Volume 42, Number 5
March 2, 2016

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: Judge Emmet Sullivan Feb. 23 granted Judicial Watch limited discovery in its FOIA suit against the State Department for records concerning the agency's decision to allow Huma Abedin, a close aide to former Secretary of State Hillary Clinton, to continue to work for the Clinton Foundation as well as Teneco, a consulting company, while employed by the State Department. In approving discovery, Sullivan noted that "there has been a constant drip, drip, drip of declarations. When does it stop?" According to the Washington Post, Sullivan indicated that there was a reasonable suspicion that recordkeeping laws had been violated. While Sullivan's decision essentially guarantees that litigation surrounding Clinton's email server will continue through
Election Day in November, the drain on resources is taking a toll on the State Department as well. During testimony before the Senate Foreign Relations Committee, Secretary of State John Kerry noted that "we have more than 50 simultaneous investigations going on, and we have an unprecedented number of FOIA requests." Kerry told the Committee that "I have had to cannibalize bureaus to get people to go spend their time on these requests."

Court Finds Agency Search Adequate Foreclosing Challenge to Immigration Status

A recent decision by Judge James Boasberg provides a good illustration of how important FOIA often becomes in legal controversies that initially do not have any records access component. The case also serves to illuminate the frequent misconceptions plaintiffs have about the role federal record-keeping plays in providing a documentary source to substantiate a plaintiff's claim. In this case, Armando Garcia's FOIA request began as largely tangential to his challenge to the likelihood that he would be deported, but ultimately became the linchpin of his attempt to remain in the United States.

Garcia came to the U.S. as a child with his mother from Cuba by boat in 1980. In 1981, his mother applied on his behalf for lawful permanent resident status with the Immigration and Naturalization Services. No decision was

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made on the application and Garcia filed a new application in 1990, which was originally granted, but was subsequently revoked after Garcia was convicted of cocaine trafficking, which made him immediately deportable. However, since the United States did not have relations with Cuba at that time, he was not subject to deportation. But after the United States recognized Cuba and his deportation became a potential reality, Garcia requested records concerning the unfinished 1981 lawful permanent resident application from U.S. Citizenship and Immigration Services. The agency decided that his alien file was the only likely location for records pertaining to the 1981 LPR application. But after searching for the records, scanning them, and reviewing them for disclosure, the agency found only the application itself and no further indication of its resolution. After unsuccessfully asking OGIS to help him resolve the dispute, Garcia then filed suit challenging the agency's search, but also arguing that the agency had violated the Administrative Procedure Act by failing to act on his 1981 application and requesting Boasberg to order the agency to process the 1981 application.

Although USCIS and U.S. Immigration and Customs Enforcement, which processed some documents referred to it by USCIS, claimed exemptions in responding to Garcia's request, he chose only to challenge the adequacy of the agency's search. Garcia focused primarily on the fact that the agency had found nothing beyond his original 1981 LPR application, suggesting that the agency's search was inadequate. Boasberg explained that Garcia "remains convinced that USCIS has not conducted a thorough search for responsive documents because among the documents the agency released to Garcia was his 1981 Form I-485A Application, dated October 19, 1981, and stamped 'UP-FRONT PROCESSED,' 'indicating that Mr. Garcia was interviewed in connection with the application.' Yet 'the 278 pages released by USCIS contain no indication of adjudication of the application.' Plaintiff thus contends that a 'reasonably conducted search would have revealed the ultimate disposition of Plaintiff Garcia's application.'"

Much of Garcia's argument was based on his interpretation of what OGIS had told him in completing its review. OGIS indicated that USCIS had not found a Form I-485A in Garcia's alien file and that after conducting a further search, the agency still found no more responsive records than those contained in the alien file. Because USCIS had provided Garcia with the Form I--485A application from his alien file, he interpreted OGIS's statement as evidence that the search was inadequate. The agency, in turn, explained that OGIS's statement referred to the absence of an *adjudicated* Form I-485A, not to the original application. Boasberg agreed with the agency. He noted that "whatever records OGIS reviewed are the same records USCIS reviewed—and the same ones USCIS either provided to Plaintiff or withheld under a FOIA exemption. And as shown by USCIS's *Vaughn* Index. . .none of the 18 pages withheld in part or 2 pages withheld in full is a document related to the ultimate disposition of Plaintiff's 1981 I-485A application. OGIS's statement thus has no bearing on whether USCIS fulfilled its legal obligations under FOIA."

