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Washington Focus: At a July 27 meeting of Chief FOIA Officers, FOIA staffers indicated their agencies are doing more with less. Michael Bell, FOIA Public Liaison for the Department of Health and Human Services, noted that his agency has received a 25 percent increase in requests so far in 2017, while Linda Frye, Public Liaison for the Social Security Administration, observed that her agency is "running twice as many requests with one-third the staff." Frye pointed out that her agency is starting to handle more requests online with some promising results. Michael Morisy, co-founder of MuckRock, noted that agencies were facing budget cuts and staffing shortfalls and "were asked to carry out more. . . without the resources to tackle the growing challenges. I think that is not a sustainable path in terms of keeping up with increasing demand with current resources."

Two Courts Express Frustration With FBI's Processing of Requests

Two recent decisions by long-time district court judges have expressed frustration with the FBI's apparent inability and unwillingness to accommodate complex historical requests that require more than a first-in, first out approach, instead taking positions in court that require requesters to either accept decades long delays in processing voluminous records or limiting search parameters in ways that are likely to produce far fewer responsive records. Both Judge Gladys Kessler and Judge Royce Lamberth took the agency to task for failing to explain why delay and search problems could not be resolved in ways that better served the goals of public disclosure of government information.

Kessler was the more pointed of the two, rejecting out-of-hand the FBI's suggestion that Nina Seavey, a documentary filmmaker and history professor at George Washington University, should be content to wait 17 years for the agency to finish processing her multi-part request for records concerning the role the agency played in discouraging protests against the Vietnam War in St. Louis during the 1960s and 1970s. After the agency found 151,000 potentially responsive documents, the FBI suggested processing them at its normal rate of 500 pages a month, a rate that Kessler calculated would take the agency 17 years to complete.

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In a ruling in May, Kessler granted Seavey a fee waiver after finding her request was clearly in the public interest. In the current ruling, she found that the FBI had retreated to its standard policy of reviewing records in voluminous requests at a rate of 500 pages per month for what was now 102,385 pages. Seavey suggested the agency be required to process the records at a rate of 5,000 pages a month, rather than the standard 500-page rate. Since the FBI had not argued that it had complied with the statute's deadline to determine how to process the request, Kessler granted Seavey's motion for summary judgment. She then turned to fashioning a remedy.

Observing that the FBI wanted to maintain the status quo, Kessler explained that "the basic gist of the FBI's argument is that it has developed a comprehensive policy for handling FOIA requests that appropriately balances issues of administrative efficiency and fairness to all FOIA requesters. Thus, the FBI argues that 'in terms of managing work-flow' the 500-page policy has 'proven to be ideal,' and that it is 'key in meeting the demands posed by the growing number, size, and complexity of FOIA/PA requests received by the FBI.' Additionally, the FBI claims that the 500-page policy promotes fairness by preventing 'a system where a few, large queue requests monopolize finite processing resources, resulting in less pages provided to fewer requesters on a more infrequent basis.' Neither proffered justification is justifiable."

Kessler rejected the FBI's efficiency rationale, calling it "simply without merit." She pointed out that "in the name of reducing its own administrative headaches, the FBI's 500-page policy ensures that larger requests are subject to an interminable delay in being completed. Under the 500-page policy, requestors must wait one year for every 6,000 potentially responsive documents, and those who request tens of thousands of documents may wait decades." She noted that "where a request imposes truly burdensome obligations on an agency, FOIA provides one safety value – a stay for exceptional circumstances. However, the FBI has not invoked that statutory provision in this case. The agency's desire for administrative convenience is simply not a valid justification for telling Professor Seavey that she must wait decades for the documents she needs to complete her work."

To bolster its case for applying its 500-page policy to Seavey's request, the FBI had provided a smattering of statistical data, none of which impressed Kessler. Instead, she observed that "relevant information [the FBI might supply] includes: (1) the FBI's capacity to process FOIA and Privacy Act requests expressed as a rate – i.e., a number of pages per month; (2) the average number of pages generated by FOIA and Privacy Act requests expressed as a rate; and (3) the distribution of requested pages between queues, and, in particular, the number of pages associated with the largest requests in the large queue. Such data *might* plausibly demonstrate a gross imbalance between the FBI's processing capabilities and the size of the largest requests it receives, and thereby show that the diversion of resources to the largest requests would substantially delay the processing of smaller requests."

