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Washington Focus: New York Times General Counsel David McCraw offered a forceful defense for why the media should litigate FOIA denials more frequently in a June 13 editorial. McCraw described the Times' experience in suing, observing the newspaper has often gotten more useful documents as a result. McCraw also described two cases in which the government was forced to pay attorney's fees as well. Acknowledging that pursuing FOIA litigation is time-consuming, McCraw pointed out why the Times has decided to file suit more often. "If requesters always shrug and walk away [after an administrative appeal], it means we are leaving it to FOIA bureaucrats to decide just how secret our government is going to be. That was never part of democracy's plan."

Remedy for Reading Room Violation Only Available to Individual FOIA Requesters

In the first ruling in a series of suits filed by animal rights and environmental groups challenging the decision of the Department of Agriculture's Animal and Plant Health Inspection Service to take down and reassess records from its website containing personally identifying information the agency believed might be subject to privacy concerns, Judge William Orrick of the U.S. District Court for the Northern District of California has found that the Animal Legal Defense Fund has not shown that it is entitled to an injunction requiring the APHIS to repost the information it took down.

At the heart of ALDF's claim was that the APHIS records fell under the requirement in 5 U.S.C. §552(a)(2) that agencies make public final opinions and frequently requested documents through a reading room. ALDF argued that APHIS had violated that provision by taking down the posted records and asked Orrick to order the agency to repost them. Instead, Orrick found ALDF had not demonstrated that it was entitled to such relief. He noted that "they are not likely to succeed on their FOIA claim because there is no public remedy for violations of the reading room provision – courts may order production of documents to specific plaintiffs but cannot mandate publication to the public as a whole. They have not exhausted administrative remedies on their reading room claims

claims either. They also are not likely to succeed on their claim under the [Administrative Procedure Act] because FOIA provides plaintiffs an adequate alternative remedy."

APHIS's decision to take down the inspection records was seen initially as a first salvo in an anticipated policy shift by the Trump administration to make less information publicly available. But the decision to take down the APHIS records actually had its roots in an earlier contentious dispute pitting agricultural businesses against advocacy groups and other entities that use data about government financial support to agricultural operations over the level of privacy for such businesses whose corporate identities overlap with publicly available personally identifying information. The leading case in the D.C. Circuit, *Mult Ag Media v. Dept of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), leans slightly in favor of disclosing personally identifying information when it is in a business context, but Congress has taken measures since that decision to shrink the universe of personally-identifying business information. Orrick cited *American Farm Bureau Federation v. EPA*, 836 F.3d 963 (8th Cir. 2016), a recently decided reverse-FOIA case in which the Eighth Circuit agreed that members of the American Farm Bureau Federation had standing to sue on behalf of their members over whether the EPA could disclose personally-identifying information in response to FOIA requests from environmental groups. Even though the Department of Agriculture had agreed in 2009 as part of a four-year suit brought against it by the Humane Society to post reports required under the Animal Welfare Act, APHIS became concerned that posting some of the personally-identifying information might open it up for liability under the Privacy Act. As a result, it took down many of the inspection records to assess whether or not personally-identifying information needed to be redacted.

These actions led to lawsuits being filed in D.C. as well as other districts challenging APHIS's actions as violating its FOIA obligation to post final opinions and frequently requested records. In what may well be a preview of how these cases will be decided at the district court level, Orrick found that the recent D.C. Circuit ruling in *CREW v. Dept of Justice*, 846 F.3d 1235 (D.C. Cir. 2017), not only severely limited ALDF's remedies, but also made clear that ALDF did not even have standing to bring its challenge because it had not made a FOIA request and exhausted administrative remedies.

There is a significant back story to the *CREW* case as well which does not bode well for ALDF and its fellow plaintiffs going forward. Even though *Payne Enterprises v. USA*, 837 F.2d 486 (D.C. Cir. 1988), which held that FOIA allowed courts to provide equitable remedies to rectify agency policies that effectively denied access to information short of denials, has recently been reaffirmed by a number of district court judges in D.C., courts have been extremely reluctant to recognize rights to enforce the affirmative disclosure provisions of Section (a)(2). Viewed in historical context, a primary driver of such limited judicial remedies stems from the Supreme Court's 1980 companion decisions in *Kissinger* and *Forsham*, in which the Court announced that agencies only violated FOIA when they improperly withheld agency records in response to a FOIA request. Although this describes the normal course of FOIA litigation, it does not take into account a variety of other agency obligations under FOIA. Nevertheless, government attorneys frequently claim in court that the court does not have jurisdiction because the agency has not actually withheld any records, even though it has failed to respond within the statutory time limit, or denied a fee or fee category request. That argument usually isn't persuasive, but the fact that government attorneys continue to argue it suggests that they remain hopeful that a court will agree.