Boasberg pointed out that the agency's legal obligation was to show that it had conducted a search reasonably calculated to uncover relevant documents. Because Garcia had requested his entire alien file, Boasberg concluded the agency's search in locating and processing his alien file was sufficient. He observed that "because all documents related to a alien's immigration transactions 'should, as a matter of course, be consolidated in the A-File,' there is no reason to doubt that any extant files related to Plaintiff's 1981 I-485A application were included in his A-File, and Plaintiff has provided no evidence to suggest otherwise."

Garcia argued the agency should have conducted an electronic search as well as a search for paper-based records. Boasberg indicated that "as Defendants explain in their reply, however, not all A-Files are digitized. Indeed, when USCIS searched [its] database for Plaintiff's A-File, it obtained the physical location of the file, and there was no indication it had been digitized; had it been, 'the results of the search inquiry would have reflected in bold, red print that the file had been digitized.' Even if Plaintiff's A-File *had* been digitized, Defendants aver, the electronic copy would 'either be identical to the paper A-File, or would contain

even *less* material than the paper A-File. . .'" Boasberg observed that "Plaintiff's FOIA request specifically sought only his A-File, which USCIS provided, and he cannot now—on appeal—seek to expand his search beyond that."

Garcia had also requested an *in camera* review because he contended the agency's inconsistent releases suggested that it was holding something back. Boasberg, however, explained that was not the purpose of *in camera* review, noting that "this is plainly not how *in camera* review should be entertained in the context of FOIA. Rather, such a review is only appropriate where a litigant challenges specific *exemptions* used to justify withholdings, something Plaintiff has not done here."

Turning to Garcia's request to have his 1981 I-485A application adjudicated, Boasberg concluded that because Garcia was ineligible under the Immigration and Nationality Act to apply for legal permanent resident status because of his drug conviction there was no likelihood that he could obtain a waiver even if the I-485A application was processed by 1981 standards. (*Armando Garcia v. U.S. Citizenship and Immigration Services*, Civil Action No. 15-744 (JEB), March 2)

Views from the States...

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

Kentucky

A court of appeals has affirmed the trial court's imposition of $756,000 in statutory penalties for the failure of the Cabinet for Health and Family Services to provide access to 140 files on child fatalities or near fatalities requested by the Louisville *Courier-Journal* and the Lexington *Herald-Leader* pursuant to the newspapers' Open Records Act requests. The appeals court also affirmed the trial court's award of $300,000 in attorney's fees to the two newspapers. The appeals court also ruled that once the Cabinet disclosed the disputed records with the minor redactions ordered by the trial court the merits of the case became moot. In a case in which both the trial court and the appellate court had previously ruled that the Cabinet acted egregiously by continuing to obstruct the courts' orders requiring disclosure of the records, the Cabinet first argued that its appeal of the trial court's ruling concerning the application of exemptions was not moot. Noting that there was no state court precedent dealing with the subject, the appeals court turned instead to the way in which federal courts had consistently ruled that once an agency had disclosed records the case was moot, observing that "if we were to reverse the [trial] court's decision as to the production of the documents, the reversal would have no practical effect as the Cabinet has already produced such records in conformity with the [trial] court's orders." The appeals court rejected the Cabinet's contention that the case fell within the public interest exception to the mootness doctrine, finding that because the trial court's ruling was fact-specific the Cabinet had failed to show a likelihood that the same circumstances would recur in the future. The appeals court then approved of the trial court's attorney's fees award. It turned to an assessment of the provisions in the ORA providing for assessment of a statutory penalty up to $25 a day for an agency's failure to provide disclosure to non-exempt records. The trial court had levied a $10 a day penalty on a per record basis. The Cabinet argued that the penalty provision allowed for a per person levy instead of a per record award. Finding the trial court was within its discretion, the appeals court noted that "reading [the penalty provision] liberally and in conjunction with the policy as expressed through the Open Records Act, the trial court's interpretation and application of that statute in light of the Cabinet's conduct was entirely reasonable." (*Cabinet for Health*

