Volume 43, Number 1
January 4, 2017

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Court Rejects Claim That Blogger is Commercial User 1

Views from the States 4

The Federal Courts 6

Index

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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: Several Exemption 3 provisions have been included in the recently passed 21st Century Cures Act. Section 301(f)(1) allows the Department of Health and Human Services to withhold biomedical information about an individual gathered or used during the course of biomedical research. Information and privacy consultant Bob Gellman noted that the provision includes an unusual requirement that HHS make publicly available a written statement of the basis for withholding the identifying information. The other (b)(3) provision is contained in Section 3022(d)(2), allowing the agency to withhold information received in connection with a claim or suggestion of possible information blocking, which refers to health data processed in non-standard ways that undermines the interoperability of electronic systems and exchange of electronic health data. . . In a Dec. 9 letter sent to Sen. Dianne Feinstein (D-CA) and Sen. Richard Burr (R-NC), the ranking member and chair of the Senate Intelligence Committee, President Barack Obama's attorney indicated that Obama will preserve a copy of the Senate Intelligence Committee's 7,000-page report on the use of torture as part of his presidential records subject to disclosure under the Presidential Records Act after 12 years.

Court Rejects Claim That Blogger is Commercial User

Judge Ketanji Brown Jackson has rejected the Department of Transportation's conclusion that Ellen Liberman, who writes a blog for the for-profit company Safety Research & Strategies, Inc., did not qualify for the news media fee category because her request furthered the commercial interests of SRS. Although agency interpretation of the fee provisions is one of the most-hotly contested issues in FOIA, cases interpreting the statutory provisions and case law are relatively rare. But Jackson's rejection of the agency's decision emphasizes the impact of the D.C. Circuit's decision in *Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015), which rejected many of the restrictions agencies routinely place on requesters who are not clearly organized to disseminate news. Here, Jackson found that, even relying solely on the 1987 OMB fee guidance, Liberman qualified as a member of the news media for purposes of her request.

Liberman writes for *The Safety Record*, an online publication operated by SRS that reports on regulatory developments, consumer litigation, congressional hearings, and other legislative developments. Liberman made a FOIA request to the National Highway Traffic Safety Administration for records concerning 114 compliance investigations of vehicles equipped with smart key technology. She asked to be included in the news media fee category, explaining that the records she was requesting would be used as part of her reporting for *The Safety Record*. The agency rejected her request for inclusion in the news media fee category, noting that SRS and *The Safety Record* were organized for commercial research and advocacy, not for dissemination of news. The agency indicated that Liberman would need to pay $2,070 for processing her request. She agreed to pay the fee under protest, reserving her right to appeal the decision. Liberman filed an administrative appeal of the agency's denial of news media status, pointing out that *The Safety Record* received 6,000 unique visitors per month and that FOIA requests submitted by SRS were separate from those submitted by *The Safety Record*, which were used only for disseminating news. NHTSA's chief counsel denied Liberman's appeal, finding instead that "*The Safety Record* blog is not a distinct entity that can be separated from SRS" and "the publication exists primarily (if not solely) for marketing purposes." Liberman filed suit and two months later the agency told her it was rescinding its prior decision in light of the D.C. Circuit's ruling in *Cause of Action v. FTC*. A month later, NHTSA rejected Liberman's request on the basis that it was made for commercial use.

Jackson began by reviewing statements made at the time the fee provisions were passed in 1986. She pointed out that Sen. Patrick Leahy (D-VT), the Senate sponsor of the fee provisions, had indicated that "any person or organization which regularly publishes or disseminates information to the public should qualify for waivers as a representative of the news media." The 1987 OMB Guidelines on the fee provisions defined "commercial use" as "a use or purpose that furthers the commercial, trade, or profit interest of the requester," but also noted that "a request for records supporting the news dissemination function of [a commercial news-media entity] shall not be considered to be a request that is for a commercial use." Jackson noted that in *Cause of Action v. FTC*, the D.C. Circuit explained that a determination of who qualified as a representative of the news media "focuses on the nature of the *requester*, not its request," while the commercial use requirement does not focus on "the identity of the requester, but the *use* to which he or she will put the information obtained," which can vary from request to request.

Jackson noted that in *Cause of Action v. FTC*, the D.C. Circuit had identified five factors in the news media category provision: "A requester must: (1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience." Jackson observed that "with this framework in mind, this Court easily concludes that *The Safety Record* satisfies the five statutory criteria for being deemed a new-media entity." She pointed out that "there is no dispute that *The Safety Record* has a long history of 'gathering information' through its submission of FOIA requests regarding matters such as automobile safety" and that the publication "gathers information 'of potential interest to a segment of the public'—specifically, people who are interested in automobile and consumer product safety, including the blog posters themselves." Finding *The Safety Record* easily qualified as using editorial skills, she indicated that "the D.C. Circuit has condoned news-media fee waiver treatment for entities producing works that is far less 'distinct' and that reflect far less in terms of 'editorial skills,' and in fact, the Circuit has held that publishing documents *in toto*, with scant editorial commentary, suffices." She added that "it is now well-established that online means of distribution. . .can satisfy the statutory requirement that a requester 'distribute [its] work to an audience.' And the 'audience' for such distribution need not be demonstrably large. . .Here, there is no dispute that *The Safety Record* distributes its work to an audience by posting articles to a public blog that has more than 6,000 visitors per month."