Until the *CREW* case was decided recently by Judge Amit Mehta, both plaintiffs and the government believed that FOIA did not provide a remedy for failure to abide by Section (a)(2) and that if a remedy existed it was under the Administrative Procedure Act. Indeed, CREW's original suit to force the Justice Department's Office of Legal Counsel to post its opinions on line was brought under the APA. But after examining the text of FOIA, Mehta concluded that FOIA did give courts the ability to remedy such violations.

The case went to the D.C. Circuit where the appeals court agreed with Mehta but found a remedy that was so circumscribed that it was virtually useless. Based on *Kennecott Utah Copper Corp. v. Dept of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), the D.C. Circuit concluded that any relief available for a violation of the affirmative disclosure provisions in Section (a)(2) was limited to FOIA requesters. Although the circumstances giving rise to the *Kennecott Utah* case were peculiarly unsuited for making pronouncements about information disclosure policy – the case essentially tried to force the Interior Department to publish a rule in the Federal Register that it had withdrawn – the D.C. Circuit noted that FOIA's judicial review right "allows district courts to order 'the production of any agency records improperly withheld *from the complainant*,' not agency records withheld from the *public*."

Orrick found the *CREW* decision was directly on point. He noted that "federal courts do not have the power to order agencies to make documents available for public inspection under section 552(a)(4)(B) of FOIA. While plaintiffs may bring suit to enforce section 552(a)(2) and may seek injunctive relief and production of documents to them personally, they cannot compel an agency to make documents available to the general public." He rejected ALDF's claim that it would suffer irreparable harm if APHIS did not repost the records immediately. Instead, he concluded that "the public's interest in immediately accessing all AWA enforcement and compliance records is outweighed by the USDA's interest in ensuring that these records do not improperly disclose private information." (*Animal Legal Defense Fund, et al. v. United States Department of Agriculture*, Civil Action No. 17-0094i9-WHO, U.S. District Court for the Northern District of California, May 31)

Views from the States…

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

California

Using a narrow interpretation of the California Supreme Court's recent ruling in *Los Angeles County Board of Supervisors v. Superior Court* (2016) holding that information about fees charged by outside attorneys is not categorically protected by the attorney-client privilege, an appeals court applying the Supreme Court's ruling on remand has essentially ruled that the only information not covered by the privilege are fee totals for closed cases. The ACLU of Southern California brought suit against Los Angeles County to learn more about how it was litigating prisoner abuse cases. The trial court ruled that most of the records were not privileged, but the appellate court reversed, finding the records privileged. However, the Supreme Court ruled that fees were not typically covered by the privilege except where litigation was still pending. On remand, the appeals court ruled that the ACLU was only entitled to fee totals in cases that had since been closed. Rejecting the ACLU's contention that the trial court should review other previously redacted information from closed cases for possible disclosure, the court noted that "a trial court faced with a claim that information contained in invoices is protected by the attorney-client privilege is not permitted, absent the consent of the party asserting the privilege, to examine the invoices to determine whether specific billing entries reveal anything about legal consultation or provide insight into litigation strategy." (*County of Los Angeles Board of Supervisors v. Superior Court of Los Angeles County; ACLU of Southern California, Real Party in Interest*, No. B257230, California Court of Appeal, Second District, June 6)

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Kansas

A court of appeals has ruled that the trial court erred in dismissing Trina Green's request to the Wyandotte County Sheriff and the Kansas City Police Department for records concerning the shooting of her son. Both agencies refused to disclose records, citing the criminal investigation exemption as the basis for withholding the records. Green then filed suit and the agencies asked the trial court to dismiss her suit for failure to state a claim. The trial court dismissed her suit with prejudice. The appeals court found the trial court did not have the authority to dismiss the case at that stage and, instead, the court noted that "there was no evidence before the court, so it had to accept Green's allegations as true. Green's petition alleged, with factual support, that disclosure was in the public interest and the responding agencies hadn't offered an explanation as to how release of the records would interfere with their investigations. In those circumstances, the district court would have the discretion to order disclosure of these records after consideration of the [statutory] factors. It abused its discretion by ruling without an evidentiary record and without weighing the statutory factors." (*Trina Green v. Unified Government of Wyandotte County/Kansas City*, No. 116,038, Kansas Court of Appeals, May 26)