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and Family Services v. Courier-Journal, Inc. and Lexington H-L Services, Inc., No. 2012-CA-000179-MR, No. 2012-CA-000356-MR, and No. 2014-CA-000540-MR, Kentucky Court of Appeals, Feb. 19)

A court of appeals has dismissed Antoinette Taylor's suit for emotional distress brought against James Maxson, an attorney at the Education and Workforce Development Cabinet, because he failed to respond to Taylor's Open Records Act request within the statutory three-day time limit. Taylor made a request to the Cabinet and Maxson told her that the agency should be able to respond within 10 days. Taylor then filed a complaint with the Attorney General, who ruled that the agency had violated the ORA. Taylor then filed suit under the ORA as well as for damages. The trial court dismissed her damages suit, finding the agency was immune because it had not waived its sovereign immunity and that Maxson was personally immune because his actions were within the scope of his employment. The court of appeals agreed, noting that "we observe that from the record it appears that Taylor has filed a separate action in circuit court that relates directly to her open records request. Any damages pursuant to the [Open Records Act] to which Taylor may be entitled would be covered by that suit." Taylor alleged Maxson had violated the ORA's three-day time limit for a response. The court observed that "the question of whether compliance with this portion of the act is ministerial or discretionary has not yet been decided by our appellate courts." However, the court pointed out the General Assembly had clearly indicated that "suits based on violations of the Open Records Act, including the time provisions, [are] to be brought against the state agencies themselves and not against the individuals employed by those agencies." The court indicated that "the content of [Maxson's] response to the Attorney General action [was] discretionary, and therefore, immune from suit. Nothing in the Open Records Act sets out how an agency is required to respond to the Attorney General as part of a records appeal." (*Antoinette C. Taylor v. James Chesnut Maxson*, No. 2014-CA-000743-MR, Kentucky Court of Appeals, Feb. 19)

Maryland

A court of appeals has ruled that identifying information about doctors and administrators named in materials required to be filed with the state to qualify to operate a surgical abortion facility is protected by the catch-all exception in the Public Information Act because its disclosure would not be in the public interest. Andrew Glenn requested application materials filed by abortion clinics operating in Maryland from the Department of Health and Mental Hygiene. The department disclosed most of the records but redacted names of individuals who were listed as owners, administrators, and medical directors of each facility, arguing that it "was in the public interest to deny access to those particular pieces of information." Glenn filed suit and the trial court sided with the agency, as did the court of special appeals. Acknowledging that withholding identifying information about the operators of facilities was unusual in typical circumstances, the court of appeals observed that "because of the history nationally of harassment and violence associated with the provision of abortion services, there is a palpable basis for concern that releasing the redacted information would jeopardize medical professionals from practicing within this particular field, which would deter ultimately access to women who seek an abortion in Maryland. The risk of violence is not speculative and is based on the ample evidence presented." The court concluded that "we are convinced that the redaction in the present case was necessary to avoid a substantial injury to the public interest." (*Andrew Glenn v. Maryland Department of Health and Mental Hygiene*, No. 48 Sept. Term 2015, Maryland Court of Appeals, Feb. 22)

New York

A court of appeals has ruled that the trial court erred when it declined to award attorney's fees to the Acme Bus Corporation for its FOIL litigation against Suffolk County for its refusal to provide records on successful bidders to provide transportation services in four zones for children with special needs. Acme applied for the contract. The county informed Acme that it had awarded the contracts for the four zones to other companies and identified the companies. Acme then requested records about the request for proposal.

