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Washington Focus: Rep. Jackie Walorski (R-IN) has introduced the "Transparency in National Security Act of 2016" (H.R. 4922), which would make the National Security Council subject to FOIA by inserting it in the provision dealing with the agency status of the Executive Office of the President. Walorski noted in her bill that while the courts have found the NSC does not exercise independent authority critics of the Obama administration have argued the White House has controlled national security policy. . .Steve Aftergood reports in Secrecy News that NARA has decided to reassess the CIA's request to destroy email records of non-senior agency officials. In a letter from Paul Wester, Chief Records Officer at NARA, Wester explained that "based on comments from Members of the U.S. Senate Select Committee on Intelligence and a number of public interest groups, we are concerned about the scope of the proposed schedule and the proposed retention periods."

Court Rejects FBI's Attempt To Assert New Exemptions

Judge Randolph Moss has ruled that the restrictions on the government to offer new exemption claims during litigation, first expressed by the D.C. Circuit in *Maydak v. Dept of Justice*, 218 F.3d 760 (D.C. Cir. 2000), still has considerable vitality. The *Maydak* decision put an end to a common practice of law enforcement agencies to claim that records were categorically exempt under Exemption 7(A) (ongoing investigation or proceeding), but then withdraw the 7(A) claim during litigation because the investigation had been closed. Agencies then would start reviewing the records for application of other exemptions, which would become the basis for their claims in court. The decision in *Maydak* made it clear that agencies were required to claim all exemptions they intended to assert at the beginning of litigation and not sometime later during the litigation, subject to two exceptions—where the failure to invoke an exemption was the result of human error and disclosure could compromise national security or privacy, and where there substantial was change in either the facts of the case or an interim development in applicable law.

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Moss' ruling came in a case involving multiple requests made by researcher Ryan Sharpiro, reporter Jeffrey Stein, National Security Counselors, and Truthout to the Justice Department. Several requests sought FBI search slips and processing notes for FOIA requests. The FBI told the requesters that such records were categorically exempt. In his earlier opinion, Moss disagreed, finding the agency was required to process the records. This time, the FBI told Moss that it had abandoned its previous policy and had adopted a policy whereby it would deny requests for search slips and processing notes only where the agency issued a no record response or a *Glomar* response to the underlying FOIA request. The agency asked Moss to rule on whether or not the agency could apply its new policy to the requests involved in this case.

Moss considered whether the FBI's request fell within one of the exceptions to *Maydak*. He noted that "the FBI does not contend that some change in law or fact has required it to reevaluate its policy with respect to requests for search slips or processing records. Indeed, it represents that it changed its policy in May 2015, eight months *before* the Court issued its opinion in this matter. The FBI does not point to any 'interim development,' at least not to one outside its control; it only represents that it has developed a new policy that it would like to apply to the plaintiffs' requests."

Instead, Moss noted, the agency would have to proceed under the exception for a failure to claim an exemption as the result of "pure human error" where disclosure might endanger national security or privacy interests. He concluded that "the FBI cannot satisfy this standard." He indicated that "its request to apply its new policy to the plaintiffs' long-pending FOIA requests bears more resemblance to 'an attempt to gain a tactical advantage over the FOIA requester' than it does to a simple mistake. The FBI represents that it adopted its new policy in May 2015, after briefing in this case was complete but well before the court heard oral argument and issued its decision. But the FBI did not inform the Court about the existence of its new policy at any point between May 2015, when the new policy was adopted, and February 26, 2016, when the Court held a status conference to discuss the implementation of its December 2015 opinion. The FBI has not lacked for opportunities to inform the Court or the plaintiffs that it had adopted a new policy regarding search slips." He observed that "in light of the FBI's inability to establish that its failure to invoke the new policy in a timely manner was the result of a simple mistake, the Court will decline to permit it to rely on that policy at this stage in the proceeding." He added, however, that he would permit the FBI to show if disclosure of any records might harm national security or privacy interests. He cautioned that "this is not an opportunity for the FBI to advance its new policy regarding search slips. The FBI is free to apply that policy to future FOIA requests (and future FOIA requesters are, in turn, free to challenge it). But this is not the forum for such a proceeding."

The FBI proposed an alternative argument in its attempt to get its new policy into court. The agency claimed that it had erred in not providing specific document-by-document exemption claims for the search slips and processing notes but that it had alluded to the fact in its affidavit that other exemptions might apply to such records. The FBI asked Moss to permit it to now review the records for such claims. Moss rejected this claim as well. He noted that "to the extent that the FBI argues either that it adequately preserved the exemptions that it now seeks to assert or that it would have been too burdensome to do so, *Maydak* disposes of both arguments. As in *Maydak*, the FBI here did not adequately preserve any document-by-document exemptions, stating only that additional records 'may be exempt.' And, as in *Maydak*, it would not have been burdensome for the FBI to have asserted both categorical and document-by-document exemptions at the same time—indeed, this is precisely what it did in response to [one of the plaintiff's] second request."

