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Washington Focus: The Transactional Records Access Clearinghouse has published statistics showing that the backlog of FOIA requests at U.S. Citizenship and Immigration Services has tripled in the last two years, from 17,998 in December 2014 to 46,550 in December 2016. TRAC also noted that USCIS's processing rate had dropped precipitously as well, with closed cases going from 13,913 in June 2016 to 211 on October 2016. . . Writing in Secrecy News, Steve Aftergood highlights a recent article, "Freedom of Information Beyond the Freedom of Information Act," by Columbia University Law School Professor David Pozen, in which Pozen posits that FOIA has become politicized to the extent that requesters are now subverting its goals of access to government information. Summarizing Pozen's critique, Aftergood notes that "while FOIA is still needed to pursue contested areas where government is reluctant to disclose information, it is poorly suited to serve as the primary foundation or anchor of open government.". . .The Office of Government Information Services has moved from it North Capitol Street offices to the National Archives facility in College Park. While its email address and phone numbers remain the same, its mailing address is NARA, Office of Government Information Services, 8601 Adelphi Road – OGIS, College Park, MD 20740-6001.

Court Finds Requester Failed to Support Claim for Expedited Processing

As new organizations emerge to monitor the Trump administration, a consistent unresolved problem in getting speedy access to government records has once again provided an illustration of how difficult it is for organizations to get fee category recognition and expedited processing when they have no established track record to use to persuade the agencies or the courts. In a case brought by the progressive organization Allied Progress challenging the Consumer Financial Protection Bureau's decision to deny expedited processing for the organization's requests for records pertaining to the Prepaid Rule, a recently completed regulation designed to provide consumer protections for prepaid financial products that appeared likely to be repealed by Congress under the Congressional Review Act, Judge Colleen Kollar-Kotelly has ruled that the organization had not shown a likelihood of

success sufficient to merit a preliminary injunction forcing the agency to expedite its request. Regardless of whether or not an organization such as Allied Progress could show an ability to publicly disseminate information, the paucity of any evidence supporting its claim was clearly fatal to its request for expedited processing. Further, because, as Kollar-Kotelly explained, judicial review of a denial for expedited processing was based on the administrative record before the agency, which, unfortunately for Allied Progress was nearly non-existent, the likelihood that Allied Progress could prevail was that much more difficult.

While EPIC in particular has been a pioneer in litigating expedited processing denials, both Judicial Watch and Cause of Action earlier ran afoul of agencies' often literal interpretations of the criteria for qualifying for the preferential news media fee category, facing substantial resistance from agencies pertaining to their ability to disseminate information to the public. However, part of the problem for any advocacy group that considers its online presence to be sufficient to qualify for preferential fees or expedited processing is an initial assumption on their part that having a website and a vague plan to post information online immediately qualifies them for such preferential treatment. Early on in its evolution, Cause of Action in particular seemed unaware of the necessity to support such assumptions and its denial of preferential fee status by the FTC was a rude awakening in that regard. However, in *Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015), the D.C. Circuit largely pruned back much of the questionable interpretation of the criteria for qualifying for news media fee status, making it considerably less difficult for an organization like Cause of Action to qualify. Nevertheless, the level of detail provided by Cause of Action in that case was substantially greater than that provided by Allied Progress in its litigation.

The expedited processing provision in FOIA allows a requester to ask for expedited processing when an imminent threat to the life or physical safety of an individual exists, or when the request is made by a person primarily engaged in disseminating information where there exists an urgency to inform the public about actual or alleged federal government activity. Kollar-Kotelly noted that Allied Progress was relying on the urgency to inform prong. She explained that "there is no disagreement that the FOIA requests concern a Federal government activity—the pending Congressional action with respect to the Prepaid Rule. . ."

Under the CFPB FOIA regulations a person primarily engaged in dissemination of information did not include individuals who are only incidentally engaged in dissemination of information. Kollar-Kotelly pointed out that "although courts in this Circuit and elsewhere have routinely held that media organizations and newspapers qualify under this category, in light of the pertinent legislative history, other types of organizations have been held to not qualify, unless information dissemination is also their main activity, and not merely incidental to other activities that are their actual, core purpose."

