Volume 43, Number 14
July 19, 2017

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Court Finds Agency Search Limited to Records In Its Possession 1

Views from the States 3

The Federal Courts 6

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Access Reports is a biweekly newsletter published 24 times a year. Subscription price is $400 per year.
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ISSN 0364-7625.

Washington Focus: As a result of its suit against the Department of Homeland Security to force the Trump administration to reinstate the Obama administration-era practice of disclosing White House visitors' logs after a three-month delay, CREW announced July 17 that the Department has agreed to disclose visitors' logs for Mar-a-Lago, Trump's so-called "Winter White House, because Trump conducted meetings with staff, government and foreign leaders there. At the time of CREW's request, Trump had not spent any appreciable time at his Bedminster, NJ resort, although it appears visitors' logs for that location will be available in response to FOIA requests as well. Noah Bookbinder, executive director of CREW, noted that "the public deserves to know who is coming to meet with the president and his staff. We are glad that as a result of this case, this information will become public for meetings at his personal residences – but it needs to be public for meetings at the White House as well.". . .Rep. Ron DeSantis (R-FL) has introduced the "Taxpayer-Funded Pension Disclosure Act (H.R. 3200), requiring that pension information of retired federal employees be made subject to FOIA.

Court Finds Agency Search Limited to Records in Its Possession

Judge Ketanji Brown Jackson has ruled that once former Deputy Assistant Secretary of State Philippe Reines provided the State Department with 20 boxes of emails he sent or received on former Secretary of State Hillary Clinton's private email server the agency had no further obligation to determine whether or not Reines had indeed provided all his emails that might qualify as agency records.

In a case brought by Gawker Media, Jackson noted that "the FOIA imposes no obligation on an agency to solicit or produce documents held solely by a *former* agency official, at least in the absence of evidence indicating that the agency or its former employee maintained the documents outside the agency's custody in an attempt to thwart FOIA obligations." She pointed out that "information regarding the scope and nature of a former official's initial records review is irrelevant to resolving the issue of the adequacy of the *agency*'s search for records. What is more, the additional search-related details

that Plaintiffs request in their discovery motion are well beyond the scope of what a court ordinarily considers in a typical case – i.e., when evaluating the adequacy of an agency's search of its *own* files –which means that such information likewise plays no role in this Court's assessment of whether State has conducted a reasonable search for records and is entitled to summary judgment."

The case involved a 2012 request by Gawker Media for email communications between Reines and a list of 34 different media outlets. Two months later, State told Gawker Media that it had searched the two agency record systems most likely to have such records and had found no records. In the aftermath of revelations that former Secretary of State Hillary Clinton and her staff had used a private email server, Gawker Media filed an administrative appeal, providing evidence that such emails did exist. State remanded the request for a further search, including 20 boxes of records Reines had provided in response to a letter from the State Department requesting that he and other senior officials return any agency records as required by the Federal Records Act. State processed Reines' records and filed a motion for summary judgment. In order to challenge the adequacy of State's search, Gawker Media asked Jackson to allow it to conduct discovery into the steps Reines took in determining which of his records constituted agency records.

Gawker Media argued that State's search could not be adequately assessed without a better understanding of how Reines made his determination as to what records to return. Jackson disagreed. She noted that "but that contention rests on the mistaken premise that State's FOIA duty to make reasonable efforts to locate and produce records in response to a document request extends to records that are outside of the agency's immediate possession and control." Indeed, she pointed out that "the requested details about Reines's threshold search for records have no bearing on the question of the adequacy of *State*'s FOIA search, and in any event, Plaintiffs are seeking information that is far beyond what courts typically consider when they answer this FOIA question."

For Jackson, the Supreme Court's ruling in *Kissinger v. Reporters Committee*, 445 U.S. 136 (1980), holding that the State Department was not obligated to retrieve former Secretary of State Henry Kissinger's records in response to FOIA requests, but was only required to process records in the agency's physical control, custody, and possession, was dipositive. Jackson pointed out that "Plaintiffs have failed to identify any affirmative obligation on State's part to retrieve records from former employees in the course of responding to a FOIA request and they have not explained how, absent any such duty to search and retrieve the records that Reines maintained outside of State's custody, any failure of Reines to search adequately, or tender properly, the government-related emails contained in his private email account has any bearing whatsoever on the question of whether State has conducted an adequate search of its records for FOIA purposes." She continued that "put another way, it is clear to this Court that the FOIA obligates *State* – not Reines – to search for any responsive records that are in the agency's possession or control, and here, State has proffered a declaration that details the methods that the agency employed to search both the documents that were originally in its custody and the documents that the agency came to possess when Reines returned them. Plaintiffs have not shown that this Court's analysis of State's summary judgment motion requires anything more."

