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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: The Clinton Presidential Library announced recently that it will disclose nearly 500 pages of records about the Clinton administration's interactions with Donald Trump, including how aides prepared to field questions about Trump's short entry into the 2000 presidential race as a possible nominee of the Reform Party. According to Josh Gerstein of POLITICO, the records were prepared for release as the result of a FOIA request from Christopher Massie of Buzzfeed. Under the Presidential Records Act, a current or former president has 60 business days to assert executive privilege on any records considered for release. Barring any objections from either former President Bill Clinton or President Barack Obama, that means the Trump records may become public by April.

Court Rejects FBI's Categorical Exemption Claims

Judge Randolph Moss has ruled that the FBI cannot use either Exemption 7(E) (investigative methods and techniques) or Exemption 2 (internal practices and procedures) to withhold processing documents associated with dozens of FOIA requests. In response to requests from National Security Counselors, journalists Jeffrey Stein and Jason Leopold, and researcher Ryan Shapiro for processing records for requests filed by themselves and others, the agency categorically refused to disclose any processing documents generated for FOIA requests submitted in the last 25 years for material contained in investigative files—which the agency withheld under Exemption 7(E)—or any case evaluation forms—which track and evaluate the performance of FBI employees processing FOIA requests—under Exemption 2.

The plaintiffs specifically requested search slips and FDPS case processing notes, documenting the efforts of FOIA analysts to search for files in response to FOIA requests, and case evaluation forms, which are kept in the personnel files of FOIA analysts for purposes of tracking and evaluating employee performance.

Moss first explored the roots of the FBI's Exemption 7(E) non-disclosure policy. "The search slips and notes, the FBI explains, may refer to files on individuals that would be exempt

ACCESS REPORTS

from withholding under a specific FOIA exemption, and that in fact were withheld from the original requester. But more importantly, they may also contain references to files that are *excludable* under [one of the three exclusions contained in Section (c)]—that is, files whose very existence the FBI is permitted to deny. Indeed, the FBI points out, the search slips may contain references to files that *were excluded* from its response to the original requester—that is, files that the FBI told the requester did not exist. Requests for search slips therefore put the FBI in a difficult position. The FBI cannot plausibly deny that the search slip exists—because search slips are created as a matter of course in responding to FOIA requests—but it argues that it also cannot release the search slip, as the search slip would reveal the existence of the file that the FBI told the requester did not exist. And, for similar reasons, the FBI cannot release a redacted version of the search slip, even if the redaction would tell the requester nothing about the underlying file, the FBI argues, [because] the existence of the redaction would 'tip off' the requester that *some* file existed, contradicting the FBI's prior assertion that no responsive records existed. Likewise, the FBI argues that it cannot withhold the entire search slip under one of the exemptions because the withholding itself would 'tip off' the requester that the search slip must refer to a file that he or she had previously been told did not exist." The FBI's dilemma, Moss indicated, led the agency to argue that "the only option available to it is to withhold all search slips and processing notes that it has created in responding to FOIA requests for investigative files in the last 25 years."

Moss did not deny that the FBI's problem was serious, but he noted that "the question before the Court, however, is not the existence or gravity of the problem facing the FBI, but whether the solution the FBI has adopted is consistent with FOIA. Although the question is a difficult one, the Court concludes that the FBI's proposed reading of the statute cannot be squared with its text or the governing precedent." He pointed out that the three exclusions in Section (c) "relate to sensitive matters of law enforcement and national security. They have nothing to do with the day-to-day administration of FOIA itself." He continued: "To be sure, a particular search slip might, on a rare occasion, replicate excludable records and thus also fall within one of the FOIA exclusions, in full or in part. But the overwhelming majority of FBI processing documents are not excludable under any reasonable construction of Section 552(c). . .In the most recent fiscal year, the Justice Department invoked an exclusion only 145 times—or in 0.23% of the over 60,000 requests that it processed. The FBI's sweeping policy of withholding all search slips for investigative records, as a result, cannot be justified on the plain terms of Section 552(c)."

Having found no support for the FBI's withholding policy in Section (c), Moss pointed out that Exemption 7(E), upon which the agency was basing its categorical exemption claim, "does not authorize the policy either." He explained that "the search slips are not themselves 'records. . .compiled for law enforcement purposes;' they are records compiled for the purpose of responding to FOIA requests. . . [T]he FBI is not seeking to withhold specific law enforcement information compiled in the search slips on the basis of Exemption 7(E); it is seeking to withhold *all* of the search slips in their *entirety* on the basis of Exemption 7(E)." He observed that "in the absence of a showing that *all* of the withheld search slips in their *entirety* constitute records 'compiled for law enforcement purposes,' the FBI's categorical reliance on Exemption 7 fails at the threshold." Moss pointed out that the search slips did not qualify as the kind of "techniques" or "procedures" to which Exemption 7(E) referred. He noted that "the purpose of Exemption 7(E) is to prevent the public from learning about the existence of confidential law enforcement techniques, not to prevent it from learning about the use of already-disclosed law enforcement techniques. It is thus implausible that the disclosure of the FBI's use of Section 552(c) exclusions—although in some instances harmful—would be harmful in a way that would bring the search slips within Exemption 7(E)'s grant of authority."

