm security measures. (*Patricia Gilleran v. Township of Bloomfield*, No. A-15-15, New Jersey Supreme Court, Nov. 22)

Oregon

The supreme court has ruled that whether or not serial communications between members of a public body can constitute a deliberation for purpose of the public meetings law, Rob Handy has failed to provide sufficient evidence to show that the Lane County Board of Commissioners had violated the public meetings law. In 2011, a $350,000 judgment had been entered against the Lane County Board of Commissioners for violating the public meetings law. Handy, a member of the board, was fined an additional $20,000. Running for re-election a year later, Handy tried to pressure local businessmen to donate money to pay off his fine. These allegations were brought to the attention of the Lane County administrator and attorney, and the county

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received a public records request for a letter drafted in response to the allegations. The board, without Handy's participation, called an emergency meeting and decided to disclose the letter. Handy then sued, claiming the emergency meeting was improper and that the board improperly deliberated concerning disclosure of the letter. The trial court dismissed Handy's claims, finding he had not presented sufficient evidence to meet his burden of proof. However, the appeals court reversed, finding that the serial communications between board members violated the public meetings law. The supreme court, reversed once again, reinstating the trial court's finding that Handy had not provided sufficient evidence to meet his burden of proof. Assuming that serial communications could violate the public meetings law, the supreme court did not reach that issue. Dismissing Handy's claims, the supreme court observed that "no reasonable trier of fact could find from the evidence that plaintiff submitted in response to defendants' special motion to strike that each of the three commissioners decided or deliberated toward deciding whether to release the attorney's letter." (*Rob Handy v. Lane County*, No. SC S063725, Oregon Supreme Court, Nov. 25)

Wyoming

The supreme court has ruled that public bodies may charge reasonable fees for compiling electronic records for disclosure, even where the requester asks only to inspect the records rather than receiving a copy. The Cheyenne *Tribune Eagle* requested emails from school board members of the Laramie County School District. Because school board members used their personal email accounts to conduct board business, the request required the involvement of the school district's IT staff. The school district copied the emails to a CD and charged the newspaper $110. The *Tribune Eagle* sued, claiming the Public Records Act allowed public bodies to charge for records only when they were sent to the requester and not when the requester asked only to inspect the records. The trial court disagreed and the newspaper appealed to the supreme court. The supreme court upheld the trial court. The supreme court noted that "to interpret the statutory language otherwise would produce an absurd result. For those electronic records that cannot be provided without producing a copy, the custodian expends the same effort and incurs the same cost regardless of whether the request is for inspection or a copy—and, as in this case, the result is the same, with a copy of the record being given to the public record applicant." The supreme court observed that "to the extent a public records applicant wishes to challenge the efficiency of a custodian in storing its electronic records and making them available for inspections, that challenge must be directed to the reasonableness of the charge imposed for access to the record." The dissent interpreted the statutory provision for fees as prohibiting public bodies from charging for inspection of both electronic and paper records. The dissent criticized the school district for not issuing official email addresses to board members and observed that "the majority's decision will encourage governmental entities to keep their electronic records in disarray, rather than properly organizing them so that they can be inspected." (*Cheyenne Newspapers, Inc. v. Board of Trustees of Laramie County School District Number One*, No. S-16-0059, Wyoming Supreme Court, Nov. 30)

The Federal Courts…

Judge Amit Mehta has ruled that a report prepared by SD Solutions evaluating the FEC's IT systems in light of security guidelines published by the National Institute of Standards and Technology qualifies for protection under **Exemption 7(E) (investigative methods and techniques)**. Dave Levinthal, an investigative reporter for the Center for Public Integrity, requested the NIST Study and any records mentioning it. The agency produced 1,450 pages of records, but withheld the NIST Study under Exemption 7(E) as well as **Exemption 5 (privileges)**. Siding with the agency, Mehta noted the NIST Study had a rational nexus to the agency's law enforcement function. He pointed out that "a federal agency, like the Commission, cannot effectively carry out its law enforcement function unless it has a secure and reliable IT system. The

