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*Washington Focus: Based on a May 1 opinion by the Justice Department's Office of Legal Counsel, the Trump administration has been refusing document requests from minority members of Congress, including ranking minority member Rep. Elijah Cummings (D-MD). The OLC opinion notes that "individual members who have not been authorized to conduct oversight are entitled to no more than 'voluntary cooperation of agency officials or private persons.' Individual members of Congress, including ranking minority members, do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee." While agencies have routinely treated FOIA requests from members of Congress on behalf of constituents as carrying no greater weight than any other FOIA request, agencies previously would respond to an information request signed by the ranking minority member of a committee. As Josh Gerstein of Politico pointed out, the inability of minority party members to obtain information is a political roadblock that makes it that much more difficult for the opposition party to effectively challenge the majority party. . .Charlie Savage of the New York Times reports that Twitter users who were blocked by President Trump after being critical of his tweets are threatening to sue for violation of their First Amendment rights. The situation also brings up questions about whether the government may selectively withhold access to records that are publicly available.*

## Court Finds Agency Investigation Does Not Qualify Under Exemption 7

In a decision concerning an investigation by the U.S. Forest Service into whether or not agency policy was violated in the euthanizing of wild horses and burros by untrained individuals, Judge Lewis Babcock of the U.S. District Court for the District of Colorado has explored some interesting issues as to when an internal investigation qualifies as a law enforcement function. While Babcock ultimately ruled that the investigation had not been conducted with law enforcement purposes, the decision plays into a disturbing trend launched by Justice Samuel Alito's concurrence in *Milner v. Dept of Navy*, 562 U.S. 562 (2011), to blur the lines between traditional law enforcement functions and security-related functions that previously would not have been considered to

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qualify under Exemption 7 (law enforcement records). Alito's concurrence was adopted by the D.C. Circuit in *PEER v. U.S. Section, International Boundary and Water Commission*, 740 F.3d 195 (D.C. Cir. 2014), in which the court characterized the agency's flood inundation projections as security-related, qualifying them for protection under Exemption 7(E) (investigative methods and techniques) and Exemption 7(F) (harm to any person). The *PEER* decision has subsequently been cited in district court opinions as expanding the coverage of Exemption 7. Babcock's decision that the Forest Service investigation did not qualify under Exemption 7 was predicated upon the concept that while agencies like the FBI have law enforcement as their core function, many other agencies, like the Forest Service, have at best a mixed-function role. As a result, to qualify for Exemption 7, such agencies must show that the claimed records were created or compiled as part of the agency's law enforcement duties, rather than for administrative purposes. That distinction occasionally trips up an agency's attempts to claim Exemption 7.

The case before Babcock was brought by Kathy Whitson, an activist who alleged that the Forest Service had directed untrained employees to use firearms to kill wild horses, in part to avoid the costs of paying a veterinarian to euthanize the animals. Whitson submitted a seven-part request for records pertaining to a misconduct investigation of the Jicarilla Ranger District Wild Horse and Burro Program, located in northern New Mexico, which, according to Whitson, was common knowledge among district employees. After the Forest Service employee who was first assigned to process Whitson's request retired, FOIA Analyst Danielle Adams took over the case. After familiarizing herself with the request, Adams concluded that such an investigation would have been conducted by the Human Resources Management Office in Albuquerque. She ascertained which employees had been involved in the investigation and sent a copy of Whitson's request to them. She also had an IT search conducted for emails. The agency withheld 149 pages and released more than 600 pages, many with redactions.