Having dismissed Gawker Media's allegation that State needed to justify the adequacy of Reines' original determination of what did or did not constitute an agency record, Jackson reflected on the merits of Gawker Media's claims. She explained that "an agency's threshold determination regarding which records to retain in its files is *entirely distinct* from the agency's subsequent search of maintained records pursuant to the FOIA – and these two duties should not be conflated." She observed that "with respect to the initial retention decision, State has policies that require individual employees to determine whether a document (including an email) qualifies as a federal record that must be retained, or is instead a non-federal record that need not be

retained. State does not directly oversee or inspect its employees' retention determinations, nor does it ever require employees to provide, in the FOIA context, a declaration explaining how they reached these retention decisions. Instead, the employees' individual retention decisions, taken together, effectively create the universe of records that State maintains, and eventually searches, when the agency receives a FOIA request." She pointed out that "even when a court is evaluating the adequacy of the agency's search of records that have always remained under the agency's control, the affidavits that the agency provides in support of any motion for summary judgment describes only how its agent or employee conducted a search of the *records that have been retained* and never addresses how each individual employee reached the threshold retention decision with respect to the records that were searched."

Jackson explained that "Plaintiffs may, of course, challenge the adequacy of [the agency's] methodology; such challenges to an agency's search of the records in its possession are commonplace at the summary judgment stage. What will not be countenanced is Plaintiffs' extraordinary attempt to mount an adequacy challenge on the grounds that the *threshold retention decisions* may have been improper." Jackson added that "Plaintiffs may reasonably be concerned that Reines should have undertaken his retention responsibilities prior to his departure from State, but the fact that he failed to search his private email account for federal records before leaving the government does not change the fundamental nature of his task, nor does it alter the reality that State employees are not ordinarily required to provide an account of their retention decisions in a FOIA affidavit." (*Gawker Media, LLC. et al. v. United States Department of State*, Civil Action No. 15-0363 (KBJ), U.S. District Court for the District of Columbia, July 17)

Editor's Note: Jackson's reluctance to expand FOIA remedies to cover what are essentially records management issues under the Federal Records Act is understandable. But the use of a private email server by Clinton and her staff to conduct agency business has implications for both records management and public access. It is still unclear whether or not the FOIA staff at State understood that Clinton and her staff were using a private email server, but the fact that State could have told Gawker Media that it had no emails from Reines responsive to its request suggests that the FOIA staff was unaware that records actually existed. To recover the records, State sent letters to Reines and others pursuant to the Federal Records Act asking them to return any agency records in their possession. For the most part, Reines and other former staffers seem to have replied in good faith, but there is no way to tell whether this voluntary return of records captured all records qualifying as agency records. Indeed, in *Judicial Watch v. Kerry*, 844 F.3d 952 (D.C. Cir. 2016), the D.C. Circuit ruled that the State Department's letters were not adequate to show that the agency had complied with its obligations under the Federal Records Act. Another recent D.C. Circuit decisions may also shed some light on agency obligations to process emails discussing agency business that were created on a private email account. In *Competitive Enterprise Institute v. Office of Science and Technology Policy*, 827 F.3d 145 (D.C. Cir. 2016), the D.C. Circuit indicated that such records were agency records for FOIA purposes.

Views from the States…

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

Massachusetts

The supreme court has ruled that the safety and security of persons and infrastructure exemption, added to the public records law after 9/11, should be narrowly construed to reflect the reasonableness that

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disclosure of information would create a risk of harm and that whether or not names and addresses are protected under the privacy exemption depends on the degree to which they are not publicly available. The case involved two requests from People for the Ethical Treatment of Animals to the Department of Agricultural Resources for records concerning export and import of non-human primates during 2013 and concerns about security of people and buildings involved in housing and transporting non-human primates. The department provided health certificates with all personal identifiers redacted and told PETA that it was withholding the identifying information under the safety and security exemption. The department also provided a copy of 2013 memo from the U.S. Department of Veterans Affairs indicating that any identifying information about animal research at its facilities should not be disclosed. PETA appealed to the supervisor of public records, who upheld the department's decision. PETA then filed suit. At the trial court, the department argued that the privacy exemption applied as well as the safety and security exemption. The trial court ruled in favor of the department and the supreme court accepted PETA's appeal. Noting that the safety and security exemption was passed to protect records that might aid terrorism, the supreme court pointed out that "because the records custodian must exercise 'reasonable judgment' in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian's determination given the context of the particular case." The supreme court emphasized that when the types of records identified in the safety and security exemption were implicated in a request the burden of proof was at its lowest, but when an agency invoked the exemption to cover "all other records," its burden of proof was at its highest. The department argued that application of the privacy exemption was heightened in this case because of the potential security risks from disclosure. But the supreme court pointed out that the security claim did not affect the balancing in the privacy exemption and noted that because the redacted information primarily related to business locations, which were frequently shared publicly, it was necessary for the trial court to determine on remand whether the exemption applied. (*People for the Ethical Treatment of Animals v. Department of Agricultural Research*, No. SJC-12207, Massachusetts Supreme Judicial Court, June 14)