Commission is responsible for investigating violations of the Federal Election Campaign Act. Its IT system contains sensitive information related to investigations. . .[T]he Commission's IT system is central to its law enforcement function." He noted that "the NIST Study in turn was designed to promote the integrity of that system and thus itself serves a law enforcement function. . .A study designed to evaluate and improve a critical law enforcement tool, such as an IT system, easily meets the rational nexus requirement." Mehta observed that the study was compiled for law enforcement purposes because it assessed the risk of a cybersecurity attack on the FEC's IT system. Levinthal argued the study had to pertain to an actual investigation to qualify for Exemption 7(E), but Mehta indicated that "the fact that the NIST Study does not pertain to a particular investigation does not place it outside Exemption 7(E)." Levinthal contended that disclosure of the NIST Study would not be harmful because the vulnerabilities it addressed had since been fixed. Mehta rejected the claim, noting that the agency's declaration "credibly demonstrates that disclosure of any portion of the NIST Study would pose a present and genuine security threat to the Commission's law enforcement function." While he acknowledged that much of the NIST Study was probably deliberative, Levinthal argued the agency had failed to show why it could not release non-exempt information from the study. Mehta pointed out that the agency's declaration "clearly establishes that the factual portions of the NIST Stud are 'inextricably intertwined' with its deliberative elements. It also sets forth with 'reasonable specificity' why those factual portions cannot be segregated." (*Dave Levinthal, et al. v. Federal Election Commission*, Civil Action No. 15-01624 (APM), U.S. District Court for the District of Columbia, Nov. 23)

Judge Beryl Howell has ruled that the Department of State did not conduct an **adequate search** for records showing the names of visitors who attended meetings at former Secretary of State Hillary Clinton's office at the White House. The Republican National Committee requested visitor lists or other records detailing any visitors' to Clinton's office. The State Department decided such records would be located either at the Executive Secretariat or the Bureau of Diplomatic Security. The agency concluded that neither the Executive Secretariat nor Diplomatic Security maintained such visitor logs. It also searched the Visitor Access Control System, a database that allows DS staff to pre-register individuals entering the State Department, but it provided no information on which visitors might have come to events at Clinton's office. The RNC sued, arguing that an Inspector General's report on Clinton's email server had referred to an Outlook Calendar used by Clinton's staff. In response, the agency explained that the calendars might refer to meetings but would not have information about who had attended those meetings. The agency argued further that "to extend [the RNC request] to any records 'evidencing' visitors to Secretary Clinton's office would go beyond the terms of the request." RNC argued that its request for "other records" encompassed the Outlook Calendars. Howell agreed, calling the State Department's interpretation of the request "crabbed" and pointing out that "this unilateral narrowing of the request runs counter to the agency's obligation to construe the request reasonably and liberally." She added that "the State Department may not restrict the FOIA request to an identified subset of records, *i.e.*, 'visitor logs,' when the request more broadly seeks 'other records detailing any visitors to' Secretary Clinton's 'formal quarters and/or personal office,' over a four-year period." She rejected State's characterization of the Outlook Calendars as 'indirectly' responsive. She observed that "the FOIA does not distinguish between 'directly' and 'indirectly' responsive records, and any responsive record must be produced, unless exempt. Parsing a FOIA request to exclude purportedly 'indirectly' responsive records, as the State Department suggests, would undercut the long-standing mandate to agencies to construe FOIA requests liberally." She indicated that "the Outlook calendars and schedules for Secretary Clinton can reasonably be expected to elucidate 'any visitors" to her office. Finding the search inadequate, Howell noted that "the narrow interpretation given by the agency to the Visitor Records Request improperly limited the scope of the search, rendering the search conducted in this case inadequate." (*Republican National Committee v. Department of State*, Civil Action No. 16-489 (BAH), U.S. District Court for the District of Columbia, Nov. 22)