The agency argued that Moss should recognize a judicial gloss for these records akin to the *Glomar* doctrine, allowing an agency to neither confirm nor deny the existence of records, or the mosaic theory, allowing a court to consider that disclosure of certain non-exempt information might allow a requester to infer the nature of related exempt information. Moss declined the agency's invitation, noting that "the FBI is not making a 'mosaic' claim, nor could it. It is only arguing that by withholding all search slips, even those *not*

protected by FOIA, it can amass a haystack in which to hide the search slips that *are* protected." He pointed out that "although the *Glomar* doctrine may constitute a gloss on FOIA's text, it does not lead to results fundamentally at odds with the statute. The FBI's present policy does." He observed that "there may be compelling reasons to authorize the FBI to withhold search slips and similar processing records. But FOIA itself does not do so, and the FBI cannot act on the basis of an exemption or exclusion that Congress has not provided."

The agency's other categorical claim was that evaluations forms for FOIA analysts assessing their performance were completely protected under Exemption 2 since they qualified as personnel records. But Moss noted that while the Supreme Court in *Milner v. Dept of Navy*, 562 U.S. 562 (2011), held that Exemption 2 focused on personnel-related records, its prior ruling in *Dept of Air Force v. Rose*, 425 U.S. 352 (1976), explained that even personnel records could be disclosed if there was a significant public interest. Moss indicated that "*Milner* does nothing to overrule or undermine that holding" and added that "unless overruled by the Supreme Court or by Congress, the Supreme Court's holding in *Rose* continues to bind this Court. . .The test articulated in *Rose* thus remains the law, and it excludes 'matters [that are] subject to a genuine and significant public interest' from the reach of Exemption 2." Agreeing with the plaintiffs that the evaluation forms reflected on the agency's operations, Moss pointed out that "the fact that the FBI *uses* the forms solely for the purpose of evaluating individual employees does not mean that the forms 'relate solely' to employee management. To the contrary, the forms reflect information regarding how the FBI goes about fulfilling its obligations under FOIA and, thus, at least in that sense 'relate' to far more than issues of internal management. Viewed from this perspective, the forms 'relate'—at least in part—to how the FBI performs one of its statutory obligations." (*Ryan Noah Shapiro; Jeffrey Stein; National Security Counselors; Truthout v. U.S. Department of Justice*, Civil Action No. 13-555 (RDM), U.S. District Court for the District of Columbia, Jan. 22)

Views from the States…

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

Connecticut

A trial court has ruled that the FOI Commission erred when it found that partial disclosure of an attorney-client privileged report prepared for the Berlin Board of Education by its attorney waived the privilege as to the entire document. The board's attorney prepared a report on his investigation of allegations that Gary Brochu, the chair of the board of education, used his position to intimidate athletic coaches. The board went into executive session to receive the report. After returning to open session, the board adopted as part of its minutes six paragraphs with some changes reflecting the attorney's recommendations. The Berlin Education Association requested the report. The board denied the request claiming the report was privileged. The education association complained to the FOI Commission, which found that federal case law on waiver of privileged documents suggested that disclosure of the "gist" of a privileged record waived protection for the entire record. But the court found that *In re Von Bulow*, 828 F.2d 94 (2d Cir. 1987), in which the court ruled that partial disclosure in the context of litigation waived the privilege but not disclosure in extrajudicial circumstances, remained the leading federal case. Here, the court noted that "in this case, the commission found that the meeting minutes contain 'recommendations' consisting of 'six very detailed paragraphs, taken nearly verbatim from the report itself.' The court agrees that, at a minimum, these recommendations 'actually

disclosed' the same recommendations in the [board] report. . .even if the recommendation in the minutes are not worded precisely the same way as the report." The court pointed out that "as *Von Bulow* recognized, in the extrajudicial context, the 'actually disclosed' standard is not equivalent to a broad waiver of communications of the same 'subject matter.'" The court added that "in the present case, the purpose of the inquiry into deciding what was 'actually disclosed' should merely be to identify what portion of the attorney-client communication 'confirms what was actually disclosed.'" The court sent the case back to the FOI Commission to apply the correct standard. (*Berlin Public Schools v. Freedom of Information Commission*, No. HHB CV15-6029080S, Connecticut Superior Court, Judicial District of New Britain, Feb. 3)

New York

A court of appeals has ruled that the New York City Department of Education must disclose an investigative file concerning Peter Sell's complaint that school administrators had improperly influenced the re-scoring of a Regents Examination with the intent of improving the number of students who passed "with distinction." The Department of Education claimed most of the records should be withheld because the charges were unsubstantiated. But the court noted that "we find there is significant public interest in the proper academic assessment of public school students and therefore in the requested materials, which may shed light on the adequacy of [the Office of Special Investigation's] investigation into the allegedly improperly influenced assessment in this case." The court added that "respondents failed to establish that this significant public interest is outweighed by the privacy interests of those involved. Contrary to respondents' argument, there is no indication in the record that any interviewees were promised confidentiality, explicitly or implicitly." (*In re Peter Sell v. New York City Department of Education*, No. 16724, New York Supreme Court, Appellate Division, First Department, Jan. 21)