Jackson characterized the agency's original position that the contents of *The Safety Record* did not qualify as news as "utterly misguided." She noted that "the FOIA also specifically defines 'news' to mean *any*

'information that is about current events or that would be of current interest to the public'" and explained that "neither party here has cited a single case in which a court has scrutinized the content of published information on the grounds that it may not concern 'current events' or matters that would be of 'current interest,' much less considered such an evaluation to be dispositive of the new-media issue separate and apart from the five statutory elements." She also rejected the agency's contention that First Amendment case law on what constituted commercial speech was relevant in this context. She pointed out that "there is simply no basis for DOT's assertion that content that is properly characterized as commercial speech for First Amendment purposes is necessarily disqualified from being deemed 'news' for the purpose of FOIA's fee-waiver provision. Indeed, quite to the contrary, Congress crafted the FOIA to make clear that any 'information that is about current events or that would be of current interest to the public'—whether or not it is expressed in a commercial context—qualifies as 'news' for FOIA purposes."

Jackson rejected the implicit argument that because *The Safety Record* was published by SRS, its FOIA requests were made in furtherance of SRS's commercial interests. Instead, she noted that "the record demonstrates that *The Safety Record* is almost entirely devoid of any specific references to SRS, and when SRS is mentioned, it is almost always in the context of reporting SRS's role in gathering and presenting certain information, and almost never in the context of describing SRS's fee-based services."

The agency insisted that Liberman's requests necessarily were made for commercial use because SRS was a for-profit company. Turning again to *Cause of Action v. FTC*, Jackson noted that the D.C. Circuit had explained that "just as the law recognizes that a corporate news-media entity can request records in furtherance of its news-dissemination function, it also acknowledges that not *all* records requests from such an entity are necessarily aimed at news dissemination. The D.C. Circuit has observed that a news-media entity can also seek records in its 'commercial' capacity—*i.e.*, in service of inward-looking corporate functions that have no direct relationship with public dissemination of information." She indicated that "the structural dichotomy in the FOIA statute between requests for documents for public dissemination, which are subject to one set of fee standards, and requests for documents for commercial use, which are governed by different fee rules, strongly supports the conclusion that when a news-media entity seeks records in its *journalistic* capacity—*i.e.*, in services of its news-dissemination activities—it does not seek records 'for commercial use,' even if that entity is a 'for-profit enterprise' that has non-journalistic activities in its portfolio." She pointed out that "unlike the 'representative of the news media' requirement, which focuses on the requester, the 'commercial use' provision homes in on the anticipated 'use' of the requested information and news-dissemination activity is not a 'commercial use,' even when undertaken by a commercial entity." Applying these standards, Jackson noted that "DOT's suggestion that representatives of *The Safety Record* blog are precluded from receiving the waiver because the primary purpose of *The Safety Record* is to serve as an either explicit or implicit advertisement for the blog's parent company not only asks this Court to embark on a 'more or less unresolvable inquiry into the value of journalists' private goals,' it also invites a legal conclusion about 'commercial use' that is manifestly inconsistent with the FOIA statue and the governing precedents that interpret it." (*Ellen C. Liberman v. U.S. Department of Transportation*, Civil Action No. 15-1178 (KBJ), U.S. District Court for the District of Columbia, Dec. 31, 2016)

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Views from the States…

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

Connecticut

A trial court has ruled that Ohan Karagozian failed to properly serve the FOI Commission when a marshal served his complaint against the Commission at the Attorney General's office. The FOIA provides that the FOI Commission be served in person rather than through the Attorney's General's office. Nevertheless, the marshal serving Karagozian's complaint checked to see if the FOI Commission was on the "do not serve" list at the Attorney General's office, and, further, was told by an employee at the Attorney General's office that she could accept service of the complaint. Regardless, the complaint was not served on the FOI Commission, which found out about the complaint only after the Board of Examiners for Opticians, the public body which Karagozian accused of violating the open meetings provisions of FOIA, notified the Commission that it had been served. Dismissing the complaint for lack of jurisdiction, the trial court explained that Karagozian had the ability to ascertain the requirements for service and could have mailed a certified copy of his complaint to the Commission as well. Although Karagozian had properly served the Board of Examiners for Opticians, the court dismissed them as well, noting that "failure to serve the agency that *rendered* the decision deprives the court of subject matter jurisdiction over the entire appeal, and where there is no appeal, proper service on the defendants is simply a moot point." (*Omar Karagozian v. Freedom of Information Commission*, No. HHB-CV-16-6034438-S, Connecticut Superior Court, Judicial District of New Britain, Dec. 2, 2016)

