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In this Issue

Court Finds Facebook Request Failed to Specify Electronic Records 1

Views from the States 3

The Federal Courts 7

Index

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Washington Focus: A coalition of 31 open government advocacy organizations has sent a letter June 26 to the chairs and ranking minority members of the House and Senate Armed Services Committees urging them to reject a provision in the FY-18 defense authorization bill that would allow DOD to withhold "information on military tactics, techniques, and procedures, and of military rules of engagement." Noting that the key terms were too broadly defined, the coalition observed that the provision would allow DOD "to conceal information about the military's handling of sexual assault complaints; its interrogation and treatment of prisoners; its oversight of contractors; and other matters of compelling public interest."

Court Finds Facebook Request Failed to Specify Electronic Records

A ruling by a magistrate judge in California finding that the IRS does not have to provide Facebook with Excel spreadsheets in native format that the company can analyze and instead can provide the spreadsheet as a static PDF file because Facebook did not specifically ask for electronic records underscores limitations in FOIA that pose major obstacles to government record-keeping and the way in which many sophisticated users of data expect as a matter of course in the 21st century.

The case, stemming from an IRS audit of Facebook for 2008-2010, involved the agency's determination that the company owed back taxes because it seriously understated the value of the transfer price at which Facebook licensed certain technology to its Irish affiliate. The IRS concluded that the present value of the transfer price was nearly $14 billion, increasing Facebook's income in 2010 by $85 million. As a result of the agency's decision, Facebook filed suit in U.S. Tax Court challenging the determination and submitted two detailed FOIA requests as well. The agency told Facebook that it would take at least 3-4 months to complete its search and even longer to review the records. The agency estimated an initial cost of $19,598 to process Facebook's request, which Facebook paid.

The agency located 1.9 million documents in processing Facebook's FOIA requests, and decided that 320,000 of them were potentially responsive. The IRS had reviewed over 68,000 pages of records before Facebook filed suit. Those documents contained Facebook's tax returns and documents provided by Facebook to the IRS during the 2008-2010 audit, including a 16,000-page PDF Excel spreadsheet Facebook had provided. However, Facebook told the court that it "is wholly unable to discern what edits, changes, or comments the IRS may have made to the file because it is impossible to reconstruct the file from more than 16,000 pages of gibberish." Facebook discussed with the IRS "its request for certain native electronic files in the format in which the IRS maintains them along with email that includes a standard load file with typical email metadata." The agency refused to disclose the metadata without first reviewing it for exemptions. Facebook asked the court to order the IRS to disclose emails, spreadsheets, word-processing documents, and PowerPoint presentations in their native electronic format. The IRS argued that Facebook had not exhausted its administrative remedies because its requests did not ask for electronic records.

Beeler relied on *CREW v. Dept of Education*, 905 F. Supp. 2d 161 (D.D.C. 2012), where District Court Judge Rosemary Collyer rejected CREW's contention that the Department of Education was required to disclose emails in an electronic format including metadata after finding that CREW's request had not asked for electronic records. Collyer pointed out that "FOIA only requires production of responsive records 'in any form or format requested by the person if the record is readily reproducible by the agency in that form or format,'" and explained that "CREW did not request that [the agency] *produce* its records in electronic format, much less electronic format with metadata." As a result, Collyer noted that the agency "had no obligation to produce the documents in any particular format" because they were not readily reproducible in electronic format because of the agency's retention system limitations. Collyer rejected CREW's argument that agencies were obligated by FOIA to disclose electronic copies and/or metadata because she did not see "any basis to *impose* an electronic copy obligation on a federal agency."

Beeler wholeheartedly agreed with Collyer's analysis in *CREW*. She pointed out that "Facebook did not originally ask the IRS to produce the records in native format, much less with email metadata, Excel spreadsheet formulas, Word document comments and revisions, or PowerPoint presentation notes. Facebook also did not request emails in 'load file' images, which it now suggests as an alternative." But Beeler readily acknowledged that Facebook had requested all records *whether maintained in electronic or hard copy format*, which suggests that Facebook did request electronic records from the beginning. However, Beeler noted that "Facebook did not ask the IRS to produce documents in electronic native format that contained metadata. It asked for all records 'whether maintained in electronic or hardcopy format,' but did not specify the format for production. As Facebook points out, metadata is an important part of electronic records in today's world. But as the *CREW* court noted, the court does not see 'any basis to *impose* an electronic copy obligation on a federal agency' when the requester did not specify that form." She added that "with respect to its request for electronic-format documents, then, Facebook did not submit a valid FOIA request in compliance with the IRS's regulations. The request did not trigger the IRS's FOIA obligations, the IRS did not have an opportunity to exercise its discretion in analyzing the request, and so Facebook has not exhausted its administrative remedies."