Texas

A court of appeals has ruled that an assessment video used as part of the Houston Fire Department's Senior Captain examination qualifies under the exemption for examination questions. The fire department received a request for the record from Edwin Hilburn, who had taken the examination. The fire department decided to withhold it under the exemption for written examination questions and requested an Attorney General's opinion. While the AG found the fire department could withhold much of the material, it told the fire department that the video portions did not qualify as written examination questions. In the meantime, the City filed suit and both the AG and Hilburn intervened. The trial court ruled in favor of the City and Hilburn appealed. The appeals court pointed out that "the applicable section of the [City's] collective bargaining agreement . . .allowed for the administration of the videotaped exercise at issue. Thus, the collective bargaining agreements specifically provided otherwise than the requirement that the entire test be in writing." Ruling in favor of the City, the appeals noted that "the exercise is demonstrated to be a test question. . .The Act provides that a test developed by a licensing agency or governmental body is excepted from disclosure." While the court agreed the test was exempt, it rejected the City's suggestion that the assessments were also protected by the common-law right of privacy. (*Captain Edwin Scott Hilburn v. City of Houston*, No. 07-15-00158, Texas Court of Appeals, Amarillo, Jan. 21)

Washington

A court of appeals has ruled that the Woodland Park Zoological Society, which operates the Seattle Zoo under contract with the City of Seattle, is not the functional equivalent of a government body for purposes of the Public Records Act. Alyne Fortgang, co-founder of Friends of the Woodland Park Zoo Elephants, sent a request to the Woodland Park Zoological Society for records about elephant care and programs aimed at counteracting criticism of the Zoo's elephant program. For 100 years, the City of Seattle ran and operated

Woodland Park Zoo, but as the result of 2000 legislation, the City entered into a 20-year operating contract with the Zoological Society to operate the zoo. Although the City pays the Zoological Society more than $8 million a year to run the zoo, only 16 percent of its revenue comes from public funds. Under its agreement the Zoological Society is required to disclose information about animal care and it responded to Fortgang's request by disclosing information about the zoo's elephants. However, it refused to provide any records about its public relations programs. Fortgang sued and the trial court ruled that the zoological society was not a functional equivalent of a public entity. The court of appeals agreed that none of the four factors used in analyzing whether a private entity was performing a public function supported Fortgang's claim. On the issue of governmental function, the court noted that "Fortgang fails to point to any Zoo operation that resembles a 'core government function' that could not be wholly delegated to the private sector." As to the degree of public funding, the court pointed out that "public funding comprises a minority of WPZS's revenue. Washington courts have consistently concluded that the government funding factor weighs in favor of applying the PRA only when a majority of the entity's funding comes from the government." As to governmental control, the court observed that "nothing Fortgang points to demonstrates sufficient City control over WPZS's exclusive authority to manage and operate the Zoo." Turning to the final factor, the origin of the entity, the court explained that "WPZS has always remained a private nonprofit organization incorporated under Washington laws and registered with the Secretary of State as a charity." (*Woodland Park Zoo v. Alyne Fortgang*, No. 72413-4-I, Washington Court of Appeals, Division I, Feb. 1)

The Federal Courts...

In a much more thorough examination than that conducted by the D.C. Circuit in *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996), the Second Circuit has ruled that the National Security Council is not an agency subject to FOIA because its primary function is to advise and assist the President and because it has no independent authority to take action on its own. In a test case brought by Main Street Legal Services, which requested NSC documents concerning targeted drone attacks, a district court in the Eastern District of New York upheld the D.C. Circuit's 1996 ruling and found that if anything the NSC's current role in coordinating administration foreign policy had become even more dependent on the President. Main Street Legal Services appealed, arguing that under the test articulated in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), the NSC was an agency subject to FOIA unless its sole function was to advise the President. Main Street Legal Services argued that the NSC's role was broader and, thus, it did not meet the sole function test. Writing for the court, Circuit Court Judge Reena Raggi stressed that the *Soucie* test also required a showing of "substantial independent authority" derived from a source other than the President in determining whether an entity within EOP qualified as an agency for purposes of FOIA. After reviewing the provisions in the National Security Act creating the NSC, Raggi pointed out that "the Council is more appropriately viewed as a forum attended by actors exercising independent authority within their respective spheres, not an actor itself, much less one exercising authority independent of the President." She added that "recommendations do not manifest an exercise of independent authority. Rather, they are advice to the person with authority to act on them—here, the President." This description led her to conclude that "because the Council lacks any authority independent of the President, it is not an agency subject to the FOIA." After finding the Council was not an agency, Raggi proceeded to examine whether the NSC System—parts of which were created by statute—could be considered an agency. Finding that it was not, she observed that "in considering what statutory authority Congress conferred on staff, boards, and committees of the NSC System, we are ever mindful that atop this system sits the Council, which, we conclude has been granted no authority independent of the President, but, rather, has been assigned only the function of advising and assisting the President. This gives rise to a strong presumption that Congress intended to confer no more authority on the NSC System than

ACCESS REPORTS

it conferred on the Council at its head." Concluding the NSC System did not qualify for agency status either, Raggi rejected the NSC's argument that the court did not have subject-matter jurisdiction to hear the case. Raggi noted that the provisions in FOIA providing for district court review of adverse agency decisions was remedial and did not speak to subject-matter jurisdiction. As a result, she found the trial court had properly dismissed Main Street Legal Services' claim on the merits. She pointed out that "to state a claim for relief under [FOIA's judicial review provisions], a plaintiff must plausibly allege, among other things, that the defendant is an agency subject to the FOIA. Where, as here, the defendant is a unit within the Executive Office of the President, Main Street's conclusory pleading of agency status was insufficient. To the extent Main Street pointed to publicly available materials to support its agency allegations, we have just explained why those materials do not admit a plausible claim. In the absence of a plausible claim of agency, the district court acted within its discretion in granting dismissal without affording Main Street discovery." (*Main Street Legal Services, Inc. v. National Security Council*, No. 13-3792, U.S. Court of Appeals for the Second Circuit, Jan. 26)