Whitson challenged the adequacy of the agency search, arguing that there were no records from employees of the Jicarilla District with whom she had had contact, the agency had not sent her request to the Inspector General's Office, and the agency had not provided a cut-off date for the search. Babcock noted that "the mere fact that Plaintiff had some unspecified contact with these individuals, however, does not mean that the Forest Service's search was inadequate because it did not include specific search requests to those individuals." Babcock found that because Whitson's request cited the investigation by file number there was no reason for the agency to search the Inspector General's Office since it was not involved in the investigation. He observed that "under these circumstances, Plaintiff's FOIA request did not put the Forest Service on notice that it should refer the request to OIG, and the Forest Service's failure to do so does not undermine the reasonableness of the search." As to the cut-off dates, Babcock explained that "here, because of the Forest Service's lengthy delay in responding to Plaintiff's FOIA request, the cutoff dates ranged from June 8, 2016 to June 30, 2016 and the latest responsive document is dated May 2, 2016. I conclude that these cut-off dates were reasonably calculated to lead to the collection of all documents responsive to Plaintiff's FOIA request."

Whitson complained about the lack of detail in the agency's exemption claims. While Babcock approved the agency's use of categories to divide the types of records, he questioned the agency's cursory explanations for withholding records under Exemption 7(E). To resolve the 7(E) question, Babcock turned to the threshold requirement for claiming Exemption 7. He pointed out that "the threshold inquiry under Exemption 7 is whether the withheld information was compiled for law enforcement purposes. This in turn requires an examination of the involved agency to determine whether it exercises law enforcement functions. An agency exercises law enforcement functions if it has a clear law enforcement mandate, such as the FBI, or has a 'mixed' function that encompasses both administrative and law enforcement functions."

He noted that "here, there can be no dispute that the primary function of the Forest Service, unlike the FBI, is not law enforcement. The Forest Service has also failed to demonstrate that it nonetheless qualifies as

a mixed-function agency. Moreover, even if the Forest Service can be properly characterized as a mixed-function agency, it still bears the burden of showing that the withheld information was compiled for adjudicative or enforcement purposes. In the case of internal investigations such as this, the Forest Service must show that the investigation was conducted for law enforcement purposes rather than for general internal monitoring that might reveal evidence that could later rise to a law enforcement investigation. An internal investigation of an agency's employees is for law enforcement purposes if it focuses 'directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions.'"

Babcock observed that "here, the only evidence that the Forest Service cites to show that the subject misconduct investigation was for law enforcement purposes, is a conclusory assertion to this effect by Ms. Adams" that some allegations might have criminal implications. Babcock pointed out that "the cited quotation instead supports a finding that the investigation was focused on alleged violations of the Forest Service's internal policies and regulations that might incidentally reveal evidence of a single violation of criminal law." As a result, he indicated that "the Forest Service has failed to meet its burden of showing either that it is a government agency with law enforcement functions or that the information withheld pursuant to Exemption 7 was compiled for law enforcement purposes." He told the agency to disclose any records withheld under Exemption 7(E), but indicated the agency could reconsider whether any of its Exemption 7(C) (invasion of privacy concerning law enforcement records) claim might qualify under Exemption 6 (invasion of privacy). (*Kathy Whitson v. United States Forest Service*, Civil Action No. 16-01090-LTB-NYW, U.S. District Court for the District of Colorado, May 23)

# 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 the FOI Commission misunderstood the concept of statistical disclosure avoidance when it ruled that the Department of Education improperly withheld aggregate data about student performance on state-mandated tests from reporter Michael Savino while it had disclosed the same data to school district superintendents. When Savino learned that the department would release aggregate performance data by school district to individual superintendents, he requested a copy of non-identifying state-wide aggregate data. The department told Savino that it was not allowed to provide data from the student database until a required report was prepared and made public. The report was released several weeks later, but Savino complained to the FOI Commission that the department should have disclosed the aggregate data to him when he requested it. The department argued that it was not allowed to disclose even aggregate data directly from the student database until it had been statistically verified. Finding that there was no difference between the aggregated data disclosed in the report and the data disclosed to the superintendents, the FOI Commission ruled against the department. After reviewing the restrictions and disclosure requirements in the federal Family Educational and Privacy Rights Act, the court indicated that the FOI Commission had misunderstood the import of the exemption of even aggregate data from the student database. The court pointed out that "the system database of student information was created precisely to facilitate public reporting of school performance data *required to be disclosed* under federal and state law. The department *must* publish the aggregated school performance data required under federal laws and under state statutes that implement