Beeler then addressed Facebook's alternative argument that requiring it to submit a new revised request would be futile. Noting that the D.C. Circuit, in *Hildago v. FBI*, 344 F.3d 1256 (D.C. Cir. 2003), and *Wilbur v. CIA*, 355 F.3d 675 (D.C. Cir. 2004), had concluded that failure to exhaust administrative remedies was jurisprudential rather than jurisdictional, meaning that a court could go ahead and hear the case if it decided that dismissing the case would not serve the purpose of the administrative process under FOIA, Beeler found that "judicial intervention now would deprive the IRS of the opportunity to exercise its discretion and analyze Facebook's (now clarified) request for electronic documents and metadata, and dismissal would give

the IRS the chance to do so. The court is not convinced that Facebook's refiling of a revised FOIA request to specify the format (and content) of the records it seeks would be futile." Having ruled in favor of the agency, however, Beeler indicated that her ruling did not prevent the IRS from accommodating Facebook's clarified request, which the agency interpreted as being for data and formulas as organized in an Excel file and written comments in Word and PowerPoint. Responding to the agency's concern that if it produced the records willingly rather than by court order it might still be liable for attorney's fees, Beeler agreed that she would not order the parties to work out a settlement, but would allow the parties to do that on their own. (*Facebook, Inc. and Subsidiaries v. Internal Revenue Service*, Civil Action No. 16-05884-LB, U.S. District Court for the Northern District of California, June 19)

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 Department of Insurance failed to exhaust its administrative remedies when it went directly to court to block disclosure of preacquisition notifications rather than challenge the FOI Commission's ruling that the department provide the documents for *in camera* review. Arguing that it was statutorily prohibited from disclosing the preacquisition notifications, the department claimed it was futile to challenge the FOI Commission's order to conduct an *in camera* inspection because the order presupposed the commission's final decision. The court rejected the department's argument, noting that "the problem with this novel argument is that it requires the court to assume that the commission will reject the department's arguments and approve the proposed final decision. If the commission were to reject the proposed decision and conclude that the documents at issue are categorically exempt, there would be no need to return the case to the hearing officer to consider alternative claims of exemption. The department would thereby obtain complete vindication with respect to the documents at issue." The court pointed out that "even if it is likely that the commission will approve the proposed final decision, the commission still has the *authority* to reject it. The fact than an agency may have previously indicated how it will decide a question has been held not to excuse compliance with the exhaustion requirement on the ground of futility." The court added that "the department has not cited, and the court has not found, a case in which exhaustion has been excused based on the predictability of the administrative outcome." (*State of Connecticut, Department of Insurance v. Freedom of Information Commission*, No. HHB-CV-17-6036748-S, Connecticut Superior Court, Judicial District of New Britain, June 26)

Georgia

A court of appeals has ruled that the trial court erred when it dismissed Chawanda Martin's suit under the Open Meetings Act alleging that three interim members of the city council of the City of College Park had been improperly appointed without a vote. Martin, a firefighter, had been terminated for misconduct. She filed an open records request with the city and discovered that all three interim council members had been appointed by consensus rather than by taking a vote. She sued the city for violating the Open Meetings Act. Although two of the interim members had been appointed more than 90 days before Martin filed suit, the third interim member had been appointed before the 90 days had expired. Noting that the statute required a public

vote for appointments or employment of a public official, the appeals court observed that 'the statute does not differentiate or exempt 'interim' appointments from its reach." The court of appeals added that "here the evidence was that *no vote* was ever taken." The appellate court allowed Martin to continue with her suit, noting that the city might be liable for a civil penalty not to exceed $1,000 for the first violation. (*Chawanda Martin v. City of College Park*, No. A17A0032, Georgia Court of Appeals, June 21)

