Volume 42, Number 7
March 30, 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: A survey of FOIA responses by the Associated Press has found that agencies redacted information in 596,095 responses in 2015, more than 77 percent of all requests. That figure includes 250,024 requests for which agencies either found no records, the requester refused to pay assessed fees, or an agency determined that a request was not perfected. The AP noted that the White House routinely excludes such cases from its calculations, allowing it to claim that it released all or parts of records in 93 percent of requests. Analyzing what figures culled from agency annual reports mean in context is a useful exercise and frequently shows that agencies are disclosing far less information than they claim, largely because redaction of personal information has become so routine that most responses have at least some redactions. The inability of agencies to find records in so many cases is a serious issue, but it probably says more about agencies' lack of searchable records systems than it does about attempts to evade FOIA. So many agencies are dependent on initial database searches which may or may not yield any hits. That, however, reflects a failure in database design that has serious downstream effects on the accuracy of such searches. . .Judge Beryl Howell has been named chief judge of the U.S. District Court for the District of Columbia, replacing Judge Richard Rogers after he resigned suddenly last month.

Court Rules Attorneys' Notes Are Agency Records

In a decision that has far-reaching effects on what records qualify as agency records, Judge Randolph Moss has ruled that notes taken by SEC attorneys during meetings and phone conversations are not categorically exempt from FOIA because they are personal records rather than agency records. While the distinction between agency and personal records comes up in litigation only occasionally, as a matter of interpretation agencies generally assume that notes taken by an employee to memorialize an exchange are personal to that employee and are not agency records unless specifically relied upon by the agency.

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Instead of a presumption that the notes were personal, Moss concluded the notes were taken by the attorneys as part of their jobs and reflected work done for the agency, not for their personal convenience. Moss noted that "what little evidence the SEC has submitted shows that the notes 'facilitated the day-to-day operations of the' SEC's review of the transaction, whether or not they were incorporated into the official file that was created to accompany that review. It is thus incorrect to assert that the notes were created for the '*personal* convenience' of the attorneys; it is more accurate to say that they were created for the attorneys' '*professional* convenience.' Such records are not categorically shielded from FOIA's reach, whether or not they were distributed within the agency. To make distribution the centerpiece of the 'agency records' analysis cannot be squared with the purposes of FOIA."

The case involved multiple requests made by Richard Edelman for records concerning the SEC's decision to approve the formation of the Empire State Realty Trust, which converted ownership of the Empire State Building into a real estate investment trust. Edelman was a former investor in the Empire State Building and maintained a website that provides information to investors and the public about the conversion. Edelman eventually filed suit over six requests he had made for records pertaining to the transaction. Edelman had appealed the agency's failure to respond for several of the requests. The agency acknowledged that it had failed to respond within the statutory time limits and remanded most of his requests, all of which had been processed by the time Moss decided the case. The status of the attorneys' notes was part of the agency's response to Edelman's request for records concerning the agency's reviews of consumer complaints about the transaction.

The agency claimed that Edelman had failed to exhaust his administrative remedies for a request for confidential records submitted by the Empire State Realty Trust. Edelman had appealed the agency's failure to respond on time and the agency remanded the case for processing. Without reference to the remand, two weeks later the agency responded to the request, telling Edelman that it had found no records and that he had the right to appeal that decision. The next day, Edelman received a letter acknowledging the remand on appeal and indicating the agency would begin processing the remand. A week after that, Edelman received another letter from the agency explaining in more detail the basis for its no records claim and, again, indicating he had the right to appeal that decision. Edelman did not appeal.

The agency argued Moss did not have jurisdiction over the request because Edelman had failed to appeal before filing suit. Moss found that *Oglesby v. Dept of Army* applied in these circumstances. Moss explained that "if 'an administrative appeal is mandatory if the agency cures its failure to respond within the statutory period by responding to the FOIA request before suit is filed,' it stands to reason that the appeal is mandatory even if the agency's failure to respond initially is 'cured' only after a remand. . .Edelman cannot now rely on the SEC's initial failure to timely respond to the request to excuse his failure to file an appeal from the Commission's subsequent decision."

Turning to the records status of the attorneys' notes, Moss indicated that "surprisingly, it is an open question within this circuit whether notes taken by individual agency employees in the course of performing their official duties are 'agency records' subject to FOIA. The district judges who have considered the question have held, by and large, that they are not. . .[H]owever, the Court disagrees and concludes that FOIA and the relevant caselaw do not support the categorical exclusion of notes taken and used solely by individual agency employees from the statute's reach."

The Supreme Court first interpreted the statutory meaning of agency records in two cases—*Kissinger v. Reporters Committee*, 445 U.S. 136 (1980), and *Forsham v. Harris*, 445 U.S. 169 (1980)—ruling that to be subject to FOIA a record must be in the custody and possession of the agency. The Court tweaked that definition in *Dept of Justice v. Tax Analysts*, 492 U.S. 136 (1989), in which the Court ruled that records

obtained and controlled by an agency were agency records. Moss found that two D.C. Circuit decisions—*Bureau of National Affairs v. Dept of Justice*, 742 F.2d 1484 (D.C. Cir. 1984), and *Consumer Federation of America v. Dept of Agriculture*, 455 F.3d 283 (D.C. Cir. 2006), both of which involved appointment calendars—were the most relevant case law to the circumstances here. He pointed out, however, that both cases involved a mix of personal and agency information. He explained that "by contrast, the notes in this case contain no personal content whatsoever, or at least the SEC has not suggested that they do." He added that "the SEC merely argues that the notes are not agency records because, although the attorneys created them in furtherance of their official duties, they did so individually, not at the agency's behest."

Based on those two cases, Moss examined whether the SEC had control and use of the notes. He observed that "the SEC argues that it did not control the notes because the employees were not required to keep them. . .and they were not incorporated into the SEC's files. But the Commission's assertions rest on misunderstanding the law and facts. As a matter of law, it is not at all clear whether the Federal Records Act, or the SEC's regulations would have obligated the attorneys to maintain the notes that were the topic of Edelman's two requests." Moss pointed out that "it is difficult to imagine that the SEC does not at least require that its staff maintain some record of witness interviews." The agency also argued the notes were not integrated into the agency's files. Moss indicated that "it is hard to understand why it would matter, for purposes of FOIA, whether a document is kept on an attorney's agency computer or in her agency desk—at least to the extent the document concerns agency business rather than personal matters. Indeed, it is safe to assume that some of the most consequential records in the government have at times resided in individual offices rather than in agencies' centralized filing systems. Treating those records as beyond FOIA's reach cannot be squared with the statutory goal of 'opening agency action to the light of public scrutiny.'"

