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## In this Issue



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 Senate passed the "FOIA Improvement Act of 2016" (S. 337) March 16, meaning that both houses of Congress have approved FOIA amendments similar to those that failed at the end of the last session. In a speech during Sunshine Week, Sen. Patrick Leahy (D-VT) indicated that he was confident that President Barack Obama would sign FOIA amendments once they passed the entire Congress. A White House spokesman later confirmed that Obama intended to sign legislation modeled after the Senate bill, but also urged Congress to make itself subject to FOIA, a long-time criticism of the statute by the executive branch. The Senate legislation would codify the presumption of openness from the Obama and Holder memos, cap the use of the deliberative process privilege to documents more than 25 years old, and improve procedures for requesting information online. A 2014 Justice Department memo highly critical of the FOIA amendments then being considered in Congress surfaced during Sunshine Week after it was disclosed to the Freedom of the Press Foundation in response to a FOIA suit the organization filed against DOJ. One aspect of the memo challenged the constitutional underpinnings of OGIS, a reflection of a strong but unspoken distrust of the organization by the executive branch.*

## Court Finds FOIA Provides Remedy For Lack of Affirmative Disclosure

In a case that explores the limitations of FOIA's equitable relief, Judge Amit Mehta, while ultimately rejecting CREW's attempt to enforce the affirmative publication requirements of Section (a)(2) under the Administrative Procedure Act, has instead held up hope that FOIA itself can provide the equitable remedy CREW sought.

CREW has been one of the leading public interest litigators to force the Justice Department's Office of Legal Counsel to disclose most of its opinions, which many people outside the government consider to be binding final legal opinions. OLC has consistently argued that its opinions are frequently privileged legal advice to client agencies, and, further, not binding on the agencies. When OLC has issued

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opinions that are particularly controversial—such as its infamous torture memo during the Bush administration—or that shed light on legal topics that are currently in the news—such as the President's appointment powers—open government organizations like CREW have requested the opinions under FOIA with quite limited success since courts have found such opinions either qualify for protection under the attorney-client privilege or the deliberative process privilege. With that experience in mind, CREW took another rarely used approach, sending a letter to the Justice Department demanding that OLC opinions that were binding on the executive branch be affirmatively made public under Section (a)(2), which requires agencies to make available for public inspection and copying "(1) final opinions. . .made in the adjudication of cases and (2) those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register." DOJ responded that OLC's opinions contained confidential legal advice that was not subject to Section (a)(2) publication requirements. DOJ indicated that OLC released opinions on a case-by-case basis pursuant to a FOIA request. CREW then filed suit, citing both the APA and FOIA as the basis for its claim that the agency's refusal to make the OLC opinions available under Section (a)(2) was arbitrary and capricious. In response to an order from Judge Emmet Sullivan, who originally was assigned the case, to amend its complaint to clarify the relief sought and the legal basis for such relief, CREW amended its complaint, dropping FOIA as a basis for its claim and relying solely on the APA. While CREW demanded the agency make the OLC opinions available through Section (a)(2) publication, it also asked for an injunction prohibiting DOJ from misinterpreting what constituted a final opinion or statement of policy.

Mehta first framed the question, noting that "although this case is ostensibly about DOJ's alleged non-compliance with FOIA, because Plaintiff challenges DOJ's actions only under the APA, it must satisfy the APA's predicate requirements for bringing suit. A key limitation on the *availability* of review under the APA is the *unavailability* of any 'other adequate remedy in a court' to challenge the disputed agency action." DOJ argued that there was no way to enforce the Section (a)(2) requirements except by challenging them through a FOIA request. Mehta observed that DOJ's claim was that "neither 'a FOIA claim directly under Section 552(a)(2)' nor 'some other claim such as an APA claim,' is available to remedy a violation of Section 552(a)(2)." CREW replied that relief through an individual request was not sufficient because Section (a)(2) required agencies to proactively make public final opinions and statement of policy and that goal could not be accomplished through individual requests.

Mehta examined several cases decided less than a decade after FOIA became effective for clues about the kind of equitable relief that could be provided to a plaintiff making a Section (a)(2) challenge. DOJ relied on *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969), as the primary basis for its position. Gulick requested a memorandum relied upon by the agency in adjudicating his case. In ruling against Gulick, however, the three judges on the D.C. Circuit panel agreed the agency was not required to disclose the memo, but could not agree on why. But the primary opinion concluded that the remedy for a Section (a)(2) violation was to make a FOIA request and then file suit if the requester was not satisfied. Mehta noted that in 1969 a court had the authority to enjoin an agency from withholding records, which was subsequently amended in 1974. Three years after *Gulick*, the D.C. Circuit relied on that decision in its ruling in *Irons v. Schuyler*, 465 F.2d 608 (D.C. Cir. 1972). Irons had sued the U.S. Patent Office to force it to make available under Section (a)(2) unpublished manuscript decisions as well as an index of such decisions. Citing *Gulick*, the D.C. Circuit decided that Irons was required to make a FOIA request for such records and that in this case Irons had failed to request identifiable records. The saga did not end there, however. Irons filed a petition for rehearing, arguing the panel had mistakenly relied on *Gulick*. In a "Supplemental Opinion on Petition for Rehearing," the D.C. Circuit largely agreed, indicating that the three separate opinions in *Gulick* made it difficult to rely on it as a precedent. The D.C. Circuit observed that "the opinions and orders referred to in Section 552(a)(2), when properly requested, are required to be made available, and that such requirement is judicially enforceable *without further identification under Section 552(a)(3)*, even though the agency has failed to make them available as required by Section 552(a)(2)."