Moss pointed out that the FBI's request did not qualify under the "pure human error" exception to *Maydak*. He noted that "although it is conceivable that the FBI's failure to assert any document-by-document exemptions with respect to the plaintiffs' requests resulted from 'pure human error,' that seems unlikely given the FBI's assertion of those same exemptions in response to [one of the plaintiff's] second request.

Furthermore, although *some* of the records the FBI requests permission to withhold at this stage might implicate the disclosure of 'national security or sensitive, personal, private information,' it is clear that not all of them will." He observed that "the Court will—in its discretion—permit the FBI to assert untimely exemptions to the extent that it can show that the disclosure of such records *will* 'compromise national security or sensitive, personal, private information.'" (*Ryan Noah Shapiro; Jeffrey Stein; National Security Counselors; Truthout v. U.S. Department of Justice*, Civil Action No. 13-555 (RDM), U.S. District Court for the District of Columbia, April 8)

Views from the States…

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

Florida

A court of appeals has amended its decision ruling that personally-identifying information about students at the University of Central Florida is exempt under the federal Family Educational Rights and Privacy Act, finding that, while identifying information about students involved in hazing incidents is protected, information identifying members of the student government accused of misconduct is not. The court initially indicated that it agreed with the ruling of the U.S. Court of Appeals for the Sixth Circuit in *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), that "student disciplinary records are 'education records' subject to the protections afforded under FERPA, The court observed that "the names of student government officers charged with malfeasance in the performance of student government duties or alleged to have engaged in misconduct with regard to their election or appointment to their position, do not qualify as protected 'personally identifiable information' under FERPA because student government officers have implicitly consented to the dissemination of that information given Florida's statutory scheme concerning university student governments." The court added that "student government officers know or reasonably should know. . . that they may be disciplined for misconduct in the performance of their student government duties. . ." (*Knight News, Inc. v. University of Central Florida*, No. 5D14-2951, Florida Court of Appeal, Fifth District, April 8)

Kentucky

A court of appeals has ruled that the Lexington-Fayette Urban County Government properly responded to a letter from Douglas Wain concerning his allegations that Partners for Youth, an initiative of the mayor's office, had ignored Wain's organization, which focused on violence prevention, in providing grants and support. Wain sent an eight-page letter to the mayor requesting that Partners in Youth be investigated. In response, an attorney asked Wain to clarify if he was making an Open Records Act request. Wain failed to respond until a year later when he sent another letter requesting an investigation and records substantiating the government's actions. LFUCG provided some records, but told Wain it had no obligation to provide non-existent records. Wain filed a complaint with the Attorney General's Office, which upheld LFUCG's actions. Wain then filed suit and the trial court ruled in favor of LFUCG, citing the AG's opinion. Upholding the government's decision, the appeals court noted that "once Wain informed LFUCG that he indeed sought documents, to the extent such documents existed, LFUCG made all documents responsive to his requests available for Wain's inspection within a reasonable time and in a manner compliant with KORA." (*Douglas A. Wain v. Lexington-Fayette Urban County Government*, No. 2014-CV-001526-MR, Kentucky Court of Appeals, April 8)

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New York

A trial court has ruled that the superintendent of the Hempstead Public School District violated the Open Meetings Law when she prohibited local reporters from attending a public forum at the Hempstead high school called to explain the consequences of the New York State Education Department's designation of the high school and junior high school as being "struggling" under state law, which resulted in the schools being placed in receivership and the superintendant being named receiver for a period of two years. When reporters from *Newsday* and a local television station attempted to attend the meeting, the superintendent had them barred until the meeting was over. *Newsday* and the television station filed suit, arguing the superintendent had violated the Open Meetings Law as well as the First Amendment and parallel state constitutional protections for freedom of the press. The school district argued the meeting was not covered by the Open Meetings Law because no school board business was discussed. The court rejected that claim as too narrow and noted that "the subject meeting was clearly a response to the statutory requirement under the Education Law requiring that a public meeting be held where the community, including the parents and guardians of the students in the district, were to be so informed as to the recent designations of the subject schools and the plans regarding the same. Although the [Open Meeting Laws] arguably do not apply to the case at bar, the recently enacted statutory provision renders the subject meeting as a public meeting." The court also rejected the argument that the press could be barred from the meeting because it was on school property. The court noted the superintendent "opened the non-public forum for a convocation of the general public and/or community to discuss a matter of public interest. Although the subject was relative to issues concerning the subject schools, the forum, contrary to the respondent's argument, was not being used for school purposes." The court acknowledged that there was clearly animosity between the superintendent and the local press, but found that was not sufficient to bar the press from such a meeting. (*News 12 Company and Newsday LLC v. Hampstead Public Schools Board of Education*, No. 6871/15, New York Supreme Court, Nassau County, April 12)