Moss recognized that his ruling might impact agency employees' willingness to take notes at all. But he indicated that "many of the notes that may be subject to the Court's interpretation will likely be exempt from disclosure under one of FOIA's statutory exemptions." Stressing that his ruling was limited, Moss observed that "all the Court concludes at this juncture is that the notes in this case are not categorically exempt from FOIA simply because they were maintained and used exclusively by their authors." (*Richard Edelman v. Securities and Exchange Commission*, Civil Action No. 14-1140 (RDM), U.S. District Court for the District of Columbia, March 29)

Views from the States…

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

California

The supreme court has ruled that a public body does not waive its ability to claim exemptions for records that are inadvertently disclosed. Reversing earlier rulings by the trial court and the court of appeals concluding that attorney Rachele Rickert was not obligated to return several documents she received as part of the City of Los Angeles' response to her California Public Records Act request for records pertaining to a civil suit brought by Estuardo Ardon because the City's disclosure waived any privilege. Rickert informed the City that she had received three documents that appeared to match the descriptions on privilege logs submitted by the City in Ardon's civil suit. The City asked her to return them and when she declined, claiming the City had waived its privilege by disclosing them, the City filed suit, arguing that such an inadvertent disclosure did not

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waive the privilege claim. While the trial court and court of appeals both concluded the disclosure waived the City's privilege, the supreme court reversed. The supreme court noted that "the Legislature intended to permit state and local agencies to waive an exemption by making a voluntary and knowing disclosure, while prohibiting them from selectively disclosing the records to one member of the public but not others." The court added that "the rule of construction [requiring courts to interpret the public records act in favor of disclosure] does not require the courts to resolve every conceivable textual ambiguity in favor of greater access, no matter how implausible that result in light of all the relevant indicia of statutory meaning. In this case, consideration of the statutory text, context, purpose, and history leave us with no genuine doubt that the Legislature did not intend for the Public Records Act's protections to be forfeited through simple inadvertence." (*Estuardo Ardon v. City of Los Angeles*, No. S223876, California Supreme Court, March 17)

A court of appeals has ruled that David Harrison is not entitled to fees for his suit against the San Diego County district attorney because the record he requested was disclosed as a result of unrelated litigation and not because Harrison filed suit. The district attorney declined to disclose a letter filed in a civil action because it had been sealed by the court. Harrison then filed suit. In the interim, an appellate court ruled in separate litigation that once a record was filed with a trial court it became a public record. As a result of the appellate decision, the district attorney released the document. Harrison continued with his Public Records Act suit, asking the trial court to award him fees. The trial court sided with the district attorney. The appellate court agreed that Harrison had not shown that his litigation caused the district attorney to disclose the letter. The court noted that "the District Attorney did provide the letter to Harrison, albeit after his petition was filed, but that the delay was attributable to the fact the letter had been ordered sealed by a court rather than because the District Attorney was refusing to produce it or was only producing it because of Harrison's petition." The district attorney argued that while Harrison's suit was not frivolous when first filed, it became frivolous once the district attorney disclosed the record in response to the appellate court decision. The appeals court pointed out that "even assuming Harrison's petition at some later time changed from a potentially meritorious action and became frivolous, the District Attorney cites no authority suggesting it was entitled to recover the costs it incurred during the period when the action was meritorious." (*David Scott Harrison v. San Diego County*, No. D068603, California Court of Appeal, Fourth District, Division 1, March 18)

Hawaii

The Office of Information Practices has ruled that the Hawaii Public Housing Authority Resident Advisory Board violated the Sunshine Law when it held a meeting without prior public notice. While OIP found the Board had violated the Sunshine Law, it recommended only that the Board study OIP's Sunshine Law training materials to make sure it did not violate the law in the future. OIP also found the Board's agenda was insufficiently detailed and pointed out that "the Board's future agendas [should] set forth detailed descriptions of agenda items, instead of just the titles of documents or events, or names of persons speaking or to be discussed at the meeting." OIP also indicated that the Board could not provide revised agenda material at the time of the meeting. OIP explained that "if the Board chooses to revise its agenda, it must obtain the requisite two-thirds vote of the Board's total membership, and it cannot add an item 'of reasonably major importance' that 'will affect a significant number of persons.'" (OIP Opinion Letter No. F16-012, Office of Information Practices, Office of the Lieutenant Governor, March 23)

Iowa

The supreme court has ruled that the open meetings law prohibits deliberations of a majority of the members of a public body through serial meetings with an employee who has been delegated the authority to speak on behalf of board members. The case involved the Warren County board of supervisors. The board

decided to improve the efficiency of the county government and hired an administrator to assist them with that task. The administrator met with board members separately, but acted as a conduit for discussions leading to recommendations which were presented for the first time at a public meeting at which the board adopted the recommendations, resulting in some employee terminations. Six employees sued the board, alleging that the board had improperly deliberated through the serial meetings. The trial court ruled in favor of the county government, finding that none of the serial discussions involved a quorum that would require a public meeting. The supreme court, however, reversed, finding that the administrator had been delegated the authority to deliberate on behalf of the board members and the public meeting had just rubber-stamped a decision that had already been made. The supreme court noted that "the supervisors concede they intentionally used the county administrator to facilitate discussion amongst themselves concerning various aspects of the reorganization and to negotiate an agreement concerning the precise details of the reorganization plan, as evidenced by the fact that the board never discussed the plan at an open meeting before they actually implemented it. The legislature clearly intended public bodies subject to the open meetings law to deliberate the basis and rationale for important decisions such as these, as well as the decisions themselves, during open meetings." The supreme court observed that "the open meetings requirements apply to all in-person gatherings at which there is deliberation upon any matter within the scope of the policy-making duties of a governmental body by a majority of its members, including in-person gatherings attended by members of a governmental body through agents or proxies." (*Peg Hutchinson, et al. v. Douglas Shull, et al.*, No. 14-1649, Iowa Supreme Court, March 18)

New Hampshire

The supreme court has ruled that cast ballots are exempt from disclosure under the Right to Know Law. Deborah Sumner asked the New Hampshire Secretary of State to allow her to review 71 ballots cast during a 2012 election in the town of Jaffrey to determine why those ballots were rejected. Rejecting Sumner's claim, the supreme court noted that "given that New Hampshire's ballot exemption statutes promote the State's compelling interest in the integrity, fairness, and efficiency of elections, and the state law incorporates public oversight into the vote counting process, we find that, on balance, the State's interest outweighs the public's interest in access. We therefore hold that the ballot exemption statutes are reasonable restrictions under [state law]." (*Deborah Sumner v. New Hampshire Secretary of State*, No. 2015-0340, New Hampshire Supreme Court, March 22)

