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Washington Focus: POLITICO has reported that the Republican House leadership has told Rep. Jason Chavetz (R-UT), chair of the House Committee on Oversight and Government Reform, that he cannot launch any investigations concerning agencies' electronic recordkeeping practices that focuses on Hillary Clinton. The warning to Chavetz comes after the House Leadership told Rep. Lamar Smith (R-TX), chair of the House Science, Space and Technology Committee, to delay his look at Clinton's private email server and let the FBI investigation play out instead. POLITICO reported that House Speaker Paul Ryan told Chavetz that he could investigate systemic government-wide problems but made clear his preference to steer away from anything dealing with Clinton personally.

Court Finds Consultant's Self-Interest Waives Deliberative Process Privilege

The Supreme Court's decision in *Dept of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), in which the Court ruled that parties who had interests separate to those of the agency did not qualify for protection under the deliberative process privilege, has left the government's ability to claim the consultant's privilege—when the agency uses third parties as de facto agency advisors—unsettled. Part of the post-*Klamath* litigation on extending privileges to third parties has focused on the common interest doctrine. But in a recent ruling exploring the reach of the consultant's privilege, Judge Amit Mehta has found that the Office of Science and Technology Policy waived the deliberative process privilege when agency director John Holdren shared portions of a draft letter with University of Rutgers Professor Jennifer Francis.

The case involved a complaint filed by the Competitive Enterprise Institute under the Information Quality Act challenging an agency video featuring Holdren in which he suggested that there was a growing body of evidence linking the weather phenomenon known as the "Polar Vortex" with global warming. A follow-up blog post by agency web editor Becky Fried featured the video and again made a link between recent cold weather and greenhouse-gas pollution. CEI

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challenged the accuracy of those statements and cited to a number of studies refuting and criticizing Holdren's claim. Nearly six months later, the agency sent CEI a letter denying its request to correct the information, explaining that under the guidelines for the Information Quality Act it did not apply to personal opinions. CEI appealed the agency's decision, arguing that Holdren's and Fried's statements were facts and not opinion and thus fell under the Information Quality Act. OSTP General Counsel Rachael Leonard affirmed the agency's decision not to correct the information, noting that the legal definition of "information" did not include expert judgment and personal opinions and that, as a result, the agency was not required to correct the information. CEI then made a FOIA request for records about production of the video and the agency's decision that the statements were personal opinions and did not represent agency policy. The agency initially found 11 pages, withholding portions under Exemption 5 (privileges) and Exemption 6 (invasion of privacy). CEI appealed the adequacy of the agency's search and Leonard ordered a further search, which yielded another 47 pages of drafts of the letter, which she indicated were being withheld under Exemption 5. In response to CEI's subsequent suit, Leonard indicated that the 47 draft pages were the only drafts in existence and that they had been reviewed only by executive branch officials. But Mehta explained that "those [statements] were, in fact, incorrect. In truth, according to a supplemental declaration submitted by Leonard, OSTP staff consulted with Holdren *after* filing its summary judgment motion and learned that he 'had shared one version of the draft response letter with Dr. Jennifer Francis, a professor at Rutgers University. . ." The agency claimed the draft shared with Francis was protected by the consultant's privilege.

Mehta first addressed whether the 47 pages of internal drafts of the letter were protected by the deliberative process privilege. He noted that both *Russell v. Dept of Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), and *Dudman Communications v. Dept of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987), dealing with requests for draft histories, supported the agency's claim. Finding that the 47 pages of drafts were protected by the deliberative process privilege, Mehta pointed out that "the drafts plainly were predecisional—they preceded in time the final version of the OSTP Letter. And they were deliberative—they reflect the opinions, reactions, and comments of OSTP employees to the OSTP Letter. Moreover, the same concerns over disclosure that animated *Russell* and *Dudman*—stifling creative thinking, confusing the public, and 'disrobing the agency decision maker's judgment'—apply equally here. Court-ordered disclosure of the 47 pages unquestionably would have a chilling effect on the free exchange of ideas and viewpoints that the deliberative process privilege is meant to encourage and protect."