Judge Amy Berman Jackson has ruled that the Competitive Enterprise Institute's FOIA suit against the EPA alleging the agency's decision to disclose emails sent to an anonymous email account used by former EPA Administrator Lisa Jackson at a rate of 100 records per month violated FOIA became **moot** once CEI and the agency agreed upon a more rapid response and the agency began to process the records at the accelerated rate. CEI filed suit alleging that the agency's original proposal was glacially slow and, thus, a de facto violation of FOIA. Jackson noted that "here, by virtue of the negotiated resolution, plaintiff has obtained the relief it sought in the form of an injunction in Count II, and that count is moot. And under these circumstances, as the D.C. Circuit has stated, Count I becomes moot as well." CEI argued that it still could contest the agency's exemption claims. Jackson indicated that "but in this complaint, notwithstanding its references to the fact that plaintiff has already appealed what it characterized as 'heavy redactions' in the productions that have been made to date, plaintiff did not ask the court to *do* anything about those redactions. The complaint is devoid of any claim alleging improper withholdings under Exemption 5 or any other exemption, and it seeks no relief in connection with the withholdings. The obvious point of the litigation was to obtain a judicial declaration that producing only 100 of the 120,000 responsive records per month was inconsistent with the FOIA statute, as well as an order requiring production of the records at a faster pace. Since the request for the only relief sought in this case has been rendered moot, the case will be dismissed." CEI claimed the agency had a **pattern or practice** of failing to respond to its FOIA requests. Jackson found CEI had not shown that the agency's response to this request constituted a pattern or practice in responding to other CEI requests. She pointed out that "but the single bone of contention between the parties has now evaporated, and neither the head of the agency nor the Court has found that the original production schedule was unlawful. . .[T]here was no allegation in the complaint identifying any other specific FOIA request that was denied or even delayed, and the complaint does not describe any other dispute that needs to be resolved or behavior that needs to be enjoined." (*Competitive Enterprise Institute v. United States Environmental Protection Agency*, Civil Action No. 15-0346 (ABJ), U.S. District Court for the District of Columbia, Jan. 28)

Judge Royce Lamberth has reconsidered his previous ruling that the CIA had acknowledged a special activity exception to its operational files exemption under the CIA Information Act and has concluded that his earlier ruling that the CIA had disclosed the existence of a special activity in conjunction with the hunt for Colombian drug lord Pablo Escobar was incorrect. He pointed out that "the *Vaughn* Indices' disclosure of special activities, whether or not those activities relate to Pablo Escobar, at most declassifies the mere existence of discussion of some sort of special activity in the Los Pepes Panel documents. And where nothing more has been declassified than the mere existence of some sort of special activity, the Court's rationale—that '[special] activities (1) did exist, (2) were CIA-linked, and (3) have been declassified'—does not apply."

Explaining that such an argument would "allow FOIA plaintiffs to bootstrap themselves into the exception using the very transparency they crave," Lamberth noted that "plaintiff's argument takes the government's decision to explain in the *Vaughn* Indices the redaction of material from the Los Pepes Panel Reports, adds to that the government's decision to unredact portions of those reports, and infers that a special activity targeting Pablo Escobar has been disclosed and thus declassified. But if such an argument prevails in court, the government will be far more tempted to simply redact even more material, or provide even less detail in future *Vaughn* Indices. And who could blame it? Plaintiff's argument would, if accepted, punish the government for doing precisely what FOIA requires—providing what disclosure it safely can, and where it cannot safely disclose, explaining why—by creating a constant risk of inadvertent declassification." (*Institute for Policy Studies v. United States Central Intelligence Agency*, Civil Action No. 06-960 (RCL), U.S. District Court for the District of Columbia, Jan. 28)