Maryland

The Court of Appeals has adopted the D.C. Circuit's decision in *Critical Mass v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) for assessing whether confidential business information voluntarily provided to Prince George's County as part of a lease for the development of a commercial project that would feature Whole Foods as an anchor store may be withheld under the confidential business information exemption in the Public Information Act. Jayson Amster argued that because the CEO of Whole Foods had publicly discussed the terms of its lease for a store in Detroit the County had waived its ability to withhold the terms of the lease for the Prince George's County project. The trial court ruled that because the developer had disclosed portions of the lease, the County had not waived its ability to claim the exemption and the appellate court upheld the trial court's decision. The Court of Appeals agreed that *Critical Mass* was the appropriate legal standard to use, but found that both the trial court and the appellate court had failed to recognize the relevance of *Vaughn v. Rosen*, 484 F. 2d 820 (D.C. Cir. 1973), requiring agencies to provide an index to explain their exemption claims and their decision as to whether or not non-exempt information could be separated and disclosed. Noting that the County had not done so here, the court pointed out that "the County can provide descriptions, affidavits, a *Vaughn* index, or other materials to aid the court in teasing apart the confidential and nonconfidential information. The court observed that the County had not sufficiently considered the *Critical Mass* test, explaining that "here, the [County] has not met their burden of showing that this lease is protected in its entirety from disclosure because they have not demonstrated that Calvert Tract would not 'customarily' disclose *any* of its contents." The court rejected the County's claim that it was not required to disclose portions of the lease that had been made public by the developer. The court indicated that "indeed, when a source of commercial information has already revealed it to the public, it can hardly be said that the information 'would customarily not be released to the public by the person from whom it was obtained.'" (*Jayson Amster v. Rushern L. Baker*, No. 63 Sept. Term 2016, Maryland Court of Appeals, May 22)

The Court of Appeals has ruled that Anne Arundel County conducted an adequate search for records concerning an encounter in which Gary Glass was stopped by police officer Mark Collier for driving too close. Glass filed a complaint against Collier, who was exonerated. Glass was also acquitted of the traffic violation. But the incident spawned a series of requests from Glass, who filed several lawsuits challenging the police department's processing of his requests. At the Court of Appeals, the court largely agreed with the agency's processing, finding the search was reasonable and that the agency had properly declined to process some of Glass' requests because of his unwillingness to pay fees to search for archived emails. But the court disagreed

with the police department's claim that it was not required to search archived emails because they were not in their possession. The court noted that "a custodian is not relieved of responsibilities under the [Public Information Act] merely because the requested records are not at the custodian's fingertips." While the police department characterized the Office of Information Technology, which maintained the archived emails, as a separate entity over which it exercised no control, the court analogized it to a warehouse. The court pointed out that "while a requestor might submit a PIA request to the supervisor of a County warehouse for records stored at the warehouse, inevitably that request would be forwarded to, and handled by, a custodian at the agency to whom the records belonged. The same holds true for records stored electronically." Instead, the court found that the police department had not actually denied Glass access to the records, but had placed his request in abeyance until he resolved his fee dispute. The court found that records contained in Collier's internal affairs investigation file were protected by the personnel records exemption. Noting that it was not condoning any attempt on the part of an agency to evade the PIA by placing records in an IA file that did not belong there, the court of appeals observed that "our holding—that an IA file can be withheld in its entirety, without the need for a serverability review—applies only when a PIA request is directed to a specifically-identified IA file—that is 'a personnel record *of an individual*.' Because Mr. Glass's request was functionally a request for the IA file of a specific individual (Officer Collier), the County was required to withhold it in its entirety." (*Gary Alan Glass v. Anne Arundel County*, No. 20 Sept. Term 2016, Maryland Court of Appeals, May 25)