CEI argued that the drafts were not privileged because they did not deal with a policy matter. Mehta disagreed, noting that "the drafts at issue here are not 'merely peripheral' to a legal or policy matter. On the contrary, they relate directly to a legal matter. The OSTP Letter expresses OSTP's *legal position* on whether the Information Quality Act and implementing guidelines required it to correct statements made in the Polar Vortex video and in the related blog post." He added that "although the agency came to the conclusion that the views expressed by Holdren and Fried were expressions of their personal opinions rather than of agency policy, the *process* by which the agency arrived at that legal conclusion is protected." He also rejected CEI's claim that factual material could be disclosed. He pointed out that "the deliberative process privilege protects not only the content of drafts, but also the drafting process itself. . .Any effort to segregate the 'factual' portions of the drafts, as distinct from their 'deliberative' portions, would run the risk of revealing 'editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis.' Such differences easily could be discerned by comparing the final letter with an earlier version."

Mehta found, however, that the draft shared with Francis, who CEI alleged was the primary academic champion of climate change, did not qualify under the consultant's privilege because of her own self-interest. He explained that "whether a person is self-interested in a particular situation is not a binary question. Rather, self-interest exists on a spectrum, with altruism at one end and greed or avarice on the other. The point at which selflessness passes into self-interest is not demarcated by a bright line. Here, OSTP offers little more than bald assertions to support Dr. Francis' purported lack of self-interest in commenting on the OSTP Letter."

Mehta observed that the agency "offers [little] detail about the 'consultancy' that Dr. Francis provided to Holdren. [The agency] does not explain why Holdren needed to confer with Dr. Francis about the OSTP Letter; to what portions of the letter Dr. Francis contributed her 'technical science' expertise about the Polar Vortex; or to what extent Dr. Francis has conferred with Holdren and OSTP in the past about scientific or other issues."

CEI, in contrast, portrayed Francis as the leading academic proponent of climate change. Reciting CEI's allegations, Mehta noted that "none of the foregoing should be interpreted as a criticism of Dr. Francis. Nor should it be interpreted as the court taking a position in the debate that her theory has provoked. That is not the court's purpose. Rather, the court recites the foregoing because it clearly shows that, at a minimum, Dr. Francis had a professional and reputational stake in OSTP's decision to reject Plaintiff's request to correct Holdren's and Fried's statements, which endorsed her climate theory. A government consultant, of course, is permitted to have a point of view. But here, Dr. Francis cannot be likened to a government employee whose 'only obligations are to truth and its sense of what good judgment calls for.' A decision by OSTP to correct Holdren's and Fried's statements would have been contrary to Dr. Francis' self-interest."

Assessing the reasons why Holdren sought advice from Francis, Mehta observed that "Dr. Francis did not deliver her advice in this case to assist OSTP with forming a policy position in the claimed connection between the Polar Vortex and global warming. Instead, the letter Dr. Francis reviewed concerned OSTP's *legal response* to a demand for correction made under the Information Quality Act. Indeed, having carefully read the final OSTP letter, the court is left wondering what aspect of the draft letter required Dr. Francis' expertise either on climate science generally or the Polar Vortex in particular."

The agency had also withheld emails about the agency's production of the video. Mehta pointed out that "the video, and the withheld communications about it, do not concern an OSTP policy position. Rather, when OSTP rejected Plaintiff's request for correction, it explained that the video's statements were 'an expression of Dr. Holdren's personal opinion.' If the video was an expression only of Holdren's personal opinion, then it follows that internal communications about the video cannot be part of a process of formulating agency policy." (*Competitive Enterprise Institute v. Office of Science and Technology Policy*, Civil Action No. 14-01806 (APM), Feb. 10)

Drone Use by FBI Protected By Exemption 4 and Exemption 7(E)

Judge Gladys Kessler has ruled that the FBI properly withheld the majority of responsive records concerning its use of drones in response to a request from CREW. While the agency relied on obvious exemptions like Exemption 1 (national security) and Exemption 3 (other statutes), it was equally successful in withholding large number of records under a combination of Exemption 4 (confidential business information) and Exemption 7(E) (investigative methods and techniques), perhaps the first time that combination has come up in litigation as the basis for withholding what was essentially manufacturers' information about the products.

CREW's request for records about the FBI's use of drones included a request for expedited processing, which the agency denied. However, by the time CREW got into court, Kessler ordered the agency to process records at the rate of 1,500 pages per month. The agency made six interim releases and one supplemental release. In all, the agency found 6,720 pages, released 1,970 in full or in part, and withheld the rest under Exemption 1, Exemption 3, Exemption 4, Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records) and Exemption 7(E). CREW

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chose not to challenge the agency's search, but did contest the exemptions as well as the agency's obligation to conduct a segregability analysis and disclose non-exempt information.