Maryland

A court of appeals has ruled that the Anne Arundel County Fire and Police Departments conducted adequate searches for records pertaining to a 2009 settlement of charges of inappropriate sexual behavior by volunteer fireman Louis D'Camera against two teenage recruits. The case was settled in federal court by the County's Self Insurance Fund Committee for $321,000. Gary Glass made multiple requests for related records, but refused to provide the county with more detailed information that could have focused its search. Dissatisfied with the results of the search, Glass filed suit. The appeals court found the county agencies had conducted appropriate searches. The court indicated that the fire department had found no internal investigation because the police had handled the complaint. The appeals court agreed with the fire department that "unless and until the AACFD *completed* an internal investigation into allegations of misconduct against D'Camera, there would not be documents in his personnel file pertaining to any allegations against him." The police department located a file on one of the teenage victims, but "because the dates associated with those reports preceded the only date provided by Glass in his letter, [the police] did not have reason to believe that those reports would be responsive." The county withheld two legal memoranda pertaining to the settlement. Glass argued they could be severed. However, the court noted that the trial court "reviewed both documents in *camera* and ruled that both were properly exempt from disclosure as attorney work product." (*Gary Glass v. Anne Arundel County*, No. 2077, Sept. Term, 2015, Maryland Court of Special Appeals, Dec. 15, 2016)

New York

A trial court has ruled that the Attorney General failed to explain why it found no more responsive documents for a request filed by the Competitive Enterprise Institute for a copy of the Climate Change Coalition Common Interest Agreement. The Attorney General initially told CEI that it had no responsive

documents, but that since the CIA document had been disclosed by a third party, the Attorney General claimed the case was now moot. CEI argued that the Attorney General had not justified its original decision and asked the court to award it attorney's fees. The court noted that "in denying the request, the respondent has the burden of demonstrating the records fall within one of the statutory exemptions. However viewed, the denial was nothing more than a parroting of statutory language, and thus a complete failure of its obligation 'to fully explain in writing. . .the reason for the denial of access.'" Sending the case back for further proceedings, the court pointed out that "although [the Attorney General] argues that it should not be subject to attorney's fees and costs because it substantially complied with the petitioner's request, on this record the Court finds that this was simply not the case. Here, petitioner has substantially prevailed and respondent's 'conclusory assertions that certain records were within a statutory exemption are not sufficient.'" (*Competitive Enterprise Institute v. Attorney General of New York*, No. 5050-16, New York Supreme Court, Albany County, Nov. 21, 2016)

Ohio

The supreme court has revised its 22-year-old decision in *Steckman v. Jackson*, 639 N.E. 2d 83 (1994), finding that the confidential law enforcement investigatory records exemption prohibited prisoners from obtaining any more information under the Public Records Act than they were entitled to under Criminal Rule of Evidence 16, after concluding that the revision of Rule 16 had largely obviated the necessity for such a prohibition. At the time *Steckman* was decided, the supreme court pointed out that the PRA had developed as a back-door mechanism for prisoners to get access to more information about their conviction for potential use in post-conviction motions. But by ruling that prisoners were not entitled to access unless there was no possibility of further proceedings, *Steckman* had evolved into a life-time ban on prisoner access. In the case before the supreme court, Donald Caster, an attorney with the Ohio Innocence Project, had requested records from the Columbus Police Department concerning the investigation of Adam Saleh for murder. Although OIP was only researching whether Saleh was a potential candidate for representation, the Columbus police denied Caster's request, citing *Steckman*. Finding the revisions to Rule 16 questioned the continued need for *Steckman*'s prohibitions, the supreme court noted that "the court's prior jurisprudence in this area was based on expedience—the idea that a defendant should not be able to have more information on retrial than he or she could have gained through Crim.R. 16 discovery for the original trial. The reworking of Crim.R. 16 has allayed those concerns." The court pointed out that "because the revisions to Crim.R. 16 have leveled the disparity between information available through PRA and through Crim.R. 16 discovery, and in the interests of justice, we hold that the confidential-investigatory-work-product exception does not extend beyond the completion of the trial for which the information was gathered." Because the Columbus police had summarily rejected Caster's requests, the supreme court also awarded him attorney's fees. (*State ex rel. Donald Caster v. City of Columbus*, No. 2016-8394, Ohio Supreme Court, Dec. 28, 2016)