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the federal requirements. That information is intended to be public. But the student database itself contains millions of pieces of information about individual students that must not be revealed either directly or indirectly. FERPA protects not only information that *directly* identifies students, but also information that, when combined with other information, allows by *indirect* means the identification of individual students." The court added that "the exemption of the entire system database of student information from [access requirements] protects the privacy interest in *both* the information that is directly identified with individual students *and* aggregated information that may not have been tested for avoidance of accidental statistical disclosure." (*Diana Wentzell, Commissioner, State of Connecticut Department of Education v. Freedom of Information Commission and Michael Savino*, No. HHB-CV-16-6032889-S, Connecticut Superior Court, Judicial District of New Britain, May 16)

## Illinois

A court of appeals has ruled that the College of Du Page Foundation performs a government function for the College of Du Page by handling the college's fundraising activities and that the college must provide a copy of a grand jury subpoena issued to the foundation that was requested by the *Chicago Tribune*. In response to several requests from the *Tribune*, both the college and the foundation claimed that the foundation was not a public agency and that neither the college nor the foundation were obligated to provide records relating to the foundation. The *Tribune* filed suit and the trial court ruled in favor of the newspaper, although it declined to rule on whether the foundation qualified as a public agency. The college argued that *Better Government Association v. Illinois High School Association*, a recent decision by the First District Appellate Court, held that records created by a non-public agency performing a delegated governmental function were not subject to disclosure unless they would be subject to disclosure if they were in the possession of the public agency that had delegated the authority. Rejecting the First District's interpretation, the appeals court pointed out that "to impose these additional requirements, as the First District suggests, would have the unintended effect of shielding third-party records from disclosure in precisely those instances where [the interpreted section] was plainly meant to apply." The appeals court found that the foundation was performing a governmental function for the college. The appeals court noted that "the College has no private-fundraising operation of its own, nor does it maintain a separate endowment—ostensibly because the Foundation handles all of these tasks exclusively pursuant to contract. If the Foundation did not undertake these responsibilities, the College would necessarily do so itself, as it had done prior to the [contract]." The appellate court observed that a record must "directly relate" to the governmental function performed on behalf of a public body to qualify as a public record. Finding that the subpoena directly related to the foundation's governmental function, the appeals court rejected the college's contention that it did not have possession of the subpoena. Instead, the appeals court found that the college had handed over the subpoena to the foundation's outside counsel. The court explained that "under these circumstances, it is clear to us that the College does not possess the federal grand jury subpoenas of its own accord, and it cannot now claim that it is powerless to disclose it." (*Chicago Tribune v. College of Du Page and College of Du Page Foundation*, No. 2-16-0274, Illinois Appellate Court, Second District, May 9)

The supreme court has affirmed the appellate court's ruling that the Illinois High School Association, which organizes and operates high-school athletic tournaments on behalf of its member schools, is not a public agency subject to FOIA. But it restricted the appellate court's interpretation of section 7(2) that held that a public boy was not required to disclose records maintained by a non-public body unless they were prepared for the public body. The Illinois High School Association's membership is made up of both public and private schools. Its funding comes from receipts for post-season tournaments, as well as vendor sales at such events. The Better Government Association requested copies of vendor contracts. The Association told BGA that because it was not a public agency it would not comply with the request. The BGA then requested the same records from District 230, a public high school that was a member of the Association. District 230 told BGA