New Jersey

A court of appeals has ruled that Signature Information Solutions, a data broker, is not entitled to attorney's fees for its Open Public Records Act suit against Jersey City Municipal Utilities Authority because it did not substantially prevail. Signature routinely requested municipal water billing and lien data from the Authority. The Authority contracted out its data management to United Water Jersey City. With help from United Water, the Authority printed copies of screen shots of the data, converted them to PDF, and disclosed them to Signature. Signature continued to receive the records in hard copy, but in 2014 Signature requested all Jersey City's utility billing data in electronic format. The Authority indicated its monthly PDF files contained all the information Signature requested, but that it was unable to provide the data electronically. After Signature filed suit, the Authority disclosed several of the most recent monthly PDF reports. The Authority subsequently concluded that it could reconfigure the software in such a way as to allow electronic access, but to do so would cost $3,851, which Signature would be required to pay as a special service fee. The trial court found that Signature was required to pay the service fee if it wanted to obtain the data electronically. Signature argued it was entitled to attorney's fees because the Authority had disclosed several monthly PDF files after suit was filed. The appeals court disagreed, noting that Signature "failed to establish a factual causal

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nexus between the litigation and the relief ultimately achieved—the August 2014 [monthly] report. Plaintiff rejected the August 2014 Report as not fully compliant with its OPRA request and continued the litigation. More importantly, the August 2014 report was not the relief plaintiff requested in [its] OPRA request. Rather, plaintiff requested data in a specific electronic format, which, undisputedly, was a format United Water did not routinely use, develop or maintain, and which required a substantial amount of manipulation or programming of information to develop. Plaintiff was only entitled to the data upon payment of the special service charge, which plaintiff never paid." The court found the request was overbroad. The court observed that "the May 2014 OPRA request was overly broad, as it requested all billing information for every property in Jersey City serviced by United Water and provided no beginning and end date." (*Signature Information Solutions, LLC v. Jersey City Municipal Utilities Authority*, No. A1503-14, New Jersey Superior Court, Appellate Division, March 18)

Tennessee

The supreme court has ruled that Rule 16 of the Tennessee Rules of Criminal Procedure qualifies as an exemption to the Public Records Act and prohibits non-defendants from obtaining criminal investigative records related to a specific prosecution until any post-conviction appeals are completed. The case involved the 2013 rape of a student in a Vanderbilt University dormitory, for which four members of the Vanderbilt football team were indicted. Brian Haas, a reporter for the *Nashville Tennessean*, submitted a Public Records Act request to the Metro Police for records concerning the investigation. The Metro Police denied his request, claiming the records were part of an open investigation and were protected under Rule 16(a)(2). The *Tennessean* clarified that it would not identify the victim without her permission. The *Tennessean* filed suit, joined by a number of other media organizations. The trial court ruled that records not reflecting the police's investigative efforts were public records. The court of appeals reversed, finding that all the records related to a pending or contemplated criminal action were protected by Rule 16. The supreme court agreed. The court noted that "Rules of Criminal Procedure constitute state law exceptions to the Public Records Act. Rule 16, as state law, controls the release of these records and provides for access to these records only to the parties to the criminal case—the State and the defendant. There is no provision in Rule 16 for release of discovery materials to the public." The court found that Rule 16 placed a necessary limiting restriction on disclosure of discovery materials. The court pointed out that "if Rule 16 did not function as an exception to the Act, a defendant would have no reason to seek discovery under Rule 16, but would file a public records request and obtain the *entire* police file, which could include more information than the defendant could obtain under Rule 16. Or, if the media could make a public records request and obtain the investigative files, then the defendant and potential jurors could learn about the State's case against the defendant by reading a newspaper or watching a television news broadcast. This absurd result was not intended by the Legislature and would have a negative impact on a police department's ability to investigate criminal activity and a defendant's ability to obtain a fair trial." (*The Tennessean, et al. v. Metropolitan Government of Nashville and Davidson County*, No. M2014-00524-SC-R11-CV, Tennessee Supreme Court, March 17)

The Federal Courts…

Judge Richard Leon has ruled that although the Justice Department failed to claim **Exemption 5 (privileges)** when the case was first before him, because the parties agreed that certain memos concerning the agency's decision not to prosecute former House Majority Leader Tom DeLay (R-TX) qualified as privileged, waiving the exemption claim would not serve the underlying policy restricting agencies from subsequently claiming exemptions not claimed originally. The case involved CREW's suit for records concerning the agency's decision not to prosecute DeLay. Leon had originally approved the agency's use of a *Glomar*

response neither confirming nor denying the existence of records. That decision was reversed by the D.C. Circuit, which remanded the case back to the agency for processing and then for Leon to determine the applicability of any exemption claims. CREW protested that DOJ had waived its ability to claim Exemption 5 because it had not done so the first time the case was before Leon. Leon found that the Criminal Division had indicated that it was relying on Exemption 5, but pointed out that "nowhere did defendant claim the FBI had also properly withheld records pursuant to Exemption 5, nor could it, as the FBI did not attempt to justify non-disclosure of any of its responsive records by asserting Exemption 5." As a result, Leon observed, "because it was not even hinted at in the first round of summary judgment, the issue of whether Exemption 5 is applicable to the FBI's material was not one plaintiff had the chance to contest or this Court had the opportunity to consider and therefore was not asserted in the original court proceedings." The FBI argued that forbidding it to invoke Exemption 5 under these circumstances would not serve the underlying policy of promoting judicial economy by addressing all the issues from the beginning, and prohibiting agencies from changing their exemption claims as the litigation progressed. Leon noted that "in general, permitting a defendant to raise a new claim of exemption for the first time at this late stage could result in dragging a plaintiff back to the starting line. But that is not the case here. Plaintiff does not dispute that Exemption 5 shields the material at issue from disclosure and therefore there is no occasion for delaying the process with presentation and consideration of fresh arguments about the applicability of the exemption." He added that "defendant's behavior is not consistent with gamesmanship. Defendant never withheld its general argument that the DOJ attorneys' 'distillation of facts, legal analyses, opinions, and recommendations about whether to prosecute certain individuals' falls within Exemption 5. That defendant now seeks to withhold similar material for the same reasons does not appear to be intentional sandbagging. . ." Leon found CREW had not shown that the identities of third parties linked to the investigation had been publicly disclosed to such an extent that their identities could not be redacted under either **Exemption 6 (invasion of privacy)** or **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. He indicated that "plaintiff does not point to any information in the public domain confirming the individuals whose names are redacted have been publicly associated specifically with the investigation into Mr. DeLay or into the precise conduct or events discussed on the pages with redacted names and identifying information." He then rejected CREW's contention that disclosure was in the public interest. He pointed that "while releasing the withheld names would provide more information about *Mr. DeLay's* conduct and associations, it is unclear from plaintiff's argument how doing so would serve the public interest in shedding light on how the *Department* conducted the investigation, the level of diligence and resources it put forth, and the amount of evidence it surmounted." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 11-592 (RJL), U.S. District Court for the District of Columbia, March 30)