The county denied the request, telling Acme to wait until the contracts were actually executed. After unsuccessfully appealing the decision administratively, Acme filed suit and the county disclosed the records. The trial court then dismissed Acme's motion for attorney's fees. The court of appeals reversed, noting that "inasmuch as the petitioner eventually received the documents it sought, it 'substantially prevailed' in this case. Moreover, the respondents had no 'reasonable basis for denying access' to the records that the petitioner requested." The court added that "that circumstance in itself militates in favor of the award of reasonable attorney's fees. Although the respondents professed to be acting to protect the integrity of the competitive bidding process, they did not set forth any facts supporting their contention, but made only a conclusory assertion that delay in disclosure achieved that goal. Entities subject to the requirements of FOIL should not be permitted to evade them on a bare assertion that—contrary to the bedrock underpinnings of FOIL—withholding documents is in the public interest. In the context of the awarding of public contracts, even short delays in disclosure may have deleterious effects because the timelines for challenges for awarding of public contracts are so short." (*In the Matter of Acme Bus Corp. v. County of Suffolk*, No. 16-01171, New York Supreme Court, Appellate Division, Second Department, Feb. 17)

Ohio

The supreme court has ruled that a request for the addresses of homes in Cuyahoga County where a child was found to have elevated blood lead levels would require the county to disclose protected health information. Lipson O'Shea Legal Group requested records showing the addresses of homes with children with elevated blood lead levels. The county filed a suit for a declaratory judgment to determine whether the records were protected by an exemption for health information that would identify an individual. The trial court ruled in favor of the county, but the appeals court reversed, finding that the county had not shown that the records could not be redacted. At the supreme court, the court noted that it had previously ordered the disclosure of non-identifying records concerning elevated blood lead levels, but that under these circumstances Lipson O'Shea's request was so specific that to respond would require providing addresses of children who had elevated blood lead levels. The court pointed out that "it is undeniable that the address of a home where a child has an elevated blood lead level can be used to identify the afflicted child. Even if it were possible to comply with the request by redacting protected health information, the release of merely the address of a house in response to the public-records request at issue means that a child at the house had elevated blood lead levels, which is protected health information." In closing, the supreme court indicated that Lipson O'Shea could rephrase its request in such a way as to obtain non-identifying information, but that would require a different request than the one at issue. (*Cuyahoga County Board of Health v. Lipson O'Shea Legal Group*, No. 2014-0223, Ohio Supreme Court, Feb. 18)

Texas

A court of appeals has ruled that two witness statements made to an investigator from the Office of Inspector General for the City of Houston are not protected by the attorney-client privilege because there is no evidence that they were given by individuals covered by the privilege. Three employees were investigated by the OIG for misconduct. The attorney for one of the employees requested records, including the witness statements of the other two employees. The City asked the Attorney General's Office for an opinion and the AG concluded the two witness statements were not privileged. The City then filed suit challenging the AG's opinion. Siding with the AG, the court of appeals noted that "the only evidence in this record pertaining to the capacity in which the OIG operated supports that of 'investigator' rather than 'attorney' and—even assuming that the attorney capacity is a reasonable inference from the evidence in the record, there is no evidence that the employees at issue knew of this capacity or made their statements to the OIG investigator for the purpose

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of effectuating legal representation for the City." (*City of Houston v. Ken Paxton*, No. 03-1500093-CV, Texas Court of Appeals, Austin, Feb. 23)