Michigan

A court of appeals has ruled that while the Secretary of State's database of licensed drivers is a public record, the agency properly refused to respond to Terry Ellison's request because he did not agree to pay an estimated $1.6 million in fees for access to the entire database. The DMV cancelled Ellison's license plate because it claimed it was unable to verify his insurance at the time of renewal. Ellison appealed and his license plate was restored. However, he requested an electronic file containing all license holders who were notified about an inability to verify proof of insurance at renewal. Alternatively, he requested paper copies of the letters. The DMV told Ellison that because his request would require the agency to create a record it was not obligated to do so. Ellison filed suit. The trial court found the database was not a public record because it was incapable of generating reports such as the one requested by Ellison. The court of appeals, however, found the database was a public record, noting that "it was not necessary for defendant to generate a report from the database for it to be a public record. The database itself was a writing because it was information stored in a computer that defendant uses to perform an official function." The court observed that "a FOIA request need only be descriptive enough that a defendant can find the records containing the information that the plaintiff seeks. When a plaintiff does not ask the defendant to create a new record, 'the fact that the [defendant] has no obligation to create a record says nothing about its obligation to satisfy plaintiff's request in some other manner'. . .[Here], Plaintiff requested 'any' information that was included in its list. The database's tables contained much of the information plaintiff sought." But as to the database request, the appeals court pointed out that the Michigan Vehicle Code established a per record charge for access, which

superseded FOIA's fee provisions, prohibiting "defendant from providing plaintiff with the database unless defendant charges plaintiff a fee for each individual record that the file contains." (*Terry Lee Ellison v. Department of State*, No. 336759, Michigan Court of Appeals, June 13)

New Jersey

The supreme court has ruled that dash-cam videos capturing the activities of multiple police cars during a high-speed chase of a stolen car that resulted in the shooting death of the driver, as well as use of force reports filed by the police officers who shot the driver, must be disclosed in response to press requests from local reporters. The case involved a car stolen from a residence in North Arlington. The pursuit of the car involved police from multiple local jurisdictions as well as the state police. The driver was eventually cornered, but instead of getting out of the car he tried to accelerate, resulting in several officers shooting and killing the suspect. North Jersey Media Group filed suit on behalf of local reporters after the various jurisdictions refused to disclose most of the records, claiming they were protected by the criminal investigative records exemption. NJMG argued the criminal investigative records exemption did not apply to the withheld records and that the media also had a common law right of access. The trial court sided primarily with the media, but the appeals court found most of the records were protected by the criminal investigative records exemption. The supreme court, however, ruled that the use of force records did not qualify under the criminal investigative records exemption because they were required under the Attorney General's policy, and that, although the dash-cam recordings fell under the criminal investigative records exemption while they were still being used as part of the investigation, the public interest in disclosure was significant enough that the common law right of access applied. The supreme court found that investigative reports and witness statements were properly withheld under the criminal investigative records exemption. But the court pointed out that "although it may be appropriate to deny a request for investigative reports early in an investigation – as in this case – the outcome might be different later in the process." Turning to the use of force reports, the supreme court noted that "UFRs contain relatively limited information" and added that "based on the nature of the form, the release of UFRs presents far less of a risk of taint to an ongoing investigation." As to the dash-cam videos, the court observed that "as to the integrity of an ongoing investigation, courts must consider the particular reasons for non-disclosure in a given matter," including "the nature of the details to be revealed, how extensive they are, and how they might interfere with an investigation." The court added that "the fact that a video depicts a fatal shooting does not by itself establish that disclosure would undermine the reliability of an investigation." Ordering the disclosure of the dash-cam videos under the common law right of access, the court explained that "footage of an incident captured by a police dashboard camera can inform the public's strong interest in a police shooting that killed a civilian. . .Dash-cam footage can also be released without undermining the integrity of an investigation . . ." (*North Jersey Media Group, Inc. v. Township of Lyndhurst, et al.*, No A-35-15, New Jersey Supreme Court, July 11)