Texas

A court of appeals has ruled that a common-law protection against physical harm, enunciated in the Texas Supreme Court's decision in *Texas Dept of Public Safety v. Cox Texas Newspapers*, 343 S.W. 3d 112 (Tex. 2011), as qualifying as a court-recognized exemption to the Public Information Act, does not apply to names of pharmacists providing lethal injection drugs for executions. The Supreme Court recognized the exception in *Cox Texas Newspapers* to withhold information about the security detail for former Gov. Rick Perry, but had never provided any further guidance on its application. The Texas Department of Criminal Justice withheld the information from several attorneys representing death-row inmates, arguing that identifying the pharmacists would endanger their safety. The appeals court concluded that the Supreme Court meant "'*substantial* threat of physical harm' in the sense of a probability of harm." The appeals court noted that "the *Cox* standard is intended to describe and effectuate the historically recognized common-law right to be free of physical harm, the same right on which the battery of tort is founded. This right, importantly, is distinct from the right or interest, also long recognized in the common law, to be free of apprehension of physical harm—i.e., the interest underlying the tort of assault, as opposed to battery." The agency provided examples of pharmacies that had received a barrage of angry emails when their identities were made public. The appeals court found this was not enough. It pointed out that "to the extent this evidence is relevant to the existence of a threat of physical harm to the pharmacy here, it would demonstrate only the residual or general threat of physical harm that would accompany virtually any participation in governmental functions or controversial issues. This falls short of the '*substantial* threat of physical harm' that *Cox* envisions." (*Texas Department of Criminal Justice v. Maurie Levin, et al.*, No. 03-15-00044-CV, Texas Court of Appeals, Austin, May 25)

Virginia

A trial court has ruled that the Virginia Senate is a public body subject to the disclosure provisions of the Virginia Freedom of Information Act, but since individual Senators are public officials, not public bodies, they are not personally subject to the act's disclosure provisions. Rejecting a request submitted to Sen. Siobhan Dunnavant, the court pointed out that "Senator Dunnavant is not a legislative body; rather, she is a

member of a legislative body. While Senator Dunnavant is indeed a public official, she is not a public body within the meaning of FOIA. As such, the Court finds that [Brian] Davison's request was not subject to the procedures and time limits prescribed by FOIA, which, by its express terms, relates only to FOIA requests made to public bodies." (*In re: Brian C. Davison v. Siobhan S. Dunnavant*, No. CL17-737, Circuit Court of Henrico County, Virginia, June 14)

Washington

The Washington Supreme Court has ruled that an exception to the Open Public Meetings Act allowing public bodies to go into executive session to discuss the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price is limited to a discussion of the minimum acceptable price, but does not extend to discussions of factors comprising that value. The Port of Vancouver negotiated a lease for a large rail terminal on public land with two private companies, Tesoro Corporation and Savage Companies. The lease agreement would involve receipt of large quantities of petroleum products for export. The terms of the lease agreement were negotiated by the Port staff, but the board of commissioners was required to approve the price. Over the course of the approval process, the board went into executive session at least seven times. Columbia Riverkeeper, the Sierra Club, and the Northwest Environmental Defense Center sued the Port for violating the OPMA. In a case of first impression, the Port argued that it was allowed to go into executive session to discuss anything that might affect the price of the lease. The Supreme Court disagreed, noting that "the exception permitting executive sessions to consider the minimum price at which to offer public land for sale or lease must be read narrowly. The plain language of the provision confines discussion in executive session to the lowest acceptable price to offer land for sale or lease, and does not permit discussion of all factors that influence price." The court observed that "in practice, this means that a government entity's discussion of the factors comprising value must occur in public. While conversation in executive session may address how these factors impact the minimum price, these contextual references cannot themselves become the focus of discussion." (*Columbia Riverkeeper, et al. v. Port of Vancouver USA*, No. 92455-4, Washington Supreme Court, June 8)

The Federal Courts…

Judge James Boasberg has resurrected a **policy and practice** filed by the American Center for Law and Justice against the State Department after finding ACLJ's amended complaint sufficiently articulates a policy – requiring requesters to sue in order to force the agency to respond to their request – to allow its claim to survive the agency's motion to dismiss. ACLJ's first policy and practice claim argued that the agency intentionally failed to respond to requests. Because State routinely acknowledged receipt of requests, Boasberg found ACLJ had not articulated a coherent policy and practice claim. However, he invited ACLJ to amend its complaint after explaining the level of allegations that would need to be made. This time around, Boasberg found ACLJ had adequately refined its claim to survive the agency's motion to dismiss. Based on a 2012 OIG report criticizing the agency's FOIA operations, ACLJ argued State was on notice of its problems in timely responding to FOIA requests, but decided to ignore them instead. ACLJ contended that "State requires lawsuits because it saves the agency the hassle of actively maintaining a FOIA-disclosure regime." State responded that ACLJ's claim could not survive because Boasberg had already found that its acknowledgement letters were consistent with FOIA obligations and it could not be sued for failure to provide sufficient training. But this time, Boasberg pointed out that ACLJ's claim was based on its allegation that State required requesters to sue to get records. He noted that "that policy or practice, if proven, would violate the basic tenets of FOIA, including its requirement that agencies disclose information in the first place." Based on its own experience requesting records from State, ACLJ indicated that no matter how long it waited for a response, the