Pennsylvania

A court of appeals has ruled that cell phone records showing calls made between the district attorney and two local judges are judicial records that must be processed by the judiciary and are not county financial records subject to the Right to Know Law. In a case involving multiple opinions concerning whether the district attorney was also part of a judicial agency, the appeals court found that while the district attorney did not qualify as part of a judicial agency, records of her cell phone calls to the judges, which were paid for by the county, were not subject to the Right to Know Law. The appeals court noted that "here, the Phone Records involve the usage of cellular phone services by the Judges. The County concedes the records document the Judges' activities in that they reveal their identities as the caller or recipient. However, to some extent the Phone Records also document the County's payment of Verizon invoices for services. As such, the Phone Records are simultaneously 'of' the judicial agency and 'of' the County." The county argued that financial records of the judiciary were subject to the RTKL so that there was no harm in the county disclosing the records. The court pointed out, however, that "even when the same record, like a financial record, is requested under the RTKL from two different types of agencies, the process for access may follow different paths." The court found the county had not strictly speaking disclosed financial information about the judges. The court observed that the county "chose to release information that exceeded the financial parameters of an itemized cell phone bill. The records disclosed did not contain content of communications, but they also did not contain any indication of cost or other financial information." The court concluded that "the Phone Records showing usage of services by the Judges are also of the judicial agency. As a result, the County misapplied the RTKL when responding." (*Jonathan D. Grine v. County of Centre*, No. 854 C.D. 2015 and No. 855 C.D. 2015, Pennsylvania Commonwealth Court, April 13)

South Carolina

The supreme court has ruled that the Town of Mount Pleasant technically violated the Freedom of Information Act when it went into executive session after a special meeting and then took action without providing notice. The trial court and the court of appeals sided with the Town. But the supreme court agreed with the plaintiff, Stephen Brock, that, even though public bodies were not required to provide notice of action taken as the result of a regularly scheduled meeting, public bodies were required to notice such action as the result of a special meeting. The supreme court noted that "the court of appeals erred in failing to recognize the distinction between regularly scheduled meetings and special meetings. Thus, the court of appeals' holding that Town Council could take *any action* on *any item* that was properly discussed during an executive session is in conflict with [precedent], wherein we noted that in special meetings, 'nothing can be done beyond the objects specified for the call.' The court of appeals erred in concluding that an agenda giving notice of discussion during an executive session necessarily implies action following that discussion." The supreme court reminded the Town to be cognizant of this difference but did not require the Town to take any other action. However, the supreme court pointed out that its opinion should be considered by the trial court in determining whether to award Brock attorney's fees. (*Stephen George Brock v. Town of Mount Pleasant*, No. 27621, South Carolina Supreme Court, April 13)

Texas

A court of appeals has ruled that an exemption protecting an email address of a member of the public does not apply to personal email addresses used by the Mayor of Austin, members of the Austin city council, and the city manager while conducting public business. The student newspaper at the University of Texas made several requests under the Public Information Act for emails reflecting city business that were sent or received on city-owned devices or personal email addresses. The city requested an opinion from the Attorney General's Office as to whether or not it was required to disclose records that did not reference city business. The Attorney General indicated the city was required to disclose most of the records because they pertained to city business, but that personal email addresses could be redacted under the exemption for email addresses of a member of the public. The student newspaper filed suit and the trial court ruled in favor of the city, finding the personal email addresses were exempt. The court of appeals, however, reversed, finding that the city's claim that city officials' were members of the public could not be reconciled with how that term was commonly used. The court noted that "in sum, the common and ordinary meaning of the phrase 'member of the public' depends, as does the meaning of all words and phrases, on context. Standing alone or without reference to another group, it means a person who belongs to the community as a whole. When used in relation to another group, it means anyone who is not a part of the other group. In the email-address exception, 'member of the public' does not stand alone. Its companion is the governmental body to which the email at the heart of the exception was sent: 'an email address. . .provided for the purposes of communicating . . .with a governmental body.' Accordingly, we hold that 'member of the public' [in the exception] does not include a person who is part of the governmental body that was 'communicated with' by email." (*The Austin Bulldog v. Lee Leffingwell, Mayor, et al.*, No. 03-13-00604-CV, Texas Court of Appeals, Austin, April 8)