A federal court in Colorado has ruled that the U.S. Forest Service must widen its **search** for records responsive to Rocky Mountain Wild's request for records from third parties pertaining to a proposed land swap at Wolf Creek, but has found that the agency's shortcomings so far stem primarily from a misunderstanding between the parties and not because the agency has a **pattern or practice** of violating FOIA as Rocky Mountain Wild alleged. A private entity known as Leavell-McCombs Joint Venture, which owns a parcel of former Forest Service land near the base of the Wolf Creek Ski Area, proposed a swap of 177 nonfederal acres for 205 federal acres located within the Rio Grande National Forest near the Wolf Creek Ski Area. The agency started work on an environmental impact assessment for the proposed land swap. In February 2014, before the EIS was completed, Rocky Mountain Wild submitted a FOIA request to the Forest Service for communications with third parties regarding the Wolf Creek project. Dissatisfied with the agency's processing of its request, Rocky Mountain Wild filed suit. After the Forest Service published its final EIS in November 2014, Rocky Mountain Wild submitted a second FOIA request and subsequently filed suit. Since that time, the agency had disclosed more than 12,000 pages to Rocky Mountain Wild. Rocky Mountain Wild had also filed suit under the Administrative Procedure Act substantively challenging the agency's EIS. Rocky Mountain Wild argued that its second FOIA request was distinct from its first FOIA request, while the Forest Service contended that under the circumstances it was appropriate to treat the second request as a continuation of the first request. Agreeing that the agency's interpretation was reasonable, the court noted that "if the [second] request had been the first or only request, Rocky Mountain Wild would have an easier time arguing that its literal meaning (much less its liberal meaning) clearly expresses an intent to seek all documents of every type, not just communications or, even more specifically, communications with third parties." But based on the intervening events, the court noted that "the Forest Service unsurprisingly interpreted the [second] request for 'all as-yet undisclosed agency records. . .including communications between [the Forest Service and various third parties]' as an extension of the [first] request's temporal scope, rather than a new request with an independent scope." But the court observed that "nonetheless, when an agency learns that it has misunderstood the scope of a request, it has a duty to adjust its records search accordingly." The court added that "in circumstances where the original request encompasses documents that the agency has never searched (or chooses to withhold) due to a good faith misunderstanding of the request, the agency cannot continue to refuse to search or disclose." The court pointed out that "through an honest misunderstanding, the Forest Service apparently performed a too-narrow records search (*i.e.*, for 'communications' only), and has also chosen to withhold certain records as outside the scope of the search (*i.e.*, intra-agency communications). However, having learned of its misunderstanding, the Forest Service cannot continue to insist on that misapprehension as the proper interpretation of Rocky Mountain Wild's request." As a consequence of the misunderstanding, the court noted that "given that the Forest Service has continued to find additional custodians and documents as this case has progressed, and given FOIA's broad purpose in favor of public access. . .the Court will order the Forest Service to search the individuals and

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locations named in Rocky Mountain Wild's Specific Requests, both for responsive third-party communications as well as responsive intra-agency communications, and any other responsive record, whether embodied in a communication or not." The court found that most of the agency's exemption claims were appropriate, but indicated it could no longer withhold records because the agency considered them outside the scope of the request. The court pointed out that "if the Forest Service wishes to continue withholding any such document, it must explain its decision in the updated *Vaughn* index ordered above. Otherwise, it must disclose the document." The court found Rocky Mountain Wild had not shown that the agency had a pattern or practice of delay in responding to its requests. The court observed that "the basic problem is that 'too long' must be judged in the context of the requests submitted. . .Here, Rocky Mountain Wild has produced no evidence that the Forest Service's response time has been repeatedly and intentionally unreasonable in light of the requests received and the scope of documents implicated." (*Rocky Mountain Wild, Inc. v. United States Forest Service*, Civil Action No. 15-0127-WJM-CBS, U.S. District Court for the District of Colorado, Jan. 29)

Judge Randolph Moss has become the latest D.C. Circuit district court judge to rule in a prisoner case that the Justice Department's Criminal Division properly withheld wiretap authorizations and memos under **Exemption 3 (other statutes)** and **Exemption 5 (privileges)**. Eric Ewell requested records about the use of wiretaps during his trial on possession of heroin. The Criminal Division told Ewell that it would not search for such records because they were exempt under Title III. Ewell filed suit and the agency searched for the records, but withheld them all under Exemption 3 and Exemption 5. Ewell argued the **search** was inadequate because the agency should have searched for records more broadly under his name. Moss noted that "Ewell sought a precise set of documents—an authentic [Office of Enforcement Operations] 'copy of the Title III authorization letter(s), memorandums, and any other documents involved in their approval for the electronic surveillance' conducted on five telephone lines. As [the agency's affidavit] explains, OEO is the component of the Criminal Division that processes requests from prosecutors seeking permission to apply for court-authorized surveillance and that makes recommendations to the Assistant Attorney General for approval of those requests. The Department thus reasonably construed Ewell's FOIA request for records actually involved in that approval process and, accordingly reasonably concluded that its search effort should focus on records maintained by OEO and communications between OEO and the prosecutor who sought approval for the wiretap." Ewell argued that the existence of wiretaps was made public at his trial. But Moss indicated that while wiretaps were mentioned as his trial, there was no evidence that the contents of any of the wiretaps were made public. Moss pointed out that "even if the *recordings* had been made public that would not justify the release of *application materials*." He then found that any records not covered by Exemption 3 were attorney work-product protected under Exemption 5 and that because the privilege covered both advice and factual material, the agency did not have to consider whether any information was segregable. (*Eric Ewell v. U.S. Department of Justice*, Civil Action No. 14-495 (RDM), U.S. District Court for the District of Columbia, Jan. 26)

Judge Amy Berman Jackson has ruled that the Defense Department did not waive its **Exemption 5 (privileges)** claim for a memo prepared for Assistant Secretary of Defense Michael Lumpkin concerning the transfer of five detainees from Guantanamo Bay to Qatar in exchange for Sergeant Bowe Bergdahl, who was held captive in Afghanistan. Jackson had previously held that the memo was covered by the deliberative process privilege, but asked the Defense Department to respond to Judicial Watch's assertion that the agency had failed to consider whether any portions were segregable. After reviewing the memo *in camera*, Jackson noted that she was satisfied that the entire memo qualified for the privilege. Judicial Watch then argued that the memo was adopted as the official government position when the exchange took place. Jackson disagreed, observing that "the Congressional testimony to which plaintiff directs the Court does not show that the Secretary expressly adopted or relied on the Lumpkin Memorandum. Instead, it shows, at most, that it may

have been used as part of the larger decision-making process. Absent some showing that the agency either expressly or implicitly utilized the Lumpkin Memorandum in connection with its communication of its decision to the public, there is no basis to call for its release." She pointed out that "under plaintiff's approach, no memorandum containing recommendations would remain privileged after a decision in accordance with that document has been made, and that is not the state of the law." (*Judicial Watch, Inc. v. U.S. Department of Defense*, Civil Action No. 14-1935 (ABJ), U.S. District Court for the District of Columbia, Feb. 2)