Mehta then pointed out that *Irons* lent support to DOJ's claim in one respect, but contradicted it in another respect. He explained that "*Irons* makes clear that an action to enforce an agency's alleged non-compliance with Section 552(a)(2) is available under FOIA—specifically, through a suit that invokes federal court jurisdiction under Section 552(a)(4)(B)." But, Mehta indicated, "*Irons* stands for the proposition that to enforce the requirements of Section 552(a)(2), a plaintiff need not first make a request under Section 552(a)(3). Rather, the request can be made directly under Section 552(a)(2), as long as the request, like those made under Section 552(a)(3), is for 'identifiable' records." CREW cited *Public Citizen v. Lew*, 127 F. Supp. 2d 1 (D.D.C. 2000), for support of its claim that actions other than those for withholding records were reviewable under the APA. Mehta noted that "but *Public Citizen* offers Plaintiff no help. As *Irons* makes clear, an action to enforce disclosure under Section 552(a)(2) *does* fall within the scope of Section 552(a)(4)(B), and thus the standards of FOIA, not those of the APA, are applicable to this suit."

Agreeing with DOJ's claims on the limitations of FOIA, CREW argued that FOIA's "remedial provision is inadequate here—and therefore its suit is *not* precluded under the APA—because the only relief it affords is compelled disclosure of records specifically requested by and withheld from a FOIA requester." Mehta was not nearly as certain as the two parties. He noted that "the statute itself provides district courts with the authority 'to enjoin the agency from withholding agency records *and* to order the production of any agency records improperly withheld from the complainant.' The statute's use of the conjunctive 'and' suggests that district courts have the power to issue injunctive relief beyond merely compelling disclosure of records."

Pointing to *Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1988), as evidence of the authority of the courts to provide equitable remedies under FOIA, Mehta pointed out that "the court need not, however, decide the extent of a district court's equitable powers under FOIA's remedial scheme to conclude that, in this case, FOIA provides an adequate remedy, thus precluding review under the APA." He observed that "FOIA, of course, affords complainants who bring suit under Section 552(a)(4)(B) a *de novo* review of the agency's withholding of information." He indicated that even if CREW was required to make multiple requests to achieve its goals that relief, no matter how imperfect, was a remedy of sorts. He pointed out that "it is hard to conceive that, if this court or, more likely, the Court of Appeals, were to conclude that certain OLC opinions are subject to the disclosure requirements of Section 552(a)(2), DOJ would not modify its policies, thereby ameliorating the need for serial requests and litigation." He noted that both the attorney's fees and sanctions provisions would likely encourage DOJ to change its policy under those circumstances. (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 13-01291 (APM), U.S. District Court for the District of Columbia, March 7)

# Views from the States…

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

## Indiana

A court of appeals has ruled that the campus police department at the University of Notre Dame is subject to the Access to Public Records Act because it qualifies as a law enforcement agency under the statute. But while the appeals court found the police department was subject to the APRA it indicated that Notre

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Dame, a private university, was not a public agency for purposes of broader application of the APRA to its records. As part of its investigation into the way large universities treat student athletes, ESPN requested incident reports from Notre Dame. The university refused to respond to the request because it was not a public agency subject to the APRA. ESPN complained to the Public Access Counselor, who concluded that, although the office had found that Notre Dame was not a public agency in three prior orders spanning a decade, in this case the records qualified as law enforcement records subject to the statute. When Notre Dame continued to resist ESPN's requests, ESPN filed suit. The trial court agreed with Notre Dame that because it was not subject to the APRA its police department was also not subject to the access statute. But the court of appeals indicated it was not so straightforward. Pointing out that the statute included "any law enforcement agency" in its definition of public agency, the appeals court noted that "the Police Department fits within the definition because it was acting as a governmental entity by exercising a governmental function." The court added that "it is clear that the Police Department exercises governmental, public functions even though it was established by a private entity. It would be inappropriate for the Police Department, having availed itself of its statutory right to exercise these public functions, to then be able to circumvent public records requirements to which all other entities exercising such functions are required to adhere." The court observed that "it is possible for a subdivision of a private entity to be considered a public agency under APRA for purposes of public disclosure relating to its exercise of a public function without subjecting the entire private entity to APRA." The court then sent the case back to the trial court to determine what, if any, records were disclosable. The court pointed out that "we cannot, as ESPN requests, order the Police Department to produce the records that ESPN sought because we are not able to determine whether those records are accessible under APRA." (*ESPN, Inc. v. University of Notre Dame, Security Police Department*, No. 71A05-1505-MI-381, Indiana Court of Appeals, March 15)