The supreme court has ruled that dash-cam recordings made by two police officers during a high-speed chase are public records and that only 90-seconds of the recordings showing the arrest of the suspect could be considered confidential law enforcement investigatory records. The *Cincinnati Enquirer* requested the dash-cam recordings from the high-speed chase. The state police provided the incident reports and the 911 transcript, but withheld the dash-cam recordings because they were considered confidential law enforcement investigatory records until the investigation was completed. Once the driver was convicted, the state police disclosed the recordings. The supreme court ruled that the recordings were public records and that only those portions showing the arrest of the suspect qualified as law enforcement material. Indicating that a case-by-case analysis was appropriate when considering the disclosure of dash-cam recordings, the supreme court noted that "the recordings contain images that have concrete investigative value specific to the prosecution of [the suspect] that may be withheld, but also contain images that have little or no investigative value that must be disclosed. A case-by-case review is necessary to determine how much of the recordings should have been

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disclosed." The court observed that "a large portion of the recordings did not involve any investigative functions at all. . .Under even the most generous view of investigative work product, these images held no investigative value and should have been disclosed." Because the only case law on the disclosure of dash-cam recordings was a single trial court decision ruling that they were protected by the law enforcement exception, the supreme court concluded the state police's position was reasonable and denied the *Enquirer*'s request for attorney's fees. A dissenting justice disagreed, pointing out that "the Enquirer could have saved attorney's fees by abandoning this action as soon as the records were produced but it did not, and the law of Ohio is more easily understood as a result of their tenacity. The Enquirer has prevailed on the merits of this case." (*State ex rel. Cincinnati Enquirer v. Ohio Department of Public Safety*, No. 2015-0390, Ohio Supreme Court, Dec. 6, 2016)

Oklahoma

The supreme court has ruled that a surveillance video used as the basis for requiring Joe Mixon to appear before a trial court on charges that he had struck a female at a Norman restaurant is a public record that must be made available to the media for copying. After Mixon appeared, the court made the video a part of the record. Although Mixon was not charged, he was required to stay in police custody until he posted bail. When the television station requested a copy of the video, the district attorney said he no longer had the video, since it had been placed in the litigation files of the city attorney. The television station sued and the trial court ordered the city to disclose the video. The appeals court, however, found that since Mixon had not been arrested, the police were no longer responsible for disclosing the video. The supreme court found that Mixon's detention qualified as an arrest, noting that "adding additional elements to the definition of arrest and its common meaning would thwart the Act's underlying legislative policy. The city argued that an amendment to the Open Records Act excluded law enforcement agencies from the provision requiring an agency to provide a copy of records. The supreme court disagreed. The supreme court noted that "we find that [the amendments] must be read to allow copying as well as inspection of records of an arrest, including facts concerning an arrest." (*Oklahoma Association of Broadcasters, Inc. v. City of Norman*, No. 113,973, Oklahoma Supreme Court, Dec. 6, 2016)

The Federal Courts…

Judge Colleen Kollar-Kotelly has ruled that Cause of Action failed to show that a 2009 memo from then White House Counsel Greg Craig instructing agencies to consult the White House in processing FOIA requests that involved White House-related records before the statutory deadline for responding expired constituted a **policy or practice** that delayed FOIA requests Cause of Action had made to various agencies for records pertaining to contacts with the President or Vice President's office. Although Kollar-Kotelly noted that the Craig Memo was similar to memos issued by previous administrations, Cause of Action argued that its use of the term "White House equities" was so vague and undefined that it encouraged agencies to consult with the White House when not necessary. Kollar-Kotelly found Cause of Action had not shown a pattern of violating FOIA since only one if its requests had even been referred to the White House. Further, she noted that the agencies had not decided to withhold any records. Instead, "Plaintiff merely alleges that the Agency Defendants' responses to its request have been *delayed*. This distinction is significant," since "delay alone, even repeated delay, is not the type of illegal policy or practice that is actionable under [FOIA]." She added that "in light of [Cause of Action's] concession that OWHC review is not '*per se*' unlawful, Plaintiff's claim that the delays in this care are actionable is quite narrow. It is dependent not only on the allegation that the delays in this case are caused by OWHC review, but also on the allegation that such review is unlawful under the circumstances because it is 'unnecessary,' and merely used to 'control political messages and avoid