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The Ninth Circuit has ruled that the district court erred in finding that payroll records for a contractor working on a construction project for NASA are protected by **Exemption 4 (confidential business information)** and **Exemption 6 (invasion of privacy)**. Noting that the full court had recently ruled in *Animal Legal Defense Fund v. FDA*, 839 F.3d 750 (9th Cir. 2016), that factual disputes were to be reviewed *de novo*, the court indicated that because the question here concerning Exemption 4 and Exemption 6 was factual in nature it should be subject to *de novo* review. The court explained that "here, as in *ALDF*, the parties submitted competing declarations, with equivalent levels of detail and based on equivalent levels of knowledge, about whether the release of the requested information would cause competitive harm." The court indicated that "we reverse as to Exemption 4 and remand for further proceedings to resolve the dispute of material fact on the issue of competitive harm." Turning to Exemption 6, the court agreed that personally identifying information like social security numbers, names, and addresses should be withheld, but pointed out that "any privacy interest in payroll data after names, addresses, and social security numbers are redacted is trivial. Accordingly, we reverse the district court's judgment as to Exemption 6, which was the only exemption NASA invoked to withhold tax deduction, tax withholding, and net earnings information." The Ninth Circuit sent the case back to the district court for reconsideration of the issue of segregability and whether Exemption 4 applied to workers' job classifications, dates and hours worked, total hours worked, rates of pay, gross earnings information, and whether the pay was standard or overtime. (*Torres Consulting and Law Group v. National Aeronautics and Space Administration*, No. 14-17303, U.S. Court of Appeals for the Ninth Circuit, Nov. 21)

A federal court in Virginia has ruled that the Department of State properly redacted emails exchanged between the White House and the State Department pertaining to the upcoming Paris Climate Change Conference under **Exemption 5 (deliberative process privilege)**, although the court held that two redactions were factual and not protected by the privilege. Competitive Enterprise Institute requested records about communications between State and a group called Climate Interactive. By the time of the court's decision, only four documents redacted under Exemption 5 remained in dispute. Those emails were between the State Department's Special Envoy for Climate Change, a White House staffer, and the assistant director of the White House Office on Science and Technology Policy, and concerned several media articles. State contended the redactions reflected opinions pertaining to the articles, but CEI contended they were factual. The court first found the redactions were predecisional, noting that "the weight [these individuals] attributed to different scientific studies and their personal opinions about the credibility of those studies was instrumental in determining the sorts of policies the United States would propose during the Paris Conference and the specific actions it might seek that other countries take." CEI argued that the brevity of the redactions suggested that they were not deliberative, but the court pointed out that "the emails were exchanged between a group of government officials who were responsible for formulating U.S. climate policy, and various officials contributed their personal opinions on two apparently widely-read articles on that topic. Those redactions in which officials expressed their subjective thoughts are covered by the deliberative process privilege and therefore need not be disclosed." The court found two redactions were not deliberative. The court explained that "they are merely factual statements, which, at best, could be said to reflect peripherally on actual policy making; this is insufficient under Fourth Circuit case law to justify redacting them." Rejecting CEI's brevity argument, the court noted that "in preparing for an upcoming negotiation, high ranking government officials can logically be expected to write short emails containing sensitive information condensed into brief sentences. This brevity does not make those statements any less central to the formation of policy than longer statements." (*Competitive Enterprise Institute v. United States Department of State*, Civil Action No. 16-00080 (AJT/IDD), U.S. District Court for the Eastern District of Virginia, Dec. 1)