Virginia

A trial court has ruled that the Virginia Department of Education is required to provide student growth percentile data pertaining to the Loudon County public schools to Brian Davison. The agency claimed the data was protected by an exemption for teacher evaluation records, but the court noted that "while the evidence revealed that student growth percentiles can be used for multiple purposes, including teacher evaluation, on balance considering the testimony and evidence the student growth percentiles have not been used as a teacher performance indicator by Loudon County Public Schools." Ordering the department to

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disclose non-exempt data, the court observed that "considering that Petitioner seeks assessment data by teacher and school for evaluation of student growth, Respondent shall produce and provide nonexempt fields of information maintained in its database, excising exempt fields of information in accordance with law. . . The Court holds that this procedure does not implicate the prohibition of creating a new public record by a public body under FOIA. . ." The court awarded Davison $35,000 in attorney's fees. (*Brian C. Davison v. Virginia Department of Education*, No. CL14-4321, Richmond City Circuit Court, April 12)

Washington

The supreme court has ruled that the Washington sex offender registration law requiring disclosure of the identities of sex offenders upon request does not qualify as a prohibitory statute under the Public Records Act that would protect disclosure of sex offender information pursuant to a PRA request. Donna Zink made several requests to the Washington State Patrol and the Washington Association of Sheriffs and Police Chiefs for records identifying sex offenders. The agencies indicated that they would disclose the records, but contacted some of the offenders whose information would be disclosed to let them know about the action. A group of those offenders filed suit to block disclosure and the trial court issued a permanent injunction against disclosure. The supreme court then accepted the case for review. There, the court ruled that the sex offender law did not qualify as a prohibitory statute. The court noted that "rather than being prohibitory, the language of the [statute] as it pertains to sex offender records, is framed in terms of what an agency is permitted to, or must, do." The court added that "nothing in [the statute] indicates a legislative intent to protect level 1 sex offenders or their victims." The court observed that "the PRA, and our case law surrounding it, demands that an 'other statute' exemption be explicit. Where the legislature has not made a PRA exemption in an 'other statute' explicit, we will not. Because of the presumption of disclosure under the PRA, the lack of any prohibitory language—save for a *mandate against confidentiality*—or explicit exemption [in the statute]. . . we hold that [the statute] is not an 'other statute' under the [PRA] and that level 1 sex offender registration information is subject to disclosure under a PRA request." Zink asked for fees and penalties for prevailing, but the court pointed out that because she had not prevailed against the agencies but against the intervenors she was not entitled to fees or penalties. (*John Doe v. Washington State Patrol, et al.*, No. 0-413-8, Washington Supreme Court, April 7)

A court of appeals has ruled that an injunction barring disclosure of the identities of providers of services for functionally disabled persons under Medicaid granted to the union that represents such providers should be dissolved because the union did not show that the Freedom Foundation, an organization advocating against union membership, had a commercial purpose in requesting the records. Freedom Foundation requested the records from the Department of Social and Health Services. The agency concluded that it was required to disclose the records, but provided notice of its intent to disclose to the union. The union then filed suit to block the disclosure, arguing primarily that a provision in the Public Records Act prohibiting disclosure of lists of individuals when the request was made for commercial purposes prevented the agency from disclosing the records. The trial court granted the union a preliminary injunction and the Freedom Foundation appealed. The Freedom Foundation argued that it was making the request for political purposes, not commercial purposes and that it did not intend to use the list to generate revenue. The court indicated that "commercial purposes" "includes a business activity by any form of business enterprise intended to generate revenue or financial benefit." The union contended that the Freedom Foundation would benefit economically by injuring the union's reputation. But the court noted that "economically injuring SEIU would not directly generate revenue or financial benefit for the Foundation. Even if SEIU ceases to exist there will be no direct financial benefit to the Foundation. Therefore, economically injuring SEIU does not fall within the definition of 'commercial purposes' that we adopt [here]. We decline to hold under the facts of this case that a nonprofit entity decreasing the revenue of another nonprofit entity is a type of commercial purpose under [the PRA provision]." The court declined to award the Foundation attorney's fees after finding that the union's suit for

an injunction was the reason that the records had not been disclosed, not any action taken by the agency. (*SEIU Healthcare 775NW v. Department of Social and Health Services*, No 46797-6-II, Washington Court of Appeals, Division 2, April 12)