political embarrassment.'" Instead of finding the OWHC review unnecessary, Kollar-Kotelly observed that "to the contrary, the Court finds that the FOIA requests OWHC had allegedly reviewed plausibly implicate records that either come from the White House or could reasonably call for White House input to determine the applicability of FOIA exemptions. For example, a number of the requests explicitly implicate White House records or correspondence, which even Plaintiff concedes makes OWHC review reasonable." She continued: "Having reviewed all of the *facts* alleged, including the sixty-five exhibits attached to Plaintiff's Complaint, the Court finds no factual support for Plaintiff's conclusions that OWHC review has been used as a politically-driven delay tactic divorced from legitimate review. The requests are not nearly so far removed from legitimate reasons the White House might have to review FOIA request to support this conclusion. Even if the OWHC has been consulted with on FOIA requests that, as it turned out, did not in fact implicate White House records or records that were protected by an executive-related FOIA exemption, the focus of the 'policy or practice' doctrine is conduct this is '*wholly unjustified*.'" Kollar-Kotelly dismissed Cause of Action's claim under the Administrative Procedure Act, finding instead that FOIA provided a remedy for its practice or pattern challenge. Cause of Action argued that the APA was the appropriate vehicle for challenging the legality of agency FOIA regulations. But Kollar-Kotelly noted that ""although Plaintiff expounds on this argument at length in its Opposition, the Complaint is completely devoid of any allegation that any Agency Defendant has violated their own FOIA regulations by coordinating with the OWHC regarding FOIA requests." (*Cause of Action Institute v. W. Neil Eggleston, et al.*, Civil Action No. 16-871 (CKK), U.S. District Court for the District of Columbia, Dec. 15, 2016)

The D.C. Circuit has ruled that the district erred in finding that the State Department had complied with its obligations under the **Federal Records Act** when it attempted to recover former Secretary of State Hillary Clinton's work emails by asking her to return them to the agency rather than requesting the Attorney General initiate an enforcement action under the FRA. Ruling in a case brought by Judicial Watch and Cause of Action challenging the district court's finding that its FRA case was moot, Circuit Court Judge Stephen Williams noted that "appellants sought the only relief provided by the Federal Records Act—an enforcement action through the Attorney General. But nothing the Department did (either before or after those complaints were filed) gave appellants what they wanted. Instead of proceeding through the Attorney General, the Department asked the former Secretary to return her emails voluntarily and similarly requested that the FBI share any records it obtained. Even though those efforts bore some fruit, the Department has not explained why shaking the tree harder—e.g., by following the statutory mandate to seek action by the Attorney General—might not bear more still." Williams indicated that the FBI's recovery of emails from Clinton's server might have mooted plaintiffs' claims, but "because the complaints sought recovery of emails from all of the former Secretary's accounts, the FBI's recovery of a server that hosted only one account does not moot the suits." The district court had concluded that the Department fulfilled its FRA obligation by taking some action to recover the Clinton emails. But Williams explained that did not satisfy all the elements required by *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991). Instead, he noted that "the entire enforcement scheme assumes that the agency head (or Archivist) will actually refer cases to the Attorney General—as the statute requires—and we said that if he does not 'there will be no effective way to prevent the destruction or removal of records.' That passage alone makes clear that when records go missing, the *something* required by the statute is a referral to the Attorney General by the agency head and/or the Archivist." He observed that "while we recognized that sometimes an agency might reasonably attempt to recover its records before running to the Attorney General, we never implied that where those initial efforts failed to recover all the missing records (or establish their fatal loss), the agency could simply ignore its referral duty. That reading would flip *Armstrong* on its head and carve out enormous agency discretion from a supposedly mandatory rule. Plainly, we understood the statute to rest on a belief that marshalling the law enforcement authority of the United States was a key weapon in assuring record preservation and recovery." The D.C. Circuit sent the case back to the

ACCESS REPORTS

district court for further determination. (*Judicial Watch, Inc., et al. v. John F. Kerry*, No. 16-5015, U.S. Court of Appeals for the District of Columbia Circuit, Dec. 27, 2016)

Ruling on the basis of his *in camera* review after the Department of Homeland Security and journalist Irvin Muchnick were unable to settle their dispute over 20 remaining documents from George Gibney's alien file, a federal court in California has ordered the agency to disclose most of the redacted information concerning allegation of sexual abuse of underage swimmers, which the agency claimed were protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7(E) (investigative methods and techniques)**. Gibney, a former coach of the Irish swim team, had immigrated to the United States in 1994, even though there were substantive allegations of sexual abuse on his part. As part of his research for a book on sexual abuse in amateur athletics, Muchinick requested Gibney's alien file from U.S. Citizenship and Immigration Services. After the agency refused to disclose most of the records, Muchnick filed suit. Judge Charles Breyer ruled previously that because the sexual abuse allegations against Gibney were already public, his privacy interest in such information was non-existent. However, in his most recent decision, Breyer had indicated that the agency's exemption claims were appropriate. After the parties failed to come to an agreement, Breyer resolved the remaining issues based on his *in camera* review. The agency had relied on *Reporters Committee* to argue that the information was practically obscure, but Breyer noted that "Gibney finds little shelter under *Reporters Committee*. At least as to allegations of sexual abuse, his A-File is no 'compilation of otherwise hard-to-obtain information.' Anyone who bothers Googling his name can get their hands on the sordid details of his alleged crimes." As a result, Breyer added, "Gibney has 'no privacy interest' in preventing disclosure of the widely known allegations swirling around him. And without a privacy interest, there can be no invasion of personal privacy, let alone an unwarranted one." As to the public interest in disclosure, Breyer indicated that "much of [the information] sheds light on multiple decisions by multiple DHS personnel. It details what they knew about Gibney's past and when they knew it." Rejecting the agency's claim that disclosure of the information was not in the public interest because in involved a single individual, Breyer pointed out that "although he has a privacy interest in DHS immigration decisions, the public has a strong interest in understanding how and why their government allowed a man with a far-worse-than-checkered past (and perhaps present) to stay here for more than two decades." Breyer agreed with the government that information that could reveal how certain databases were used was protected under Exemption 7(E). Breyer however, found the exemption applied only so far. He explained that "so long as DHS redacts *how* it obtained information about Gibney, disclosing *what* it found out would not disclose a law enforcement technique, procedure, or guideline. That is all the more true given that the allegations here are no secret." (*Irvin Muchnick v. Department of Homeland Security*, Civil Action No., 15-3060 CRB, U.S. District Court for the Northern District of California, Dec. 6, 2016)