Illinois

A court of appeals has ruled that the Village of Rosemont may not pass an ordinance prohibiting disclosure of information about contracts to use two local entertainment venues because it goes further than the confidential business information exemption in the Illinois FOIA. The *Chicago Tribune* requested the contract for Garth Brooks' appearance at Allstate Arena. Rosemont refused to disclose the contract without substantial redaction, claiming it contained confidential business information exempt under the Illinois FOIA. Rosemont filed a complaint with the Public Access Counselor, arguing the contract was protected. At the same time, Rosemont adopted an ordinance prohibiting disclosure of information pertaining to contract information related to entertainers appearing at the two venues. This prompted a challenge from the Better Government Association. The Public Access Counselor ruled in favor of the *Tribune*, finding that Rosemont was required to disclose the Brooks contract and that it could not adopt an ordinance prohibiting disclosure of information that was available under the FOIA. The appeals court agreed with Rosemont that it was not collaterally estopped from claiming that contract information was confidential even though the PAC had ordered such information contained in the Brooks contract disclosed. Relying on the federal case, *Lardner v. Dept of Justice*, 638 F. Supp. 2d 14 (D.D.C. 2009), in which the district court found that just because it had ordered the Justice Department to disclose the names of a group of unsuccessful applicants for pardons during the Bush administration did not mean the government was collaterally estopped from arguing that the privacy exemption applied to other applicants. The appeals court noted that the trial court "should give Rosemont the opportunity to demonstrate that the court should treat the legal issue differently for some of the contracts at issue here." But the appeals court indicated that because Rosemont's rental rates did not come from a third party, "Rosemont did not obtain the information about Rosemont's standard rates from the renters." The appeals court rejected Rosemont's ordinance providing greater restrictions on disclosure of contract information. The court noted that "the legislature stated its intent that only State statutes may create additional restrictions on disclosure of information, and other laws in Illinois, including ordinances of home rule units, may create additional obligations for disclosure but cannot create exemptions from disclosure." (*Better Government Association v. Village of Rosemont*, No. 1-16-1957, Illinois Appellate Court, First District, June 27)

Louisiana

The supreme court has reversed two lower courts in ruling that a provision restricting the use of the public records law by prisoners does not apply to a prisoner's attorney, even though the request is made on behalf of the prisoner. The public records law restriction prohibits prisoners from using the statute unless they can show a valid claim for post-conviction relief. James Boren was retained by Stephan Bergeron to review his 2013 rape conviction to determine if grounds for an appeal existed. However, the St. Landry District Attorney's office rejected Boren's request because it was made on behalf of Bergeron. The trial court ruled in favor of the government, as did the court of appeals. However, the supreme court reversed. The supreme court noted that "having found that the [provision] clearly and unambiguously applies only to 'an individual in custody after sentence following a felony conviction,' we find it unnecessary to delve further into the intent of the legislature in enacting this statute." The supreme court observed that "Mr. Boren's rights under the Public Records Law have not been 'specifically and unequivocally' limited by any law. Therefore, his public records

request to the defendant/custodian should have been evaluated under [the access provisions to the public records law] allowing custodians to inquire only as to the 'identification of the person' seeking access to public records and whether he or she is 'of the age of majority.'" (*James E. Boren v. Earl B. Taylor*, No. 2016-CC-2078. Louisiana Supreme Court, June 29)

New Jersey

The supreme court has reversed an appellate decision requiring Galloway Township to disclose only the sender, recipient, date, and subject fields of emails sent by the Township's Municipal Clerk and Chief of Police over a two-week period, but not the content of the emails constituted creation of a record under the Open Public Records Act and was contrary to an earlier appellate court ruling, *MAG Entertainment v. Division of Alcoholic Beverage Control*, 868 A.2d 1067 (N.J. 2005), in which the court found that a request for all records was too broad and would impermissibly require the agency to conduct research for the requester. Noting that separating the header information requested by John Paff was quite simple, the supreme court pointed out that "a document is nothing more than a compilation of information – discrete facts and data. By OPRA's language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information, it is a government record." Finding that *MAG* was not on point because it dealt with a voluminous hard-copy search, the supreme court observed that "a records request must be well defined so that the custodian knows precisely what records are sought. The request should not require the records custodian to undertake a subjective analysis to understand the nature of the request. Seeking particular information from the custodian is permissible; expecting the custodian to do the research is not." The court added that "with respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that 'OPRA only allows requests for records, not requests for information.' That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information." The court pointed out that informal guidance from the Government Records Council was not precedential or binding, noting that "surely, if the [trial court] is to give no weight to a GRC decision, then informal guidance from the GRC can stand in no better position." Because its decision only settled whether the headers were government records, the supreme court sent the case back to the trial court to determine if any exemptions applied. (*John Paff v. Galloway Township*, No. A-88-15, New Jersey Supreme Court, June 20)