The agency claimed records were protected by Exemption 1 because disclosure would reveal intelligence sources and methods. CREW argued that "the *domestic* use of drones by the FBI does not constitute an 'intelligence activity' or 'intelligence sources or methods' within the meaning of" the Executive Order on Classification and that testimony of former FBI Director Robert Mueller contradicted the agency's claims. Kessler noted, however, that Mueller had testified that the agency used drones in eight criminal cases and two national security cases. She pointed out that "'National security cases' is a broad category and by no means excludes foreign counterintelligence activities." She added that "in addition, the FBI's statutory duties include protecting the United States from terrorism and threats to national security, as well as furthering the foreign intelligence objectives of the United States. It logically follows that the FBI's use of drones relates to issues of national security and the intelligence activities of the United States." CREW also questioned the agency's foreign relations claim. Kessler observed that "although CREW characterizes its FOIA request as pertaining exclusively to the FBI's domestic drone program, any such limitation is absent from its FOIA Request itself." She observed that "in short, the FBI's comments do not rule out the possibility of drone use pertaining to foreign activities or foreign relations." Because the FBI's Exemption 3 claim was based on the sources and methods provision in the National Security Act, Kessler quickly found that the same types of records that fell under Exemption 1 were also protected under Exemption 3.

Turning to Exemption 4, Kessler rejected the FBI's argument that disclosure would impair the agency's ability to get similar information in the future. She pointed out that "DOJ has not sufficiently explained how disclosure will make future contract solicitation submissions less reliable." She also rejected the agency's claim that disclosure could undercut the vendor's position by allowing potential competitors to obtain information. Here, she noted that "DOJ fails to fully explain the relevance of the fact that the vendor exclusively sells this type of equipment to law enforcement entities."

She was far more satisfied with an *in camera* affidavit provided by the vendor. Here, she found that "public release of this information would cause serious competitive harm to the vendor. The vendor must diligently protect this information at every juncture. The vendor requires non-disclosure agreements from third-party commercial intermediaries, confidentiality agreements from employees, and does not share this information with competitors or the public. It would put the vendor at a distinct disadvantage in bid solicitations if its pricing information were made public." CREW argued that DOJ had placed too much reliance on the vendor's affidavit and that operating manuals for drones were publicly available. Kessler rejected both arguments. She noted that "CREW does not challenge the substance [of the vendor's claims]—that competitive harm will result from disclosure—of the vendor and DOJ's assertions." As to the manuals, she pointed out that "CREW does not assert that the withheld materials are the same as those in the public domain, but does point to different drone manuals and training documents which are in the public domain. However, the existence of those materials and training documents do not indicate that the vendor's sensitive information is already public, nor does it necessarily diminish the vendor's concerns of competitive harm."

Kessler then found that much of the information about the drones was protected by Exemption 7(E). To rebut the agency's claims that information about the use of drones by government agencies was not already publicly known, CREW pointed to various information from the Internet, as well as articles discussing the operational capabilities of drones. Kessler, however, pointed out that "this argument assumes that all drones are alike. While drones may generally face similar challenges across the board, it does not logically follow that all of the capabilities and limitations are similar, or that to know one is to know them all. DOJ explicitly states that the information withheld contains '*non-public* investigative techniques and procedures.' The public information cited by CREW does not raise doubts about the veracity of DOJ's claim." CREW also questioned

whether vendor and supplier identities could be protected under Exemption 7(E). Kessler agreed with the agency's argument that "disclosure of the vendor would, due to the vendor's niche market, reveal the equipment and services provides to the FBI."
As to training materials, Kessler noted that "the training and equipment information, if disclosed, would reveal law enforcement techniques and procedures, which could reasonably be expected to risk circumvention of the law." (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, Civil Action No. 13-1159 (GK), U.S. District Court for the District of Columbia, Feb. 9)

Views from the States…

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

Florida

A court of appeals has ruled that the trial court properly dismissed 16 of the 17 public records requests submitted to the University of Florida by Knight News, Inc. because they are education records under the Family Educational Rights and Privacy Act. Dismissing the requests, the appeals court noted that 'we agree with the Sixth Circuit Court of Appeals' conclusion in *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), that student disciplinary records are 'education records' subject to the protections afforded under FERPA. As observed in *Miami University*, FERPA does permit the release of certain student disciplinary records and information when the alleged misconduct constitutes a crime of violence or a non-forcible sex offense. In the case before us, there is no suggestion that the non-disclosed information fell within one of those exceptions." The court observed that "although KNI has set forth valid public policy arguments as to why the type of records and information requested in this case should be subject to public disclosure, we believe that those arguments are more properly addressed to the appropriate legislative bodies." (*Knight News, Inc. v. University of Florida*, No. 5D14-2951, Florida Court of Appeal, Fifth District, Feb. 5)