agency did not respond unless ACLJ filed suit. Boasberg observed that "if true, these allegations at least encapsulate an informal *modus operandi* for the Department's dealing with its requestors – in effect, a wink-wink that it takes a lawsuit for the Government to get going on its FOIA duties." Acknowledging the low bar for allowing a complaint to proceed, Boasberg pointed out that "even if Plaintiff were to ultimately prove its case, moreover, the remedial question would still remain open. . ." (*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, June 8)

The D.C. Circuit has ruled that Section 308 of the Clean Water Act does not supersede **Exemption 4 (confidential business information)** and does not require the EPA to disclose information obtained from power plants that does not qualify as a trade secret but does qualify as confidential business information. Writing for the court, Circuit Court Judge Brett Kavanaugh rejected a claim by the Environmental Integrity Project, the Sierra Club, and Earthjustice that the records were required to be made public under Section308 of the Clean Water Act. Kavanaugh noted that the Administrative Procedure Act, of which FOIA is a part, states that a later statute may supersede or modify the APA only if it does so expressly. Kavanaugh explained that "Section 308 does not expressly supersede Exemption 4. Therefore, EPA permissibly invoked Exemption 4 to deny the environmental groups' FOIA request." The environmental groups argued that the language in Section 308 requiring that such information "shall be available to the public" would be meaningless if Exemption 4 could be used to routinely withhold it. But Kavanaugh, referencing the Supreme Court's decision in *Forsham v. Harris*, 445 U.S. 169 (1980), which held that records from third parties are not agency records unless in the custody and control of the agency, noted that at the time Section 308 was enacted in 1972 it was not yet clear that the information provided by power plants would qualify as agency records. He observed that "absent Section 308, therefore, it would not have been clear whether records obtained from power plans were subject to disclosure under FOIA. Section 308 clarified that records obtained by EPA from power plants under Section 308 are subject to FOIA. So Section 308 was not meaningless at the time that it was enacted." (*Environmental Integrity Project, et al. v. Environmental Protection Agency*, No. 16-5109, U.S. Court of Appeals for the District of Columbia Circuit, May 30)

Judge Amy Berman Jackson has ruled that the IRS conducted an **adequate search** for records concerning instances in which the White House requested tax return information about individuals for purposes other than consideration for various appointments. Cause of Action requested the records to try to establish that the White House misused tax return information for political purposes. Jackson found the agency's first search insufficient because it had failed to explain why it did not search the Office of Legislative Affairs. This time, the agency searched the Office of the Executive Secretariat, which, the agency asserted, was the only office at the agency that would have received a request from the White House. It searched the E-Trak database because that database contained a record of all White House requests. At the urging of Cause of Action, it also searched two FOIA-related databases. The searches found no records. Cause of Action challenged whether the employees who signed the agency's affidavits had sufficient personal knowledge and suggested that they were not in a position to know whether or not improper White House requests were received and not recorded. Jackson noted that "obviously, no declarant can rule out the possibility that an employee may fail to follow proper procedure, and therefore it would be speculative for her to aver than any employee who ever actually received an improper request in fact promptly forwarded it to the Office of the Executive Secretariat. But it is equally speculative to assume that such a request was made." Jackson observed that Cause of Action's request posed a difficult legal conundrum since it asked for records that should not exist. She noted that "not only does plaintiff not know whether the record it seeks exist – they are not supposed to exist. But this raises the question: how would the agency be able to reasonably identify where

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records that should not exist are likely to be found?" Cause of Action insisted the agency should have searched more email accounts. Jackson pointed out that "but when the Court summoned the parties to a status conference and invited the plaintiffs to provide more direction, plaintiff acknowledged that it had no particular email accounts in mind. Given plaintiff's inability 'to identify specific additional places the agency should now search,' plaintiff has not pointed to any genuine issue of fact related to the adequacy of the search." (*Cause of Action v. Internal Revenue Service*, Civil Action No. 13-0920 (ABJ), U.S. District Court for the District of Columbia, May 25)