She explained that the only evidence to support Allied Progress' claim was its FOIA requests, which, under its request for a fee waiver, indicated that "Allied Progress will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. Allied Progress will also make materials it gathers available on our public website." Kollar-Kotelly observed that "neither the statement nor anything else in the FOIA Requests describe *any* of Plaintiff's activities, let alone indicate that information dissemination is its 'main activity.' At most, the statement relays Plaintiff's intentions with respect to the materials that it seeks to obtain via the FOIA Requests. But even the statutory language plainly speaks to the general type of activity in which the requester is 'primarily engaged,' and not merely what the requester will do in the future. Were a statement of the type proffered by Plaintiff to suffice, then *any* type of organization could qualify under the statute by merely representing that it intended to engage in information dissemination with respect to the fruits of its FOIA request. That result is at odds with the plain language of the statute, the pertinent legislative history, and the case law. . ."

Having found that Allied Progress had not shown it was primarily engaged in dissemination of information, Kollar-Kotelly indicated that alone was sufficient to dismiss its case. However, she went on to explore whether Allied Progress could qualify under the urgency to inform prong as well. She expressed doubt that it was a matter of "current exigency to the American public" as required by the agency's FOIA regulations. She observed that "that is not to say that the Prepaid Rule is not important, and indeed, the Court in no way concludes that there is not in reality substantial public interest in the Prepaid Rule. Rather, the Court merely finds that the current record, which it was Plaintiff's burden to develop, does not provide any evidence of this public interest."

Pointing out that to succeed in obtaining a preliminary injunction Allied Progress needed to show irreparable harm if an injunction was not granted, Kollar-Kotelly indicated that "courts in this Circuit have recognized that simply because a request for expedited treatment is 'time-sensitive,' does not mean that, *ipso facto*, failing to grant injunctive relief mandating expedited processing would lead to irreparable harm." She added that "in order to establish irreparable harm, Plaintiff must show that, absent an injunction, it would suffer harm that is both 'great' and not 'theoretical.' Plaintiff, however, has failed to demonstrate that there is substantial public interest in the records sought via the FOIA requests, such that a delay in the release of those records would cause harm that is sufficiently 'great' to constitute irreparable harm." She observed that balanced against the public interest in expediting FOIA requests generally was the need for agencies to properly protect exempt records and to make sure that other requesters were not harmed by the reallocation of resources to respond to an expedited processing request. She pointed out that "here, where Plaintiff has not provided credible evidence of a significant public debate over the subject of the FOIA Requests, the Court cannot conclude that the public interest is best served by directing resources toward Plaintiff's requests, and away from others." (*Allied Progress v. Consumer Financial Protection Bureau*, Civil Action No. 17-686 (CKK), U.S. District Court for the District of Columbia, May 4)

Views from the States…

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

Georgia

A court of appeals has ruled that the trial court erred when it found that the University of Georgia had the discretion to disclose information concerning a contract for a statistical study of payday loans. Kennesaw State University awarded the contract to Consumer Credit Research Foundation. The Campaign for Accountability requested communications between a KSU professor and the Foundation related to the study. The University indicated that it did not object to providing some records in redacted form. The Foundation, however, filed suit to block disclosure, arguing that the records fell within two research exceptions. The trial court found that application of the exemptions was discretionary and that the university could exercise its discretion to disclose the records. The appellate court disagreed, noting that, unlike the federal FOIA, the exemptions in the Georgia Open Records Act were mandatory, not discretionary. The court pointed out that "the Foundation was entitled to enjoin KSU from disclosing the research correspondence to the CFA, if the Foundation showed that the correspondence fell within one or both of the research exceptions found in the Open Records Act." Finding that the trial court's ruling was based on an erroneous interpretation of the law, the appeals court sent the case back to the trial court to decide if the redacted records were exempt in the first

instance. (*Consumer Credit Research Foundation v. Board of Regents of the University System of Georgia*, No. A17-A0620, Georgia Court of Appeals, May 4)

Louisiana

The supreme court has ruled that the Louisiana Society for the Prevention of Cruelty to Animals functions as the equivalent of a public agency by performing animal control services for the City of New Orleans under the terms of a Cooperative Endeavor Agreement and that its records concerning the CEA are subject to the Public Records Law. The New Orleans Bulldog Society submitted a request to the LSPCA for records concerning its contract with New Orleans. The LSPCA denied the request, claiming it was not an agency subject to the Public Records Law. The trial court agreed, but the court of appeals reversed, finding instead that because the LSPCA was being paid with public funds to perform a governmental function, records related to its work providing animal control services to New Orleans were subject to disclosure. The LSPCA contended that even if it were to be considered a public agency, the reporting requirements under the CEA provided a sufficient level of public disclosure. Both the court of appeals and the supreme court rejected that claim, finding instead that the CEA could not be used to limit the LSPCA's disclosure obligations under the Public Records Law. The supreme court noted that "we find the court of appeal correctly focused on the *function* the LSPCA serves as an 'instrumentality' of the City of New Orleans, through its CEA, to provide animal control services." As to the funding, the court observed that 'it is not the amount of money which is of concern, it is only that the money provided by the City to the LSPCA is derived from the taxpayers." Finding that the reporting requirements in the CEA were not sufficient, the supreme court indicated that "we also limit this holding to only those documents which pertain to the LSPCA's functions, duties and responsibilities. . . as outlined in the CEA with the City of New Orleans." (*New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*, No. 2016-C-1809, Louisiana Supreme Court, May 3)