Maryland

A court of appeals has ruled that the Office of the State's Attorney for Baltimore County properly responded to Jason Richards' request for records about his conviction for first degree murder by informing Richards that his previous 2012 request had gone unfulfilled because Richards failed to pay the $1,440 fee for copying the records. The State Attorney's Office indicated that it would provide the records to Richards if he paid the fee. Richards then filed suit arguing the State Attorney's Office had constructively denied access to the records without claiming any exemption. The trial court dismissed the case without holding a hearing. Finding the State Attorney's Office had responded appropriately, the appeals court noted that "to the extent that appellant attempts to cast the actions of the PIA clerk as a denial of his request for documents, we disagree. The PIA clerk did not deny appellants' request, but granted it contingent on appellants paying the state fee due to the cost of producing the documents." Richards argued that several Attorney General opinions required disclosure of records to indigent prisoners. The appeals court disagreed, pointing out that "contrary to the thrust of appellants' argument [one of the AG opinions] provides that although a convicted defendant may obtain access to the prosecutorial files concerning him, 'a defendant is not generally entitled to obtain access unless the defendant pays any applicable fees or [is granted] a fee waiver in a particular case." (*Jason Terance Richards, et al. v. State of Maryland*, No. 0816 Sept. Term 2014, Maryland Court of Special Appeals, Feb. 4)

New York

A court of appeals has ruled that the trial court erred when it dismissed a FOIL suit brought by Newsday against the Nassau County police department without conducting an *in camera* review of the disputed records. In 2009, Leonardo Valdez-Cruz was convicted of stabling Jo'Anna Bird to death and was given a life sentence. The Nassau County Police Department's Internal Affairs Unit conducted an investigation into the circumstances leading up to Bird's death. Although the results of the investigation were never made public, Newsday reported that the investigation found that at least seven police officers had failed to fully investigate domestic violence calls made by Bird in the days before her murder. In March 2012, Nassau County agreed to pay $7.7 million to Bird's family to settle a wrongful death suit. Newsday then requested records about the police department's investigation of the Bird case. The police department denied access to the records because they were personnel records. The trial court then dismissed Newsday's suit. The appeals court indicated that because the personnel records exemption was intended to protect officers from having their personnel records used to impeach or embarrass them in litigation the trial court failed to properly assess whether the exemption applied. The appeals court noted that "in the instant case, the [trial court] should have conducted an in camera inspection to determine if the requested documents fall within the exemption from disclosure. Accordingly, the matter must be remitted to the [trial court] for a new determination based upon the in camera inspection." (*In the Matter of Newsday, LLC v. Nassau County Police Department*, No. 16-00981, New York Supreme Court, Appellate Division, Second Department, Feb. 10)

A court of appeals has ruled that the trial court erred when it found the Trustees of the Town of Southampton failed to properly respond to a FOIL request from South Shore Press for banking and financial records, but decided that South Shore Press was not entitled to attorney's fees. South Shore Press requested the Trustees' banking and financial records and when the Trustees failed to respond within the statutory time limit it appealed the constructive denial of its request. The Trustees responded by indicating that the request was unduly broad and burdensome. When South Shore Press filed suit, the trial court found that the Trustees had not provided a sufficient reason for not responding to the request, but concluded that South Shore Press was not entitled to fees. The appeals court disagreed, noting that "here, all of the statutory prerequisites for such an award have been satisfied. Moreover, an award of attorney's fees and costs pursuant to FOIL is particularly appropriate in this proceeding in order to promote the purpose and policy behind FOIL." The court sent the case back to the trial court for a determination of the amount of fees to be awarded. (*In the Matter of South Shore Press, Inc. v. Fred Havemeyer, etc., et al.*, No. 16-01191, New York Supreme Court, Appellate Division, Second Department, Feb. 17)

The Federal Courts…

Judge Ellen Segal Huvelle has ruled that a detailed disciplinary letter concerning a former Assistant U.S. Attorney who was terminated is protected by **Exemption 6 (invasion of privacy)**, but does not qualify as a law enforcement record for purposes of **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Howard Bloomgarden had been convicted in 1995 on drug-related charges in the Eastern District of New York. The prosecution also involved allegations of kidnap and murder. Bloomgarden currently is being tried for those murders in California. He requested records about the former AUSA to use in his murder trial as evidence of prosecutorial misconduct in the original conviction. The former AUSA was disciplined and terminated by the Justice Department in the latter 1990s. After reviewing the letter *in camera* Huvelle found the entire letter was protected under Exemption 6. She rejected the agency's Exemption 7(C) claim, noting that "a document is not exempt if it is merely 'related to' a criminal prosecution, but instead must have been 'compiled for' that purpose." She added that "it is not enough that a law enforcement agency,