## Kentucky

A court of appeals has ruled that data vendor Roger Hurlbert's suit challenging Boone County's fee regulations that the county claimed allowed it to charge a $2 per record fee for each of its 48,000 real property tax assessments may continue even after the county disclosed the records without cost because it is still possible the county will continue to charge Hurlbert such a rate in the future. After the county told Hurlbert it would release the records after he paid $96,000, Hurlbert filed suit, arguing that the fee being assessed by the county bore no relationship to the cost of providing the records. The county then released the records without any reference to cost and asked the trial court to dismiss the case because it was now moot. The trial court agreed with the county and Hurlbert appealed, arguing that his challenge to the county's fee policy still remained. The appeals court noted that "rather than being moot, the issue of payment appears to be in remission and capable of reviving." Allowing Hurlbert's challenge to continue, the court noted that "the Revenue's fee guidelines against [Hurlbert], the underlying issue concerning the propriety of those guidelines in light of the governing statutes, remains a question of a public nature likely to recur in other cases and in other counties." (*Roger W. Hurlbert v. Office of the Boone County Property Valuation Administrator*, No. 2015-CA-000052-MR, Kentucky Court of Appeals, March 11)

## Louisiana

A court of appeals has ruled that the East Baton Rouge Sheriff's Office failed to show that information redacted from a criminal report concerning a 1973 murder investigation was protected by the exemption for confidential sources. Emily Posner, a public defender representing a prisoner in post-conviction appeals, requested an unredacted copy of the criminal incident report. The East Baton Rouge Sheriff's Office claimed the redactions remained exempt because they concerned a confidential source. To carry its burden, the Sheriff's Office provided an affidavit from a deputy who worked with confidential informants. Finding the affidavit was insufficient, the court of appeals noted that "there must be some showing that in providing

information, the informant requested that his or her identity be kept secret or confidential and such a showing may even be made by the law enforcement agency asserting the privilege. However, short of such a showing, information otherwise designated as confidential by a law enforcement agency is not entitled to invoke the privilege provided under [the public records act] for non-disclosure." ( *Emily H. Posner v. Sid J. Gautreaux, III*, No. 2015 CA 1196, Louisiana Court of Appeal, First Circuit, March 3)

## Massachusetts

A trial court has ruled that 2013 amendments to the public records law expanding the definition of public records means that the Retirement Board of the Massachusetts Bay Transportation Authority Retirement Fund, which the supreme judicial court had found in 1993 was not subject to the public records law, is now subject to the statute and that all of its records, not just those created since 2013, may be requested. In response to requests made by the *Boston Globe* since the 2013 amendments became effective, the court found the requests were not barred by a number of procedural and constitutional challenges. Rejecting the Fund's claim that the amendment had an impermissible retroactive effect on its records, the court pointed out that "a statutory amendment changing the scope of a public records law or freedom of information act 'merely affects the propriety of this prospective relief and is therefore not impermissibly retroactive,' even though it has the effect of increasing or restricting access to pre-existing documents or information." (*Boston Globe Media Partners, LLC v. Retirement Board of the Massachusetts Bay Transportation Authority Retirement Fund*, No. 1484CV01624, Massachusetts Superior Court, Suffolk County, March 9)

## New York

A court of appeals has ruled that the New York Department of Health and Mental Hygiene properly withheld the identity of a mohel involved in a ritual Jewish circumcision that resulted in the infant contracting herpes simplex virus type I under the privacy exemption. Paul Berger, a reporter for the Jewish Daily Forward, requested the name of the mohel, who had been identified in the health alert prepared by the department. The department denied Berger's request because it claimed the information related to an individual's medical condition and because disclosure would constitute an invasion of privacy. Berger filed suit and the trial court dismissed the case. The appeals court noted that the trial court had used the wrong standard for assessing Berger's challenge, but found that the record was properly withheld under the privacy exemption. The appeals court noted that "inherent in Berger's request for 'the name of the mohel who infected an infant with HSV-1 during ritual circumcision in December 2012' is that the mohel is himself infected with, or a carrier of, the HSV-1 virus. Thus, the petitioner's argument that they are not requesting the mohel's 'medical history,' but only his name, is without merit. Inasmuch as that information is undeniably 'information that one could reasonably expect to be included as a relevant and material part of [the mohel's] proper medical history,' it is 'medical history' within the meaning of [the exemption]." (*In the Matter of Paul Berger v. New York City Department of Health and Mental Hygiene*, No. 2016-01667, New York Supreme Court, Appellate Division, Second Department, March 9)

## Pennsylvania

A court of appeals has ruled that copies of pornographic emails sent from email addresses in the Office of the Attorney General are not records subject to the Right to Know Law. Brad Bumsted, the capitol reporter for the *Pittsburgh Tribune-Review*, requested copies of pornographic emails sent by employees in the Office of the Attorney General, which were part of an investigation into the misuse of government computers. Noting that it had recently rejected a nearly identical request from the *Philadelphia Inquirer*, the court pointed out that "given that the request seeks emails of a 'pornographic' nature, the requested emails cannot relate to any OAG 'transaction' or 'activity.' Although the emails may violate OAG policy, the OAG is not required under the

RTKL, to disclose such records simply because an agency email address is involved." The court added that even if it were to accept that the emails were public records, they would be protected by the non-criminal investigation exemption. The court observed that "the request in itself establishes that the documents are related to an investigation internal to the OAG as it calls for emails 'which were part of Special Deputy H. Geoffrey Moulton's review,' thereby indications that an investigation is underway, and that disclosure of such documents is contrary to the RTKL's provisions." (*Pennsylvania Office of Attorney General v. Brad Bumsted*, No. 2097 C.D. 2014, Pennsylvania Commonwealth Court, March 15)