A federal court in Alabama has ruled that the Justice Department's Office of Professional Responsibility properly invoked a *Glomar* response neither confirming nor denying the existence of records based on both **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to a request from the law firm of White, Arnold & Dowd for records pertaining to any complaints filed against Matt Hart, a former U.S. Assistant Attorney in Alabama, who had since gone to work for the Alabama Attorney General. As part of his work for the Attorney General, Hart investigated corruption charges against Michael Hubbard, the former Speaker of the Alabama House of Representatives. Hubbard was charged with 23 counts related to misusing his office for personal gain. He was convicted of 12 charges and was removed from office. Part of Hubbard's defense was to accuse Hart of prosecutorial misconduct. After his conviction, the law firm of White, Arnold & Dowd requested all complaints filed against Hart in his previous job as an AUSA. The Office of Professional Responsibility issued a *Glomar* response indicating that disclosure of such records would invade Hart's privacy and that disclosure of records concerning a single non-supervisory attorney would not shed any light on government activities or operations. The law firm argued that because allegations of Hart's misconduct in the Hubbard investigation were public he no longer had a cognizable privacy interest in non-disclosure. The court noted that the law firm's FOIA request did not pertain to records that were public. The court pointed out that "the actual request seeks information relating to *complaints* made against Hart in the possession of OPR. The court finds that the evidence does not establish that the existence or non-existence of any documents concerning any such *complaints* has not been publicly disclosed." The law firm argued that Hart had publicly acknowledged the existence of such complaints during a conversation with a co-worker. But the court observed that "the issue is not whether *allegations* of misconduct by Hart had been made public. They have. The question is whether the existence or non-existence of documents regarding complaints to DOJ or OPR against Hart has been made public. . .A conversation with a co-worker is not a 'public disclosure' regarding the existence or non-existence of records regarding a complaint." The court found the co-worker's testimony in the Hubbard case about alleged misconduct by Hart while working at the Alabama Attorney's General's Office was not relevant either. The court noted that "this evidence has no relation to complaints against Hart while he was employed by the U.S. Attorney's office." The court agreed that Hart had a privacy interest under both Exemption 6 and Exemption 7(C). Addressing the potential public interest in disclosure of the existence of Hart's complaint records, the court agreed that "information regarding complaints about one non-supervisory AUSA does not say enough about 'government operations' to outweigh Hart's significant privacy interests in that information." (*White, Arnold & Dowd, P.C. v. Department of Justice, Office of Professional Responsibility*, Civil Action No. 15-00837-RDP, U.S. District Court for the Northern District of Alabama, June 2)

A federal court in Connecticut has ruled that the Department of Veterans Affairs has not shown that it **conducted an adequate search** for records responding to a multi-part request concerning the use of Subject Matter Experts to adjudicate disability claims stemming from contaminated drinking water at Camp Lejeune and has agreed that the veterans' organizations who brought the suit may conduct **discovery** if currently

uncompleted searches do not satisfy them. Concerned that the rate of successful claims had dropped from 25 percent to eight percent, several veterans' organizations submitted the requests to the agency. The agency divided responsibility for responding to the request between the Veterans Benefits Administration and the Veterans Health Administration. After a number of searches, the agency provided some records, withholding personally-identifying records about SMEs under **Exemption 6 (invasion of privacy)**. The veterans' organizations argued the agency had not shown why it divided the request for search purposes. The court agreed, noting that "at this stage of the litigation, the Court cannot conclude that this allocation of labor was a reasonable response to Plaintiffs' request. Defendant delegated the claims-related paragraphs of the FOIA request to VBA because of VBA's focus on claims adjudication, rather than management of the SME program and the SMEs. As Plaintiffs noted, however, Defendant's declarations do not adequately explain why VBA would not have records responsive to more general questions concerning the SME program. . ." The court faulted the VBA for failing to describe its file system, its decision to limit the search to certain offices, and its failure to use certain obvious keywords. The court observed that the agency's affidavits "do not explain why VBA excluded the term 'Subject Matter Expert' when searching for responses to a FOIA request concerning the Subject Matter Expert program. Without this 'explanation,' the Court cannot conclude that the search was 'adequate.'" Assessing the search done by VHA, the court agreed with the plaintiffs that the component had not sufficiently shown **personal knowledge** of the records search by the individuals who signed the affidavits. The court pointed out that it "cannot hold as a matter of law that the three declarations from VHA officials are based on sufficient 'personal knowledge' to support a motion for summary judgment. This is especially true because the declarations provide few details about the searches in question." The agency had redacted all information about the SMEs, including their qualifications. The court noted that "Defendant does not describe a privacy interest relating to the SME's qualifications and submits no information suggesting that such disclosure would subject SMEs to harassment or threats. Plaintiffs articulate a public interest in the disclosure of SMEs' qualifications, but do not describe a separate public interest in the disclosure of other identifying details. Because Defendant represented at oral argument that it will produce additional records in response to Plaintiffs' inquiry about the qualifications of the SMEs, the Court will not address whether Exemption 6 would permit redaction of the SMEs' names, if Defendant produced no additional records establishing their qualifications." The court expressed hope that the parties could settle their remaining differences, but indicated that it would grant limited discovery if the agency's further responses were not satisfactory. (*The Few, the Proud, the Forgotten; Vietnam Veterans of America; and Connecticut State Council of Vietnam Veterans of America v. United States Department of Veterans Affairs*, Civil No. 16-00647, U.S. District Court for the District of Connecticut, May 26)