Wisconsin

A court of appeals has ruled that the Milwaukee County Sheriff's Office failed to show that redaction of identifying information for 12 individuals in state custody pending detainer notices from U.S. Immigration and Customs Enforcement was appropriate under Wisconsin's open records law and has ordered the sheriff's office to disclose the I-247 forms to Voces de la Frontera, a group focused on immigrants' rights. Responding to Voces' request for all I-247 forms submitted by ICE to the sheriff's office since November 2014, the sheriff's office concluded that no exemptions to Wisconsin's public records law applied, but decided to disclose the forms with redactions made by ICE. Voces filed suit and the trial court ruled in its favor. The appeals court agreed. The sheriff's office argued that federal regulations required local law enforcement to detain individuals upon ICE's request. While the appeals court agreed such a requirement existed, it found that it applied only after an individual's state custody ended, which was not the case here. Noting that the regulations specified that ICE would not pay the expenses of housing detainees until they were in federal custody, the court pointed out that "this language makes it clear that local law enforcement agencies cooperating with an I-247 request do not relinquish custody and that the subject of the detainer request remains in local law enforcement custody until DHS actually assumes custody." The sheriff's office argued that disclosure might increase the possibility of identity theft. But the court noted that "there is no evidence in the record to support the assertion that release of the requested information might increase the risk of identity theft harassment in some tangible way." The court added that "the Sheriff's sole public policy argument against disclosure is not even one of *public* policy, but rather focuses on hypothetical injury to the *individual*. The test is whether there is a risk to the *public* if information is released, not whether there is a risk to an *individual* if the information were released." (*Voces de la Frontera, Inc. v. David A. Clarke, Jr.*, No. 2015-AP-1152, Wisconsin Court of Appeals, April 12)

The Federal Courts…

Judge James Boasberg has ruled that the CIA conducted an **adequate search** for records concerning allegations that it had hacked into secure computers the agency had provided for staff of the Senate Select Intelligence Committee during its investigation of the use of torture by the U.S. In so doing, he dismissed multiple challenges from journalist Jason Leopold and researcher Ryan Shapiro questioning the completeness of the agency's search. After the CIA failed to respond to their request after two months, Leopold and Shapiro filed suit. Over the next year, the CIA produced 82 documents, disclosing 12 in full and 70 with redactions, and prepared a *Vaughn* index explaining the reasons it withheld the remaining 231 documents. Leopold and Shapiro chose not to challenge any of the exemptions but did question the agency's search. After consulting agency staff familiar with the incident, the CIA decided to search the Office of the Director, the Office of Public Affairs, the Office of Congressional Affairs, the Office of the General Counsel, the Office of the Inspector General, and the Office of Security using keywords designed to locate responsive records. Leopold and Shapiro argued the agency had not sufficiently explained how it determined when a potentially responsive record was non-responsive. But Boasberg noted that "if, upon closer inspection by CIA personnel, the document was 'clearly' irrelevant to the request, it was deemed 'non-responsive.'" The plaintiffs insisted they should be able to challenge the agency's non-responsiveness determinations and pointed to two cases from the Northern District of California—*Dunaway v. Webster*, 519 F. Supp. 1059 (N.D. Cal. 1981), and *ACLU v. FBI*,

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2013 WL 3346845 (N.D. Cal. July 1, 2013)—as supporting their claim. Boasberg, disagreed, noting that "both were cases in which certain documents were already before the court, and the parties were quibbling about the scope of certain redactions. That is not the case here, and with no suggestion that the agency improperly carried out its responsiveness determination, the Court is unwilling to require further and more detailed explanations on this front." Leopold and Shapiro also argued the agency should have provided duplicates that it found during the search because their request specifically asked for duplicates because they might provide more context and nuance. Although there is no legal basis on which to refuse to provide duplicates except a resources claim that producing such records is a waste of the agency's time and funds, Boasberg quickly agreed with the agency's position that once it produced all responsive records its disclosure obligations were at an end. He pointed out that "the government's obligations under FOIA are 'satisfied when an agency produces the requested pages.' While this does not mean that where there are similar but not identical documents, the government may choose which one to produce, 'it would be illogical and wasteful to require an agency to produce multiple copies of the exact same document.' The Court will not so require here." Leopold and Shapiro had also listed records systems drawn from the agency's Privacy Act systems of records notice that they wished the agency to search. The plaintiffs argued the agency had not searched all these systems. But without more evidence that those systems should contain responsive records, Boasberg was reluctant to require the agency to search more broadly. He noted that "plaintiffs have not offered any explanation as to why the specific Privacy Act systems of records identified in their request constitute leads that, on their face, should have been pursued, particularly given the agency's assertion that it searched the relevant offices that managed those systems." He emphasized that "requesters cannot simply demand that an agency carry out the search in a manner they wish by 'mere fiat.' Critical here, too, is that the agency has provided a reasonable explanation for why those purported leads would not assist it in executing its search." As a realistic matter, the agency should decide which records systems to search based on its understanding of where responsive records are most likely to exist. But agencies are also required to explain sufficiently why they decided not to search for records in locations requested by the requester rather than just unilaterally making that determination with no explanation. Boasberg also rejected the claim that "plaintiffs [should be] entitled to summary judgment merely because they might have preferred that the agency use one search over another. This is all the more relevant here where the agency has gone to great lengths at the beginning of the search process to ensure that its effort was designed to maximize responsive results." (*Jason Leopold, et al. v. Central Intelligence Agency*, Civil Action No. 14-1056 (JEB), U.S. District Court for the District of Columbia, April 8)