The Federal Courts…

A federal court in Illinois has ruled that the Department of Homeland Security properly withheld the identification of the names of organizations included on the Tier III list used to assess whether an individual has ties to terrorism that would disqualify them from admission to the United States under **Exemption 7(E) (investigative methods and techniques)**, but that information about date of birth and nationality for otherwise non-identified asylum applicants is not protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The Heartland Alliance National Immigration Justice Center, a Chicago-based organization providing information and legal aid to immigrants seeking refuge in the U.S., requested information related to Tier III terrorist organizations as defined in the Immigration and Nationality Act. The agency provided some records. Unsatisfied with the agency's response, Heartland Alliance filed suit. The parties were able to resolve all their disputes except for those surrounding 90 Exemption Worksheets that contained information about whether an applicant was affiliated with a Tier III organization, whether the applicant's affiliation made him or her inadmissible, and whether the individual received an exemption from the inadmissibility finding. The agency withheld the names of the Tier III terrorist organizations on the basis of Exemption 7(E). Heartland Alliance argued the names of the organizations did not qualify as either techniques or procedures. The court agreed, but indicated that the names qualified instead as guidelines that could be protected under Exemption 7(E). Heartland Alliance contended that the agency had failed to show how disclosure would risk circumvention of law. The court, however, observed that "given how information on Tier III organizations is collected, coupled with the documented cases in which immigration applicants have lied about or omitted their association with Tier III organizations, it is reasonable that the release of all Tier III organization names, not just the ones revealed through the course of litigation, could influence applicants to misrepresent or conceal their past or present involvement with foreign organizations." The court rejected the agency's attempt to withhold date of birth and nationality information about applicants under Exemption 7(C). The court noted that "without a link or connection to an individual person, the privacy concerns in this case are low to nil." The court added that "plaintiff does not request the applicants' names; it only wants age and nationality information for a statistical review on the treatment of minors and to discern any 'disparate impact' on applicants based on their national origin. Plaintiff's request follows the spirit of the FOIA, which is 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.'" (*Heartland Alliance National Immigration Justice Center v. United States Department of Homeland Security*, Civil Action No. 12-9692, U.S. District Court for the Northern District of Illinois, Eastern Division, Feb. 17)

Judge Reggie Walton has ruled that the Office of the Director of National Intelligence and OPM properly invoked **Exemption 7(E) (investigative methods and techniques)** to withhold portions of a revised version of the Federal Investigative Standards, which provides standards for security and background investigations, and the appendix entitled the Expandable Focused Investigation Model. The FIS and the EFI Model were requested by William Henderson, who runs a personnel security consulting firm. Henderson argued that the 1986 FOIA amendments revised Exemption 7(E) in such a way that the ruling in *Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982) finding that Exemption 7 applied to both civil and criminal law enforcement matters was no longer good law. Walton dismissed the claim, noting that "the Court is unaware of any indication that, after *Pratt*'s recognition of the applicability of Exemption 7 to records compiled for both civil and criminal law enforcement purposes, Congress acted to reject this understanding of Exemption 7's

scope." Indicating that the background investigation materials clearly qualified under Exemption 7, Walton pointed out that "the defendants have amply demonstrated a 'rational nexus' between the background investigation techniques and each agency's responsibility to prevent potential bad actors from obtaining security clearances and access to government technologies and facilities, and a 'connection' between potential bad actors and the risk of a breach of security," Once he found the records qualified under Exemption 7's threshold, Walton easily found the records were covered by Exemption 7(E). He agreed with the agency that "the very purpose of the FIS and EFI Model—to ensure that unsuitable individuals do *not* gain access to sensitive government positions, facilities, technologies, clearances, or information—would be defeated if they were disclosed to the public." Walton found the agencies had also conducted an adequate **segregabiliy analysis**. He pointed out that "the Court is not persuaded by the plaintiff's contention that, merely because the defendants released additional information from the FIS after their initial decision to withhold the entire document the defendants' representations regarding segregability at this juncture are insufficient." (*William Henderson v. Office of the Director of National Intelligence and Office of Personnel Management*, Civil Action No. 15-103 (RBW), U.S. District Court for the District of Columbia, Feb. 25)