New York

A trial court has ruled that the New York State Executive Chamber has failed to show that records concerning two economic development initiatives known as the Buffalo Billion and the Nano Economic Development Program that were subpoenaed by a grand jury in the Southern District of New York as part of an investigation are protected by either the criminal investigation exemption in the state FOIL or the federal rule on grand jury secrecy. The *New York Times* requested emails and appointment calendars for several officials of the Executive Chamber. The Chamber argued that because the records had been compiled as part of a law enforcement investigation they were exempt. Although the *Times* argued that the criminal investigation exemption in the FOIL only applied when records were created for law enforcement purposes, the court agreed with the Chamber that the U.S. Supreme Court's decision in *John Doe Agency v. John Doe*

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Corp., 493 U.S. 146 (1989), interpreting the threshold for what constituted a law enforcement record under Exemption 7 of the federal FOIA, held that records could qualify as law enforcement records if they had been compiled as part of a law enforcement investigation. But the court found that the Chamber had not shown that the records were protected under any FOIL exemption. The court noted that "the Chamber does not make any representations whatsoever about the existence of confidential sources. Notably absent from respondent's argument is any suggestion that there were confidential sources in this investigation, that the accounts of confidential sources are in the requested documents or how the information sought is confidential." The court added that "in this case, the Chamber offered no proof that the requested records fell into any enumerated categories and failed to specify the implicated privacy interests, if any, against which the public interest in disclosing the records were to be balanced." (*New York Times Company v. New York State Executive Chamber*, No. 00383-2017, New York Supreme Court, Albany County, July 6)

Tennessee

A court of appeals has ruled that the Town of Lynnville willfully violated the Tennessee Public Records Act when it refused to provide Ricky Taylor with records of board minutes when he came to inspect them because it was impracticable. The trial court found that although Lynnville had violated the law it did not rise to the level of willfulness. The court of appeals disagreed, remanding the case to the trial court for a determination of attorney's fees. Amanda Gibson, Lynnville's City Recorder, told Taylor when he came to view the records that she was waiting on advice from the town attorney. But the court observed that "although deference to counsel may certainly be advisable, we are of the opinion that such deference does not countenance against a finding of willfulness in situations where there is not good faith legal argument for the denial of access." The court pointed out that "Mr. Taylor had to file a lawsuit to obtain access to the requested public records, and this appeal was part and parcel of his efforts to vindicate his right of access. Indeed, absent the willful denial of access, Mr. Taylor would not have incurred any attorney's fees, appellate or otherwise. Thus, in our view, his appellate costs and attorney's fees are 'costs involved in obtaining the record.'" (*Rickey Joe Taylor v. Town of Lynnville*, No. 2016-01393-COA-R3-CV, Tennessee Court of Appeals, at Nashville, July 13)

The Federal Courts…

Judge Christopher Cross has ruled that the Department of Defense and the Department of State improperly denied a request by the Protect Democracy Project for **expedited processing** of its request for the legal basis supporting the Tomahawk cruise missile strike against Syria in retaliation for allegedly using chemical gas, but that the agencies are not required to commit to processing the requests by a date certain. The Protect Democracy Project requested the records from Defense, State, and the Justice Department. It requested expedited processing from all three agencies. Justice granted expedited processing but Defense and State denied the request. The Protect Democracy Project then filed suit against all three agencies, asking Cooper to order the agencies to complete its requests by a date certain. Cooper first found that Protect Democracy was primarily engaged in disseminating information. He then pointed out that Protect Democracy had shown that the Syrian airstrikes were a matter of current exigency, noting that "as evidence that they were justified [in making the claim of exigency], one need look no further than the widespread media attention – including by some of the nation's most prominent news outlets – paid both to the April 6 strike and its legality, as early as the date of Protect Democracy's requests." Cooper added that "if production is unduly delayed, both Protect Democracy and the public at large will be 'precluded. . .from obtaining in a timely fashion information vital to the current and ongoing debate surrounding the legality of' a high-profile government

action – namely, military strikes against the Syrian government. Being closed off from such a debate is itself a harm in an open democracy." Cooper explained that "the recent escalation in hostilities between U.S. and Syria, plus indications from the White House that another chemical weapons attack may be in the offing, make it more likely that irreparable harm will result without expedited processing of Protect Democracy's requests . . .That is especially so, here, where the use of military force is implicated." But having granted Protect Democracy's request for expedited processing, Cooper observed that the relief available under the expedited processing provision was limited. He pointed out that "in cases where expedited processing has been granted, it follows that the district court's supervision will aim to ensure that the agency is processing a request with 'due diligence' *and* as quickly 'as practicable.' But there is no reason to assume that any request processed in less than twenty days has failed to meet that standard." He indicated that "it cannot be said, however, that there will be irreparable harm if the requested information is not released within, say, twenty days." He added that "requiring production by a date certain, without any factual basis for doing so, might actually *disrupt* FOIA's expedited processing regime rather than implement it." He concluded that "the Court will direct Defendants to process Protect Democracy's requests on an expedited basis, but will stop short, at this juncture at least, of ordering production by a date certain." (*Protect Democracy Project, Inc. v. U.S. Department of Defense, et al.*, Civil Action No. 17-99842 (CRC), U.S. District Court for the District of Columbia, July 13)