While feeling itself bound by its previous acceptance of the "clearly erroneous" standard for appellate review of FOIA cases, a Ninth Circuit panel has questioned the continued validity of the distinction. Reviewing a decision by a district court finding the FDA had shown that records pertaining to the capacity of egg-production facilities were protected by **Exemption 4 (confidential business information)**, the Ninth Circuit found the district court's conclusion that the FDA's declarations were more persuasive than those offered by the plaintiff, the Animal Legal Defense Fund, was not inappropriate when assessed under the clearly erroneous standard. The court noted that "whether or not releasing the requested data would create a likelihood of substantial competitive harm was subject to dispute. But, on this record, the district court did not clearly err in finding that disclosure of the information was likely to cause commercial undercutting." Acknowledging that the Animal Legal Defense Fund had provided its own expert affidavits arguing that disclosure of the disputed information would not cause substantial competitive harm, the court pointed out that "nevertheless, under our special standard of review for FOIA cases, and in view of the extensive FDA affidavits, we see no clear error. The incomplete data could allow egg producers to make *more* accurate—if imperfect—estimates of their competitors' production capabilities and sales than they could without the redacted information." In a per curiam concurrence, the panel questioned the continued validity of the clearly erroneous standard. The concurrence noted that "even if we assume that the sensitive nature of documents

withheld under a FOIA exemption calls for deference in some contexts, why we defer to the district court in cases such as this one—where the factual inquiry on which the summary judgment turns is one that does not depend on a review of withheld information—remains unclear." The concurrence observed that "the district court ultimately decided that the FDA's declarations were more persuasive than those submitted by Plaintiff. But the district court was in no better position to make that determination at summary judgment than we are on appeal." The concurrence concluded that "in sum, if ordinary principles applied, summary judgment would not be appropriate because the record contains a disputed issue of material fact, and we would reverse and remand for further proceedings. Under our current FOIA standard, however, we must affirm. We urge our court to take up, en banc, the appropriate standard of review in FOIA cases." (*Animal Legal Defense Fund v. Food and Drug Administration*, No. 13-17131, U.S. Court of Appeals for the Ninth Circuit, April 11)

Judge Reggie Walton has ruled that the Department of Homeland Security cannot categorically withhold assessments to refer, which are recommendations by an asylum officer as to whether or not to grant an applicant asylum, under **Exemption 5 (deliberative process privilege)** because the D.C. Circuit's recent opinion in *Abtew v. Dept of Homeland Security*, 808 F.3d 895 (D.C. Cir. 2015), which involved the same type of records, held that such assessments frequently had factual material that could be **segregated** and disclosed. Further, Walton noted that the district court judges in both *Abtew v. Dept of Homeland Security*, 47 F. Supp. 3dd 98 (D.D.C. 2014), and *Gosen v. U.S. Citizenship and Immigration Services*, 118 F. Supp. 3d 232 (D.D.C.) had conducted an *in camera* review of the assessments in those cases and concluded they contained some factual portions that could be segregated and disclosed. Several applicants for asylum, represented by Catholic Charities, requested their individual assessment recommendations. After U.S. Citizenship and Immigration Services denied the assessments under Exemption 5, Catholic Charities filed its own FOIA request for records concerning how the agency processed those requests and determined that Exemption 5 applied categorically. The agency told Catholic Charities that it would require an extension of time under the unusual circumstances provision, but had not responded more than a month later when Catholic Charities filed suit. Walton acknowledged that other judges in the district had ruled that assessment to refer recommendations were protected, but observed that in this case the agency "discusses the segregability of the assessments in a categorical fashion, as opposed to providing a description of the assessments prepared in each of the individual plaintiffs' cases. The Court is therefore unable to conduct a *de novo* assessment of the agency's determination of segregability as to each of the individual plaintiffs' requests." He added that "the defendant's representation that it conducted a 'line-by-line examination' of each of the assessments to determine whether any portions were reasonably segregable is seemingly undermined by what appears to be defendant's blanket policy not to release any portion of an assessment, irrespective of its contents." Walton indicated that "the Court is persuaded by *Gosen* and *Abtew* that there may be some portion of the assessments at issue in this case that contain factual information that may reasonably be segregated from the whole. He ordered the agency to provide a revised *Vaughn* index addressing the issue of segregability for each of the individual plaintiffs' assessment. The agency had responded to Catholic Charities' FOIA request more than six months after it had been received. Catholic Charities requested **attorney's fees** because the agency had failed to respond within the statutory time limit. The agency argued that once it had informed Catholic Charities that it was invoking an extension under the unusual circumstances provision, it was free to take as much time as necessary to respond. But Walton pointed out that the unusual circumstances provision extended the agency's time limit by ten days and required the agency to provide an estimate of when the request would be finished. Because the agency had done neither, he noted that "the defendant's reliance on the 'unusual circumstances' provision is therefore unavailing." He explained that to justify its failure to respond, the agency was required to ask the court to stay processing because of exceptional circumstances, which the agency had not done. He observed that "the Court is mindful of the significant number of FOIA requests the defendant is required to process, but despite this reality, the defendant cannot simply fail to seek