acting as an employer, compiled the document as part of a supervisory investigation into its own employee's misconduct. . .DOJ does not contend that its investigation of the former AUSA involved any suspicion of illegal activity, or that the Letter made any such allegation. Rather, the Letter arose out of precisely the type of run-of-the-mill employee discipline that falls outside Exemption 7(C)." Noting that the disciplinary action took place more than 20 years ago, she observed that "plaintiff is correct that federal prosecutors do weighty, important work, affecting matters of 'life, death, or lengthy incarceration.' But it does not necessarily follow that everything a prosecutor does is a matter of pressing public concern, especially as regards instances of garden-variety incompetence and insubordination, and *especially* years and years after the fact." Balancing the former AUSA's privacy interest against the public interest in disclosure, she indicated that "the former AUSA has a strong interest in avoiding the professional embarrassment that disclosure would likely cause, while the public has only a negligible need to know about a largely unremarkable, decades-old disciplinary proceeding involving an entry-level prosecutor." Huvelle then found that **segregating** non-exempt information from the letter was impossible because "the Letter's content and the former AUSA's identity are 'inextricably intertwined.'" She explained that "even if the former AUSA had not been publicly identified as the Letter's subject, the Court finds that the exhaustively detailed thirty-five page Letter would allow others to identify him as the responsible U.S. Attorney in each of the cases discussed therein." (*Howard Bloomgarden v. United States Department of Justice*, Civil Action No. 12-0843 (ESH), U.S. District Court for the District of Columbia, Feb. 5)

Judge Ketanji Brown Jackson has ruled that Conservation Force is not entitled to **attorney's fees** for its suit against the Interior Department because it did not substantially prevail. Conservation Force, a nonprofit wildlife-conservation foundation, sued the U.S. Fish and Wildlife Service to obtain records concerning the agency's denial of its application to import wood bison trophies from Canada, where they had been legally shot by four American hunters. After successfully challenging the denial of its application, Conservation Force submitted a FOIA request for the reasons for the denial of its application. Although there was some back and forth with the agency, Conservation Force filed suit before the agency had responded. After the ligation was filed, FWS disclosed more than 1,000 pages in their entirety and also provided 577 pages with redactions. In her previous ruling, Jackson found the agency had not yet justified Exemption 5 claims and told the agency to either provide a supplemental *Vaughn* index or disclose the records. The agency provided a supplemental Vaughn index and Jackson ruled its exemption claims were sufficient. Conservation Force then filed for attorney's fees, claiming that it had substantially prevailed because Jackson had ordered the agency to supplement the record. Jackson pointed out that Conservation Force misunderstood the nature of her previous ruling which "merely denied the government's motion for summary judgment in part and without prejudice, on the grounds that some of the claimed exemptions were insufficiently explained to support summary judgment, and the Court permitted Defendants to choose between releasing the content allegedly protected by the insufficiently explained exemptions or submitting a 'supplemental *Vaughn* Index and/or affidavits or declarations that comply with their obligations under FOIA.'" She added that "if a court order to produce a *Vaughn* Index, without more, 'does not constitute court-ordered relief for a plaintiff on the merits of its FOIA claim,' then neither does a court's reminder to a defendant that it must *either* justify its exemptions sufficiently *or* release the requested documents." Although Conservation Force had not argued the catalyst theory – that its suit caused the agency to disclose the records—Jackson explored that possibility anyway. She noted that "while it is true that Defendants released some documents after Conservation Force filed the complaint as a purely chronological matter, it is also clear beyond cavil that the catalyst method requires more. No averments or other facts in the instant record indicate that Defendants only produced these documents *because* of Conservation Force's lawsuit or its necessary consequences. . ." Jackson rejected the agency's alternative claim that Conservation Force might be eligible for fees for parts of its litigation in which it succeeded. She noted that "this approach to evaluating eligibility is not based in the statute, which clearly

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speaks about eligibility to receive fees for *cases*, not particular pieces of work within a case." She explained, instead, that "the degree to which a plaintiff deserves to recover fees for particular pieces of work is not entirely irrelevant to an attorneys' fees motion; it may certainly factor into the court's ultimate determination of whether the entire amount of fees that the plaintiff claims to have incurred in the case is reasonable." (*Conservation Force v. Sally Jewell*, Civil Action No. 12-1665 (KBJ), U.S. District Court for the District of Columbia, Feb. 5)