A court of appeals has ruled that telephone records of Centre County District Attorney Stacy Parks Miller are not judicial records because the DA's office is not a judicial agency. Centre County decided to provide telephone records of Miller and several judges in response to Right to Know Law requests. Miller filed suit to block the county from disclosing her phone records, arguing that she was a judicial agency not subject to the RTKL. Reversing the trial court's injunction blocking disclosure of the records, the appellate court noted that "the DA ignores the functional differences between clerks of courts and prothonotaries, who serve the courts in an administrative capacity, and district attorneys who litigate the controversies before judges." The court observed that "thus, the function of the DA's Office to enforce the law is prosecutorial in nature, not judicial." (*Stacy Parks Miller v. County of Centre*, No. 856 C.D. 2015 and No. 857 C.D. 2016, Pennsylvania Commonwealth Court, March 15)

### Virginia

Gov. Terry McAuliffe has abandoned his plan to substitute a much narrower amendment instead of the legislature's much broader bill amending FOIA in reaction to a recent Virginia Supreme Court decision in which the court ruled that once an agency had properly claimed an exemption it had no obligation to further review the records for purposes of determining if there was non-exempt information that should be disclosed. In a case brought by Sen. Scott Surovell for records concerning the procedures for conducting executions, the Supreme Court reversed a finding of the trial court that a manufacturer's manual on the electric chair did not qualify for the security exemption. Instead, the Supreme Court ruled that once the department showed the records fell within the exemption, it was not obligated to determine if some of the information could be disclosed. Because the Virginia Freedom of Information Act has a segregability requirement much like that in the federal FOIA, agencies are required to further review records to determine if any portions can be released, Legislators and open government advocates immediately criticized the decision and moved quickly to amend the statute to clarify that agencies were required to disclose non-exempt information. But McAuliffe decided the Supreme Court's decision was limited to its facts and that the amendment went too far. As a result, he substituted a narrower amendment for the broader amendment passed by the legislature. Reaction to McAuliffe's amendment was universally negative and several days later McAuliffe backed down and agreed to sign the legislature's original amendment.

## The Federal Courts...

Judge Rosemary Collyer has asked the EPA to provide more information about its FOIA-related IT technology to help settle a dispute between the agency and the Competitive Enterprise Institute over when CEI's emailed appeal was actually received by the agency. CEI requested emails or text messages sent by the Office of General Counsel concerning EPA Administrator Gina McCarthy's use of text messages. EPA eventually disclosed 1,702 documents, but withheld records under **Exemption 5 (privileges)**. The agency told CEI that it could appeal and provided address information, including an email address at hq.foia@epa.gov. CEI sent its appeal to the email address on Thursday, January 8, 2015. EPA's FOIA Online tracking software

issued an acknowledgement letter to CEI's counsel on Monday, January 12, 2015 informing him that the appeal had been received on that date. CEI filed suit on February 6, 2015 after the 20 working days deadline had expired by its calculation. On February 10, 2015, EPA notified CEI that it was taking a ten-day extension to process the appeal because of unusual circumstances. CEI then argued that EPA had missed the deadline for notifying CEI and that its request for an extension was invalid. EPA claimed CEI's suit was premature because the 20-day time limit had not yet expired. Collyer noted that while FOIA's exhaustion requirement was jurisprudential rather than jurisdictional, "the detailed structure of FOIA supports application of this jurisprudential doctrine, making prior exhaustion required before suit." CEI argued that the agency's claim that it took four days to receive an email was implausible and that the agency identified two different dates in its affidavits, suggesting the possibility of bad faith on the part of the agency. Adding to the agency's problem was that it misidentified the time limit for completing an appeal, relying instead on the 10-day time limit that requires an agency to respond to a request within ten days of its receipt. Collyer pointed out that the agency was confusing the time limits for responding to a request with those for responding to an appeal, which are not the same. She noted that "appeals are governed by clause (ii), not by clause (i). The date that EPA's 'appropriate component' received the appeal—which it argues was January 12, 2015—is immaterial for present purposes. What matters is the date that *the Agency* received the appeal." Collyer noted that "EPA directs FOIA appellants to send their appeals to an email address from which they are sorted and delivered internally. Notably, because EPA's argument does not distinguish between FOIA requests and FOIA appeals—or explain whether an email to its FOIA website is maintained by EPA or an outside vendor—the argument does not say when the Institute's appeal was received *by EPA* and, thus, whether the Institute's present lawsuit is premature." She indicated that the timeliness issue was not resolved by EPA's request for an extension because of unusual circumstances. She pointed out that *Oglesby v. Dept of Army* "concerned an agency's tardy response to a FOIA *request*, not a tardy response to an *appeal*." *Oglesby*, instead, stands for the proposition that once an agency has responded to a request before the plaintiff has filed suit, the requester is required to go through the appeals process before he or she can file suit. But the *Oglesby* decision specifically indicated that such a requester would then be eligible to file suit if the agency failed to respond to his or her appeal within the 20-day time limit. Collyer observed that "certainly, *Oglesby* did not erase an agency's ability to claim more time to handle an appeal due to unusual circumstances. Here, however, EPA may have notified the Institute too late. If so, under *Oglesby* the Institute's suit would not be premature." Sending the case back to EPA for further explanation, Collyer pointed out that "EPA does not explain the communications technology at work here, whereby a message emailed to a public address on a Thursday was somehow not delivered under the following Monday. Since there are possible explanations (outside contractors, technical limitations, etc.) for this seeming discrepancy but none is provided, the Court cannot determine on this record when the Institute's email was actually received by EPA. The threshold question of timeliness is therefore impossible to answer." (*Competitive Enterprise Institute v. United States Environmental Protection Agency*, Civil Action No. 15-215 (RMC), U.S. District Court for the District of Columbia, March 4)