New York

A trial court has awarded the attorneys representing the Competitive Enterprise Institute in its FOIL suit against the attorney general nearly $21,000 in fees. CEI requested the Common Interest Agreement. The Attorney General claimed the record was exempt, but never explained the basis for its exemption claims and finally disclosed the record after it had already been made public. Finding that CEI's attorneys from Baker & Hostetler had justified hourly rates of more than $350, the court noted that CEI "substantially prevailed, and it was only through the use of judicial process that it was able to obtain the required disclosure. Further, given respondent's continued failure 'to proffer more than conclusory assertions' as a basis for withholding the subject record—and then only producing it after it was in the public domain—the Court's award of substantial attorney fees is particularly appropriate 'in order to promote the purpose and policy behind FOIL.'" (*Competitive Enterprise Institute v. Attorney General of New York*, No. 27135, Supreme Court, Albany County, New York, Apr. 19)

Oregon

A court of appeals has ruled that the trial court erred when it found that it did not have jurisdiction to hear a suit filed under the Oregon Public Records Law by the International Longshore & Warehouse Union against the Port of Portland for charging excessive fees to obtain records it requested from the Port. The Port estimated that retrieving and reviewing the records would cost $200,000. After discussions between the parties, the Port contended it would still cost more than $45,000 to process the union's requests. As required under the Public Records Law, the union petitioned the district attorney to file suit against the Port to require it to produce the records. After the district attorney declined to act because he believed he did not have jurisdiction, the union sued. The trial court ruled that it did not have jurisdiction because the union did not

have standing to sue and, alternatively, that the Port had not denied the request. Saying that "the port misreads how the statutes work together," the court of appeals explained that "the references in [the Public Records Law] to a person 'denied the right to inspect or receive a copy of any public record' are references to who may petition the Attorney General or the district attorney. Those statutory sections do not say anything about who may file a proceeding in the circuit court. Rather, who may file a proceeding in circuit court is governed by [another provision in the Public Records Law] which provides that a person seeking the disclosure of records may file suit 'if the Attorney General [or district attorney] denies the petition in whole or in part.' Thus, the only statutory prerequisite to instituting a circuit court proceeding is that the Attorney General or district attorney denied, in whole or part, the person's petition. . .because such failure 'shall be treated as an order denying the petition for purposes of determining whether a person may institute proceedings for injunctive relief.'" The appeals court pointed out that "nothing in that grant [of jurisdiction to the circuit court] requires that the public body formally 'deny' a records request before a court can exercise its statutory authority." The court observed that "because the only statutory prerequisite [for filing suit] has been met, the circuit court did have jurisdiction to determine whether an injunction should issue compelling the port to produce the public records that the ILWU sought." (*International Longshore & Warehouse Union v. Port of Portland*, No. A157602, Oregon Court of Appeals, May 3)

Washington

A court of appeals has ruled that the Public Employees Collective Bargaining Act, which recognizes and protects public employee unions, does not qualify as a prohibitory exemption under the Washington Public Records Act. The Freedom Foundation, an organization advocating against unions, requested information from the Department of Social and Health Services concerning contracting appointments and training presentations for individual providers caring for disabled persons. SEIU 775, which represented the individual providers, filed suit to block disclosure, arguing that the PECBA prohibited the disclosure because of its potential to interfere with union representation. The appeals court disagreed. The court noted that in *John Doe v. Washington State Patrol*, 374 P.3d 63 (2016), the Washington Supreme Court had ruled that "such a statute must expressly prohibit or exempt the release of the records." Applying the holding here, the appellate court indicated that "the PECBA does not explicitly exempt or prohibit the release of records or information that would constitute an unfair labor practice. In fact, the PECBA does not even mention any records or information. Holding that the PECBA provides an 'other statute' exemption would require us to imply such an exemption, which *Washington State Patrol* expressly prohibits. If the legislature had wanted to prevent the disclosure of information related to public employees and their unions, it could have done so expressly through explicit language." (*SEIU 775 v. State of Washington, Department of Social and Health Services*, No. 48881-7-II, Washington Court of Appeals, Division 2, Apr. 25)