Judge Gladys Kessler has ruled that the FBI conducted an **adequate search** for records responsive to four requests submitted by George Canning pertaining to Lyndon LaRouche, Paul Goldstein, and Jeffrey Steinberg, including various information that had been declassified as a result of an ISCAP review. even though the agency insisted that it had no record of receiving three of them. Kessler also approved all the agency's exemption claims, but agreed with Canning that because the FBI had disclosed the names of two individuals in response to previous FOIA requests it was required to provide that information to Canning in response to these requests. Although the FBI claimed it had only received Canning's request to the FBI Washington Field Office and not those he sent to FBI headquarters, Kessler was satisfied that the agency had searched for and processed all records encompassed by all of Canning's requests. Kessler reject Canning's challenges to withholding claims made under **Exemption 1 (national security)**, **Exemption 3 (other statutes)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, **Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods and techniques)**, she agreed with Canning's argument that because the agency had previously disclosed the names of two individuals whose identities it had redacted in response to these requests the identities were now in the public domain and the

agency could not withhold them. She noted that "Mr. Canning has demonstrated that the Government previously released the Boston ELSUR information in response to Mr. Steinberg's FOIA request. The Government has not explained why the identity of the FOIA requester should affect the Court's analysis. In both instances, the material has been previously released to the public, a fact that warrants the disclosure of withheld information in this case." (*George Canning v. U.S. Department of Justice*, Civil Action No. 11-1295 (GK), U.S. District Court for the District of Columbia, June 5)

For the second time in recent months, a district court judge in the D.C. Circuit has ordered the government to pay **attorney's fees** to a plaintiff whose only claim to be entitled to fees was because of the agency's obdurate behavior in responding to his request. Ruling that Howard Bloomgarden is entitled to $45,518 in fees and costs, a reduction from the original request for $75,654, Judge Ellen Segal Huvelle found that EOUSA's conduct in processing the request was unreasonable. After the agency told him that it had found no records responsive to his request for disciplinary records pertaining to an Assistant U.S. Attorney, Bloomgarden filed suit. Huvelle originally ruled against Bloomgarden and he appealed to the D.C. Circuit. While his appeal was pending, EOUSA located a disciplinary file containing more than 3,000 pages, including records that had been sealed by a court order 20 years previously. The D.C. Circuit remanded the case to Huvelle. She rejected the agency's claim that the sealing order continued to prohibit disclosure of records, but also ruled that a 35-page disciplinary letter was exempt under **Exemption 6 (invasion of privacy)**. Noting that "the vast majority of the 3,700-page file that plaintiff requested has 'little if any value to anyone, including the plaintiff,'" Huvelle found that because Bloomgarden's motive for requesting the records was to undercut the government's credibility in his trial for murder in California "there is no public interest in plaintiff's attempt to uncover evidence that would absolve him of criminal liability." However, she pointed out that "this litigation was plagued by the government's obdurate and recalcitrant behavior," including its initial refusal to release public documents, its submission of a "woefully inadequate" *Vaughn* index, and its attempt to raise new bases for withholding documents. She then assessed the reasonableness of Bloomgarden's fee request. She concluded that Bloomgarden was not entitled to fees for the first phase of the litigation since it was not until later that another agency responding to one of Bloomgarden's requests located the disciplinary file that became the focus of the litigation. Since Bloomgarden did not prevail in much on the second phase of the litigation Huvelle reduced his request by a third. She criticized Bloomgarden for block billing –lumping several tasks together in one billing entry. She pointed out that "given the difficulty in disambiguating the block billed entries to reduce travel-time recovery or to evaluate the reasonableness of the entries themselves, the Court will [instead] reduce plaintiff's recovery by an additional 4%." Huvelle did not award Bloomgarden for the third phase of the litigation because he had not prevailed on any issue except for his fee request. Even there, she reduced his $4,050 fees by 30% to account for duplication and over-billing. (*Howard Bloomgarden v. United States Department of Justice*, Civil Action No. 12-0843 (ESH), U.S. District Court for the District of Columbia, May 25)