The Second Circuit has wrapped up the remaining threads of the FOIA litigation brought by the ACLU over the analysis of the legality of targeted drone killings of U.S. citizens abroad. The Second Circuit earlier concluded that the government had waived much of the analysis through public acknowledgment, but continued to allow the government to withhold many of the records. Reviewing a redacted decision by the district court judge finding that the government had properly withheld 52 remaining documents while finding that portions of seven documents contained acknowledged facts that should be disclosed, the Second Circuit concluded that all the remaining records should be withheld. Ruling in favor of the government on all the 52 documents as well as the seven disputed documents, the Second Circuit noted that "the documents are protected by one or more FOIA exemptions and no waiver of secrecy has occurred with respect to any of them." As to the seventh fact that the district court had identified as possibly subject to segregation, the Second Court explained that "the Government did not assert the right to withhold any of the documents at issue in this appeal on the ground that those documents contained the seventh fact. Accordingly, even if we

were to conclude that the Government publicly acknowledged the seventh fact, we would not order disclosure of any document on that basis." (*American Civil Liberties Union v. United States Department of Justice*, No. 15-2956 (L) and No. 15-3122 (XAP), U.S. Court of Appeals for the Second Circuit, Dec. 20, 2016)

A federal court in Illinois has ruled that the FBI properly withheld personally identifying information about its agents, Illinois law enforcement agents, and third parties of interest under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 6 (invasion of privacy)**. Ben Baker requested records on the federal investigation of former Chicago police officer Ronald Watts, who was convicted of theft and sentenced to 22 months in prison. The FBI initially rejected Baker's request under Exemption 7(C), a decision that was upheld on administrative appeal. However, after Baker filed suit, the FBI decided Baker had shown sufficient public interest in the investigation to merit a search. The agency located 5,818 pages and disclosed 736 pages, redacting personally identifying information under Exemption 7(C) and Exemption 6. Baker argued that the fact that Watts was investigated and convicted showed government impropriety. The court disagreed, noting that "Baker has not produced any concrete evidence or logical conclusion that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred. . .Even though Baker states that he is not accusing any agents of specific wrongdoing, his contention that a government impropriety occurred is based only on his own perception of the criminal justice system. Baker's generalized statement about government impropriety and painting all those involved in the process with a broad brush has no merit." The court added that "Baker has failed to produce sufficient evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." The court found that personally identifying information for FBI agents and local law enforcement officials was properly withheld. The court indicated that "the disclosure of these individuals would serve little to no public interest other than subjecting them to harm or harassment." The court concluded by commenting that "under Baker's broad reading of FOIA, privacy considerations essentially would be meaningless and the laws relating to exemptions would not matter. This court gives due consideration to the right of the public to know certain information and the privacy rights of citizens to be protected from disclosure of certain information." (*Ben Baker v. Federal Bureau of Investigation*, Civil Action No. 14-9416, U.S. District Court for the Northern District of Illinois, Dec. 6, 2016)

Judge Christopher Cooper has ruled that the Department of State has shown that it conducted an **adequate search** for records concerning contacts with *New York Times* reporter David Sanger after a request by Freedom Watch was remanded to the agency for further processing after the return of former Secretary of State Hillary Clinton's emails. Cooper also rejected Freedom Watch's request for **discovery**. After the district court had ruled in favor of State, the D.C. Circuit remanded the case in light of the recent discovery of Clinton's emails. Using the same keyword search employed during its original search, State again found no records. However, two former State employees provided State with additional potentially relevant records. The search of those records yielded several internal emails concerning a draft version of a briefing in preparation of an interview with Sanger. State redacted portions of those emails under **Exemption 5 (deliberative process privilege)**. Freedom Watch argued the agency improperly used an automated search. But Cooper noted that "keyword searches in response to FOIA requests are routine" and added that "in short, because it was perfectly reasonable for State to conduct its search using a list of search terms, in accordance with various orders of this Court, Freedom Watch's argument to the contrary is unavailing." Cooper found the redactions under Exemption 5 were appropriate. He rejected Freedom Watch's request for discovery based on what Freedom Watch referred to as "inconsistent" later disclosures by State. Instead, Cooper observed that "what this argument overlooks is the fact that most of the documents uncovered in the later stages of this litigation came to light because former employees, including Secretary Clinton, turned over documents to