The Federal Courts…

Judge James Boasberg has ruled that although the Department of State routinely misses the statutory deadline for responding to FOIA requests, its failure to respond on time does not constitute a **pattern or practice** that can be remedied under FOIA. The American Center for Law and Justice filed a FOIA request for records of any grants provided to OneVoice Israel and OneVoice Palestine, which the ACLJ alleged was primarily focused on defeating Benjamin Netanyahu. The agency acknowledged receipt of the request, but after the agency failed to respond within five months, ACLJ filed suit, claiming the agency "has a reputation for flaunting and disregarding its public accountability and FOIA obligations." ACLJ indicated that it had been forced to file four lawsuits against the Department in six months. Boasberg explained that "in a nutshell,

ACLJ posits that transparency repeatedly delayed has become a practice of transparency denied." But he noted that "in theory, that might be so. But the pleadings here do not give rise to a reasonable inference that the State Department subscribes to any policy or practice of dragging its feet on FOIA requests." Boasberg pointed out that "to state a policy-or-practice claim, a plaintiff must plausibly allege 'that the agency has adopted, endorsed, or implemented some policy or practice that constitutes an ongoing failure to abide by the terms of the FOIA.'" Boasberg rejected ACLJ's implication that State's failure to routinely respond to requests within the statutory deadline was sufficient to establish a pattern or practice violation. Instead, he noted that "while tardiness would violate FOIA, it only become actionable when 'some policy or practice' also undergirds it." He observed that "to the extent that ACLJ seeks to invoke some formal or informal agency decision that FOIA's twenty-day limit simply will not apply, its Complaint does not adequately capture that theory. Nowhere does Plaintiff actually articulate some agency-wide 'intent' to delay, some 'determination' that State would pass over the Act's time limits, or even that Defendant has taken some informal stance that across-the-board delay is the new operating procedure." He observed that "to set forth a plausible case, the organization must at the very least string together a coherent narrative and not merely speculate that the government may have unlawful internal workings." Boasberg suggested that ACLJ was contending that State's letter acknowledging receipt of a request and assigning a case number was deliberately misleading. He indicated that "ACLJ does not assert that these letters were somehow shams and that State is instead buying time. . .Plaintiff's only objection seems to be that this mere *acknowledgment* letter is not the punctual *substantive* response that it seeks. This is true. But unless ACLJ can show that sending out receipt letters that *comply* with FOIA is somehow tantamount to *violating* the Act—whether it be by causing delay or something else—its attack on this aspect of the agency-disclosure process falls flat." ACLJ also faulted State for forcing requesters to sue. But Boasberg explained that "although individuals *may* choose to sue following agency inaction, once again, Plaintiff does express in its Complaint that State's policy or practice is to *force* lawsuits." He added that "a plausible complaint would need to articulate, beyond the fact that *requestors* choose to sue when faced with (admittedly) frustrating delays, that the *State Department* itself has a policy or practice of forcing lawsuits." (*American Center for Law and Justice v. United States Department of State*, Civil Action No. 16-2516 (JEB), U.S. District Court for the District of Columbia, Apr. 17)

The D.C. Circuit has ruled that the district court erred in finding that six pages of records concerning the Justice Department's decision not to bring charges against former House Majority Leader Tom DeLay could be withheld under **Exemption 5 (privileges)**, even though the agency had failed to claim the exemption in its original opposition to CREW's suit for the records. The Justice Department originally issued a *Glomar* response neither confirming nor denying the existence of records under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The district court initially accepted the agency's *Glomar* response, ruling in favor of the government. However, on appeal, the D.C. Circuit ruled that the public interest in knowing how and why DOJ decided not to prosecute DeLay outweighed the agency's basis for issuing a *Glomar* response. Instead, the D.C. Circuit remanded the case to the district court to consider whether Exemptions 6 and 7(C) allowed the agency to withhold the records. After conducting a search, the FBI located 328 pages. The agency disclosed 124 pages and withheld 204 pages, citing Exemption 5 as its basis for withholding six pages. On remand, the district court recognized that *Maydak v. Dept of Justice*, 218 F.3d 760 (D.C. Cir. 2000), generally prohibited agencies from claiming exemptions not claimed previously, but decided that the privileged nature of the disputed documents was accepted by both CREW and DOJ and that, as a result, there was no reason not to affirm the new exemption claim. CREW appealed once again. Writing for the court, Circuit Court Judge Robert Wilkins underscored the importance of the timeliness rule in *Maydak*. He pointed out that "a robust timeliness rule encourages the Government to present all its arguments the first time around. Weakening that rule lessens the incentive. In addition, requiring a FOIA requester to brief and argue the merits of newly asserted defenses—rather than simply adverting to the timeliness rule—imposes additional costs on that party. These considerations suggest