A federal court in Tennessee has ruled that the SEC properly invoked **Exemption 7(A) (interference with ongoing investigation or proceeding)** to categorically withhold all records concerning its investigation of Walmart for violating the Foreign Corrupt Practices Act when it paid bribes to Mexican officials to facilitate Walmart's growth in Mexico. In December 2012, the *New York Times* published an article based on tens of thousands of documents related to Walmart's bribes to Mexican officials. In January 2013, a congressional committee publicly released internal Walmart documents it had acquired through its own investigation. In response, Walmart announced it had provided extensive documentation to the Justice Department and the SEC, including the documents the committee released. The law firm of Robbins, Geller, Rudman & Dowd made a FOIA request to the SEC for all records provided by Walmart to the agency that

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related to possible FCPA violations or Walmart's public disclosure concerning such possible violations. The SEC denied the request under Exemption 7(A). When the law firm sued, the agency divided the records into three categories and explained to the court than none of them could be disclosed. Robbins Geller argued the agency had not shown the prospect of enforcement proceedings. Noting that "the SEC must only establish that 'there is at least a reasonable chance that an enforcement proceeding will occur,'" the court found the agency had done so. The law firm contended that one category—records received from Walmart—was too vague. The court noted, however, that "the fact that the first category encompasses a variety of types of documents produced by Walmart does not render it a non-functional category. Although there are different types of documents contained in the category, they are all documents that were in Walmart's possession that the SEC believed were important to its investigation." Concluding that the category was appropriate, the court observed that "requiring the SEC to reveal more details about the information Walmart has provided to it could reasonably be expected to interfere with its enforcement proceedings." Robbins Geller asserted that the agency could not withhold records Walmart had itself disclosed publicly. But the court pointed out that "the SEC has not officially acknowledged *any* portion of the records that are in its investigative file. Although Walmart chose to make public statements about documents it claims it produced to the SEC, based on its own interests, that choice does not obligate the government agency charged with conducting investigations and bringing charges based on violations of federal law to *itself* divulge what documents it has obtained from a subject of the investigation." The law firm also argued that the disclosures made by the *New York Times* and Congress diminished the likelihood that disclosure would harm enforcement proceedings. But the court noted that "although some of the documents released by the *New York Times* and Congress may be contained in the SEC's investigatory file, the SEC's release of those documents in response to a FOIA request will unavoidably reveal the SEC's 'selection process.'" The court explained that "the motivations and interests of a private company subject to an investigation by a government agency, journalist, and Congress, are far different than those of the government agency tasked with investigating and bringing legal actions against those who have violated the law." The court rejected the law firm's claim that the SEC was required to provide a *Vaughn* index to justify its claims that no information could be **segregated** and disclosed. The court noted that "although an agency's use of the categorical approach to show that the withheld documents fit into FOIA Exemption 7(A) does not discharge its obligation to consider whether any portion of the records are reasonably segregable, an agency need not create a *Vaughn* index to account for the agency's determination that none of the responsive records are reasonably segregable. Requiring the government to provide a *Vaughn* index for purposes of its segregability analysis would eviscerate the policy considerations that have led courts to conclude that the government need not provide such an index to show that its withholding of responsive FOIA documents is justified under Exemption 7(A)." (*Robbins, Geller, Rudman & Dowd, LLP v. United States Securities and Exchange Commission*, Civil Action No. 14-2197, U.S. District Court for the Middle District of Tennessee, Nashville Division, March 12)

Judge James Boasberg has ruled that the U.S. Postal Inspection Service has now shown that it conducted an **adequate search** for records concerning Gregory Bartko, a securities attorney and broker who was convicted of mail fraud and security-related charges, and that it properly withheld 238 pages under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)**. While Boasberg had previously found the agency's affidavits insufficient to justify its claims, this time, after conducting an *in camera* inspection, he upheld the agency's claims. Bartko argued the agency had not shown that it expanded on its search methodology. Boasberg pointed out that "in one sense, then, Bartko is correct; the agency has not altered its search methodology. It has, however, fully described that methodology in two affidavits and, most importantly, has incanted the 'magic words' concerning the adequacy of the search—namely, the assertion that USPIS searched *all* locations likely to contain responsive records." Bartko claimed the search was inadequate because he had uncovered emails and other records the agency had not disclosed. Boasberg indicated that "Bartko does not