Pennsylvania

The supreme court has ruled that motor vehicle recordings taken by two state police troopers while dealing with a traffic accident on a residential street are not categorically protected by the criminal investigation exemption of the Right to Know Law nor do they constitute criminal information protected by the Criminal History Information Act. The court also found the audio and videotapes are not protected by the Wiretap Act either. The case involved a request by Michelle Grove, who witnessed the accident and its aftermath, for copies of the MVRs. The state police withheld the MVRs in their entirety and Grove filed a complaint with the Office of Open Records. OOR ruled in favor of Grove and ordered the state police to disclose the records. The state police appealed to the court of appeals. Because the state police had relied on earlier OOR decisions finding MVRs were exempt, the court of appeals allowed the state police to supplement the record. The court of appeals found that the video portions of the recording did not constitute criminal investigative records, but that the audio portions were akin to witness interviews and could be withheld. While the court of appeals found that the records were not subject to the Wiretap Act, it pointed out that there was no evidence that witnesses had consented to disclosure of the recordings and remanded the case back to OOR for further exploration of that issue. Instead, the state police appealed the case to the supreme court. The supreme court noted that the state police retained MVRs "when a person captured on the recording

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notifies PSP of her intent to use it in civil proceedings. This latter point supports a conclusion that MVRs do not always 'relate to' or 'result in' criminal investigations such that they should be *per se* exempt from disclosure under the [criminal investigation exemption]. The [court of appeals] therefore correctly determined the MVRs are not exempt from disclosure as a general rule." Finding that the state police trooper had gathered the information necessary to charge the driver through his conversations with witnesses and drivers, which the court of appeals had ordered redacted, the supreme court pointed out that "PSP simply does not explain how the video portion of the MVRs captured a criminal investigation." The state police argued that redacting the videos would create a new record. But the supreme court disagreed, noting that "the redaction envisioned here is analogous to the printed copy of an existing, original agency document which is delivered to the requester with black marking blocking exempt material." The supreme court dismissed the Wiretap Act allegations altogether, observing that "it is clear that individuals at the scene could have had no reasonable expectation of privacy, or any justifiable expectation that their statements and images were not being captured on MVRs, or any number of cellphones for that matter." (*Pennsylvania State Police v. Michelle Grove*, No. 25 MAP 2016, Pennsylvania Supreme Court, June 20)

Virginia

The supreme court has ruled that a database maintained by the Office of the Executive Secretary of the Supreme Court containing data originating from clerks of courts throughout the state is a record of the individual clerks, not the Executive Secretary and if the *Daily Press* wishes to access documents it needs to request them from the individual clerks. Reporter David Ress requested a searchable copy of the Online Case Information System database from the Office of the Executive Secretary under the Virginia FOIA. The Online Case Information System is designed to provide broader public access through the internet, but is a read-only database whose content cannot be changed. A separate but similar database, the Circuit Case Management System, contains non-public case information that is regularly updated by the court clerks. Although the Executive Secretary admitted that it maintained both databases, it explained to Ress that its content was provided solely by the court clerks and that the Executive Secretary did not have statutory authority to make the records available without consent of the clerks. The Executive Secretary reached out to 118 individual court clerks, 50 of whom agreed to allow access while 68 refused to grant access. Ress filed suit and the trial court ruled in favor of the Executive Secretary. The *Daily Press* then appealed to the supreme court. The supreme court agreed with the trial court, noting that a statute "plainly established the clerks as the custodians of the court records. In addition, this statute plainly provides that the clerks' custody extends to court records that are 'stored in electronic format' and that they remain custodians even if the electronic records are stored off premises, in this instance at the Executive Secretary's offices. Because the clerks of court are the expressly designated custodians of court records, the Daily Press must address its VFOIA request to them." The Daily Press argued that the OCIS was an entirely new database created by the Executive Secretary by duplicating the CCMS. However, the supreme court observed that "like CCMS, OCIS is a 'court record' brought into being by the content of a clerk of court, to serve the needs of court clerks, and of which the clerks statutorily have custody. . .Therefore, when the Executive Secretary uses database replications software to create OCIS, which is a read-only copy of the CCMS, it does not create a new record for purposes of FOIA." (*The Daily Press, LLC. v. Office of the Executive Secretary of the Supreme Court of Virginia*, No. 160889, Virginia Supreme Court, June 29)