A federal court in California has ruled that the Interior Department did not waive its ability to claim that records pertaining to the development of an opinion by the Solicitor of Interior finding that the Bureau of Reclamation had the legal authority to make certain flow augmentation releases (FARs) from the Trinity River Division of the Central Valley to increase flows in the lower Klamath River for the benefit of migrating salmon were protected by **Exemption 5 (privileges)**. The San Luis & Delta-Mendota Water Authority had sued the agency challenging its authority to divert the water. The court found the agency did not have the authority to issue the FARs, which resulted in a new Solicitor's opinion reinterpreting the agency's legal authority. The Water Authority then made several FOIA requests to the agency, including one for records about how the Solicitor's opinion was developed. The Water Authority argued that because it was a party to litigation with the agency on the issue it would be unfair for the agency to assert that the records concerning the development of the opinion were privileged. The court rejected the Water Authority's waiver argument, noting that "if Plaintiff is correct that mere issuance of the Solicitor's Opinion waives all privilege with regard to internal memoranda concerning the Solicitor's Opinion, agencies would *never* be able to benefit from attorney-client, attorney work product, deliberative process, or other privilege protections that are incorporated by reference into FOIA's Exemption 5. If the mere disclosure of the final product resulted in evisceration of those privileges, the privileges would no longer have any practical effect. The fact that the final (disclosed) product is used to advance an agency goal is to be expected, that such a goal may be adverse to Plaintiff's interest does not diminish the operation of the relevant privileges in any way." The court rejected the agency's claim that the Solicitor's Office was not a proper party because it was not an agency itself. Noting a number of cases in which components of Interior had been named as defendants, the court observed that "these cases establish, at a bare minimum, that inclusion in a FOIA suit of component branches of an executive agency is routine. Absent affirmative authority suggesting inclusion of such component branches as defendants is improper, which Federal Defendants have not provided and the Court has been unable to locate, the Court will not dismiss the Solicitor's Office as a defendant at this time." *San Luis & Delta-Mendota Water Authority v. U.S. Department of the Interior*, Civil Action No. 15-01412-LJO-EPG, U.S. District Court for the Eastern District of California, Feb. 3)

Judge Amy Berman Jackson has ruled that EOUSA properly withheld information about stenographic services in use in the Southern District of Florida during the time in which James Henderson was tried and convicted under **Exemption 6 (invasion of privacy)**, but that the information did not qualify as a law enforcement record under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Finding that the agency had conducted an **adequate search**, Jackson rejected Henderson's claim that it failed to search for grand jury records. Jackson pointed out that "the EOUSA is obligated to construe plaintiff's FOIA request liberally. But plaintiff's request does not mention grand jury materials, and even a liberal interpretation of the request would not have prompted the EOUSA to search for grand jury materials. In this case, the EOUSA was 'able to determine precisely what records are being requested.'" Jackson found the stenographic records did not qualify as law enforcement records. She noted that the agency's "general explanation [of law enforcement records] does not necessarily apply to the narrow set of records sought here, since the connection to the investigation is highly attenuated. The responsive records pertain to litigation

ACCESS REPORTS

expenses and were maintained in an 'expense file.' Nothing in the EOUSA's supporting declarations suggests that this expense information was found in a criminal case file. Notwithstanding the apparent connection between stenographic services and the EOUSA's law enforcement function in prosecuting plaintiff's criminal case, it cannot be said that these expense-related records fall within the scope of Exemption 7." Nevertheless, Jackson found the redactions fell under Exemption 6. She observed that "the parties do not dispute that the third parties mentioned in the responsive records have a privacy interest in their personal information, and that their privacy interest is substantial. . .Although this argument is less compelling in this instance because the relevant records were not compiled for law enforcement purposes, it is apparent that the third parties' privacy interest is greater than *de minimis*." (*James M. Henderson v. United States Department of Justice*, Civil Action No. 14-2002 (ABJ), U.S. District Court for the District of Columbia, Jan. 29)