A federal court in New York has ruled that the amount of menthol in each brand of cigarette constitutes a trade secret and that the FDA properly invoked **Exemption 3 (other statutes)** and **Exemption 4 (confidential business information)** to withhold the information from Kyle Rozema. The Family Smoking Prevention and Tobacco Control Act gave the FDA regulatory authority over tobacco products. Under the statute, tobacco product manufacturers are required to provide a range of information about their products, including a list of all ingredients. This includes a requirement that manufacturers provide a list of all constituents in their products that have been identified by the FDA as harmful or potentially harmful (HPHC list). FDA has published a list of 93 harmful or potentially harmful constituents, which is required to be made public. Menthol is not on the HPHC list. A provision of the Tobacco Control Act, 21 U.S.C. § 387d, allows for withholding any information that manufacturers provide to the FDA that would fall within the parameters of Exemption 4. The FDA denied Rozema's request under both Exemption 3 and Exemption 4 and after he filed suit, the tobacco manufacturers intervened to block disclosure. Rozema's primary argument was that Exemption 3 and Exemption 4 did not apply in this case because the Tobacco Control Act required publication of the menthol levels because Congress had directed the Tobacco Products Scientific Advisory Committee, created by the Tobacco Control Act to advise the FDA on tobacco safety issues, to study the harmful effects menthol and, by implication, had determined that menthol was a potentially hazardous ingredient. The court found that the Tobacco Control Act placed the final authority to determine whether an ingredient was potentially harmful with the FDA. The court noted that "FDA was tasked with establishing a list of HPHCs in each tobacco product 'by brand and by quantity in each brand and subbrand,' and placing the list on public display 'in a manner determined by' FDA. Pursuant to its authority, FDA has not identified menthol (as of the date of the Decision and Order) as an HPHC." In a footnote, the court further observed that "regardless of its policy imperatives and the mechanism codified to accomplish those imperatives, the [Tobacco Control Act] contains a nondisclosure provision applicable to a specific class of information. This fact alone, undercuts Plaintiff's unsupported argument that Congress intended tobacco-related information obtained by the FDA under § 387d to escape the reach of any withholding statute or exemption from FOIA. To the extent that Plaintiff may be understood to argue that tension exists between FDA's duty to publish HPHC quantities by product brand and subbrand, on the one hand, and FOIA's exemption for trade secrets, on the other, that tension simply does not exist because menthol is not an HPHC as defined by FDA." Having dismissed Rozema's claim that the Tobacco Control Act required disclosure of menthol levels, the court found the menthol levels were protected by Exemption 4. However, the court rejected an alternative ground put forth by the tobacco manufacturers that the records were also protected because they qualified as having been voluntarily submitted under the standard articulated in *Critical Mass*. The court noted that "the Second Circuit

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has not adopted this amendment to the [confidential business information] test, and this District has never applied it. As a result, the Court declines Defendants' invitation to apply it here as an alternative, independent basis for concluding that menthol quantities are not subject to disclosure." (*Kyle Thomas Rozema v. U.S. Department of Health and Human Services and the U.S. Food and Drug Administration*, Civil Action No. 14-0495, U.S. District Court for the Northern District of New York, March 2)

A federal court in California has ruled that the Department of Homeland Security has not yet justified its claims that records concerning its decision to allow George Gibney, an Irish-national swimming coach accused of sexual abuse, to enter and reside in the United States may be withheld under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(F) (harm to any person)**. Investigative journalist Irvin Muchnick requested records on Gibney as part of an investigation into sexual abuse in amateur sports. The agency located Gibney's alien file and withheld 98 pages. Noting that "apart from boilerplate recitations of FOIA exemption law, the DHS index almost exclusively repeats a few general asserted grounds for withholding documents," the court indicated that "boilerplate explanations for withholdings—like those provided by DHS here—are improper, and efforts must be 'made to tailor the explanation to the specific document withheld.' DHS's declaration supporting the index provides no additional details." The court found the agency's **segregability analysis** was also inadequate. Sending the case back to the agency for further justification, the court observed that "between DHS's failure to segregate any information and its inadequate Vaughn Index, the Court cannot approve its decision to entirely withhold the 40 documents in dispute here." (*Irvin Muchnick v. Department of Homeland Security*, Civil Action No. 15-3060 CRB, U.S. District Court for the Northern District of California, Feb. 24)