Wisconsin

The supreme court has reversed an appellate court ruling finding that the Appleton Area School District's Communication Arts 1 Materials Review Committee was not a governmental body for purpose of the Open Meetings Law. The court noted that "where a governmental entity adopts a rule authorizing the

formation of committees and conferring on them the power to take collective action, such committees are 'created by. . . rule'. . . and the open meeting law applies to them. Here, the Board's Rule 361 [which was created to establish review committees to implement class curriculum] provided that the review of educational materials should be done according to the Board-approved Assessment, Curriculum & Instruction Handbook. The Handbook, in turn, authorized the formation of committees with a defined membership and the power to review education materials and make formal recommendations for Board approval. Because CAMRC was formed as one of these committees, pursuant to authority delegated to it by the Board by means of Rule 361 and the Handbook, it was 'created by. . .rule' and therefore was a 'governmental body' under [the statute]." (*State of Wisconsin ex rel. John Krueger v. Appleton Area School District Board of Education and Communications Art 1Materials Review Committee*, No. 2015AP231, Wisconsin Supreme Court, June 29)

The Federal Courts…

The D.C. Circuit has ruled that the disclosure of a report prepared by the Office of the Inspector General at the Department of Homeland Security concluding that Harriet Ames, who had been Chief of the Personnel Security Branch at the Federal Emergency Management Agency, improperly granted security clearances to two individuals did not violate the **Privacy Act** because its disclosure was permitted by two routine use exemptions. The DHS OIG investigated Ames, but before any action could be taken against her, she left for a new job in the Personnel Security Division of the National Geospatial-Intelligence Agency, a component of the Department of Defense. After learning of Ames' new job, Special Agent K.C. Yi, who prepared the report for the DHS OIG, sent the report to DOD. After reviewing the OIG report and conducting its own review, DOD fired Ames. Ames then filed suit, alleging the disclosure violated the Privacy Act. Ames lost at the district court and appealed to the D.C. Circuit. There, the D.C. Circuit found the DHS disclosure fell within the parameters of two routine use exemptions – one for suitability for federal employment and the other for sharing information pertaining to intelligence, counterintelligence, or antiterrorism activities. Writing for the court, Circuit Court Judge Brett Kavanaugh pointed out that "the purpose of DHS's disclosure of the Inspector General's report to DOD was compatible with the purpose for which the report was collected. DHS's purpose in collecting the report was to determine whether Ames had committed wrongdoing that could affect her suitability for federal employment. But before DHS could take action against Ames, Ames left her job at DHS and moved to DOD. DHS's purpose in disclosing the report to DOD was to enable DOD to determine whether Ames should continue to be employed there. DHS's purpose in disclosing the report was therefore compatible with DHS's purpose in collecting the report. After all, it would be strange indeed if an employee such as Ames could avoid the consequences of one agency's Inspector General investigation by simply high-tailing it to another agency before the Inspector General's investigation was finished." Kavanaugh found DHS's disclosure was consistent with its investigator's official duties. He pointed out that "Agent Yi, the investigator in DHS's Office of the Inspector General, was charged with investigating misconduct by employees and with coordinating with other federal agencies to ferret out fraud and abuse in the government." Noting that one appropriate routine use exception was sufficient, Kavanaugh observed that the routine use exception for intelligence information applied as well. He observed that "DHS disclosed its report on Ames to DOD so that DOD could determine whether Ames should continue to be involved in determining who may participate in such intelligence, counterintelligence, or antiterrorism activities." (*Harriet Ames v. United States Department of Homeland Security and United States Department of Defense*, No. 16-5064, U.S. Court of Appeals for the District of Columbia Circuit, June 30)