State that were not previously in the Department's possession. In other words, State could not have reviewed them because State did not have them." (*Freedom Watch, Inc. v. National Security Agency, et al.*, Civil Action No. 12-01088 (CRC), U.S. District Court for the District of Columbia, Dec. 12, 2016)

A federal court in Oregon has ruled that portions of emails and drafts pertaining to the Bureau of Land Management's decision to authorize the Steens Mountain Travel Management Plan are protected by **Exemption 5 (privileges)**, while other portions do not qualify for either the attorney-client privilege or the deliberative process privilege. Reviewing the documents *in camera*, the court noted that several emails "concern BLM seeking confidential legal advice from a DOJ attorney or an Assistant U.S. Attorney, and no non-privileged communications can be reasonably redacted from the correspondence." As to another email, the court pointed out that "the attorney-client privilege applies to comments by attorneys in the drafts' margins. Only those comments, however, that are related to providing legal advice to BLM are privileged." The court found other portions deliberative. The court observed that "the deliberative process privilege applies to certain comments in the drafts' margins. These comments 'contain the personal views of agency staff or contain questions concerning the accuracy of the information or analysis contained within the draft,' as well as 'internal discussions concerning the method by which information is to be analyzed or how the law is to be applied to that information.'" (*Oregon Natural Desert Association v. Brendan Cain*, Civil Action No. 09-00369-PK, U.S. District Court for the District of Oregon, Dec. 5, 2016)

A federal court in Louisiana has ordered an affidavit submitted by Brian Welsh, Deputy Chief of the FOIA Branch at U.S. Citizenship and Immigration Services, stricken from the record for **lack of personal knowledge** of the request at issue. In a case brought by immigration attorney Michael Gahagan, the court had previously found the agency's *Vaughn* index insufficient. Welsh submitted a supplemental affidavit on behalf of the agency. Gahagan challenged the affidavit on the grounds that Welsh did not have personal knowledge of the processing of the request. While the court agreed with decisions by district courts in other jurisdictions that personal knowledge was satisfied when an affiant showed an involvement and understanding of the agency's FOIA processing, it agreed with Gahagan that Welsh failed to show he had sufficient personal knowledge of the processing of Gahagan's request. The court noted that "Welsh's declaration attests to his position with USCIS, that he is a licensed attorney, that he was previously a judge advocate in the United States Air Force, and that as part of his duties as a military lawyer, he provided legal advice on the release of information under FOIA. Presumably, this establishes that he is familiar with FOIA procedures. But none of his attestations create an inference that Welsh has personal knowledge or familiarity with the documents at question. Accordingly, the Court finds that Welsh's declaration in support of USCIS's revised *Vaughn* index is not based on his personal knowledge." (*Michael W. Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 15-2540, U.S. District Court for the Eastern District of Louisiana, Dec. 12, 2016)

A federal court in Louisiana has ruled that U.S. Citizenship and Immigration Services has not yet shown that it conducted an **adequate search** for a Form I-485 Receipt Notice for a client of immigration attorney Michael Gahagan because its affidavit claiming that the agency's database does not contain such receipt notices conflicts with the affidavit filed in a previous case brought by Gahagan. Gahagan's client, who was subject to deportation proceedings, challenged the decision on the basis that he was legally married to a U.S. citizen. However, to prove his status, he needed to provide the court with the I-485 notice. USCIS concluded that the notice would most likely be contained in his alien file, but after locating that file the form was not found. The agency agreed to recreate the form with redactions. In light of the conflicting affidavits, the court noted that "this sworn statement, which directly bears on whether or not a search of [the database] could reveal an archived Receipt Notice, conflicts with [the current affidavit] that it could not, [and] creates a

factual controversy regarding whether or not USCIS conducted an adequate search of [its database]." The court ordered the agency to conduct a further search to determine if the archived form existed. In the meantime, the court also ordered the agency to disclose the recreated form to Gahagan. (*Michael W. Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 16-15438, U.S. District Court for the Eastern District of Louisiana, Dec. 14, 2016)