Judge Christopher Cooper has ruled that researcher Ryan Shapiro's request for any records mentioning Nelson Mandela is specific enough to require both the CIA and the NSA to conduct a search. The CIA rejected the request as too broad and the NSA interpreted the request as asking for signals intelligence information on Mandela and issued a *Glomar* response neither confirming nor denying the existence of records. The CIA initially argued that a search for records on Mandela would be burdensome, but in court it asserted only that Shapiro's request did not reasonably describe the records he sought. Cooper sided with Shapiro instead, noting that "regardless of how onerous it might be to locate them, there can be no dispute about what items are being requested—records in the CIA's possession that 'mention' Nelson Mandela or his three listed aliases. . .Here, the subject of Shapiro's request is the *entirety* of each document that mentions Mandela, even if such references are fleeting and tangential. So compliance should involve virtually no guesswork. A record is responsive if and only if it contains Mandela's name (or those of his three listed aliases) or any descriptor obviously referring to him." The CIA pointed out that courts had previously rejected requests for records that "pertained to" or "related to" an individual or subject. But Cooper observed that

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"there is a difference in kind between requests for documents that 'mention' or 'reference' a specified person or topic and those seeking records 'pertaining to,' 'relating to,' or 'concerning' the same. FOIA's reasonable-description requirement does not doom requests that *precisely* describe the records sought, even if compliance might overwhelm an agency's response team." He explained that "whether Shapiro's request would require the CIA to expend an unreasonable amount of effort cannot be determined from his request alone, 'on its face.' Although an agency need not comply with unreasonably burdensome FOIA requests, it 'bears the burden to provide a sufficient explanation as to why such a search would be unreasonably burdensome.'" Cooper observed that "the CIA has done nothing of the sort here. In fact, it has overtly declined to file such a declaration, simply asserting in its legal brief that the documents Shapiro requested could not be 'located. . .with a reasonable amount of effort.' Because the scope of Shapiro's request is clear, this is plainly an argument that a satisfactory response would be too burdensome." He rejected the CIA's claim that agency employees would have difficulty determining which records systems to search. Instead, he noted that "FOIA does not require perfection, however." Turning to the NSA's response, Cooper agreed with the agency that to the extent records might reveal signal intelligence they were properly exempt and a *Glomar* response was appropriate. But he also found the agency had interpreted Shapiro's request too narrowly and ordered the agency to conduct a search for non-signal intelligence records that mentioned Mandela. Cooper dismissed Shapiro's contention that publicly available information established that Mandela had been the target of the agency's signal intelligence operations. Although Shapiro provided a number of public references, Cooper indicated that "these documents may well demonstrate that the NSA was, at some level, 'interested' in Nelson Mandela's activities as a prominent dissident and high-ranking political leader, they do not divulge whether the NSA 'has nor has not targeted Nelson Mandela or considered him to be of SIGNT interest.'" (*Ryan Noah Shapiro v. Central Intelligence Agency, et al.*, Civil Action No. 14-00019 (CRC), U.S. District Court for the District of Columbia, March 17)

The Fifth Circuit has ruled that the Sierra Club may intervene in a **reverse-FOIA** suit brought against EPA by Entergy Gulf States Louisiana, a power plant operator, to block disclosure of 21,685 pages responsive to two FOIA requests submitted by the Sierra Club for records pertaining to Entergy's power plants. The EPA had found that none of the 21,685 pages contained Entergy's confidential business information, but had also concluded that 18,000 of the pages might contain confidential business information of a variety of third-party contractors. The EPA indicated it would maintain the 18,000 pages as CBI until third-party determinations had been made, but that it would release the remaining 3,685 pages it had determined did not contain CBI to the Sierra Club. Entergy then filed its reverse-FOIA suit to block the agency from disclosing any records to the Sierra Club. EPA and Entergy agreed to stay the case pending completion of administrative review. The Sierra Club opposed the stay, but the district court granted the stay. The Sierra Club then filed a motion to intervene, which was initially granted by a magistrate judge, but rejected by the district court judge. The Fifth Circuit found that the Sierra Club's interests diverged significantly from those of the EPA. The appeals court noted that it is undisputed that a purpose of the stay is to potentially 'narrow significantly' the amount of documents at issue in the case. In other words, if EPA determines during the stay that a document contains third-party CBI, Entergy will remove that document from the case and no longer litigate whether EPA correctly determined that the document does not contain Entergy CBI. By advocating to stay the case in order to narrow the case, the parties made the stay impact the case beyond just delaying its resolution." The court added that "the fact that EPA is legally required to undertake the third-party CBI determination process and allegedly need's Entergy's assistance to do so does not mean that these interests cannot impact the case; nor does this fact mean that these interests cannot provide a basis for intervention when Sierra Club's interests diverge from these interests." (*Entergy Gulf States Louisiana, LLC v. United States Environmental Protection Agency*, No. 15-30397, U.S. Court of Appeals for the Fifth Circuit, March 17)