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A federal court in California has ruled that the IRS has not yet shown that it conducted an **adequate search** for records concerning tax liability for Smart-Tek Services and its legal alter ego companies and has declined to rule on the agency's exemption claims under **Exemption 3 (other statutes)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** until the court resolves a dispute over whether the agency waived the exemptions during related litigation in Florida. Smart-Tek filed five FOIA suits after the IRS determined the company was responsible for unpaid payroll taxes for a number of companies that were legally related to Smart-Tek. In searching for records, the IRS found that the agent who handled the case had commingled records about all the companies in a file consisting of 141,000 pages. The agency had disclosed more than 3,000 pages in response to one of Smart-Tek's suits and 1,800 pages in response to a second request, but had withheld identifying information about all the other companies primarily under Section 6103, prohibiting disclosure of taxpayer information with consent and the two privacy exemptions. Smart-Tek argued that it could not respond to the agency's tax liability allegations without knowing the identities of the companies the agency considered legally related to Smart-Tek and that in a case challenging the conduct of the revenue agent, *Goldberg v. United States* (S.D. Fla, Aug. 5, 2015), the district court had disclosed the names of all the companies involved. Although the agency had spent more than a year reviewing the records, Judge Barry Moskowitz agreed with Smart-Tek that the company could not challenge the adequacy of the search without knowing more about how the agency decided to withhold records that did not identify Smart-Tek directly. He noted that "the fact that any privilege pertaining to the identities of the alter egos may have been dispelled does not necessarily mean the identity of every entity whose files were in the 65 boxes has to be disclosed to establish the reasonableness of the IRS's search. At this stage, the record regarding the search the IRS undertook is not yet complete, and the Court will reserve ruling on the merits of Plaintiff's argument until the record is more fully developed." As a result, Moskowitz observed that "the IRS has failed to carry its burden to demonstrate the adequacy of its search." Holding off on ruling on the agency's Section 6103 claims, Moskowitz pointed to an existing conundrum. He explained that "some of these taxpayers may be the alter ego entities whose documents Plaintiff seeks. The IRS disputes whether Plaintiff can obtain tax information relating to Plaintiff's alter egos without an authorization from the alter ego. Plaintiff cannot obtain such an authorization however, without knowing which entities' records have been withheld. Although the IRS claims even the names of the alter egos are protected from disclosure, if those names have already been published, such that any related privacy interest has been lost, there would appear to be no impediment to identifying, in subsequent briefing, any alter ego taxpayers whose records were withheld." (*Trucept, Inc. fka Smart-Tek Solutions, Inc. v. United States Internal Revenue Service*, Civil Action No. 15-0447-BTM-JMA, and *Smart-Tek Services, Inc. v. United States Internal Revenue Service*, Civil Action No. 15-0449-BTM-JMA, U.S. District Court for the Southern District of California, July 5)

A federal court in Virginia has ruled that the FBI conducted an **adequate search** for records about Tristan di Montenegro and properly withheld records under a variety of exemptions, primarily various subsections of **Exemption 7 (law enforcement records)**. The court also agreed with the FBI that Exemption (j)(2) of the **Privacy Act**, which exempts law enforcement systems of records, provided the basis for a *Glomar* response neither confirming nor denying the existence of records pertaining to whether or not di Montenegro was included on a watch list. Although its first search turned up no records, the FBI ultimately located 62 pages, releasing 48 pages with redactions, as well as referring documents to U.S. Immigration and Customs Enforcement and the Department of State. Upholding the agency's use of a *Glomar* response based on (j)(2) of the Privacy Act, the court noted that "the plain language of Exemption (j)(2) applies to prevent the disclosure of any information regarding FBI watch lists, as such lists are clearly intended to help law enforcement prevent crime and apprehend criminals. While no Circuit Court of Appeals has previously addressed a *Glomar* response in the specific context of PA Exemption (j)(2), the Court nevertheless finds that

the FBI would be well within its authority to provide this sort of generic statement to Plaintiff." (*Tristan di Montenegro v. Federal Bureau of Investigation*, Civil Action No. 16-1400 (JCC/JFA, U.S. District Court for the Eastern District of Virginia, Alexandria Division, June 22)

Judge John Bates has ruled that the FBI properly withheld a report under **Exemption 3 (other statutes)** citing the Bank Secrecy Act as the basis for its claim. Bates previously found the agency had not sufficiently explained how the report qualified under the Bank Secrecy Act, but after the agency provided a more detailed explanation he agreed the record could be withheld. Resolving the remaining issue in a case brought by Edmon Yunes for records concerning why he had been labeled a suspected terrorist and had his visa revoked, Bates noted that to qualify for withholding under the BSA all the agency needed to show was that the BSA qualified as an Exemption 3 statute and the report was the kind of record that would normally be withheld, Bates rejected Yunes' argument that the agency should provide more explanation of the report's contents. He noted that "although Yunes may desire to know the content of the report, he is not entitled to that information under FOIA." Yunes also argued that the FBI should have referred the report to FinCen. Bates pointed out, however, that "although Yunes may find the lack of a referral 'curious,' he fails to explain how DOJ's decision not to follow permissive regulations concerning referral to another agency creates a genuine issue as to a material fact that would preclude the Court from granting summary judgment in favor of the government." (*Edmon Felipe Elias Yunes v. United States Department of Justice, et al.*, Civil Action No. 14-1397 (JDB), U.S. District Court for the District of Columbia, June 26)