A federal court in West Virginia has ruled that the FBI properly responded to Eric Lapp's request for records concerning procedures for public housing authorities to access the FBI's fingerprint database for purposes of background checks by telling Lapp that it was unable to search for the records requested and had no obligation under FOIA to create records responsive to his request. Lapp, the owner of Fingerprint Solutions, a company specializing in acquiring, storing, and submitting fingerprints to authorized recipients, made a multi-part request to the FBI for records about access to its fingerprint database by Originating Agency Identifiers, a nine-character identifier developed by the FBI and assigned to qualified agencies to access the agency's Criminal Justice Information Services database. The agency told Lapp it had no way to search for the records. Lapp appealed to OIP, which affirmed the FBI's decision, explaining to Lapp that agencies were not required to create records to respond to a FOIA request. Lapp then appealed to OGIS. In response to OGIS's efforts, the FBI disclosed 119 pages to Lapp, which were responsive to two subparts of his request. For the records disclosed, the agency withheld ORIs under **Exemption 7(E) (investigative methods or techniques)**, claiming disclosure might allow criminals to gain insight into how to access the FBI's fingerprint database. Lapp called the claim ludicrous, but the court agreed with the agency, noting that "the Court discounts Lapp's underestimation of the criminal element and gives deference to the declarations of FBI professionals in this area over the bare conclusory assertions of Lapp. Furthermore, the Court is confounded by Lapp's assertion that, just because a criminal actor would have to jump over additional hurdles, the FBI is required to give them a boost over the first hurdle by releasing the ORIs." The court explained the sensitivity of the ORIs, indicating that "the ORIs are compiled to provide authorized users access to criminal databases at the FBI." As to whether the agency was required to compile records in response to other portions of Lapp's request, the court pointed out that "the FBI would be required to 'dig out' the answer to Lapp's questions regarding the channelers used and number of fingerprint submissions from a variety of locations, as well as requiring them to research outside the FBI. Moreover, it would require them to perform calculations relating to the number of fingerprint submissions based on accounting data inside and outside the FBI. This is beyond what the FOIA requires." Lapp also requested **attorney's fees**, arguing that the FBI's disclosure of the 119 pages occurred on

the last day on which the agency was required to respond to his complaint. The court found Lapp had not substantially prevailed and that the FBI's disclosure of the 119 pages occurred as the result of OGIS's involvement and not because of Lapp's suit. (*Eric M. Lapp v. Federal Bureau of Investigation*, Civil Action No. 14-160, U.S. District Court for the Northern District of West Virginia, Feb. 23)

A federal court in Connecticut has ruled that the FBI conducted an **adequate search** for records concerning alleged phone calls made by Russell Peeler that might provide evidence to challenge his state murder conviction. Peeler challenged the validity of certain phone calls that were part of his state trial. He requested records from the FBI concerning any phone calls to his number that had been collected as the result of a subpoena issued to AIMS Communications, Peeler's phone carrier. The agency indicated it had records responsive to the subpoena, but a more detailed search concluded that none of the records contained calls to Peeler's phone number. The court indicated that "the [file] pertaining to this investigation [involving AIMS Communications] lists various subpoenas. There is no indication that every subpoena listed [in the file] was served, however, or that records were received in response to every subpoena that was served." The court noted that "the FBI searched the plaintiff's file, including all other related subfiles, by hand but could not locate any records relating to his pager number from January 1999. Thus, the FBI reported that no records were found." The court pointed out that "the plaintiff's unsupported belief that records must have been received in response to the AIMS Communications subpoena is insufficient to render the search inadequate." (*Russell Peeler v. Federal Bureau of Investigation*, Civil Action No. 15-169 (DJS), U.S. District Court for the District of Connecticut, Feb. 23)