The Second Circuit has upheld a district court's ruling that the public availability of videotape showing techniques used by DEA for interdicting drug smugglers waived the agency's ability to withhold a specific tape requested by journalist Mattahias Schwartz. In a short order, the appeals court noted that the video "describes many, though not all, of the alleged law enforcement techniques and procedures the DEA asserts the Ahuas Video would reveal." The court observed that "in light of the disclosure, these alleged techniques and procedures do not provide a basis for withholding the Ahuas Video under **Exemption 7(E) (investigative methods and techniques)**." The court added that "as for the alleged law enforcement techniques and procedures not disclosed by the review, we conclude that the district court did not err in determining that they are not protected by FOIA Exemption 7(E). Some of them already appear in other publicly available

materials, and the remainder either (a) are not disclosed by the Ahuas Video, or (b) are not law enforcement techniques or procedures at all, but rather are only the circumstances in which publicly known techniques and procedures were employed." (*Mattathias Schwartz v. United States Drug Enforcement Administration*, No. 16-750, U.S. Court of Appeals for the Second Circuit, June 6)

The Second Circuit has rejected several challenges by Michael Kuzma pertaining to the FBI's **search** for records on civil rights activist Ray Robinson as well as various exemption claims. In response to Kuzma's request, the agency identified 782 pages as potentially responsive and disclosed 590 pages in full or in part. Kuzma argued the agency's failure to locate a piece of June Mail undercut its claim that the search was adequate. The court disagreed, noting that "Kuzma suggests, for example, that the FBI should have placed the missing files on 'special locate,' but he does not explain either what that means or how the FBI's failure to do so rendered the search inadequate. At any rate, insofar as Kuzma proposes search methods he believes are superior to those used by the FBI, we note that FOIA demands a reasonable search, not a perfect or ideal one." Kuzma challenged the redaction of the identifiers for individuals involved in the Robinson investigation under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The court observed that "his assertion, without evidence, that this particular information will reveal fault in the government's handling of the Robinson case is not enough. To the extent Kuzma means that learning the identities will provide further avenues for research, we have observed that 'courts have been skeptical of recognizing a public interest in this "derivative" use of information.' Even assuming the prospect of such derivative use could outweigh privacy interests in a hypothetical case, Kuzma has not shown that is true here." Kuzma argued that the agency had previously identified several confidential sources in court testimony, waiving any **Exemption 7(D) (confidential sources)** protection. The court indicated, however, that "even if Kuzma's evidence proved the FBI has acknowledged the identities of these alleged informants, that would not amount to a blanket waiver of Exemption 7(D)'s protection. Rather, we have 'rejected the idea that subsequent disclosure of the identity of a confidential source or of some information provided by the confidential source requires full disclosure of information provided by such a source.'" (*Michael Kuzma v. United States Department of Justice*, No. 16-1992, U.S. Court of Appeals for the Second Circuit, May 31)

Judge Randolph Moss has dismissed Clarence Baldwin's FOIA litigation against the Small Business Administration after finding Baldwin failed to identify any records he was seeking. Baldwin submitted two FOIA requests to the agency posing a series of questions to which he wanted the agency to respond. The agency initially indicated it was not obligated under FOIA to respond to questions, but ultimately decided to disclose 327 pages it believed responded to Baldwin's queries. Baldwin then contacted the agency, complaining that the records did not answer all his questions. The agency then asked Baldwin to identify records he believed would satisfy his queries. He refused to do so and the agency asked Moss to dismiss the case for failure to prosecute. Moss decided there was no point in prolonging the proceedings. He noted that "Baldwin was on clear notice from the Court and the SBA that, in order to proceed, he would need to identify particular agency records that he alleges the SBA failed to release; he was provided ample opportunity to do; and he declined that invitation." Moss added that "despite opportunities to argue otherwise, Baldwin has declined to disavow what appears evident on the face of his complaint—that is, that he seeks to compel the SBA to answer questions and not release agency records. Understood in this manner, the complaint fails to state a claim under any plausible reading of FOIA." (*Clarence Baldwin v. Small Business Administration*, Civil Action No. 16-1365 (RDM), U.S. District Court for the District of Columbia, June 6)

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