In two cases requesting different types of relief, Judge Colleen Kollar-Kotelly has ruled that for the present the Presidential Advisory Commission on Election Integrity does not appear to be in violation of the **Federal Advisory Committee Act** and that neither the ACLU nor the Lawyers' Committee for Civil Rights Under Law has standing to bring a mandamus action to enforce their claims that the Committee is violating the open meetings and open records portions of FACA. After the Committee was set up by Executive Order it began scheduling meetings. The Committee held an introductory teleconference June 28 and scheduled its first public meeting for July 19 through a livestreaming service. Both the ACLU and the Lawyers' Committee filed suit alleging that the Committee was violating both the open meetings and open records requirements of FACA. In response to both suits, Kollar-Kotelly found that mandamus was not available at the present because FACA provided an adequate remedy. As a result, she dismissed the ACLU's case because its only claim was for a writ of mandamus ordering the Committee to comply with FACA. She noted that "the Court merely concludes that, given the factual and legal circumstances of this case, it lacks jurisdiction to confer relief in the form of mandamus at the present time. Because that is the only jurisdictional basis pursued by [the ACLU], its motion for preliminary injunction relief must be denied." Although the Lawyers' Committee had also argued that it had a right to a writ of mandamus, it also claimed a right under FACA. The government acknowledged that the Lawyer's Committee suffered an informational injury, but argued that its injury would be remedied by subsequent future actions. But Kollar-Kotelly pointed out that "there is a merits disagreement here both about the scope and *timing* of Defendants' disclosure obligations. This is not to say that Plaintiff is correct, but merely that for purposes of this Court's subject-matter jurisdiction, Plaintiff has asserted an informational injury that is both imminent and certain – assuming its view of the law wins the day – and therefore ripe for judicial review." Kollar-Kotelly indicated that the General Services Administration's FACA regulations allowed for Internet access to meetings and pointed out that the statute did not require that every meeting be fully open to the public or subject to an opportunity for public comment. (*Lawyers' Committee for Civil Rights Under Law v. Presidential Advisory Commission on Election Integrity, et al.*, Civil Action No. 17-1354 (CKK), and *American Civil Liberties Union, et al. v. Donald Trump, et al.*, Civil Action No. 17-1351 (CKK), U.S. District Court for the District of Columbia, July 18)

A federal court in New York has ruled that the Department of Education properly claimed **Exemption 5 (privileges)** to withhold a number of records concerning its interpretation of regulations concerning

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ACCESS REPORTS

borrower defenses to the repayment of student loans under the Direct Loan and FFEL Programs, but that **Exemption 7(E) (investigative methods and techniques)** does not apply because the records were not created for law enforcement purposes. In response to a request from the New York Legal Assistance Group, the agency located 2,820 responsive pages. The agency withheld in full an Administrative Wage Garnishment manual, guidance concerning Total and Permanent Disability discharges, and drafts of manuals prepared for attorneys prosecuting student loan collection actions, and redacted portions of other documents. Although DOE withheld information under **Exemption 4 (confidential business information)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** as well, NYLAG only challenged the agency's claims made under Exemption 5 and Exemption 7(E). The court upheld the majority of agency's claims of attorney-client privilege, dismissing only those claims where the agency had not provided sufficient justification. The court noted that "absent any evidence that these emails were intended 'for the purpose of obtaining or providing legal assistance,' DOE has not met its burden of demonstrating that the attorney-client privilege applies." The court upheld many of the agency's attorney work product claims as well, but rejected its claim that entire portions of a manual were privileged. The court explained that "to the extent that any designated portion of the manual was created 'by or at the behest of counsel,' it is appropriately withheld under the work product doctrine. However, neither the *Vaughn* index nor the [agency's affidavit] make such a representation." The court approved of many of the agency's deliberative process privilege claims as well. NYLAG argued that some deliberations were not predecisional because they came before the agency had even decided to develop regulations. However, the court noted that "that some of these deliberations predated DOE's efforts to develop new regulations does not change the analysis. DOE is entitled to deliberative process protection for communications in aid of agency decision-making, regardless of whether that decision is the creation of a regulation or something smaller like the resolution of a given borrower dispute." NYLAG also argued that some of the documents withheld reflected the agency's working law. The court rejected that argument as to some claims, noting in one instance that "to provide more specificity in support of a declaration that the documents were not incorporated into a final agency policy, DOE would have to prove a negative – that none of the documents was incorporated into *any* agency policy. FOIA does not require such an undertaking." But as to documents labeled "internal guidance," the court agreed with NYLAG, pointing out that "each of these documents could refer to working law." The agency claimed Exemption 7(E) also protected several of its guidance manuals. The court found the manuals qualified as enforcement guidelines, but rejected the agency's claim after finding they were not created for law enforcement purposes as required under Exemption 7(E). The court pointed out that "the fact that DOE has a legal mandate to collect debt does not mean that the collection of debt serves a 'law enforcement purpose,' which means preventing, prosecuting or punishing violations of the law. Although DOE credibly argues that disclosure of its enforcement mechanisms could lead to borrowers' circumventing their contractual obligations, DOE cannot prove their disclosure 'could reasonably be expected to risk circumvention of the law,' because the borrowers would not be circumventing the law – they would be circumventing the terms of their contract. That circumvention would make it difficult for DOE to carry out its statutory mandate is irrelevant to the question at issue." (*New York Legal Assistance Group, Inc. v. United States Department of Education*, Civil Action No. 15-3818 (LGS), U.S. District Court for the Southern District of New York, July 12)