The D.C. Circuit has ruled that there is insufficient evidence that a comment made by Judge Amy Berman Jackson during a hearing on the House Committee on Oversight and Government Reform's attempt to enforce a subpoena issued to the Justice Department for records about the Fast and Furious gun walking operation constituted a sealing order prohibiting DOJ from disclosing records about the dispute in response to a FOIA request submitted by Judicial Watch. After the House Committee filed suit to enforce its subpoena, Judicial Watch filed a request for records pertaining to contacts between the parties concerning a possible settlement. During a hearing on the House litigation, Jackson said, in response to a discussion about the state of ongoing settlement negotiations that "I don't know what you said. I don't want to know." DOJ pointed to that statement as proof that Jackson had ordered records about settlement negotiations sealed. Dismissing Judicial Watch's FOIA suit, Judge Richard Leon indicated that Jackson's comment was "an *explicit* statement from Judge Jackson instructing the parties to keep the substance of their settlement discussions private," and explained that "there can be no doubt that there was a valid court-imposed restriction prohibiting disclosure." Alternatively, Leon noted that Local Civil Rule 84.9, which prohibits disclosure of "any written or oral communications made in connection with or during any mediation session" also applied to protect the records. Judicial Watch challenged Leon's ruling and the D.C. Circuit largely agreed. Writing for the court, Senior Judge Douglas Ginsburg noted that under *Morgan v. Dept of Justice*, 923 F.2d 195 (D.C. Cir. 1991), the D.C. Circuit's test for determining whether a court order acted to prohibit disclosure of records required an examination of whether the issuing court had intended its order to act as a prohibition against disclosure of records. Ginsburg pointed out that DOJ had suggested that Jackson wanted to protect the records to promote open discussion during settlement, but, Ginsburg observed, "there is no extrinsic evidence that was what the judge intended; indeed, that concern is nowhere mentioned in the record in this case. . ." He explained that "an ambiguous court order does not protect a record from disclosure pursuant to the FOIA." To resolve the dispute, the D.C. Circuit remanded the case to Leon "to give the Department an opportunity to seek clarification from Judge Jackson regarding the intended effect and scope of her order." Ginsburg rejected Leon's interpretation of the local rule on mediation. He noted that the rule "explicitly provides that 'these apply only to mediation proceedings that are formally conducted through the United States District Court's Mediation Program.' Further, it is not established whether Local Rule 84.9, if it applies, would resolve the FOIA question because local rules do not clearly fit within a recognized FOIA exemption." (*Judicial Watch, Inc. v. United States Department of Justice*, No. 14-5215, U.S. Court of Appeals for the District of Columbia Circuit, Feb. 12)

Judge Christopher Cooper has reconsidered his 2015 ruling awarding CREW $35,000 in **attorney's fees** using the LSI-adjusted *Laffey* matrix that is based on an index of legal services nationwide in complex federal litigation to calculate the amount of the award in light of two seemingly contradictory rulings by the D.C. Circuit –*Eley v. District of Columbia*, 793 F.3d 97 (D.C. Cir. 2015) and *Salazar ex rel. Salazar v. District of Columbia*, 809 F.3d 58 (D.C. Cir. 2015)—and has found that CREW had met the standard for use of the LSI-adjusted *Laffey* matrix. In *Eley*, a D.C. Circuit panel found that the district court judge had erred in using the LSI-adjusted *Laffey* matrix in awarding fees in a case brought under the Individuals with Disabilities Education Act, while the panel in *Salazar* approved of the use of the LSI-adjusted *Laffey* matrix in a Medicaid class action suit. Distinguishing the two decisions, Cooper noted that in *Eley*, the D.C. Circuit was concerned that the plaintiffs had not shown that the LSI-adjusted *Laffey* matrix was in line with *similar services* for litigating IDEA cases. By contrast, the *Salazar* panel found the government had not shown that the LSI-

adjusted *Laffey* matrix was inappropriate for what the government admitted qualified as complex federal litigation. Applying those rulings, Cooper pointed out that "the same [circumstances in *Salazar*] are true here. The government does not contend that FOIA litigation generally (or the particular litigation in this case) is not 'complex,' such that neither *Laffey* matrix should apply. Its only objection to CREW's fee award is that the LSI-adjudged rates are above market. But as was the case in *Salazar*, the affidavits, billing-rate surveys, and prior district-court orders that CREW has offered to support the reasonableness of LSI-adjusted rates in 'complex federal litigation' are sufficient to meet its evidentiary burden." Observing that CREW had met the standard for using the LSI-adjusted *Laffey* matrix in this case, he pointed out that "but that is not to say that all FOIA litigation is 'complex' (whatever that means) or that all FOIA litigators have comparable expertise and reputations to the attorneys handling this case. So while billing-rates matrices play an important role in the efficient administration of a lodestar award system, they cannot substitute for courts' independent judgment of the reasonableness of requested fees in each particular case." (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, Civil Action No. 13-00374 (CRC), U.S. District Court for the District of Columbia, Feb. 11)