that it had no records and that the requested documents did not fall under section 7(2) because they were not prepared by or for the District and were not under the control of the District. BGA then filed suit. Both the trial court and the appellate court ruled in favor of the Association. On whether or not the Association was a public agency, the supreme court agreed with the lower courts. The court relied on the established four-factor criteria: (1) the degree to which the entity had an independent legal identity, (2) the degree of government control, (3) the extent of public funding, and (4) the nature of the functions performed by the entity. The court noted that "it is undisputed that the IHSA was not created by a school district or any other public body or by any other statute or government. It has had a separate legal existence, independent from any public body, for more than the past 100 years." On the matter of government control, the court observed that "the board is not accountable to any particular school district or particular public school. Nothing in the IHSA's governing documents show that the actions of the board must receive approval from any public body." On funding, the court indicated that "the IHSA is not funded by participating member schools, but, rather, generates its revenue from its organizational efforts. Additionally, the IHSA provides a function that no member public school could provide on its own, and, for the last 100 years, no other public body in the State has sought to provide. The fact that the public schools could provide this service at their own expense does not transform the revenue generated by the IHSA into public funding." Summarizing its findings as to the first three factors, the court indicated that "even if the nature of the functions performed by the IHSA were governmental, this factor alone cannot transform a private entity into a public body for purposes of the FOIA. To hold otherwise would mean that any private entity that merely provides education services to public schools would risk being transformed into a public body." Turning to the appellate court's narrow interpretation of Section 7(2), the supreme court noted that "we agree that section 7(2) ensures that government entities must not be permitted to avoid their disclosure obligations by contractually delegating their responsibility to a private entity." Examining the degree of control exercised by District 230 over the IHSA, the supreme court pointed out that "the School Code authorizes school boards to form or join associations. That authorization does not mean that District 230 is authorized to perform the functions of the IHSA. Thus, the IHSA is not acting on behalf of District 230 to perform the District's responsibilities. Alternatively, District 230 has not delegated any of its governmental functions to the IHSA." (*Better Government Association v. Illinois High School Association*, No. 121124, Illinois Supreme Court, May 18)

## Kentucky

The Bluegrass Institute Center for Open Government has issued a series of recommendations for revising the Open Meetings and Open Records Laws aimed at improving access under both laws. Written by Amye Bensenhaver, a former attorney in the Attorney General's Office who dealt with open government complaints filed under both laws, the report recommends defining "public agency" as an entity receiving public funds, prohibiting less than quorum meetings by repealing a provision requiring a showing of intent to violate the law on the part of public bodies, authorizing the Attorney General to require agencies to provide additional documentation when necessary to meet their burden of proof, and reconciling conflicting exemptions in the open records and open meetings provisions. The report also recommends updating obsolete language and dated concepts, ensuring that use of personal electronic devices to conduct public business is considered a public record, and making sure that agencies that file suit to block disclosure are liable for attorney's fees if they lose in court. Additionally, the report recommended training for public officials. The report noted that until training was required "public agencies will exploit the ambiguities, inconsistencies, and anachronisms in the laws, and unnecessary disputes concerning interpretation and application of the laws will strain the resources of the attorney general and the courts." ("Shining the Light on Kentucky's Sunshine Laws," Amye Bensenhaver, Director, Bluegrass Institute Center for Open Government, May 2017)