Judge Gladys Kessler has resolved the remaining issues in a 16-year-old case brought by George Canning against the FBI concerning the kidnapping of Lewis Dupont Smith. The FBI initially processed Canning's two FOIA requests, providing some records and withholding other in full or in part under several exemptions. After the Obama administration took office, Canning requested Kessler to order the agency to re-review the records, which it did using more generous disclosure policies. The parties also agreed to allow the FBI to review a sampling of over 5,000 pages of responsive records and describe them in its *Vaughn* index.

Canning did not challenge the adequacy of the agency's search, but did question the breadth of its **Exemption 3 (other statutes)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)**, arguing primarily that the agency had publicly disclosed the identities of various individuals involved in the investigation. The agency withheld information under Title III and Rule 6(e) on grand jury secrecy. Kessler found that Title III protected records providing authorization for wiretaps as well as the communications themselves. But she agreed that the Justice Department had disclosed a 1992 letter in response to a FOIA request identifying Donald Moore and Edgar Smith as targets of wiretaps during the investigation. As a result, she noted the agency could not withhold their identities because they were in the public domain. Canning argued the government had not shown information presented the grand jury was still secret. But Kessler pointed out that "Mr. Canning, however, has it backward. To prevail on a public domain argument, the plaintiff, not the government, bears the burden of production to point to specific information in the public domain that appears to duplicate that being withheld." Kessler also agreed with Canning that the agency had publicly identified several other individuals involved in the investigation, waiving the agency's ability to withhold identifying information under Exemption 7(C). Kessler also rejected the agency's claims under Exemption 7(D). She noted that "although an implied grant of confidentiality may at times be inferred from the nature of a criminal investigation, the FBI has, in this case, done nothing more than assert that the Court should infer confidentiality just because the underlying case concerned a kidnapping conspiracy." Kessler rejected Canning's request that the agency provide a supplemental *Vaughn* index. She observed that "Mr. Canning overlooks the function of the sample Vaughn Index. A sample Index does not purport to contain every document the government chooses to withhold. Rather, as the FBI has underscored, the purpose is to allow the Court to extrapolate its conclusions from the representative sample to the larger group of withheld materials. The Vaughn Index in this case adequately fulfills that purpose." (*George Canning v. U.S. Department of Justice*, Civil Action No. 01-2215 (GK), U.S. District Court for the District of Columbia, July 13)