that a robust timeliness rule well serves FOIA's goal of a prompt and efficient process." The government argued that Exemption 5 was appropriate because the Criminal Division had claimed it for one of its records. Noting that DOJ components decided independently whether or not to claim an exemption, Wilkins indicated that "the decision of the Criminal Division to invoke Exemption 5 therefore tells us nothing about why the FBI chose not to cite it." CREW also challenged DOJ's decision to categorically redact personally-identifying information for individuals other than DeLay and former lobbyist Jack Abramoff. Wilkins noted that the redactions fell into three categories—FBI or government employees, individuals who were mentioned but not charged, and individuals who had been publicly identified as being charged. He observed that "the privacy interests of individuals who have not been convicted in connection with this investigation—and even more so those who have not been publicly linked with the investigation whatsoever—differ greatly from those of individuals who were convicted or pled guilty for their roles. Connecting the names of individuals to information contained in the documents at issue could add much, or not at all, to the public's understanding of how the Government carried out its investigation and decision not to prosecute DeLay." Wilkins ordered the agency to reassess the relative privacy/public interest balance for the third category. (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, No. 16-5138, U.S. Court of Appeals for the District of Columbia Circuit, Apr. 21)

Judge James Boasberg has ruled that the Bureau of Land Management has not yet shown that it conducted an **adequate search** for records of conversations BLM employees Lili Thomas and Beatrice Wade had with contractors operating long-term holding facilities for wild horses and burros. After researching the agency's wild horse and burro program, Debbie Coffey sent the agency a FOIA request specifically for communications between contractors and Thomas or Wade. She told the agency that the records were located in the BLM's Environmental Assessment prepared for each long-term holding facility and supplied a list of locations for 24 current long-term holding facilities in city-state format. Coffey explained that she was not looking for inter- or intra-agency records. She also requested a fee waiver. The agency denied her fee waiver request and told her instead that the estimated cost of processing her request was $1,680. She paid the fee, but the agency subsequently refunded the fee because it had failed to respond within the statutory deadline. In its response, the agency disclosed 514 pages, only three pages of which were responsive to Coffey's request. Because of an employee's error in processing the request, the remaining pages consisted of inter- or intra-agency records which Coffey had not requested. Although the agency refunded the entire amount of the estimated fee, Coffey argued it was responsible for $6.81 in interest as well. The agency argued that "FOIA does not expressly waive the government's sovereign immunity with respect to interest." Boasberg agreed, pointing out that "although Coffey's concerns about the length of time that BLM retained her processing fees are understandable, the Court concludes that the no-interest rule forecloses her argument here." While Boasberg found the agency had reasonably explained its decision to limit its search to the Wild Horse and Burro Office, he faulted the agency for narrowing its search by restricting it to communications only with contractors. He also found the agency's insistence on using the city-state identifiers supplied by Coffey limited the number of potentially responsive records as well. He indicated that "the Court is hard pressed to conclude that location search terms encompassing *both* city and state—and thus excluding records containing *only* the city or state of each facility—would be reasonably calculated to accomplish the task." He agreed with Coffey that searching the email addresses of the facilities would likely locate responsive communications. However, he pointed out that "after conducting another search with different terms, BLM might well explain in a renewed motion for summary judgment why its omission of Plaintiff's preferred keywords and inclusion of others was reasonable under the circumstances; perhaps, for example, they are not all as readily available as the Court presently infers. In addition, if Defendant reasonably believes that searching with email addresses would be likely to uncover all responsive correspondence between the individuals and BLM, if would not need to additionally search for the individuals' and facilities' names. At this juncture, however, the Court cannot

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conclude that a search using *neither* names nor email addresses, and instead using the facilities' locations and contracting-related terms, is adequate to pass muster under FOIA's standard of reasonableness." (*Debbie Coffey v. Bureau of Land Management*, Civil Action No. 16-508 (JEB), U.S. District Court for the District of Columbia,
Apr. 20)