identify a particular database or set of records that he believes the agency has not, but should have, searched, so even if the emails and notes he points to were inadvertently overlooked, they do not evince an insufficient search." Bartko also complained that the agency had not searched for records about his co-conspirators and an Assistant U.S. Attorney who prosecuted the case. Boasberg noted that "[Bartko's request] expressly states that records must be related to Bartko's name or other identifier assigned to him. It does not mention anyone else. The plain language of the request—no matter how liberally construed—simply does not support Bartko's current position that the agency was required to search for files related to" his co-conspirators. Bartko contended there was a public interest in disclosure that outweighed any privacy interest, while the agency argued that Bartko's personal interest in the records vitiated any public interest. Boasberg indicated that "the mere fact that Bartko may also have a personal interest in the misconduct he believes plagued his criminal prosecution does not, standing alone, eliminate the public's general interest in uncovering patterns of prosecutorial misconduct." Boasberg noted, however, that "the privacy interests asserted outweigh any potential public interest that might be served by releasing the withheld materials." Boasberg rejected Bartko's claim that some records had already been made public. Boasberg observed that "absent specific identification of substantially identical records already released, the Court finds Plaintiff's public-domain argument does not alter the calculus that permits USPIS to withhold relevant records." (*Gregory Bartko v. United States Department of Justice, et al.*, Civil Action No. 13-1135 (JEB), U.S. District Court for the District of Columbia, March 3)

A federal court in California has ruled that the FBI properly withheld information about two publicly-identified confidential informants that the DEA and FBI used to help gather incriminating evidence against Michael Schultz, who was convicted of drug charges in Hawaii. The two informants—Shane Ahlo and Steven Olaes—were identified during Schultz's trial, but the government did not rely on their testimony. Instead, Schultz's primary complaint was that the government had used the two informants to entrap him. The court first pointed out that because the two informants had been identified at trial the agency could not claim the exclusion in section (c)(2) for confidential sources who have not been publicly identified. Nevertheless, the court noted that loss of the (c)(2) exclusion only required the agency to process records generated during the investigation. The court indicated that "from a practical perspective, this means that Defendant is obliged to acknowledge the existence of responsive records that contain, for example, the criminal history of either Alho or Olaes that were generated during the investigation and prosecution of Plaintiff's criminal case, but not similar documents that may have been generated either before or after the involvement of the two informants in the investigation and prosecution of Plaintiff." The FBI claimed that **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** protected most of the records still in dispute. The court turned to *Roth v. Dept of Justice*, 642 F.3d 1161 (D.C. Cir. 2011), a case in which the D.C. Circuit found a public interest under the facts of the case in disclosure of potential exculpatory evidence. But applying the standard articulated in *Roth*, the court found Schultz had not met the standard. The court noted that "Plaintiff has failed to show there is any concern of a *Brady* violation and Plaintiff has presented no evidence of official misconduct beyond bare allegations of misconduct." Turning to the FBI's claim that no information be **segregated** and released, the court observed that "based on the scope of what Plaintiff requested and the scope of information that is subject to [the claimed exemptions], there is no conceivable information that would be responsive to Plaintiff's FOIA requests as originally worded, that would not be properly withheld under Exemptions 6/7(C)." (*Michael F. Schultz v. Federal Bureau of Investigation, et al.*, Civil Action No. 05-0180 AWI GSA, U.S. District Court for the Eastern District of California, March 3)

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Judge Royce Lamberth has ruled that the FBI properly withheld records concerning an investigation of the Los Angeles county jail the existence of which was revealed in a *Los Angeles Times* article under **Exemption 7(A) (interference with ongoing investigation or proceeding)** and that the American Association of Women has failed to show that the documents entered the public domain as a result of the *Times* article. The Association requested records about the investigation after the *Times* article appeared. The FBI withheld them all under Exemption 7(A). The Association then appealed to OIP, which upheld the agency's decision, finding that portions of the records were also exempt under **Exemption 3 (other statutes), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods and techniques)**. Lamberth found the records included evidentiary and investigative materials, communications coordinating the activities of various law enforcement agencies, and communications allowing the FBI to monitor the progress of the investigation. He found that all three categories fell within the parameters of Exemption 7(A) and added that he was satisfied with the agency's explanation of why there were no segregable records. Lamberth agreed with the agency that all its other exemptions were appropriate as well. The Association's primary argument was that the *Los Angeles Times* article served as a public acknowledgment of the existence of the records and, thus, the exemption claims were waived. Lamberth was unconvinced. He noted that "the news article references, as plaintiff underscores, two general types of sources. Defendant's record search produced three specific records. This discrepancy makes it difficult to find a connection between the information allegedly reviewed by the L.A. Times and the records identified in defendant's records search." Assessing the Association's argument, Lamberth pointed out that "plaintiff supports its argument mostly through negative inference and conjecture of a nature unsatisfactory to the Court to allow a finding in plaintiff's favor. Specifically, plaintiff states first that since the records 'relate to the decision not to inform the L.A. County Sheriff about the existence of a federal investigation, the records could not have been procured from the L.A. County Sheriff's office.' While there may be a certain comfortable logic to this contention, such logic is not proof that the records did not come from the L.A. County Sheriff's office. Nor does it prove that such were the subject of an officially acknowledged documented disclosure." Citing *National Security Counselors v. CIA*, 960 F. Supp. 2d 101 (D.D.C. 2013), the Association argued the burden of proof had shifted to the agency to show there had not been a public disclosure. Lamberth rejected the claim, noting that "the Court sees nothing in the record sufficient to carry plaintiff's burden that the information contained in its request is identical to that described in the article. The burden therefore remains with plaintiff." (*American Association of Women, Inc. v. U.S. Department of Justice*, Civil Action No. 14-2136 (RCL), U.S. District Court for the District of Columbia, March 7)