Judge Reggie Walton has ruled that U.S. Customs and Border Protection has not yet sufficiently supported its claim that some records pertaining to its Analytical Framework for Intelligence system are protected by **Exemption 7(E) (investigative methods and techniques)**. EPIC requested records on the AFI, which is designed to help the agency identity, apprehend, and prosecute individuals who pose a law enforcement or security risk. The agency located 358 pages, disclosed 89 pages in full, 267 pages in part, and withheld 2 pages, one of which was ultimately released. The only remaining dispute was whether Exemption 7(E) applied to some records. EPIC argued that CBP had not shown how disclosure of the records would reveal investigative techniques or procedures. Walton agreed, noting that "the declarant's statements that the withheld materials pertain to the 'use,' 'navigation,' and 'capabilities' of the AFI system, and the 'defendant's processing of internal travelers,' are minimally descriptive, and thus do not provide the Court with sufficient detail regarding the law enforcement techniques or procedures the defendant seeks to protect." He added that "from the limited information provided in the [agency's affidavit], the Court is unable to glean any support for the claim that Exemption 7(E) applies to the withheld information." But Walton pointed out that the agency might be able to support its claims with a supplemental affidavit. He observed that "if the defendant can establish, by a sufficiently detailed *Vaughn* index, declaration, or affidavit, that the withheld materials are indeed techniques, procedures, or guidelines for law enforcement investigations or prosecutions, defendant may yet prevail on a renewed motion for summary judgment." (*Electronic Privacy Information Center v. Customs and Border Protection* , Civil Action No. 14-1217 (RBW), U.S. District Court for the District of Columbia, Feb. 17)

Judge Ketanji Brown Jackson has ruled that the issues remaining in litigation between EPIC and the Department of Justice over a now-expired national security program that involved the government's surreptitious use of certain devices to collect communications information have narrowed to such an extent that the government's affidavits do not adequately address the handful of documents still in dispute. As a result, Jackson ordered the government to provide a new *Vaughn* index addressing the remaining contested documents. Jackson indicated that the parties had done an admirable job in winnowing down the issues, but noted that it was not until she held a hearing that she was able to understand the scope of the remaining issues. What remained were Westlaw printouts that had been attached to a DOJ memo as well as redacted portions of 25 semiannual reports to Congress summarizing FISC legal opinions. Jackson ordered the agency to provide new *Vaughn* affidavits, one that "set forth the government's reasons for withholding the Westlaw printouts attached to [the memo] *apart from* the FISC brief." She noted that "because it is difficult to glean from the [current affidavits] precisely what information DOJ is actually withholding [in the other contested documents] much less ascertain the government's reasons for withholding summaries of legal opinions and statements

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related to the FISA court's jurisdiction and processes," she would require a new affidavit explaining and justifying these withholdings. She also told the agency to provide the contested documents for *in camera* review. (*Electronic Privacy Information Center v. Department of Justice*, Civil Action No. 13-1961 (KBJ), U.S. District Court for the District of Columbia, Feb. 4)