A federal court in West Virginia has ruled the Dennis Murphy substantially prevailed in his pro se FOIA suit against U.S. Customs and Border Protection and is entitled to **costs** from the agency. Murphy a former security guard at the CBP facility at Harper's Ferry, requested records pertaining to an Equal Employment Opportunity complaint he had previously filed. After waiting ten months for a response, Murphy filed suit. The court ordered the agency to provide a *Vaughn* index, ordered a second search – which produced 123 additional pages – and reviewed the unredacted records *in camera*. Finding Murphy had substantially prevailed, the court noted that "the Defendant's continued motions to terminate this case, multiple inadequate disclosures and the consistent need for Court intervention, which ultimately resulted in the Plaintiff obtaining documents that otherwise would have been withheld, make the Court's decision straightforward. The Plaintiff is the prevailing party." The court ordered the agency to pay Murphy $552 in costs. (*Dennis Finbarr Murphy v. U.S. Customs and Border Protection*, Civil Action No. 15-133, U.S. District Court for the Northern District of West Virginia, June 13)

A federal magistrate judge in California has found that EOUSA properly responded to prisoner Vinton Frost's request for records about himself by indicating that it had found no records after conducting a search. Magistrate Judge Laurel Beeler noted that because Frost had sued Monty Wilkinson, the head of EOUSA, rather than the agency itself, his case should be dismissed and Frost would be given an opportunity to refile naming a proper defendant. The agency claimed Frost's suit was **moot** because it had fully responded to Frost's request. However, Beeler disagreed, pointing out that "the court understands the defendant's mootness argument but does not think that it quite applies here. The plaintiff is not merely demanding that the EOUSA do something that it has already done (conduct a FOIA search); he is claiming that that search was somehow inadequate. (Because it 'improperly withheld' perhaps 'classified' documents.) At least notionally, that is a live dispute. If it were shown that the EOUSA did refuse to turn over documents that it possessed, then the court could order the agency to produce that material to Mr. Frost. The court could, in other words, 'grant effective relief.'" Nevertheless, Beeler indicated that she would prefer to treat the matter as a summary

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judgment motion and rule in favor of EOUSA. She observed that "in these circumstances, and where the plaintiff has pointed to no 'meaningful' concrete proof that the EOUSA's search was somehow wanting, it is hard to see what evidence is likely to bear on the adequacy-of-search issue." She explained that "the court would thus be inclined to grant the defendant summary judgment and dismiss the plaintiff's claims with prejudice. At this juncture, however, given the Ninth Circuit's standards regarding leave to amend, the court dismisses the case with leave to amend." (*Vinton P. Frost v. Monty Wilkinson*, Civil Action No. 17-01587-LB, U.S. District Court for the Northern District of California, July 5)

A federal court in Hawaii has ruled that Department of Veterans Affairs has satisfactorily responded to multiple FOIA/PA requests filed by Joseph and Sandra Lee Demoruelle. The court observed that "plaintiffs have again had to go to great lengths to obtain documents related to Mr. Demoruelle's medical treatment and conditions. The VA's inability to provide Plaintiffs with a timely response is troubling, to say the least. However, albeit belatedly, the VA has satisfied all of its obligations under the relevant statutes. Because the Court has determined that Plaintiff are not entitled to any further relief under FOIA or the Privacy Act, Plaintiffs' Motion is moot. The VA concedes that 'since the VA had not complied with FOIA or the Privacy Act at the time that Plaintiff initiated this law suit (or indeed by the time the Amended Complaint was filed), Plaintiff is entitled to recover their costs of litigation.'" The court agreed to award costs, but denied the Demoruelles attorney's fees since they were proceeding *pro se*. (*Joseph Louis Demoruelle and Sandra Lee Demoruelle v. Department of Veterans Affairs*, Civil Action No. 16-00562, U.S. District Court for the District of Hawaii, June 30)

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Street Address: _______________________________________ email: _____________________
City: ________________________ State:_____________________ Zip Code: _________________