Judge Amit Mehta has ruled the IRS has so far failed to show that it responded fully to a multi-part request from Richard Goldstein, the son and chief beneficiary of the estate of philanthropist Samuel Goldstein for tax records concerning the estate and its subsequent trust as well as records pertaining to communications between Goldstein's former attorney, David Capes, and IRS officials related to Goldstein's alleged whistleblower role in informing the agency that his sister and another attorney involved with the estate failed to report capital gains in order to avoid paying taxes. Observing that the record before him was not particularly illuminating as to what the agency had done, Mehta rejected the agency's claim that some records were not processed under FOIA because the agency required requesters like Goldstein to use another access regime under Section 6103. Mehta pointed out, however, that in *Church of Scientology of California v. IRS*, 792 F.2d 146 (D.C. Cir. 1986), the D.C. Circuit concluded that Section 6103 was an Exemption 3 statute and that any withholdings made by the IRS under that statute could be challenged under FOIA. Mehta explained that "even though the IRS has established a separate 'non-FOIA' process for requesting tax returns, as opposed to all other types of records held by the IRS, it does not follow that an action challenging the denial of such tax returns is not subject to FOIA. To the contrary, *Church of Scientology* makes clear that the IRS must defend any withholding of tax returns under the procedural and substantive rules of FOIA." While the IRS found that Goldstein had a "relational interest" in the estate's tax returns, it concluded that he had not shown an appropriate "material interest" and thus was not entitled to access the estate's tax returns. But Mehta found the agency had ignored its own regulations requiring it to inform requesters like Goldstein as to why they were not entitled to access. He noted that "the IRS' regulations impose burdens not only on the requester, but on the IRS itself." He continued: "Because the IRS did not notify Plaintiff 'in what respect the request was deficient,' he did not have the opportunity 'to resubmit' his request 'for reconsideration.' Instead, the IRS unilaterally *assumed* Plaintiff's material interest in seeking the estate's tax records. The IRS cannot now claim that Plaintiff failed to perfect his request when according to its own regulations, it denied him the opportunity to do so." Mehta next found that while the IRS had properly concluded that Goldstein was not a "direct member" of his father's living trust, "it clearly erred in finding that he was not a beneficiary of the Samuel R. Goldstein Living Trust. He plainly was," which meant Goldstein could obtain access to the tax returns of the living trust. Turning to Goldstein's request for records pertaining to Capes' communications with the IRS about possible tax evasion, Mehta found the records were not subject to Section 6103. He pointed out that 'Plaintiff's request encompasses more than 'return information,' even if that term is broadly interpreted." (*Richard H. Goldstein v. Internal Revenue Service*, Civil Action No. 14-02186 (APM), U.S. District Court for the District of Columbia, March 25)

In a companion case, Judge Amit Mehta has ruled that the Treasury Inspector General for Tax Administration properly withheld personally-identifying information under **Exemption 6 (invasion of privacy)** about third parties mentioned in records concerning the IG's investigation of several IRS staffers who dealt with Richard Goldstein's attorney David Capes in relation to Goldstein's allegations that his sister and her attorney had evaded taxes on capital gains from their father's estate and trust, but that they since the records did not qualify as law enforcement records, the agency could not use **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Mehta also found that the agency had not shown that it had conducted a sufficient **segregability analysis** of the IG's records. Goldstein's suit against the IRS had included a request for records concerning Capes' interactions with the IRS, but the present suit stemmed from a request by Goldstein's current attorney, Scott Tufts, for records concerning the TIGTA's investigation regarding two IRS employees who met with Capes. The agency initially issued a *Glomar* response neither confirming nor denying the existence of records, but subsequently withdrew its *Glomar* response after determining that a TIGTA agent had told Tufts of the existence of the investigation. The agency, however, claimed that all 457 pages were exempt under Exemptions 6 and 7(C). Mehta rejected the agency's Exemption 7(C) claim, noting that "TIGTA has not offered any concrete evidence that would allow the court

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to conclude that the investigation and the responsive material it generated pertained to its law enforcement function, as opposed to its functions of investigating 'administrative misconduct.'" Having concluded that Exemption 7(C) was inapplicable, Mehta decided that Exemption 6 nevertheless protected the records. He dismissed Goldstein's claim that his whistleblower status enhanced his ability to obtain the records. He noted that "to the extent that Plaintiff argues that his mere status as a whistleblower entitles him to the responsive records, irrespective of the Exemption 6 balancing, Plaintiff has cited no legal authority for that proposition." Mehta found that Goldstein had not shown a public interest that would outweigh the individuals' privacy interest. He pointed out that "to be certain, the inconsistencies that Plaintiff discovered raise legitimate questions about the extent of Capes' interactions with the IRS and seemingly led TIGTA to conduct an investigation. But those facts alone would not cause a reasonable person to have more than a suspicion of impropriety by the government." Mehta indicated that the agency's segregability analysis was insufficient. He observed that "it largely parrots the elements of Exemption 6 and states without 'detailed justification,' but rather in 'conclusory' fashion, that no responsive documents are segregable. That may be so, but the court needs more information before it is satisfied that the agency has carried out its duty." Goldstein argued that he was entitled to access under the **Privacy Act** because the records pertained to his role as a whistleblower. Mehta pointed out that "it may be true that TIGTA's investigation of those employees arose out of Capes' contacts with the IRS and therefore the responsive documents likely in some way reference Plaintiff's counsel and his activities. But, even if Plaintiff's counsel's actions could be imputed to him, that fact alone does not make those records 'about' Plaintiff or prove that they 'pertain' to him." (*Richard H. Goldstein v. Treasury Inspector General for Tax Administration*, Civil Action No. 14-02189 (APM), U.S. District Court for the District of Columbia, March 25)

Judge James Boasberg has ruled that the Clean Water Act does not provide a disclosure requirement broader than that in **Exemption 4 (confidential business information)**. The Environmental Integrity Project requested records the EPA received from vendors of steam-powered plants as part of its revision of pollution-control regulations. Because all the information provided by the vendors had been claimed as confidential business information, the EPA withheld the records. Largely because the process of pre-notification review under FOIA would take so long, the Environmental Integrity Project decided to abandon any Exemption 4 challenge and instead argue that the 33 U.S.C. § 1318 of the Clean Water Act required EPA to disclose the records regardless of whether they constituted confidential business information under Exemption 4. EIP argued that Section 1318 authorized the agency to collect the data and then required it to make the data public except for information that qualified as trade secrets. EPA responded that it considered trade secrets in the CWA provision to include confidential business information that was not subject to disclosure. Boasberg, instead, looked to the Administrative Procedure Act to resolve the conflict. He noted that "because Plaintiffs rely exclusively on FOIA to supply both a cause of action and a source of relief, and because there is no dispute that the data is properly classified as confidential business information under Exemption 4, the only way Plaintiffs may succeed is if the CWA somehow modifies FOIA to preclude EPA's ability to invoke its exemptions." He pointed to language in the APA that indicated that a "subsequent statute may not be held to supersede or modify this subchapter. . .except to the extent it does so expressly." He indicated that "Plaintiffs cannot identify Congress's express intent to exempt the CWA from the general provisions of FOIA." He noted that another EPA-specific statute—the Toxic Substances Control Act—did have such express language. Reviewing the CWA provision more closely, Boasberg noted that "it functions not as an exemption from disclosure that *EPA* may invoke at will, but rather as a statutory bar against disclosure that may be invoked by *information providers*—here, power plants and vendors—if certain conditions are satisfied. . .[A] power plant may enjoin EPA from disclosing trade-secret information even if the agency would prefer its release." (*Environmental Integrity Project v. United States Environmental Protection Agency*, Civil Action No. 14-1282 (JEB), U.S. District Court for the District of Columbia, March 29)