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# The Federal Courts…

In her second ruling in a case involving the FBI's response to FOIA requests by the *Broward Bulldog* for records pertaining to the Meese Commission's investigation of the 9/11 terrorism attack, particularly as it relates to what the government knew about the role of members of the Saudi royal family in funding the attacks and the reasons some members were allowed to leave the United States shortly after the attacks, District Court Judge Cecilia Altonaga has found that the agency conducted an **adequate search** for records and has frequently sided with the agency's exemption claims, but has continued to reject claims that individuals mentioned in the records are protected by **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. In her first ruling in the case, Altonaga found the FBI had been so inconsistent in its application of Exemption 7(C) and had used too narrow an interpretation of the public interest in disclosure that its claims were insufficient to support redaction of such information. But while her first ruling was a broader survey of the agency's exemption claims, her second ruling was a much more specific examination of various groups of documents. The *Broward Bulldog* accused the agency of bad faith in conducting the search, but Altonaga noted that "under prevailing law, the Government has met its burden of showing its search was adequate. Plaintiffs have failed to meet their burden of showing bad faith by the FBI in performing the searches and do not identify other locations and documents the FBI should search and locate." She added that "the Court is unpersuaded by Plaintiffs' claim that the FBI's tardiness in producing the documents and multiple rounds of production shows the search is inadequate." Altonaga made clear that she was not going to accept the FBI's privacy exemption claims. The FBI argued that the inconsistencies were the result of balancing individual privacy against the public interest in disclosure. Altonaga pointed out that "these new explanations are insufficient to satisfy the FBI's burden at summary judgment. The information is already in the public domain, and the FBI has released some of the names in this same report." Elsewhere, she observed that "although the FBI 's present briefing does explain why the agency chose to redact some names while revealing others, the FBI still fails to meet its onerous burden under Exemptions 6 and 7(C). . .Given the significant public interest in learning about possible suspects involved in the attacks, the FBI has not met its burden of showing Exemption 6 and 7(C) apply to the selectively redacted names." Altonaga approved a number of claims under **Exemption 5 (privileges)**, including several draft versions of the Meese Commission's final report. The newspaper argued that the agency had withheld discussions that did not relate to any specific policy or decision. But Altonaga indicated that "while the FBI acknowledged a final decision was not made regarding the redacted comments, the internal deliberation process would be harmed if the information is released. FBI personnel would be 'more guarded in their suggestions' if they knew their discussions and deliberations may one day be disclosed." Altonaga also accepted most of the agency's claims under **Exemption 7(D) (confidential sources)** and **Exemption 7(E) (investigative methods and techniques)**. (*Broward Bulldog, Inc. v. United States Department of Justice*, Civil Action No. 16-61289-ALTONAGA/O'SULLIVAN, U.S. District Court for the Southern District of Florida, May 16)

A federal court in New York has agreed to reconsider its earlier ruling on the adequacy of the **search** conducted by U.S. Immigration and Customs Enforcement for data concerning arrests of illegal immigrants at residences after a search of the Office of Public Affairs ordered by Judge Paul Oetken yielded 366 responsive pages from various field offices. The agency argued that its search should not be called into question because the documents were not created until the search was completed. Oetken indicated that "but this fact counsels for, rather than against reconsideration. That is, if it is true that the evidence of the relevant field offices' tracking and collecting the underlying data was not available in the form of discoverable agency records at the time of the earlier motion for partial summary judgment, all the more reason that the Court should consider this information to be 'new evidence' and entertain a motion to reconsider." The agency also argued that the

plaintiffs' search terms did not always match its file labels. Oetken pointed out that "to the extent that the wording in Plaintiffs' initial request fails to match Defendants' own labels, Defendants are obligated to work with Plaintiffs to turn up relevant records. This obligation, too—in light of the newly available evidence—points the Court toward reconsidering its previous holding and directing Defendants to provide assistance to Plaintiffs in their efforts to locate responsive data and documentation." Agreeing to reconsider his earlier ruling, Oetken observed that "the newly produced documents provide tangible evidence of records maintenance by the field offices that was not available to Plaintiffs at the time they filed for partial summary judgment. This evidence is newly available, either because Defendant failed to search the DHS Office of Public Affairs until they were so directed by this Court, or because this data collection did not exist at the time of this Court's earlier ruling (but now does.)." (*Immigrant Defense Project, et al. v. United States Immigration and Customs Enforcement*, Civil Action No. 14-6117 (JPO), U.S. District Court for the Southern District of New York, May 16)