The Fifth Circuit has upheld a district court's ruling that immigration attorney Michael Gahagan was not entitled to **attorney's fees** under the four-factor analysis traditionally used in determining entitlement. Although the district court concluded Gahagan was eligible for fees since U.S. Citizenship and Immigration Services ultimately disclosed the document he requested, based on its four-factor analysis the district court found he was not entitled to fees. At the Fifth Circuit, Gahagan argued that the 2007 Open Government Act amendments, which restored the causal effect analysis to determination of attorney's fees under FOIA, had largely supplanted the previous four-factor analysis. Indicating that since Gahagan had not raised that argument before the district court it was not waived, the Fifth Circuit observed that Gahagan "misapprehends the scope of our authority; we are obligated to follow [existing precedent]." The Fifth Circuit explained that "the district court thoroughly and properly considered each of the four relevant factors. It found the first and last factors to favor USCIS and the second and third factors to favor Gahagan. Having reviewed the parties' arguments and relevant portions of the record, we cannot find that the district court abused its discretion in analyzing or weighing these factors, or in determining that, under the circumstances, Gahagan was not entitled to attorney's fees." (*Michael W. Gahagan v. United States Citizenship & Immigration Services*, No. 16-30882, U.S. Court of Appeals for the Fifth Circuit, Dec. 14, 2016)

A federal court in Ohio has ruled that the Department of Veterans Affairs has not shown the court lacks **jurisdiction** over attorney Maxwell Kinman's FOIA and Privacy Act requests for claims files of a number of veterans he represents. Kinman requested the claims files on his clients' behalf and provided appropriate Privacy Act waivers. After the agency failed to provide many of the records, Kinsman sued under FOIA and the Privacy Act. The agency claimed since it processed claims files exclusively under the Privacy Act, the court did not have jurisdiction to hear Kinman's FOIA complaint. Alternatively, the agency argued Kinman had not exhausted his administrative remedies under the Privacy Act, robbing the court of jurisdiction under the Privacy Act as well. Finding the agency's arguments somewhat incoherent, the court rejected both claims. The court noted that "defendants have not cited any authority which supports a finding that because the VA has purportedly made an administrative decision to process requests for C-files under the Privacy Act, an individual is barred from bringing a FOIA claim in federal court for the alleged withholding of those records. Nor is there any other basis for finding at the pleading stage that the court lacks subject matter jurisdiction over plaintiff's FOIA claims." As to the Privacy Act, the court pointed out that "exhaustion of administrative remedies is not a jurisdictional requirement under the Privacy Act. Thus, assuming plaintiff failed to exhaust his administrative remedies under the Act, the Court would not be deprived of subject matter jurisdiction as a result. Further, whether defendants denied plaintiff access to any of the veterans' records he requested goes to the merits of plaintiff's claims, not the Court's subject matter jurisdiction over these claims." (*Maxwell D. Kinman v. United States of America*, Civil Action No. 16-00329, U.S. District Court for the Southern District of Ohio, Dec. 7, 2016)

Judge Ellen Segal Huvelle has ruled that a class-action suit filed by a coalition of public interest groups alleging that the way fees are charged for cases on PACER violates the E-Government Act and the Little Tucker Act may continue after finding the suit is not prohibited by the first-to-file rule and states a claim

under the Little Tucker Act. The National Veterans Legal Services Program, the National Consumer Law Center, and other public interest groups, filed suit alleging that they had been charged fees in excess of those allowed under the E-Government Act and that because their individual claims were less than $10,000, the Little Tucker Act allowed them to recover excessive fees. The government argued that a previous case—*Fisher v. United States*—filed in September in the Federal Court of Claims concerning the same issues should take precedence over the case filed in U.S. District Court. Huvelle agreed with the plaintiffs that the two cases were not identical, and that, as a result, the first-to-file rule did not apply. She explained that *Fisher* was a challenge to how PACER determined the number of pages and noted that "in other words, *Fisher* claims an *error in application* of the PACER fee schedule to a particular type of request. In contrast, plaintiffs here challenge the *legality* of the fee schedule. These are separate issues, and a finding of liability in one case would have no impact on liability in the other case." The government also claimed that because PACER policies required users to alert the PACER Service Center of any billing errors within 90 days the plaintiffs had violated their contract and had no remedy. Noting that the court in *Fisher* had already rejected that claim, Huvelle observed that "this Court need not reach those legal issues because, unlike *Fisher*, plaintiffs here do not claim a billing error. Therefore, even if the notification requirement constituted a contractual condition, it would not apply to the plaintiffs' challenges to the legality of the fee schedule. Likewise, even if users were required to exhaust their claims for billing errors, that requirement would not apply to the claim in this case. In sum, the PACER policy statement provides no basis for dismissing this suit." (*National Veterans Legal Services Program, et al. v. United States of America*, Civil Action No. 16-745 (ESH), U.S. District Court for the District of Columbia, Dec. 5, 2016)