Resolving a case that began more than 15 years ago and involved two remands from the D.C. Circuit, Judge Reggie Walton has ruled that the DEA and the Marshals Service properly withheld records from prisoner Elwood Cooper concerning his prosecution and conviction in the Southern District of Florida on drug charges under several subparts of **Exemption 7 (law enforcement records)**. Because of the length of time it took to resolve the case, a primary contention was whether Exemption 7 could be used as a substitute for the now-abandoned risk of circumvention prong previously recognized under **Exemption 2 (internal practices and procedures)**. The ubiquitous use of the risk of circumvention prong previously recognized under Exemption 2 until the Supreme Court rejected its use in *Milner v. Dept of Navy*, 562 U.S. 562 (2011), is particularly stark in this case because all of the kinds of information the agencies had withheld clearly fell within the parameters of Exemption 7 and looking back there appears to be little reason for the agencies to have claimed Exemption 2 as well. But because they had, they were required to reassess that use, which resulted in them abandoning reliance on Exemption 2 altogether. Walton had no trouble finding that personally-identifying information in these law enforcement records, code numbers, and confidential sources easily qualified for protection under Exemption 7. Finding the personally-identifying information was protected under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, Walton

rejected Cooper's claim that the information pertained to government misconduct. Walton pointed out that "while the plaintiff alleges that he seeks the information to investigate potential prosecutorial impropriety, his bare and undeveloped allegations do not support a reasonable belief that the alleged misconduct might have occurred. Nor has the plaintiff adequately explained how the disclosure of the information would be probative of the prosecutor's alleged misconduct. After all, the plaintiff already knows the names of the government agents whom he accuses of conspiring to entrap him." Walton also approved the DEA's withholdings under **Exemption 7(D) (confidential sources)**. He pointed out that the agency's "representations more than adequately establish that the source of the redacted information is protected by Exemption 7(D), as it is reasonable to infer that the information provided was in connection with the DEA's drug importation and distribution investigation of plaintiff." Walton upheld the agency's **segregability** claims as well with the exception of a single document which he found the agency had not adequately described. (*Elwood J. Cooper v. United States Department of Justice*, Civil Action No. 99-2513 (RBW), U.S. District Court for the District of Columbia, March 14)

A federal court in New Jersey has ruled that the Department of Veterans Affairs conducted an **adequate search** for records requested by Dom Wadhwa, but that it has not yet justified withholding an 827-page report under **Exemption 6 (invasion of privacy)**. The court approved of the agency's use of a *Glomar* response neither confirming nor denying the existence of disciplinary records related to named individuals, but rejected the use of a *Glomar* response for non-specific individuals. Wadhwa requested a number of items pertaining to Title VII violations that occurred at the Philadelphia VA Medical Center, including disciplinary records for several identified individuals. His request was handled by several people in the VA and the agency responded by withholding records under Exemption 6 and **Exemption 5 (privileges)** as well as issuing *Glomar* responses for those parts of Wadhwa's request for disciplinary records. While he challenged the agency's search, the court noted that "he objects to the reasons the documents were withheld, a matter wholly separate from whether or not the FOIA officers conducted an adequate and reasonable search." The bulk of the exemption claims related to the agency's decision to withhold the 827-page file of discrimination complaints. But the court pointed out that "without more information that reasonably describes the contents of the 827 pages, the Court cannot say as a matter of law that withholding the documents was appropriate under Exemption 6. For this same reason, the Court similarly cannot determine whether the Department properly withheld documents under Exemption 5." The court agreed with the use of a *Glomar* response for requests for disciplinary records on named individuals. The court observed that "if the Department were to confirm the existence of responsive documents, it necessarily reveals that the individuals have been the subject of disciplinary proceedings." But as to Wadhwa's more generic requests for disciplinary-related information, the court indicated that "Plaintiff is not seeking records for a named individual but rather is seeking records for *any* individual. Although the Court can imagine that such records would contain personally identifiable information exempt under at least one FOIA exemption, it is unclear why, as the Department argues, confirming or denying the existence of documents responsive to the 'removal or *proposed* removal, or any other incident/disciplinary action cited as Title VII violation of any employee. . .would cause harm to a named individual when Plaintiff does not name any individual in [his request]. Even if a Glomar response is appropriate, or if a FOIA exception otherwise applies, the Department has not met its burden in demonstrating as much to the Court." (*Dom Wadhwa, M.D. v. Secretary, Department of Veterans Affairs*, Civil Action No. 15-2777 (RBK-KMW), U.S. District Court for the District of New Jersey, March 11)

Judge Colleen Kollar-Kotelly has ruled that Wilfredo Gonzalez-Lora's **Privacy Act** and FOIA claims both relate back to a 2000 request he made to DEA at the time he was being tried for intent to distribute cocaine and heroin. Gonzalez-Lora filed a FOIA request in 2013 for exculpatory records he claimed the DEA