A federal court in Michigan has ruled that the Department of Justice properly withheld records pertaining to a request for assistance from the U.S. Office of International Affairs to the Central Authority of Austria and a second foreign government for information about why Austria arrested Doda Lucaj and subsequently extradited him to Montenegro, where he was convicted and imprisoned for four years. Lucaj, a naturalized U.S. citizen originally from Albania, was arrested in Vienna in 2006 and sent to Montenegro. Lucaj requested records about his arrest and conviction from the Justice Department. The agency located nearly 1500 responsive pages and disclosed nearly 500 pages in full or in part. Lucaj argued that the requests for assistance were not protected by **Exemption 5 (privileges)**. The court first found that the records qualified as intra-agency records. The court noted that "here, both documents were requests for assistance from the OIA to foreign governments in furtherance of the government's investigation of possible national security crimes. The foreign governments therefore had a common interest in the investigation of the potential crimes and were not in an adversarial position vis-à-vis the United States government. Under these circumstances, the Court finds that the common interest doctrine applies and that the communications between the OIA and the foreign governments constituted 'intra-government' communications." The court then found that both documents were protected by the attorney work-product privilege. The court pointed out that "both documents were drafted by attorneys and are described as containing the DOJ's legal theories, compiled factual summaries, interpretations of evidence, and the statutory basis of the investigation into Plaintiff's actions. Because all of this constitutes attorney work-product, the Court cannot satisfy Plaintiff's request to redact only the deliberative materials and require production of the remaining factual statements in the documents. As [Sixth Circuit precedent] makes clear, the work-product privilege covers both the factual summaries as well as the deliberative processes contained within the documents." Finding the documents covered by the deliberative process privilege as well, the court added that "the release of these sensitive documents compiled during the course of an open investigation would 'expose' the agency's decision-making process, ultimately hampering its ability to perform its functions." (*Doda Lucaj v. United States Federal Bureau of Investigation and United States Department of Justice*, Civil Action No. 14-12635, U.S. District Court for the Eastern District of Michigan, Southern Division, Jan. 27)

Judge James Boasberg has ruled that he is now satisfied with the FBI's explanation of its *Glomar* response to Uzoma Kalu relating to whether or not she was on the no-fly list. As the result of additional security screenings by the TSA and an audit by the IRS, Kalu, a Columbus, Ohio physician, made a FOIA request to the IRS, TSA, and the FBI for records about herself. In his prior decision, Boasberg found that the IRS and TSA had sufficiently justified their responses, but that the FBI's no records response was accompanied with a *Glomar* response neither confirming nor denying the existence of records to the extent that Kalu was inquiring into whether she was on the no-fly list. At that time, Boasberg asked the FBI to provide a further explanation of its action. This time, Boasberg found that the agency's *Glomar* response was justified under **Exemption 7(E) (investigative methods and techniques)**. Kalu agreed that disclosure of

information about how the no-fly list operated could be protected but argued that the agency had waived its ability to issue a *Glomar* response because the program was already a matter of public knowledge. Boasberg pointed out, however, that "to argue that such acknowledgement compels disclosure here is to mistake a forest for a tree. Plaintiff has not shown—as she must—that 'the fact of the existence (or nonexistence)' of *her name* on a watch list has previously been disclosed. That the watch list itself is public knowledge will not defeat the FBI's invocation of *Glomar* here." (*Uzoma Kalu v. Internal Revenue Service, et al.*, Civil Action No. 14-998 (JEB), U.S. District Court for the District of Columbia, Feb. 1)

The D.C. Circuit has once again told Judge Richard Leon that he is using the incorrect standard in assessing whether Kennedy assassination researcher Jefferson Morley is entitled to **attorney's fees**. Morley requested records about CIA officer George Joannides, who had served as the agency's contact with DRE, a Cuba-focused organization with which Lee Harvey Oswald was in contact in the months before the Kennedy assassination. The CIA originally told Morley to go to NARA. He filed suit instead and over the next decade received several hundred documents, some of which were publicly available at NARA. Morley filed for attorney's fees and Leon denied his request. On appeal to the D.C. Circuit, the appeals court found Leon had failed to consider the public-benefit test articulated in *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008), a prior attorney's fees case. Leon once again rejected Morley's motion for attorney's fees, finding that there was no public benefit from the agency's disclosure of records to Morley. This time, Senior Circuit Court Judge Stephen Williams, writing for the court, observed that "the plausibility and value of [Morley's] inferences [about the records] are at best questionable, but are ultimately of little relevance as *Davy* required the court to assess 'the potential public value of the information sought,' not the public value of the information received." Williams noted that "lest there be any uncertainty, we clarify that the public benefit factor requires an *ex ante* assessment of the potential value of the information requested. . .[I]f it is plausible *ex ante* that a request has a decent chance of yielding a public benefit, the public-benefit analysis ends there." Turning to Morley's request, Williams pointed out that "under these circumstances, there was at least a modest probability that Morley's request would generate information relevant to the assassination or later investigations." Noting that Leon had only considered the public benefit of disclosure, Williams sent the case back once again with instructions that "the district court should consider the remaining factors and the overall balance afresh." (*Jefferson Morley v. Central Intelligence Agency*, No. 14-5230, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 21)

A federal court in New Jersey has ruled that U.S. Customs and Border Protection properly withheld records pertaining to why Cesar Manuel Cardoso Matos de Paco was removed from the Global Trusted Traveler Program under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods and techniques)**. Matos de Paco was told in 2014 that his membership in the Global Trusted Traveler Program had been revoked because he did not meet the eligibility requirements. Matos de Paco requested his alien file. CBP responded by providing him 11 redacted records concerning his revocation in the global traveler program. The court agreed with the agency that various identifying information was protected either under Exemption 6 or Exemption 7(C). The court noted that "while FOIA encourages an open and transparent government, we find that disclosure of terminal identifiers and employees' names and phone numbers amounts to a 'clearly unwarranted invasion of personal privacy' that provides little insight to the public as to why CBP revoked Plaintiff's membership in the global traveler program, or how CBP responds to such inquiries generally." The court approved of redactions made under Exemption 7(E) pertaining to the agency's TECS database. The court observed that "the [agency's] affidavit details with great specificity the volume and sensitivity of the data that is collected by the TECS system. The affidavit further detailed the importance of protecting the