A federal court in New York has ruled that the FBI and the Executive Office for Immigration Review conducted an **adequate search** for records concerning the Priority Enforcement Program, a deportation program run by U.S. Immigration and Customs Enforcement. A coalition of advocacy groups led by the National Day Laborer Organizing Network submitted 37-page requests to components of the Department of Homeland Security and the Department of Justice. The coalition challenged the searches conducted by the FBI and the EOIR, arguing that the agencies had unreasonably narrowed their keyword searches and had ignored other offices that might have responsive records. In response to the plaintiffs' claims, the FBI explained that, unlike the previous Secure Communities program in which the FBI had directly participated, it had no role in the successor PEP operation, limiting the likelihood of having responsive records. The coalition claimed that both EOIR and U.S. Citizenship and Immigration Services should have used a list of individuals identified by U.S. Immigration and Customs Enforcement to search their databases for responsive records. Rejecting the claim, the court pointed out that "EOIR and USCIS are not required to obtain A-numbers from ICE in order to thereafter search their own databases. The list of A-numbers is neither created, obtained, nor under the control of EOIR and USCIS—the list is an agency record of ICE." The coalition argued the data was a tool that the agencies should have used to aid their search, but the court observed that "plaintiffs' semantic argument contradicts long-standing law; the data possessed and controlled by ICE is an agency record of ICE under FOIA." The court agreed with ICE that a massive search of its database and review of potentially responsive records would be too **burdensome**. The coalition suggested that a narrowed version of its request would not be onerous. But the court pointed out that the coalition had missed its opportunity to narrow its database request further. The court indicated that "the Court has already allowed plaintiff to narrow their request once during this litigation. At that time, the Court noted that plaintiffs' opportunity was a 'one-shot deal' and explicitly explained to plaintiff that it would not allow plaintiffs to again modify their request at a later time, as plaintiffs are seeking to do now." The court found, however, that the coalition had narrowed its request to accept a representative sampling of certain manual records. The court observed that the agency had not shown that such a search would be burdensome. (*National Day Laborer Organizing Network, et al. v. United States Immigration and Customs Enforcement, et al.*, Civil Action No. 16-387 (KBF), U.S. District Court for the Southern District of New York, Apr. 19)

A federal court in New York has ruled that the New York Times in entitled to nearly $52,000 in **attorney's fees** for its FOIA litigation against the CIA to force the agency to disclose three reports about the presence of chemical weapons in Iraq. The agency initially issued a *Glomar* response neither confirming nor denying the existence of records. However, after the Times filed suit, the CIA withdrew its *Glomar* defense and released the reports with redactions. As a result of the CIA's actions, the parties withdrew their summary judgment motions as moot. The Times then filed a motion for attorney's fees. The CIA argued that the public interest in disclosure was limited because the public already knew about the agency's interest in chemical weapons. Judge Jed Rakoff rejected that claim, noting that "the CIA conflates its interest in concealing the fact of its investigation into chemical weapons in Iraq—an end it sought to achieve with its *Glomar* response—with the public's very real interest in learning the *results* of that investigation, *i.e.*, the contents of the reports." The CIA also relied on *Brayton v. Office of U.S. Trade Representative*, 641 F.3d 521 (D.C. Cir. 2011), to claim that a plaintiff was not entitled to attorney's fees if the agency's exemption claims would be upheld on summary judgment. Rakoff pointed out that "while this arguably is the position of the D.C. Circuit,

there is no Second Circuit decision adopting it, and, indeed, such an approach would appear to be in some tension with the Second Circuit's characterization of the entitlement inquiry as 'weighing the four criteria.'" Instead, Rakoff criticized the agency for failing to acknowledge 'the clear import of *Florez v. CIA*, 829 F.3d 178 (2d Cir. 2016), which held that disclosures by one agency are relevant to the sufficiency of another agency's *Glomar* response," which "calls into question the reasonableness of the CIA's approach." The CIA challenged the amount requested by the Times. Rakoff agreed with several of its claims, reducing the total by $10,000. Rakoff, however, rejected the CIA's claim that the Times had benefitted more from a leak identifying the existence of the reports than by its litigation to force the agency to disclose them. Rakoff noted that the Times should not be penalized where "through its own efforts [a litigant] earns an advantage outside the courtroom that strengthens its position inside it. There is no reason in principle why the Times' successful investigative journalism warrants a lower award in the FOIA fee litigation, and the Court will not reduce fees on this account." (*New York Times Company v. Central Intelligence Agency*, Civil Action No 16-3098 (JSR), U.S. District Court for the Southern District of New York, May 1)