Judge Royce Lamberth has granted Judicial Watch **discovery** in its FOIA suit against the Department of State for records concerning former Secretary of State Hillary Clinton's emails. Indicating that whether or not the State Department acted in good faith in responding to requests for Clinton's email remained an open question, Lamberth noted that "plaintiff is certainly entitled to dispute the State Department's position that it has no obligation to produce these documents because it did not 'possess' or 'control' them at the time the FOIA request was made. The State Department's willingness to now search documents voluntarily turned over to the Department by Secretary Clinton and other officials hardly transforms such a search into an 'adequate' or 'reasonable' one. Plaintiff is not relying on 'speculation' or 'surmise' as the State Department claims. Plaintiff is relying on constantly shifting admissions by the Government and former government officials. Whether the State Department's actions will ultimately be determined by the Court to not be 'acting in good faith' remains to be seen at this time, but plaintiff is clearly entitled to discovery and a record before this Court rules on that issue." Lamberth acknowledged the burdens of discovery in the context of the multiple suits filed against the agency. He indicated that discovery orders in this case would be tied to similar discovery orders in another Judicial Watch case in which Judge Emmet Sullivan has granted the organization discovery. (*Judicial Watch, Inc. v. Department of State*, Civil Action No. 14-1242 (RCL), U.S. District Court for the District of Columbia, March 29)

A federal court in California has ruled that the National Security Agency properly redacted portions of a single document responsive to EFF's request for development and implementation of a Vulnerabilities Equity Process—a set of protocols and principles used by the government in deciding whether and when to disclose computer security flaws—under **Exemption 1 (national security), Exemption 3 (other statutes)** and **Exemption 5 (privileges)**. At EFF's request, the court reviewed the document *in camera*, concluding the agency's claims were appropriate. Most of the redactions had been made under Exemption 1 and Exemption 3. EFF argued that some of the withheld information had likely been publicly acknowledged. The court noted that "here, EFF (like most FOIA plaintiffs) is operating at the disadvantage of not knowing with certainty what information lies beneath the redactions in the VEP document. Based on context, EFF has constructed an argument that the withheld information likely matches and is of equivalent specificity to certain proper official disclosures. Although EFF's speculation was not necessarily unreasonable given what it could view in the VEP document, *in camera* review of the classified declaration, subsequently confirmed by *in camera* review of the entire VEP document itself, established that the redacted 'information' has not been previously 'officially acknowledged' or disclosed such that the exemptions may no longer be claimed." EFF argued that header information was no longer privileged because it had been adopted as a final decision. The court pointed out that "EFF is not wrong to consider the header as roughly analogous to a separate pre-decisional memorandum containing recommendations regarding the VEP document. As such, however, it does *not* lose its protection merely because the VEP document was adopted as a final policy." The court explained that "the header here is not an embodiment of the Vulnerabilities Equity Process, but a reflection of the 'group thinking' involved in 'working out' what that policy would be—a policy then expressed and embodied in the balance of the VEP document. Had the contents of the header been stated on a separate cover memo stapled to the VEP document as it circulated prior to adoption, there would be no dispute that Exemption 5 applied. The fact that it was printed on top of each page instead does not change the substance of the analysis." (*Electronic Frontier Foundation v. National Security Agency*, Civil Action No. 14-0-3010-RS, U.S. District Court for the Northern District of California, March 17)

Judge Colleen Kollar-Kotelly has awarded journalist Kevin Poulsen $22,588 in **attorney's fees** for his litigation against the Secret Service for records concerning Internet activist Aaron Swartz. Kollar-Kotelly

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addressed the agency's claim that Poulsen had **failed to exhaust his administrative remedies** by filing his appeal too late. Finding the agency at fault instead, Kollar-Kotelly observed that "the fact that the agency seems to have misplaced Plaintiff's appeal for almost a month does not mean that Plaintiff has failed to exhaust his administrative remedies. Nor is it material that the agency responded to Plaintiff's appeal within 20 working after *locating* the appeal when that response was issued almost two months after the appeal was initially received by the agency. The consequences of the agency's mistakes fall on the government, not on Plaintiff." She indicated that "because the agency had not withdrawn reliance on exemption 7(A) (interference with ongoing investigation or proceeding) prior to Plaintiff's filing the complaint, the agency may not argue that Plaintiff would have achieved the same result absent this litigation; there is no telling what would have happened had the agency timely responded to Plaintiff's administrative appeal, abandoned reliance on exemption 7(A) immediately, and started producing records at that time. But the agency did not do so in this case, and the Court need not consider that possibility any further." Kollar-Kotelly pointed out that "Plaintiff substantially prevailed in this litigation because Plaintiff obtained relief through multiple enforceable orders of this Court. Alternatively, the Court would also conclude that, insofar as Plaintiff received relief in part because of voluntary changes in the agency's position, Plaintiff substantially prevailed because Plaintiff's claim is not insubstantial." She found disclosure of the records was in the public interest, noting that "Plaintiff received extensive material as a result of this litigation regarding his FOIA request" and "published articles based on the materials that he received through this FOIA litigation and posted significant materials directly online for public consumption." Kollar-Kotelly concluded the agency's reliance on Exemption 7(A) was unreasonable. She pointed out that "the agency never even indicates when the investigation began or ended, even in its briefing, such that the Court could conclude that the reliance on exemption 7(A) was proper at the time the request was denied." She added that "there is no need to belabor what the results *might* have been if the agency had responded to Plaintiff's administrative appeal in a timely fashion. The agency never withdrew its reliance on exemption 7(A) before Plaintiff timely filed suit. In sum, the agency has not shown that its denial of Plaintiff's request was reasonable." Turning to the reasonableness of Poulsen's fee request, Kollar-Kotelly reduced his request for $37,724 to $25,000 because she agreed with the agency that the traditional *Laffey* matrix was applicable in this case after finding that most of the tasks involved were not particularly complex. She also deducted $2,491 for a supplemental motion, concluding the work was not necessary. (*Kevin Poulsen v. Department of Homeland Security*, Civil Action No. 13-498 (CKK), U.S. District Court for the District of Columbia, March 21)