Judge Christopher Cooper has ruled that EPIC is entitled to **attorney's fees** for its FOIA litigation against the DEA, but has substantially reduced its fee request after finding that EPIC had only prevailed on one issue, that an updated version of the USAO matrix providing lower hourly rates should be used to calculate fees, and that EPIC's request for fees for litigating its fee motion should be reduced accordingly. EPIC had asked DEA for copies of all its Privacy Impact Statements for new databases containing personally-identifying information as required by the E-Government Act. After the agency failed to respond within three months, EPIC filed suit. In July 2015, Cooper ordered the agency to conduct a search. DEA found only one PIA for a system that was no longer in use. However, it also agreed to disclose 13 determination letters prepared by the Justice Department's Office of Privacy and Civil Liberties, four of which recommended DEA prepare a PIA for an information system. Based on this knowledge, EPIC asked Cooper to order DEA to conduct another search. Cooper told the agency that it could either conduct another search or provide a supplemental affidavit satisfactorily explaining why it could not find the four PIAs referred to in the determination letters. The DEA chose to provide a supplemental affidavit and Cooper granted the agency summary judgment. The parties also failed to reach an agreement on attorney's fees and EPIC filed a motion for an award of $33,468. Cooper found that his order requiring the agency to conduct its original search meant EPIC had substantially prevailed on that issue, but that EPIC fell short on its renewed motion to require a further search. Here, Cooper pointed out that "the summary judgment order neither required the DEA to continue searching for records nor provided EPIC the relief it sought, i.e., the production of additional responsive records. The order there did not make EPIC a substantially prevailing party." Cooper found EPIC's request had served the public interest by attempting to determine whether the agency was abiding by its legal obligations to post relevant PIAs. He rejected the DEA's claim that EPIC was commercial because it relied on donations. He observed that EPIC's "chief function remains the public dissemination of information

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regarding government surveillance." While a handful of recent attorney's fees cases involving FOIA litigation by public interest groups have sided with the plaintiffs' claim that the LSI-*Laffey* matrix should be used instead of the USAO matrix in determining hourly rates, here, Cooper was persuaded by the government's evidence indicating that the USAO matrix had been updated more recently and was thus a more reliable indicator. Cooper explained that "after examining the case law and the supporting evidence offered by both parties, the Court is persuaded that the updated USAO matrix, which covers billing rates from 2015 to 2017, is the more suitable choice here." Cooper agreed with the government that since EPIC had only prevailed on his July 2015 order, any hours claimed after October 2015 should not be considered for compensation. The DEA challenged a number of entries, but Cooper refused to engage in a nitpicking analysis of claims. However, he agreed with the agency that EPIC had not shown why three attorneys were required to attend certain meetings or make certain decisions, reducing its fee claims accordingly. Because he concluded that EPIC had prevailed only on its first issue, he reduced EPIC's claim for fees for litigating the attorney's fees award by 67 percent. He noted that his rough calculations yielded an award of $20,391, but ordered the parties to calculate a final fee agreement. (*Electronic Privacy Information Center v. United States Drug Enforcement Administration*, Civil Action No. 15-00667 (CRC), July 18)

A federal court in Colorado has ruled that Elsevier, Inc. may not intervene in a case involving whether software used by the Department of Labor to randomly assign second-opinion physicians to review workers' disability claims under the Federal Employees' Compensation Act is protected under **Exemption 4 (confidential business information)** because Elsevier failed to intervene until after the case was remanded to the district court from the Tenth Circuit. In response to requests from Blake Brown and other similarly situated plaintiffs, the agency claimed records concerning how the software randomly assigned physicians was protected by Exemption 4 and that personally-identifying information was also protected by **Exemption 6 (invasion of privacy)**. The district court ruled in favor of the agency, but on appeal the Tenth Circuit found that the agency's only evidence that the software-generated lists were confidential was an unrelated letter from Elsevier addressing several FOIA requests for the entire database. The Tenth Circuit found the Elsevier letter was insufficient to meet its burden of proof. The Tenth Circuit also found that because the personally-identifying information was about the physicians' professional status it might not be protected under Exemption 6. As a result, the Tenth Circuit remanded the case back to the district court. At that time, Elsevier moved to intervene. Although Elsevier argued that the government could not adequately represent its interests and that intervening would not affect the current status of the case, the district court strongly disagreed, noting that Elsevier had an opportunity to intervene in the original district court proceeding as well as the Tenth Circuit, but had chosen not to do so. The court pointed out that if Elsevier was allowed to intervene at this time "a party could pick and choose when to intervene based upon the assumed ease of success. That cannot be the case. In addition, how can the Court take seriously Elsevier's assertions of great prejudice if it is not allowed to intervene when Elsevier itself chose not to intervene? As such, the Court disagrees with Elsevier's assertion that it 'reasonably' decided to hold its fire. There was nothing reasonable about Elsevier's decision; it was purely a tactical maneuver." (*Blake Brown, et al. v. United States Department of Labor*, Civil Action No. 13-01722-RM-MJW, U.S. District Court for the District of Colorado, July 13)