Judge Gladys Kessler has ruled that Nina Seavey, a professor of history and film at George Washington University who has been working on a documentary about anti-Vietnam War dissent in St. Louis in the 1960s and 1970s is entitled to a **fee waiver** because her film will further the public interest in knowing what the government is up to. The FBI granted Seavey's request for inclusion in the news media fee category, but denied her request for a fee waiver. In granting the fee waiver, Kessler noted that fees would be considerably less because the FBI had found that it had no records for many of the subparts of Seavey's voluminous request. Kessler pointed out that "it is clear to the Court that Professor Seavey certainly [would enhance public understanding]. She has presented a clear and totally persuasive argument that the materials she seeks will enable her to present to the public the distinct experience of student activists and their interactions with the *local* law enforcement bodies, and, therefore, disclosure of the requested information is in the public interest because it is likely to significantly enhance public understanding of the operations and/or activities of the government." She pointed out that "the fact that some undisclosed records may contain information that is repetitive to what is already public, does not undermine her entitlement to a fee waiver." Underscoring the importance of public understanding of government activities, she observed that "at this present time in our country's history, it is important as never before, that the American public be as educated as possible as to what 'our Government is up to.'" (*Nina Gilden Seavey v. Department of Justice*, Civil Action No. 15-1303 (GK), U.S. District Court for the District of Columbia, May 16)

Judge Beryl Howell has ruled that the CIA properly withheld 167 articles from its journal *Studies in Intelligence* and redacted an additional 10 articles under **Exemption 1 (national security)** in response to a request by Jeffrey Scudder, a former senior IT project manager at the CIA whose original request encompassed 2,000 articles from SII. Scudder claimed the CIA's *Vaughn* index was too vague and uninformative for him to challenge. Noting that the *Vaughn* index had to be read alongside its declaration, Howell pointed out that the agency's affidavits "show that the withheld information meets the requirements of E.O. 13526. Not only does the declarant explain how the withheld information meets the procedural requirements of E.O. 13526, the declarations and *Vaughn* indices, taken together, adequately detail how each withheld document and redacted material includes information about sources and methods—including information about foreign liaisons and governments, cover field installations—as well as specific intelligence activities." Based on his experiences at the CIA, Scudder argued that the agency had approved of disclosure of 133 of the articles, but had never followed through. Howell observed that "effectively, the plaintiff is asking the Court to second-guess the CIA's classification determination." She pointed out that "the plaintiff does not have, or purport to have, original classification authority. Consequently, his personal opinions and recollections are insufficient to create a genuine issue of material fact with respect to whether the articles

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withheld are classified." Scudder claimed that disclosure of the name of the author of one article suggested that there was no harm in disclosing the name of the author in conjunction with another article. However, Howell indicated that "the mere fact that an author's name is unclassified in one context does not imply that the same name is not classified in another context." Howell also rejected Scudder's argument that the topics of certain articles were silly or banal and did not require protection. But Howell pointed out that "the CIA has provided reasonably detailed descriptions about each of these articles that show that the articles contain material that cannot be released without jeopardizing sensitive and classified information." (*Jeffrey Scudder v. Central Intelligence Agency*, Civil Action No. 12-807 (BAH), U.S. District Court for the District of Columbia, May 17)

A federal court in Massachusetts has ruled that the CIA conducted an **adequate search** for records concerning its role in the 1961 coup that installed General Park Chung-hee as the leader of South Korea and Park's subsequent assassination in 1979 and that it properly withheld records under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. George Katsiaficas, a professor at Wentworth Institute of Technology, submitted a request for records pertaining to the coup and a separate request for records pertaining to Park's assassination. The agency disclosed 15 documents with redactions in response to the coup request. The agency disclosed 14 documents and withheld 16 documents in full in response to the assassination request. Katsiaficas argued that because of the extensive involvement of the United States with South Korea during the time when Park rose to power and his subsequent assassination, it did not seem plausible that the agency had so few responsive documents. But the court, siding with the agency, noted that "this claim, though it cites to the long history of South Korea's relationship with the United States, its merely speculative with regard to discoverable documents in the CIA's possession. Therefore, it is insufficient to rebut the presumption of good faith on the part of the CIA." Katsiaficas did not challenge the substance of the agency's exemption claims except to argue that the age of the documents and the friendly relationship between the U.S. and South Korea suggested that the disclosure would not harm national security. The court agreed with the agency's reasoning, pointing out that "even when a friendly nation is involved, revealing confidential sources' identities could expose aspects of the CIA's recruitment process, negatively impact sources and their families, and hurt the CIA's ability to recruit future confidential sources." Even though some of the records were more than 50 years old, the court observed that "the CIA determined that the information in these records was properly withheld under FOIA exemption (b)(1) because it relates to 'CIA intelligence methods still in use, would reveal a confidential human source, or would reveal government information that would impair the U.S. foreign relations with another country.'" (*George Katsiaficas v. United States Central Intelligence Agency*, Civil Action No. 13-11058-ADB, U.S. District Court for the District of Massachusetts, May 17)