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had failed to disclose to him at the time of his trial. The agency argued that both his Privacy Act and FOIA claims were barred by **collateral estoppel**, which precludes relitigating issues previously tried and decided by a court involving the same parties, and **res judicata**, which precludes subsequent litigation when the issues were decided on the merits in a prior suit involving the same parties. Kollar-Kotelly noted that Gonzalez-Lora "readily admits that the prior action pertained to his demand for records from the DEA under the FOIA in 2000 and included his challenge to the DEA's reliance on the Privacy Act in withholding certain of the records he requested. Both cases arise from the same nucleus of facts—the DEA's response to [his FOIA/PA request]—and involved the same parties, and the court entered a final judgment on the merits of the claim. In so doing, the court necessarily decided issues of fact and law to support its judgment in defendant's favor in the prior lawsuit. Plaintiff cannot now relitigate the same cause of action or the issue of the DEA's compliance with the FOIA with respect to his 2013 FOIA request." (*Wilfredo Gonzalez-Lora v. U.S. Department of Justice*, Civil Action No. 15-0718 (CKK), U.S. District Court for the District of Columbia, March 10)

Judge Rosemary Collyer has accepted the FBI's explanation for why it did not search for records about Joseph Ladeairous using his social security number. After Ladeairous challenged the agency's search, the FBI conducted a second search using his social security number and provided an affidavit explaining why it had not searched for his social security number the first time around. The FBI told Collyer that "a search solely by a requester's social security number is generally not performed. Rather, a requester's social security number is used 'as a means of confirming that any records located through a search of a subject's name [are], in fact, about the subject.' The FBI's name-only search failed to locate responsive records; consequently, searching by Mr. Ladearious' social security number 'or any other identifier' became a moot point 'because there were no records that [the Record/Information Dissemination Section] needed to confirm were actually about plaintiff.'" Dismissing the case, Collyer noted that "now that the FBI has searched its main and cross-reference files by Mr. Ladearious' name and social security number, and has provided a reasonable explanation for the initial omission of the social security number as a search term, the Court finds that the FBI made 'a good faith effort to conduct a search for the requested records, using methods, which can reasonably be expected to produce the information requested.'" (*Joseph Michael Ladeairous v. United States Department of Justice*, Civil Action No. 14-643 (RMC), U.S. District Court for the District of Columbia, March 9)

Judge Beryl Howell has ruled that EOUSA conducted an **adequate search** for records pertaining to the conviction of Patrick Thelen and properly withheld nearly half of the responsive records under **Exemption 3 (other statutes), Exemption 5 (privileges)**, and **Exemption 7 (law enforcement records)**. Thelen had been tried and convicted in the Eastern District of Michigan and EOUSA focused its search at the U.S. Attorney's Office there. Thelen challenged the search by indicating EOUSA had not located lab reports analyzing the drugs found at his residence. Howell noted that "neither the EOUSA's failure to produce particular documents nor the plaintiff's 'mere speculation that as yet uncovered documents might exist,' undermines the adequacy of the EOUSA's search. The plaintiff's challenge pertains only to the results of the EOUSA's search, and such an assertion alone does not overcome the defendant's showing on summary judgment." The agency had withheld grand jury transcripts under Rule 6(e) on grand jury secrecy. Thelen argued that because grand jury materials were shared with him and his defense counsel and because the police detective who testified at his trial had also testified before the grand jury the grand jury proceedings had become part of the public domain. Howell disagreed, pointing out that "disclosure of grand jury materials to the plaintiff and his defense counsel in the context of the criminal proceedings does not amount to release of information into the public domain. The fact that the same witness testified before the grand jury and at trial does not establish that specific information withheld by the EOUSA in this FOIA action duplicates information that already has made its way into the public domain via [the detective's] trial testimony." Noting

that Thelen had not challenged the Exemption 5 withholdings, Howell indicated that they qualified for protection under both the deliberative process privilege and the attorney work-product privilege. Howell then found the remaining claims made under various subparts of Exemption 7 were appropriate. She rejected Thelen's claim that **Exemption 7(C) (invasion of privacy concerning law enforcement records)** did not apply because the information had become public during his trial for the same reasons she had rejected his claims pertaining to grand jury secrecy. (*Patrick Thelen v. United States Department of Justice*, Civil Action No. 15-0102 (BAH), U.S. District Court for the District of Columbia, March 12)

Judge Amy Berman Jackson has ruled that EOUSA properly withheld records concerning the recusal of an Assistant U.S. Attorney and his replacement with another in the Southern District of Florida and any information as to how the change related to the trial of Hector Orlansky. EOUSA withheld the records under **Exemption 5 (privileges)**. Jackson noted that "the Court finds the emails to be attorney work product and, thus protected from disclosure under exemption 5." She added that "nevertheless, the Court finds that defendants properly asserted the deliberative process privilege as well since the withheld emails reflect the agency's 'back and forth discussions,' pondering potential 'outcomes of [the AUSA's] recusal from certain matters." Orlansky said he really wanted to know why the AUSA recused himself. Jackson observed, however, that "FOIA authorizes access to existing agency records notwithstanding the requester's need or purpose and it confers limited jurisdiction on the court 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.' Consequently, the Court cannot compel defendants 'to answer questions. . or to create documents or opinions in response to [plaintiff's] request for information.'" (*Hector Orlansky v. Department of Justice*, Civil Action No. 15-06499 (ABJ), U.S. District Court for the District of Columbia, March 9)