Judge Randolph Moss has ruled that the Bureau of Prisons fully responded to prisoner Jason Gerhard's request for a copy of the contract for inmate copying services and donations made to FCI Fairton, but because the agency did not locate an additional eight pages pertaining to the donations until after he filed suit, Gerhard is entitled to costs. BOP told Gerhard that it did not have a contract as such but that inmates were allowed to buy cards they could use to pay for copies. Although the donation reports are supposed to be filed with the agency's Ethics Office, that office was not searched until after Gerhard brought suit. Moss agreed the agency

had explained the non-existence of the copying contract and found Gerhard had not requested information about copy cards. Moss found Gerhard had substantially prevailed, pointing out that "the fact that the BOP initially failed to search for the missing records in the office designated to receive them suggests that the BOP needed additional prodding – and not just additional time – to comply with Gerhard's request. BOP claimed that Gerhard had failed to show that his claims were "not insubstantial." Moss noted that "because BOP provides no further analysis on this point, it is difficult to know what the BOP means by this. But, in any event, to the extent that this statutory language imposes requirements beyond those of the catalyst theory, those requirements are 'lenient' and demand less than 'that a plaintiff's claim be correct on the merits.' That standard is easily met here." Moss found that Gerhard's use of information he received as the result of FOIA requests on his website made him a prison journalist of sorts. Finding the agency was required to reimburse Gerhard for his costs, Moss noted that "given Gerhard's indigent status, this case seems to present the type of situation in which court costs impose substantial barriers to the FOIA requestor's access to the documents." (*Jason Gerhard v. Federal Bureau of Prisons*, Civil Action No. 16-1090 (RDM), U.S. District Court for the District of Columbia, July 11)

In another in a series of suits brought by Smart-Tek Service Solutions against the IRS to obtain records about the company's tax liability for a number of alleged alter ego companies, a federal court in California has ruled that since the IRS has still not shown that it conducted an **adequate search**, the court will not rule on whether **Exemption 3 (other statutes)** or **Exemption 6 (invasion of privacy)** applies to protect the identities of those companies for which the IRS believes Smart-Tek Service Solutions has tax liability. The IRS discovered that responsive records were in 65 boxes containing 140,000 pages. At this stage of the litigation, the agency claimed it had finished processing the request and had disclosed 1,598 pages in full and 369 pages in part. However, the court found the agency's description of its search was still not sufficient. The court noted that "the IRS has not explained how it interpreted Plaintiff's FOIA request. . .that is, what scope of records it decided fell within the scope of the request and for which it searched in response. Federal agencies responding to FOIA requests are required to use search methods that can reasonably be expected to yield the requested information. Without a description of the scope of documents the IRS determined to be responsive to the request, the Court has no context for evaluating the reasonableness of the methods it used to find them." The court explained that "to evaluate the adequacy of the IRS's search, the Court needs information regarding the document review to determine whether the IRS's search of the 65 boxes was reasonable." In its other suits, Smark-Tek argued that it could not evaluate whether the agency's search was adequate without knowing more about the identities of alleged alter ego companies, which the IRS withheld under § 6103. But here, the court concluded that the IRS had probably identified the alter ego companies in the tax lien it sent to Smart-Tek. The court pointed out 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." However, the court found that claims made by the agency under **Exemption 5 (privileges)**, **Exemption 7(A) (interference with ongoing investigation or proceeding)** and **Exemption 7(D) (confidential sources)** were appropriate. (*Smart-Tek Service Solutions Corp. v. United States Internal Revenue Service*, Civil Action No. 15-0452-BTM-JMA, U.S. District Court for the Southern District of California, July 10)

Judge Colleen Kollar-Kotelly has ruled that the Bureau of Prisons conducted an **adequate search** for records explaining why Isaac Allen's email privileges had been suspended. Allen, who was convicted of identity theft, was not permitted to use the inmate email server at the Beaumont federal correctional facility where he was incarcerated. He asked the warden to provide an explanation, which resulted in Allen making a FOIA request for the records. Although the agency told Allen it would need to take more time, it actually

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responded to Allen's request within the statutory time limits by hand-delivering a copy of the pertinent portions of his file. The agency withheld some records. Kollar-Kotelly noted that Allen's dissatisfaction seemed to be more because the records were not labeled as a written explanation. But she pointed out that "the BOP's obligation under the FOIA is to conduct a reasonable search for responsive records. . .Plaintiff's mere 'speculation as to the existence of additional records. . .does not render the search inadequate.'" She found that the agency had not justified its redactions under **Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(E) (investigative methods and techniques),** and **Exemption 7(F) (harm to safety of any person)**. She pointed out that "the BOP's supporting declarations presume that FOIA Exemption 7 applies, yet neither declaration actually states that the two reports were compiled for law enforcement purposes. Nor do the declarations explain that disclosure of certain redacted information would cause an enumerated harm." (*Isaac Kelvin Allen v. Federal Bureau of Prisons*, Civil Action No. 16-0708 (CKK), U.S. District Court for the District of Columbia, July 11)

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