A federal court in Illinois has ruled that Akima Global Services, which contracts with U.S. Immigration and Customs Enforcement to provide detention management and health services, failed to show that disclosure of its proposal that had been incorporated into the final contract would cause competitive harm under **Exemption 4 (confidential business information)**. In response to Northwestern University Professor Jacqueline Stevens' request pertaining to detainee volunteer wages paid by contracts, ICE sent the contract to AGS for predisclosure notification. AGS claimed virtually the entire contract was confidential. ICE disagreed and after redacting information concerning AGS's pricing and its use of its intellectual property, told AGS it intended to disclose the redacted records to Stevens. AGS then filed a reverse-FOIA action to block disclosure. The court found AGS's claim that disclosure would provide competitors a road map for bidding on similar contracts was not supported. The court pointed out that "while ICE's decision may seem to be somewhat short of facts that it considered, this was because AGS submitted so few for it to consider." The court dismissed the company's claim that disclosure would make it more difficult for the agency to obtain competitive bids in the future, noting that "it wholly failed with any specificity to allege how its competitive position would be harmed by disclosure of various provisions of the bid and contract from which ICE has already agreed to redact pricing and intellectual property information. Its concern for ICE's future ability to obtain future competitive bids is laudable, but it certainly is the agency that is in the best position to make that determination." (*Jacqueline Stevens v. United States Department of Homeland Security*, Civil Action No. 14-3305, U.S. District Court for the Northern District of Illinois, Apr. 19)

Applying its previous finding that records concerning the Justice Department's policy regarding the provision of notice to criminal defendants and others against whom it intends to use evidence derived from warrantless surveillance authorized under the FISA Amendments Act were protected by the work-product privilege under **Exemption 5 (privileges)**, a federal court in New York has ruled that the remainder of the records are also protected by the attorney work-product privilege and that there are no **segregable portions** that could be disclosed. In his previous ruling, Judge Gregory Woods found the records were privileged, but indicated that DOJ had not adequately justified its claims of privilege as to several of the memos and that the issue of segregability had not been addressed at all. Woods relied on the D.C. Circuit's ruling in *National Association of Criminal Defense Lawyers v. Dept of Justice*, 844 F.3d 246 (D.C. Cir. 2016), in which the D.C. Circuit found that the entire Federal Criminal Discovery Bluebook was protected by the attorney work-product privilege. Woods explained that the new DOJ affidavits showed that "the documents were prepared in anticipation of litigation in which DOJ's notice obligations under the FAA will potentially be at issue, and that the documents 'would not have been prepared in substantially similar form but for the prospect of that

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litigation.'" In *NACDL*, the D.C. Circuit had observed that records that were divided into discrete sections were more likely to be susceptible to segregation. But here, he noted that DOJ had shown that "the documents at issue are not comprised of logically divisible sections which lend themselves to the reasonable segregability of exempt from non-exempt materials." (*American Civil Liberties Union v. United States Department of Justice*, Civil Action No. 13-7347-GHW, U.S. District Court for the Southern District of New York, May 2)

A federal court in Washington has ruled that the CIA properly invoked a *Glomar* response neither confirming nor denying the existence of records in response to Leslie Kinney's request for records on James Harold Nichols, who Kinney claimed had served as a covert operative for the U.S. during and after World War II. Finding the agency's *Glomar* response was appropriate under **Exemption 1 (national security)**, the court noted that "the CIA's affidavit reasonably explains how confirming the existence or nonexistence of the records sought would reveal an unacknowledged human intelligence source. . ." Kinney argued that the agency had publicly acknowledged the existence of records when he was told by a CIA employee that if the agency found records it might need to coordinate its response with other agencies. The court observed that "while the statement made to Plaintiff by the CIA representative could be construed as evidence that such records exist, it clearly falls short of the 'official' documented acknowledgement necessary to override an otherwise valid exemption." The court also rejected Kinney's assertion that the age of the records suggested that disclosure would not cause harm to national security. The court pointed out that "courts have routinely accepted the CIA's logical justification for its invocation of the Glomar response when dealing with records regarding alleged, long-deceased human sources." (*Leslie G. Kinney v. Central Intelligence Agency*, Civil Action No. 16-5777 BHS, U.S. District Court for the Western District of Washington, May 3)

Judge Paul Friedman has ruled that the FBI properly withheld seven pages of a report from a database pertaining to the investigation of Aaron Swartz, an Internet activist who committed suicide as the result of a federal investigation into his online activities, under **Exemption 7(E) (investigative methods and techniques)**. Wrapping up the case, Friedman noted that, although the FBI had redacted the name of the database, because its name had been disclosed elsewhere he considered the issue moot. But as to the seven pages of reports, he pointed out that "although it is true that the government relies on the secrecy of the database in its justification, this does not diminish its interest in withholding specific reports generated by that database." He added that "even though 'the identity of the investigative technique' is more publicly known, disclosure of 'the manner and circumstances of the technique' may still 'frustrate enforcement of the law.'" (*Ryan Noah Shapiro v. Department of Justice*, Civil Action No. 13-0729 (PLF), U.S. District Court for the District of Columbia, Apr. 20)