Judge Colleen Kollar-Kotelly has rejected Freedom Watch's request for more expeditious processing of its requests to the FBI and the Criminal Division concerning records about Cliven Bundy, his pending criminal trial, and the circumstances leading to the case. Kollar-Kotelly noted that "Plaintiff did not request expedited processing of its FOIA request. Had it done so, and had its request qualified, Plaintiff's FOIA request would have been placed in a separate, expedited queue. Although Plaintiff is apparently seeking to make this request now before this Court, by way of its most recent Status Report, the FOIA statute indicates that judicial review in this context applies solely to 'agency action to deny or affirm denial of a request for expedited processing. . .and failure by an agency to respond in a timely manner to such a request. . .' Because there has been no request for expediting the processing before the relevant agencies in this matter, there is no agency action for this Court to review with respect to expedited processing." Freedom Watch contended that the agency could quickly disclose the requested records since they had already been gathered for trial. Kollar-Kotelly pointed out that this "is not how Defendants normally process FOIA requests. Rather, Defendants engage in a systematic process by which the requested records are sent to the appropriate record custodians in each agency, so they may engage in a comprehensive search for responsive materials. The Court sees no

reason to deviate from this procedure here. For one, the records that may be responsive to Plaintiff's FOIA request are not necessarily the same records that would be produced in the course of criminal discovery, given the exemptions and privacy interests applicable to the former, but not necessarily the latter." (*Freedom Watch v. Bureau of Land Management, et al.*, Civil Action No. 16-2320 (CKK), U.S. District Court for the District of Columbia, May 15)

After vacating its earlier 2-1 ruling in response to a request to rehear the case en banc, the Ninth Circuit has reinstated its original decision in *Cameranesi v. Dept of Defense*. The district court originally ruled that identifying information about foreign military personnel who attended the U.S. Army School of the Americas was not protected by **Exemption 6 (invasion of privacy)** and that the public interest in knowing more about foreign students who allegedly committed atrocities during the 1980s in several Latin American countries outweighed any privacy interests. The Ninth Circuit's September 30, 2016 opinion reversed the district court's opinion. In light of Circuit Court Judge Paul Watford's strong dissent, plaintiffs Theresa Cameranesi and Judith Liteky asked the full court to rehear the case. Circuit Court Judge Sandra Ikuta, who wrote the majority opinion, and Circuit Court Judge Andrew Kleinfeld, who joined Ikuta in the majority in the original opinion, voted to deny rehearing en banc, while Watford voted to grant the petition for rehearing en banc. However, when none of the other Ninth Circuit judges voted to grant rehearing en banc, the court reinstated the original decision. (*Theresa Cameranesi; Judith Liteky v. United States Department of Defense*, No. 14-16432, U.S. Court of Appeals for the Ninth Circuit, May 8)