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relief from the statutory deadline as provided by the FOIA, and then seek to justify its delay only through arguments made in opposition to the plaintiff's partial summary judgment motion." Nevertheless, Walton rejected Catholic Charities' attorney's fees motion, noting that "the plaintiffs do not address any of [the factors for an attorney's fees award] in their partial summary judgment motion, and, accordingly, the motion must be denied." (*Rica Gatore, et. al. v. United States Department of Homeland Security*, Civil Action No. 15-459 (RBW), U.S. District Court for the District of Columbia, April 6)

Judge Rosemary Collyer has ruled that the State Department conducted an **adequate search** in response to a request from Judicial Watch for all records identifying State Department staff that used personal email accounts to conduct agency business. The State Department searched more than half a dozen offices and found no records. Judicial Watch challenged the agency's interpretation of its request and the adequacy of the searches it conducted. Collyer, however, pointed out that "Plaintiff's FOIA request was actually a question posed as a request for records. The request for 'records that identify the number and names of all current and former' State Department Officials 'who used email addresses other than those assigned "state.gov" email addresses to conduct official State Department business' is really a question that asks 'who at the State Department used private emails for conducting official business?' A question is not a request for records under FOIA and an agency has no duty to answer a question posed as a FOIA request." She explained that "the State Department read Plaintiff's FOIA request precisely as it was written to mean that Plaintiff sought 'records that identify *the number and names of all* current and former officials' who used non-State Department email addresses to conduct official State Department business. Plaintiff complains that the State Department's interpretation of its request was unduly restrictive, and that it did not expect a search to reveal a single document listing the names of all State officials who used private email for official business. Instead, Plaintiff insists that the State Department should have construed the FOIA request more broadly. But it was the Plaintiff's responsibility to frame its own FOIA request with sufficient particularity and Plaintiff cannot now complain that it was looking for records that it did not describe." Although Judicial Watch and the State Department discussed the agency's interpretation of its request, Collyer pointed out that a suggested alternative interpretation "read out the word 'all' entirely out of Plaintiff's FOIA request. Since the State Department was not obligated to look beyond the four corners of the request, State was not required to interpret the request in this alternative manner." Judicial Watch argued that it had found references to two Inspector General reports mentioning the use of private email addresses at several embassies in a Google search and that State should have considered the IG reports responsive. Collyer rejected those claims, noting that "while Plaintiff alleges that a search in response to its request should have turned up the two OIG reports, it is not at all clear that this is the case. Plaintiff did not specify what parameters it used when conducting the Google search that located the OIG reports. In addition, the two OIG reports are not responsive to the FOIA request as written since the reports do not '*identify the number and names of all* current and former officials" who used private email accounts. (*Judicial Watch, Inc. v. Department of State*, Civil Action No. 15-690 (RMC), U.S. District Court for the District of Columbia, April 6)