Judge Rudolph Contreras has ruled OIP conducted **adequate searches** for three requests filed by prisoner Jeremy Pinson, but because the agency sent its response to one of the requests to an address different from that Pinson had provided the agency must remail the materials to the correct address. Pinson, who is currently litigating multiple requests he sent concerning the Bureau of Prisons, made a request to the Office of the Attorney General for correspondence or emails from the Office of the Attorney General intended for the Director of the Bureau of Prisons. Pinson told OIP that he did not want the agency to spend more than the allotted free two hours of search and 100 pages of duplication. The agency searched the Departmental Executive Secretariat's database under the name of Harley Lappin, who was then the Director of BOP, and found 72 pages, released 40 pages, and referred the remaining 32 pages to BOP. Pinson did not challenge any exemption claims. His second request was for records related to any AG involvement with three European Court of Human Rights cases. Again, he limited the search and duplication to avoid paying fees. The agency again searched the DES database for the names of the individuals involved in the three ECHR cases and also searched for any indication that the Attorney General had been in contact with the ECHR at the time of the cases. OIP found no records. Pinson's third request was for records concerning the selection of Charles Samuels, the current director of BOP, and Paul Laird, the regional director of BOP. That search produced 139 pages. OIP released 72 pages in full and 60 pages with redactions and withheld seven pages. Although Pinson's request had been sent from ADX Florence, OIP mailed the response to him at the Federal Detention Center in Houston after determining that he had been temporarily transferred there. Pinson challenged the redaction of the name of one individual who had recommended Samuels for his current position under **Exemption 6 (invasion of privacy)**. Contreras found the agency had conducted adequate searches for all three requests. Pinson challenged the agency's no records response to his request for contacts with the Attorney General pertaining to the three ECHR cases, arguing that there was evidence that the European court had contacted both the Department of Justice and the State Department. Rejecting the claim, Contreras noted that "but this assertion proves nothing. Plaintiff fails to provide the excerpts from the docket to which he refers so that the Court may assess how 'clear' its entries are. More importantly, even taking Plaintiff's assertion at face value only indicates that the Department of Justice may have contributed to the proceeding, not the Attorney General himself (or anyone on his immediate staff)." On Pinson's third request, Contreras noted that "based on the record presented, OIP should have sent the documents to the last location Plaintiff had indicated he was held, *i.e.*, Florence. Alternatively, to the extent that OIP independently took it upon itself to determine that Plaintiff had moved to Houston when it sent the interim response, it should have made the same independent inquiry later on when it provided its final response and erroneously mailed the responsive documents to Houston." Contreras found that OIP had improperly redacted the name of an individual recommending Samuels. He pointed out that "the specific person who made the recommendation could potentially have made significant individual political contributions or have some other non-obvious personal or professional connection to the government decision makers at issue that is separate and apart from his or her employer. The revelation of such information would be of significant interest to the public because it would reflect on what the government is up to." (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-01872 (RC), U.S. District Court for the District of Columbia, Feb. 16)

Judge Beryl Howell has ruled that Wallace Mitchell failed to **exhaust his administrative remedies** by showing only that he had mailed something through the U.S. Post Office in 2014, but not that the 2014 letter was a FOIA request sent to the Bureau of Prisons. Mitchell filed suit against BOP, alleging it had not responded to his 2014 request for his disciplinary record while in prison and a list of all prison locations and names of associate wardens. After he filed suit, the agency could find no record of a 2014 request, but did find

a record of a 2015 request for his disciplinary records. The agency decided to respond to that request out of turn for purposes of convenience. Mitchell argued that he had mailed a FOIA request to BOP in 2014 and that he had a postal service tracking number. The agency argued that was insufficient and Howell agreed. She noted that "the existence of a USPS tracking number is not competent evidence that plaintiff submitted a valid FOIA request in 2014. The plaintiff does not demonstrate that the BOP actually received the July 18, 2014 request, however. Thus, the plaintiff fails to demonstrate that he has exhausted his administrative remedies in respect to the July 18, 2014 request, and the defendant's motion for summary judgment will be granted." (*Wallace G. Mitchell v. Charles E. Samuels, Jr.*, Civil Action No. 15-1192 (BAH), U.S. District Court for the District of Columbia, Feb. 17)

A federal court in Montana has ruled that the Air Force properly withheld classified information contained in a counterintelligence note under **Exemption 1 (national security)** and that Kenneth Davis' request that the agency's investigation of him on espionage charges be made public is not a cognizable claim under FOIA. Davis filed suit after the Air Force Office of Special Investigations withheld the counterintelligence note under Exemption 1 and Exemption 5 (privileges). But in court he agreed that the note was properly classified and that all he actually wanted was and admission by the agency that its investigation of him had been found to be groundless. Dismissing the case, the court noted that "Davis seeks instead for the Court to enter a finding, as a matter of law, that AFOSI conducted an investigation into the espionage claims against Davis and found the claims groundless. Davis cites no authority in support of his request." The court explained that Davis had cited to two agency documents that seemed to support his claim that the agency had found the charges unsubstantiated. But, the court pointed out that "Davis clearly has access to these documents. Davis may present these documents in his state court lawsuit. The trier of fact in that matter may consider these documents to determine whether the espionage allegations were 'groundless.'" (*Kenneth Russell Davis v. United States Department of the Air Force*, Civil Action No. 15-68-GF-BMM, U.S. District Court for the District of Montana, Great Falls Division, Feb. 8)

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