Judge Christopher Cooper has ruled that the Criminal Division of the Justice Department properly withheld records concerning the authorization for specific wiretaps used in the conviction of Sammie Woods under **Exemption 3 (other statutes)** and **Exemption 5 (privileges)**. Woods was convicted of possession of cocaine with intent to distribute in the District of Colorado. He requested the authorization memos for the wiretap. The Criminal Division indicated the records were protected by Exemption 3. Woods appealed to OIP, which affirmed the Criminal Division's exemption claim and added Exemption 5 as a basis for withholding the memos. Cooper agreed that the applications for wiretaps were properly withheld. He noted that "Woods has not come forward with any evidence that any of the Title III documents he seeks have been unsealed [by the authorizing court] or were the subject of sworn testimony." As to the Exemption 5 claims, he observed that "although the logging notes 'possess a partially administrative character,' the fact that they were compiled in anticipation of a specific criminal prosecution qualifies them as attorney work product." (*Sammie Lee Woods v. Electronic Surveillance Unit*, Civil Action No. 14-01713 (CRC), U.S. District Court for the District of Columbia, Feb. 22)

A federal court in Florida has ruled that the FBI is not required to search for a DNA match from a sample obtained during Dwaun Guidry's trial in Texas for assault and kidnapping. Guidry had been a police officer in Texas when he was tried and convicted. He contended that the DNA sample might help him appeal his case. As a result, he made a FOIA request to the FBI for a manual keyword search of its forensic database. The FBI rejected the request as not properly describing records subject to FOIA and OIP upheld that decision. Guidry, who is incarcerated in federal prison in Florida, filed suit. The agency first argued that Guidry was not a legal resident of Florida and that the case should be transferred to Texas. While the court agreed with the agency that Guidry's place of incarceration did not establish legal residency, the court declined to transfer the case since it had already been briefed by both parties. Instead, the court found Guidry's request was improper, noting that "Mr. Guidry is requesting the FBI run a comparison search of the DNA database to look for a

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possible match to any of the DNA samples obtained during his criminal investigation. That is not the same as producing a record that already exists. Instead, requesting the FBI to perform a comparison is to create a record which is not a proper FOIA request." The court also found that Guidry had already litigated the issue of whether the government had an obligation to test the DNA sample and was now barred by *res judicata* from pursuing the same relief here. (*Dwaun Jabbar Guidry v. James B. Comey*, Civil Action No. 15-23-RH/CAS, U.S. District Court for the Northern District of Florida, Feb. 4)

A federal court in Ohio has dismissed Keith DeWitt's FOIA suit against the IRS for lack of **jurisdiction**. DeWitt, a federal prisoner incarcerated in South Carolina, requested all 1099-C forms with his name and social security number. He received a response from the IRS in Kansas City indicating the search for his records had been completed. However, he never received any documents and subsequently sued in Ohio, claiming he was a citizen of Ohio. Dismissing his suit on venue grounds, the court noted that "although Plaintiff alleges that he is a citizen of Ohio, he is presently incarcerated in federal custody in South Carolina. He therefore presently resides in South Carolina, not Ohio." The court observed that "because [FOIA's jurisdictional provision] hinges jurisdiction to the complainant's residence, Plaintiff's present residence in South Carolina does not establish that this Court has jurisdiction over his complaint. Additionally, the other possible districts that have jurisdiction over the complaint are not in Ohio. The complaint does not allege that plaintiff has a principal place of business in Ohio. The complaint also does not allege that the IRS records he seeks are in Ohio. The complaint instead indicates that he received a letter from the IRS in Kansas City, Missouri and that he has written follow-up letters to the IRS in Kansas City. It appears that district courts in Missouri may have jurisdiction over Plaintiff's complaint. More clearly, under the express language of [FOIA's jurisdictional provisions] district courts in the District of Columbia have jurisdiction over Plaintiff's complaint." (*Keith W. DeWitt, Sr. v. Commissioner of Internal Revenue*, Civil Action No. 16-00021, U.S. District Court for the Southern District of Ohio, Western Division at Dayton, Feb. 26)