A federal court in Colorado has ruled that the FBI properly withheld records concerning its investigation of Homaidan Al-Turki, a citizen of Saudi Arabia who was indicted on federal charges of forced labor, under a variety of exemptions, primarily **Exemption 7(A) (interference with ongoing investigation or proceeding)**. Al-Turki was convicted in state court in Colorado of false imprisonment and extortion and sentenced to eight years to life. The U.S. government then dismissed its indictment against Al-Turki. Al-Turki's attorney requested the FBI's records about his client. The agency disclosed 736 pages and cited a number of exemptions for records withheld or redacted. Al-Turki challenged the agency's use of the attorney-client privilege under **Exemption 5 (privileges)**. Rejecting the claim, the court noted that "to the extent Plaintiff asserts that the attorney-client privilege is not applicable because the prosecuting attorneys do not have a client, *i.e.*, that they represent the United States and not a law enforcement agency or their personnel, I reject this argument. Government attorneys, including prosecuting attorneys, are protected under Exemption 5." Al-Turki argued that neither **Exemption 6 (invasion of privacy)** nor **Exemption 7(C) (invasion of privacy concerning law enforcement records)** applied to various individuals identified in court documents. The court disagreed, noting that "the release of certain documents—here the unsealed affidavits and similar documents relied on by Plaintiff—does not waive the government's right to raise exemptions as to other documents." In assessing the privacy rights of third parties, the court provided a slightly more nuanced analysis of the waiver argument. The court pointed out that "the fact that certain information was provided in

the types of [court] documents Plaintiff cites does not mean that the government can waive the private interests of third parties in other documents." The court agreed that the FBI had properly withheld records related to similar investigations under Exemption 7(A). The court pointed out that "Defendant has shown that the records or information in all [the] categories were compiled by the FBI for law enforcement purposes. [The agency's affidavit] shows that the FBI is relying on Exemption 7(A) to not only prevent interference with ongoing investigations of Plaintiff, but to avoid disruption to other pending and related investigations and prosecutions." (*Homaidan Al-Turki v. Department of Justice*, Civil Action No. 14-00802-WYD-CBS, U.S. District Court for the District of Colorado, March 30)

A federal court in Ohio has ruled that James Weikamp, the attorney for LTJV, a contractor for the Naval Housing Project at Guantanamo Bay, is not entitled to **attorney's fees** because, after finding that the factors concerning public interest and commercial or personal interest were neutral, the court concluded that the Department of the Navy had a reasonable basis in law for withholding the records. LTJV was awarded the original contract but completed only 25 percent of the work. As part of preparations for rebidding on the contract, Weikamp submitted a FOIA request on behalf of LTJV for any records concerning the project. After the agency denied access to some of the records, Weikamp filed suit. The court found the bid abstract had been improperly withheld under **Exemption 4 (confidential business information)**, but that an independent cost estimate had been properly withheld under **Exemption 5 (privileges)**. Weikamp then filed a motion for attorney's fees. The Navy argued that Weikamp was a pro se attorney litigant and was not entitled to fees. The court rejected that claim, noting that "although Plaintiff did not explicitly reference LTJV in his original FOIA request, it is clear that Plaintiff disclosed his client, LTJV, and its interests since the start of this litigation. LTJV is the 'real party-in-interest' and the proper focal point of the fees inquiry." Having found Weikamp was eligible for fees, the court assessed whether or not he was entitled to fees. The court indicated that "while there is public benefit in bringing Defendant into compliance with the FOIA, and providing some public knowledge to the Navy's bid review process, and perhaps assisting contractors generally with their [Contract Disputes Act] claims, the information at issue is highly particularized to a specific contract." The court next noted that "the withheld records seemed undiscoverable because Defendant's position was that they were exempt from disclosure under FOIA. However, LTJV seeks to use the records in support of LTJV's contract claim against Defendant, which is more of a commercial nature. . .Furthermore, Plaintiff's interest in the records is private and self-interested, rather than public in nature." Finding neither factor tipped the balance, the court assessed the reasonableness of the agency's withholding. The court observed that "plaintiff points to Defendant's delay in releasing the records and its argument shifting as examples of unreasonable conduct. Defendant's conduct is concerning. However, Defendant did point to specific, reasonable exemptions as the basis for its withholding. Although Defendant later released partially-redacted, responsive records, agreeing with Plaintiff that not all of the exemptions applied, the court does not find that Defendant had no reasonable basis in law for considering the documents exempt." (*James Weikamp v. United States Department of the Navy*, Civil Action No. 14-22, U.S. District Court for the Northern District of Ohio, Eastern Division,
March 29)

Judge Randolph Moss has ruled that the CIA properly invoked a *Glomar* response neither confirming nor denying the existence of records concerning any agency communications with the district attorney's office in Douglas County, Colorado. Larry Klayman represented Jeffrey Maes in a civil suit against Raymond Allen Davis, who was convicted of third-degree assault as the result of an altercation following an argument over a parking spot. Davis had been involved in a fatal shooting in Pakistan and had been identified in the press as a CIA contractor. Klayman believed the CIA was responsible for "strange things" that happened during the

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civil suit and filed a FOIA request with the CIA. Challenging the *Glomar* response, Klayman argued that any communication about the civil litigation could not possibly be classified. But Moss explained the agency was not concerned about the subject matter, but instead, "it contends that disclosure of whether or not it communicated with local officials would reveal whether or not it has or had a covert relationship with Davis. Indeed, that is precisely what Plaintiff seeks to discover." Moss found Klayman's claims of interference were not sufficient to rebut the agency's *Glomar* response. He noted that "in short, [Klayman] offers nothing but unsupported speculation that the CIA interfered in any way with the civil or criminal cases stemming from Davis's assault on Maes—or, indeed, that it had anything to do with either case. This is not a basis for questioning the Agency's good faith or otherwise rejecting its *Glomar* response." Moss rejected Klayman's argument that any time the CIA communicated with a third party it had made a public disclosure. Moss pointed out that "it defies commonsense to argue that any time a CIA official allegedly communicates with a third party, any such communication (if, in fact, one exists) has been 'made public'—and is thus subject to FOIA disclosure." He added that "the mere fact that Plaintiff seeks communications allegedly occurring between the CIA and third parties does not undermine the propriety of the CIA's *Glomar* response." (*Larry Klayman v. Central Intelligence Agency*, Civil Action No. 14-472 (RDM), U.S. District Court for the District of Columbia, March 23)

A federal court in Louisiana has ruled that immigration attorney Michael Gahagan is entitled to $13,138 in **attorney's fees** for his litigation against U.S. Citizenship and Immigration Services to obtain records from the alien file of one of his clients. While the 51 withheld records turned out to be duplicates of other records Gahagan had received, the Fifth Circuit found in favor of Gahagan on that issue, noting that FOIA had no provision for withholding records because they were duplicates. USCIS argued Gahagan was not entitled to fees because the request was made to further the interests of his client. The court rejected the claim, noting that "here, Gahagan has no other option in obtaining these records. . .[T]he fact that Gahagan used FOIA in the instant litigation in order to obtain records to be used in a deportation proceeding does not weigh against an award of attorney's fees." The court also indicated that the Fifth Circuit had found the agency's withholding of the duplicate records improper. Having found Gahagan was eligible for fees, the court reviewed Gahagan's $25, 350 fee request. Gahagan had requested $300 an hour, which the court lowered to $200 an hour. The court also found Gahagan's claimed hours excessive. Reducing his number of hours by 25 percent, the court noted that "Gahagan's time records reflect the hours of an attorney who has to research and draft motions working from a blank slate, rather than an attorney with expertise in the subject matter and experience in FOIA litigation. Although it is prudent to ensure there wasn't any intervening caselaw, the sheer number of hours spent on researching and drafting in an area Gahagan claims to have expertise in is excessive." (*Michael Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 14-2233, U.S. District Court for the Eastern District of Louisiana, March 22)