Judge Tanya Chutkan has ruled that the Office of Inspector General at the Department of Justice may withhold its entire investigatory file on "C.G.," a low-ranking government employee who was accused by Juan Ocasio in 1994 of impersonating a federal officer and violating the Stolen Valor Act by falsely claiming military honors. The agency originally told Ocasio in response to his 2012 request for the file that the file had been destroyed and even if it had existed in would be categorically exempt under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. After Ocasio filed suit, OIG discovered that the file had not been destroyed. The agency reviewed 296 pages and denied access to the entire file. Chutkan found that there might be some public interest in disclosure and ordered the agency to provide a *Vaughn* index explaining why the file needed to be withheld entirely. The agency argued that disclosure of any part of the file would still reveal information about the allegations of misconduct. Ocasio claimed that C.G. was guilty of several offenses, but, siding with the agency, Chutkan observed that "the court's role here is not to determine the credibility or veracity of these allegations, or pass judgment on the appropriateness of the decision to not prosecute C.G. Instead, the court must only evaluate whether the public interest here overcomes C.G.'s privacy interest in order to require disclosure." Chutkan found Ocasio had not provided any evidence to support his contention that disclosure would be in the public interest. She noted that "given these investigative files involved a low-level government employee and there is no public interest, the responsive records are of a type that may be categorically exempt under Exemption 7(C)." (*Juan Carlos Ocasio v. U.S. Department of Justice*, Civil Action No. 13-0921 (TSC), U.S. District Court for the District of Columbia, Dec. 1)

A federal court in California has ruled that a suit filed by Friends of the River against the U.S. Army Corps of Engineers for various legal memoranda affecting the Corps' operation and maintenance of two dams on the Yuba River should be **transferred** to the District of Columbia rather than dismissed as requested by the agency. Although previous requests by Friends of the River for records similar to those in dispute in this action had been located in the District of Columbia, Friends of the River also argued that venue was appropriate at any Corps district office. The court indicated that "little case law exists on this issue of whether the mere possibility that requested documents may be located in a district is sufficient to show proper venue. That which does suggests that venue is not proper." The court pointed out that "here, it is undisputed that a significant portion of the responsive documents are actually located in another district. Moreover, defendant has also provided evidence specifically stating that the responsive documents are, in fact, *entirely* located in that other district or that "there is no reasonable expectation that relevant agency records are maintained' by the Corps offices located in this District. Plaintiff's claim that venue would be proper in every federal judicial district where a Corps office is located because all offices allegedly received the same legal memorandum that it contends is responsive to one of its FOIA requests is not supported with any legal authority. Nor does the plain language of the FOIA venue statute support such an interpretation." Deciding to transfer the case rather than dismiss it, the court noted that "because Friends of the River is a nonprofit organization with a limited budget, plaintiff argues that re-filing will require it to pay additional fees and costs that would be a burden that could be avoided if the case was transferred rather than dismissed." (*Friends of the River v. United States Army Corps of Engineers*, Civil Action No. 16-05052-YGR, U.S. District Court for the Northern District of California, Nov. 22)

A federal court in New York has ruled that the Niagara Falls Bridge Commission, which is made up of four commissioners appointed by the governor of New York and four commissioners appointed by the premier of Ontario, is not an **agency** for purposes of the federal FOIA. Danny Sklarski and John Ceretto requested information from the Commission concerning the 2008 severance package provided for Thomas Garlock, the former general manager of the commission. The commission rejected the request, arguing it was not a federal agency for purposes of FOIA. Although a provision in the Intermodal Surface Transportation Efficiency Act

of 1991 indicated that the Commission should be considered a public agency of the State of New York, the district court had previously ruled that the Commission was not subject to New York's Freedom of Information Law. The court found the Commission was not subject to the federal law either. The court noted that "here, not only is federal control and/or supervision absent, but Congress actually amended the joint resolution in 1991 to 'deem' the Commission 'a public agency or public authority of the State of New York' for purposes of federal law. It is clear from the case law and from the expressed Congressional intent that the Commission is not an 'agency' of the federal government within the meaning of FOIA." (*Danny W. Sklarski and John Ceretto v. Niagara Falls Bridge Commission*, Civil Action No. 09-633 (MAT), U.S. District Court for the Western District of New York, Nov. 23)

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