Judge James Boasberg has ruled that the Department of Justice did not receive prisoner Jason Reynolds' two FOIA requests and that the agency has no obligation to process them now as a result of Reynolds' FOIA suit. Reynolds sent two requests to the Executive Office for U.S. Attorneys concerning his conviction. After the agency failed to respond, Reynolds filed suit. Since Reynolds did not provide an acknowledgment letter or case number, the agency searched its database of FOIA requests, appeals, and litigation and found no indication that it ever received Reynolds' requests. Reynolds argued that he had mailed the two requests, but Boasberg indicated that "Plaintiff does not offer proof via, *e.g.*, a certified-mail receipt or any other form of mailing that his missives reached their intended target. This is thus insufficient to create a dispute of material fact that DOJ ever *received* his requests, particularly in a FOIA case, where courts typically grant summary judgment by relying on sworn agency affidavits that are sufficiently convincing. . .As DOJ did not receive Reynolds' correspondence, it had no obligation to search for or produce records." Reynolds argued that the court should order the agency to process his request now that it was aware of it.

Boasberg disagreed, noting that "were the Court to acquiesce, such a procedure would unwisely bypass the administrative process." Reynolds complained that dismissing his case would require him to pay filing fees a second time if he challenged the agency's response. Boasberg noted that "given both that he is *in forma pauperis* and that he had to file the suit to learn DOJ had never received his request, the Court will order that any fees already paid in this case shall be offset against his filing fee should he decide to bring a new suit based on precisely the same request." (*Jason T. Reynolds v. United States Department of Justice*, Civil Action No. 16-1428 (JEB), U.S. District Court for the District of Columbia, Apr. 26)

Judge Amit Mehta has ruled that EOUSA may **consolidate** James Simon's 61 requests for records about the prosecution of him and his wife for tax evasion. Simon insisted the agency was required to respond to the requests individually. Siding with the agency, Mehta noted that "plaintiff has cited no authority for the proposition that a court can dictate the manner of an agency's search when as here, a requester makes dozens of related FOIA requests. FOIA merely requires an agency to conduct a search for responsive records that is 'reasonably calculated to discover the requested document.'" He explained that "the court will not 'micromanage' Defendant's ongoing search for responsive records—the agency is responsible in the first instance for crafting the methods needed to identify and produce responsive records, subject only to future judicial review upon a motion for summary judgment. Furthermore, Defendant's regulations permit it to aggregate FOIA requests in circumstances like those present here. Plaintiff has offered no valid basis for the court to 'second guess' Defendant's decision to invoke that authority here." (*James A. Simon v. U.S. Department of Justice, Executive Office for United States Attorneys*, Civil Action No. 16-00671 (APM), U.S. District Court for the District of Columbia, Apr. 26)

A federal court in California has ruled that the IRS conducted an **adequate search** and properly withheld records under **Exemption 3 (other statutes)**, **Exemption 5 (privileges)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to Mike Ireland's multi-part request pertaining to his liability in connection with a trust fund recovery penalty. The agency located 215 pages and disclosed 198 pages in full or in part. The agency declined to respond to Ireland's request for identification of responsible persons at Micro Capital Limited Partnership after determining that Ireland had not provided an authorization to disclose records on third parties. Ireland's primary challenge to the adequacy of the search was that the agency had told Ireland's attorney that it had to review two boxes of materials before it could rule on Ireland's separate claim for a refund, but the agency apparently had not described those records in its search affidavit. Dismissing Ireland's allegation, the court noted that "plaintiff has not presented any evidence showing that the two boxes should have been discovered during the IRS's later 2015 and early 2016 search for the requested records." The court agreed with the agency that unless Ireland provided proof of authorization to disclose third party information from Micro Capital his request had not yet been perfected and the agency had no obligation to respond to that item. Ireland did not dispute the applicability of the claimed exemptions, except to suggest that the agency's application of Section 6103 was too broad. Approving the agency's Exemption 3 claim, the court pointed out that the agency's affidavit "identifies each document withheld under Exemption 3 and provides a description identifying the kind of third-party taxpayer information contained within each record." (*Mike Ireland v. Internal Revenue Service*, Civil Action No. 16-02855-CAS (AGRx), U.S. District Court for the Central District of California, May 1)

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