Judge Amy Berman Jackson has ruled that the State Department properly withheld small portions of two June 1957 cables concerning the coup in Haiti under **Exemption 1 (national security)**. Researcher Richard Benjamin requested records about the role of the United States in the June 1957 coup. He specifically requested several State Department cables. NARA told Benjamin that the State Department had redacted portions of four cables under Exemption 1. Benjamin appealed and the State Department upheld its decision. Benjamin then filed suit. The State Department disclosed one of the cables in full, but continued to assert Exemption 1 for slight redactions for two of the cables. After reviewing the agency's classified affidavit *in camera*, Jackson agreed with the agency that the redactions were appropriate, noting that "the Court is satisfied that the State Department has put forth a 'plausible' and 'logical' argument in support of its

invocation of Exemption 1, and, therefore, the Court will grant defendant's motion for summary judgment." (*Richard Benjamin v. U.S. Department of State*, Civil Action No. 15-0160 (ABJ), U.S. District Court for the District of Columbia, April 12)

A federal court in New York has ruled that the Bureau of Prisons properly responded to the remaining portions of Corey Davis' FOIA request for records pertaining to names and register numbers of inmates housed in cell block 3 at Manhattan Detention Center from March to May 2009. The agency withheld identifying information under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The court found the records were compiled for law enforcement purposes, noting that "at a minimum, this information is assembled to permit the BOP to timely provide [the bed assignments] to law enforcement officials when needed, maintain security within prison confines, identify prisoners who may pose specific risks and/or need to be separated from particular groups of inmates, and prevent prisoner escape." While Davis argued that inmates did not have an expectation of privacy in such information, the court pointed out that claim had been previously rejected by the Second Circuit. Balancing the inmates' privacy interest with the non-existent public interest, the court observed that "plaintiff has failed to demonstrate that disclosure of the inmate names and register numbers would serve a cognizable public purpose such that the information may not be withheld under the privacy exemptions as he has not provided any justification, let alone a sufficiently weighty justification, for disclosure of the information sought." (*Corey Davis v. United Sates Department of Homeland Security, et al.*, Civil Action No. 11-203 (ARR)(VMS), U.S. District Court for the Eastern District of New York, April 6)

Judge Reggie Walton has ruled that the FBI conducted an **adequate search** for records concerning the conviction of John Giovanetti and properly invoked several exemptions. The agency disclosed 541 pages, 237 with redactions, and withheld 158 pages in full. Giovanetti complained that the agency had originally disclosed only 18 pages before its later much larger response. Walton noted that "but the plaintiff has not pointed to anything in the record supporting the suggested misrepresentation and his 'skepticism' is based on a mistaken premise. The plaintiff either ignores or overlooks the fact that the FBI's 2009 release of 18 pages was in response solely to a referral of those records from EOUSA." He indicated the FBI had initially invoked **Exemption 7(A) (interference with ongoing investigation or proceeding)** to withhold all its records, but later withdrew its reliance on 7(A) once the investigation was completed. The agency had redacted personally-identifying information under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Giovanetti questioned the agency's withholding of two pages of printouts of accomplishment reports. But Walton pointed out that the agency indicated the pages were about another third party and did not mention Giovanetti at all. He observed that "not only are the documents exempt, but they appear to be non-responsive to the plaintiff's request" for all records pertaining to his prosecution. Walton added that "moreover, the plaintiff has proffered no evidence to warrant an inquiry as to whether an overriding public interest compels the disclosure of the otherwise exempt third-party information." (*John C. Giovanetti v. Federal Bureau of Investigation*, Civil Action No. 13-1807. U.S. District Court for the District of Columbia, March 31)

Judge Tanya Chutkan has ruled that the FBI has finally shown that it conducted an **adequate search** for records concerning Cina Ryan, who believed he had been a subject of government surveillance since 9/11. The FBI had used a variety of phonetic searches and found no records, but had not searched using the name Cina A. Ryan because it decided that its phonetic combinations would have picked up any records similar to that spelling. Chutkan previously found that the FBI had not sufficiently explained why it did not search its

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ELSUR indices. This time, however, Chutkan was convinced by the agency's affidavit explaining that ELSUR searches would not be productive if no references were located in a search of its Central Records System. Finding that Ryan's challenges to the search were unpersuasive, Chutkan pointed out that "with regard to Plaintiff's otherwise unsupported allegation of bad faith, the court notes that agency declarations in FOIA disputes are presumed to be in good faith, and that presumption 'cannot be rebutted by "purely speculative claims about the existence and discoverability of other documents."' But that is all Plaintiff provides—conclusory, unfounded allegations of wholesale government crimes and conspiracies, while submitting no fact based allegation that Defendant is attempting to mislead the court." (*Cina A. Ryan v. Federal Bureau of Investigation*, Civil Action No. 14-1422 (TSC), U.S. District Court for the District of Columbia, March 31)