A federal court in New York has ruled that records of Francis Brozzo's 1993 defaulted federal student loans, which were assigned to the New York State Higher Education Services Corporation and, ultimately to Education Credit Management Corporation, are not agency records of the Department of Education under FOIA. After the agency provided Brozzo with a copy of his aggregate loan history and contact information, he filed suit. The court ruled in favor of the agency except on the issue of whether the loan documents were agency records. This time around, the court found the agency did not have even constructive control of the records. Noting that the leading federal case on constructive control, *Burka v. Dept of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996), had not been embraced by the Second Circuit, the court fell back on the Supreme Court's ruling in *Dept of Justice v. Tax Analysts*, 492 U.S. 136 (1989), as the applicable standard. The court observed that "defendant does not possess the level of supervision and control necessary for documents to be considered agency records under the constructive obtainment and control theory. . .[T]he requested documents were never used or integrated into Defendant's records or files." Brozzo argued that Education regulations suggested that the agency had the ability to request and obtain loan records. The court, however, indicated that "even if Defendant could request and obtain Plaintiff's requested records under the regulation, they would still not constitute agency records because Defendant did not use or integrate them into its file system." (*Francis Brozzo v. United States Department of Education*, Civil Action No. 14-1584 (LEK/TWD), U.S. District Court for the Northern District of New York, May 11)

A federal court in Arizona has ruled the Jorge Rojas is not entitled to **attorney's fees** for his litigation against the FAA because he did not substantially prevail. Rojas submitted three FOIA requests for records concerning changes the agency had made in a policy allowing Arizona State University to grant degrees that made recipients eligible under the FAA's Collegiate Training Initiative. The agency told Rojas that costs for his first request would exceed $50 and that the agency would not take further steps to process it unless he committed to paying fees. Rojas filed suit on October 5, 2015 and the agency responded to Rojas' request October 29, 2015. The court noted that although it had previously denied Rojas' motion for attorney's fees based on the *Buckhannon* standard he now contended the court had failed to consider whether he was entitled to fees under the catalyst theory. The court faulted Rojas for failing to inform the court that FOIA's attorney's fees provision had been amended, indicating that "the Court's initial decision to deny fees was the correct

application of the *Buckhannon* standard. Nevertheless, it is in this Court's discretion to reconsider the award of attorney's fees under the catalyst theory." Rejecting Rojas' claim under the catalyst theory as well, the court pointed out that "this Court has no doubt that Rojas' lawsuit did not catalyze the production of documents. The documents were produced only one day after the FAA received service of the lawsuit. What triggered the release was not the law suit but rather the Request making its way through the regular FOIA process." The court added that "the time it took to respond to Rojas was not because the FAA had failed to conduct the necessary research but rather because the FAA was working to fulfill the large request." Assessing the factors for entitlement to an award, the court found they favored the government. On the issue of whether Rojas had a commercial interest in the request, the court noted that "while there was commercial element to Rojas' future employability he was not solely motivated by this interest and had an interest in disseminating the information to the public." (*Jorge Alejandro Rojas v. Federal Aviation Administration*, Civil Action No. 15-01985-PHX-NVW, U.S. District Court for the District of Arizona, May 8)

A federal court in Michigan has ruled that Michael Kelly **failed to state a claim** when he filed a FOIA suit against Debra Hayes, the director of My Brother's Keeper, a homeless shelter for adult men in Flint. Kelly prepared a certified writing asking Hayes to what extent a third party subsidized the shelter. When Hayes refused to answer, Kelly filed suit, arguing that she was acting as an agent of the federal government. Dismissing Kelly's claim, the court noted that "the mere fact that a private organization receives federal funds and enjoys some control over their use does not render that organization an agency under FOIA. Plaintiff does not identify any statutory or regulatory source authorizing MBK to exercise independent governmental authority. Instead, MBK 'appears to be no different from any private [organization] which receives federal funds and enjoys some control over their use.'" The court concluded that "because MBK is not subject to the FOIA, Plaintiff Kelly's complaint fails to state a claim upon which relief can be granted." (*Michael A. Kelly v. Debra Hayes*, Civil Action No. 17-10962, U.S. District Court for the Eastern District of Michigan, May 23)