ACCESS REPORTS

TECS system from security risks because of its role as a 'fundamental law enforcement tool' that aids 'in assisting CBP to meet its primary mission to prevent terrorists, their weapons, and other dangerous items from entering the United States.' Thus, the records were properly redacted under Exemption 7(E) as the information was gathered using the TECS system." (*Cesar Manuel Cardoso Matos de Paco v. United States Customs and Border Protection*, Civil Action No. 14-5017 (MLC), U.S. District Court for the District of New Jersey, Jan. 27)

Judge Reggie Walton has ruled that EOUSA has finally shown that identifying information contained in its file on John Petrucelli's criminal conviction is protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Walton had previously shown skepticism about the agency's claim that a variety of information was protected by Exemption7(C), Exemption 7(D) (confidential sources) and Exemption 7(F) (harm to a person), but was persuaded this time that the records qualified under Exemption 7(C). Walton noted that "here, the individuals identified in the correspondence have a legitimate privacy interest, and neither the EOUSA nor the plaintiff identifies a public interest of any kind, let alone a public interest of such magnitude that it outweighs the individuals' privacy interest." (*John A. Petrucelli v. U.S. Department of Justice*, Civil Action No. 11-1780 (RBW), U.S. District Court for the District of Columbia, Jan. 27)

Judge Reggie Walton has ruled that the FBI conducted an **adequate search** when it found no records pertaining to James Patrick Donoghue, who contended that two federal agencies showed up as his state trial in Alabama in 2008 and helped persuade the court, as well as Donoghue's defense attorney, that Donoghue deserved a multiple-year prison sentence. Donoghue requested records about himself from the FBI and the agency, after searching its Central Records System using a variety of phonetic breakdowns of his name, found no records. Donoghue argued the agency should have searched the NCIC database for records. The FBI explained that the NCIC database was separate from its CRS database and that requests for an NCIC search had to be made to the Criminal Justice Information Services Division. Walton noted that "a valid FOIA request is one submitted in accordance with applicable regulations. The plaintiff has not indicated that he submitted a request to CJIS, and the FBI was therefore under no obligation to search NCIC in response to his FOIA request." Donoghue contended that the FBI had not conducted a **Privacy Act** search for records about him. But Walton pointed out that any Privacy Act rights Donoghue might have "come into play only if the FBI maintains records about the plaintiff and the FBI has demonstrated that there are no such records." (*James Patrick Donoghue v. Office of Information Policy, U.S. Department of Justice*, Civil Action No. 13-0256 (RBW), U.S. District Court for the District of Columbia, Jan. 27)

Judge Ellen Segal Huvelle has ruled that neither the Department of Homeland Security nor the Department of Defense violated Harriet Ames' **Privacy Act** rights when the DHS OIG disclosed a report of an investigation it had conducted involving Ames when she worked at FEMA that found that Ames had approved security clearances for two individuals with criminal records. While the DHS OIG investigation of Ames was pending, she left FEMA for a position as head of personnel security at the National Geospatial-Intelligence Agency, a part of the Defense Department. When Senior Special Agent K.C. Yi of the DHS OIG learned that Ames had gone to NGA, he contacted the OIG there and disclosed the contents of the DHS's report on Ames over the phone, indicating that his office would provide a copy of the report in response to a formal request. NGA requested and received the report. NGA then started its own investigation into whether Ames had made false statements and she was subsequently terminated. Ames then filed suit under the Privacy Act, alleging the agencies had improperly disclosed and used the DHIS OIG report. The government argued that the disclosures were permitted under the routine use exception in the Privacy Act, which allows agencies to

specify use of personal information that is compatible with the reason for which the information was collected. Huvelle pointed out that "DHS OIG and Agent Yi prepared the Report on plaintiff in order to determine if there had been misconduct by a government employee in a national security position. OIG's interest, of course, was to inquire into whether additional action was necessary to prevent violations occurring at an important gate-keeping function: the issuance of security clearances to government personnel. OIG's purpose in *disclosing* the Report was precisely the same: to prevent such misconduct by that individual at another national security agency. There is little doubt, therefore, that there is a 'concrete relationship' between OIG's purpose in creating the record of investigation and in publicly sharing that record of misconduct with another agency's OIG: both were motivated by the need to determine whether plaintiff's government employment responsibilities would need to be curtailed." She added that "the fact that one government agency created the record of misconduct and then disclosed it to a separate government agency does not defeat compatibility." Huvelle then found that routine uses covering law enforcement and national security permitted the disclosure of the report. She pointed out that "given that NGA OIG also possessed the law enforcement authority to investigate potential violations of law, the coordination provision in the Inspector General Act made communication perfectly appropriate." As to the national security exception, Huvelle indicated that Yi was required to disclose the report under the executive order on classification. She observed that "even setting aside Agent Yi's legal obligations [to take steps to prevent harm to the national security], common sense dictated that the DHS OIG's findings should be communicated to plaintiff's new employer given its place in the intelligence community." (*Harriet A. Ames v. United States Department of Homeland Security, et al.*, Civil Action No. 13-00629 (ESH), U.S. District Court for the District of Columbia, Jan. 27)