In another opinion dealing with multiple requests from prisoner Jeremy Pinson to the Department of Justice, Judge Rudolph Contreras has ruled that the FBI properly responded to those requests sent to it. Hardly any of the requests to the FBI pertained to records about Pinson, although some of them asked for records about other individuals, many of whom provided Pinson with Privacy Act waivers. But the most common denominator in responding to Pinson's requests was the effect of the Bureau of Prison's strict limitations on prisoners' ability to have possession of documents. In a number of the requests in dispute, Pinson either claimed he had not received the documents personally or that he had no knowledge of whether attorneys he had designated as alternative recipients of records had received them. Overall, Contreras found that Pinson had failed to show that the FBI had not properly responded. In reference to one request, Contreras observed that "here, DOJ has provided a detailed declaration and provided documents, which include Mr. Pinson's requests and correspondence, as well as the FBI's dated responses to Mr. Pinson's letters. Mr. Pinson, in

contrast, has not only failed to address the government's argument, but also failed to provide counter evidence that either [of his attorneys] did not receive these responses." Because most of the FBI's defenses against Pinson's claims hinged on whether he had **exhausted his administrative remedies** one issue that virtually never gets analyzed was the effect of the Office of Information Policy's decision to close a pending administrative appeal because the case was already in litigation. While the FBI argued Pinson had failed to exhaust his administrative remedies in relation to that appeal, Contreras indicated that "here, the OIP failed to make a determination within twenty days and instead closed the appeal on February 11, 2013, by which time 62 days had lapsed since the appeal was filed on December 11, 2012. Because the OIP failed to make a timely determination and Mr. Pinson included this request in [his complaint] filed on October 23, 2013, after OIP's closure of the appeal, Mr. Pinson is deemed to have constructively exhausted his administrative remedies." Contreras upheld all the agency's exemption claims, most of them under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Contreras expressed some sympathy with Pinson's argument that there were a number of potential public interests that could be balanced against the privacy interests of both government employees and third parties. Pinson argued the agency should disclose names of foreign government officials who were mentioned in some records. But Contreras indicated that "the public interest is in the disclosure of the foreign government's participation, not of the identifying information of each individual foreign official. As a result, while the public interest in disclosure of foreign government participation may be substantial, the public interest in the identifying information of law enforcement officials is minimal." (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, March 29)

Judge Emmet Sullivan has ruled that the Bureau of Prisons properly responded to several requests submitted by prisoner Martin Sanchez-Alaniz for various records about his incarceration. Sanchez-Alaniz requested records about a tort claim he made for damage to his locker. BOP indicated that it could find no record of having received the request. Sanchez-Alaniz also requested records concerning his security assessment at the federal penitentiary at Atwater, California. BOP disclosed five redacted pages in response to the request. His third request was for medical, commissary, and use of force records from his time at the federal penitentiary at Yazoo City, Mississippi. The agency estimated the fees would be $96.60, which Sanchez-Alaniz declined to pay. Sullivan dismissed Sanchez-Alaniz's FOIA claim for his first request for **failure to exhaust his administrative remedies**. He observed that Sanchez-Alaniz "offers no support for his assertion that the Office of the Counsel at BOP's Central Office in Washington, D.C. actually received this FOIA request. At any rate, plaintiff waives this claim." Sullivan also found Sanchez-Alaniz had failed to exhaust his administrative remedies as to his third request for which the agency had required fees. Sullivan noted that "Plaintiff does not demonstrate that he actually paid any part of his requested fees. Nor does plaintiff show that he challenged the calculation of the fees at the administrative level, and the Court will not entertain his arguments in the context of this litigation." As to the second request, Sullivan found the agency had properly redacted information under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(F) (harm to any person)**. Sanchez-Alaniz argued that he had gotten the same report as the result of two other FOIA requests and those records had been redacted differently. But BOP insisted the reports were not the same and that Sanchez-Alaniz's connection to the incidents was different. Sullivan agreed with the agency, explaining that "BOP staff saw fit to release certain information from one report and to withhold similar information from the other." (*Martin Sanchez-Alaniz v. Federal Bureau of Prisons*, Civil Action No. 13-1812 (EGS), U.S. District Court for the District of Columbia, March 25)

A federal court in West Virginia has ruled that the Mine Safety and Health Administration properly redacted records concerning its investigation of a complaint filed by Marshall Justice under **Exemption 5**

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(privileges) and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The agency claimed that specific portions of the inspector memoranda of interviews were deliberative and if disclosed risked revealing "what is important for special investigation purposes" and "could impair the quality of inspectors' investigations." The court agreed the agency had shown that the records wee deliberative. The court also approved redacting the names of investigators under Exemption 7(C). The court pointed out that "Justice has provided no explanation as to how the names or titles of low-level MSHA inspectors would reveal information about the government's operations. The 'negligible,' 'non-existent' public interest in disclosure of the agents' names or titles would be outweighed even by 'a very slight privacy interest.' It is heavily outweighed by the 'not insubstantial' interest the MHSA inspectors have in the non-disclosure of their names and titles." (*Marshall Justice v. Mine Safety and Health Administration*, Civil Action No. 14-14438, U.S. District Court for the Southern District of West Virginia, March 29)

A federal court in Florida has ruled that Chris Salmonson failed to **exhaust his administrative remedies** in regard to his requests to the IRS for his tax records. Salmonson was initially told that there were more than 15,000 responsive pages, which would cost $2,980. When Salmonson indicated his inability to pay that fee, the agency ultimately located 9,369 pages. The agency agreed to make the records available on CD for $25 and provided 8,493 pages in full and 114 pages in part. The agency withheld 762 pages entirely. Salmonson then filed suit. The court found Salmonson's failure to file an administrative appeal required dismissal. The court noted that "once the IRS responded to the pending FOIA requests, even if the response was delayed and after the statutory period, Salmonson was required to first exhaust his administrative remedies with the IRS and have his appeal denied before seeking judicial review." (*Chris Salmonson v. Internal Revenue Service*, Civil Action No. 14-2029, U.S. District Court for the Middle District of Florida, March 17)