She noted that the data the FBI had provided showed that the average request required processing 1,000 pages and that there were 22,222 requests in FY 23016 – or 22 million pages to process. The FBI said that 5.1 million pages remained at the end of FY 2016, suggesting that the FBI had a capacity to process 17 million pages annually. Based on this data, Kessler indicated that "it is hard to understand how a request for 100,000 pages (or even several such requests) could monopolize [the agency's] workload. If that is the case, then the FBI's steadfast determination to make Professor Seavey wait decades for documents to which she is statutorily entitled is simply incomprehensible." Kessler acknowledged suggestions that the FBI's processing capacity was considerably less than she assumed, but she observed that "if true, that *might* help to justify the FBI's 500-page policy. However, this possible discrepancy simply serves to highlight the fact that the FBI has not presented the relevant data that would sufficiently explain what its capabilities are and demonstrate why asking it to do more would cause harm to other requesters."

Kessler criticized the FBI's policy of dividing requests into multiple requests. The agency had divided Seavey's request into 372 separate requests. Underscoring the inherently unfair consequences of the policy, Kessler pointed out that "the FBI has assigned each subject a distinct FOIA tracking number, meaning that for the purpose of *internal tracking*, the FBI treats each request for information on a single subject as a distinct FOIA request. Yet for the purpose of *responding* to Professor Seavey's request, the FBI treats these otherwise distinct requests as a single request and caps the rate at which it will process them at 500 pages per month," resulting in a lengthier processing time. Kessler observed that "had Professor Seavey simply broken down her initial request into 372 different letters, one for each subject, and mailed them all to the FBI on the same day, it is exceedingly likely that she would have most, if not all, of the documents she seeks. Yet because she chose to include all of the subjects in one request letter, the FBI proposes that she wait 17 years. The Court does not believe that this kind of disparate treatment can be rationally justified." Noting that there was a strong public interest in disclosure of the records, Kessler ordered the agency to finish processing Seavey's request in three years, a rate that would require the agency to process 2,850 pages a month, which Kessler found was not unreasonable under the circumstances.

Lamberth's ruling involved a request by the Mattachine Society of Washington, D.C., for records concerning the implementation of Executive Order 10450, which was signed in 1953 by President Dwight Eisenhower, allowing then FBI Director J. Edgar Hoover to purge gay and lesbian employees previously identified under the agency's "Sex Deviate Program." In the following decades, the EO was used by the FBI and the U.S. Civil Service Commission to fire thousands of federal employees. Because the program was originally overseen by Warren Burger when he served as head of the Justice Department's Civil Division, the MSDC also requested records concerning Burger's participation in the EO's implementation. The FBI disclosed 552 pages and withheld an additional 583 documents. Believing there must be more records on the program that was in place for 40 years, MSDC filed suit, arguing the agency's search was not adequate.

Lamberth agreed. He initially noted that the FBI had limited its search to "Executive Order 10450," "Sex Deviate" and "Sex Deviate Program." He explained that although those search terms might be adequate to uncover records leading up to the EO, the EO itself shifted to using the term "sexual perversion," suggesting that the earlier descriptors would not be likely to uncover subsequently created records. MSDC had suggested broader search terms such as "gay," "lesbian" and "homosexual," but the FBI had rejected them as being too broad. Lamberth, however, noted that "while broad, those terms. . .are directly related to MSDC's specific request; even if there is a large volume of responsive documents, MSDC's request would compel their production." In its defense, the FBI explained that the term "pervert" yielded 5,500 hits. But Lamberth responded that "the FBI has not reviewed any portion of this search or others like it, offers no projections of what the results might be, and does not estimate the number of additional hours, resources, or funds [that] make these searches rise to the level of being an undue burden." He added that the Government provides no context in which to assess the volume of responses as being disproportionately burdensome as compared to similar requests. The FBI is asking the Court to declare that these searches would be unduly burdensome merely because the FBI suspects that they might be so, and that is not sufficient."

Lamberth was disturbed by the FBI's response to MSDC's contention that it initially failed to search for records on Burger. Now the agency claimed it had searched all permutations of Burger's name and found no responsive records. Lamberth indicated that "respectfully, this strains credulity. It is suspicious at best, and malicious at worst, for the FBI to assert in one paragraph that the review of 5,500 documents would be too burdensome, and in the next claim to have conducted a review of every document related to any permutation of Warren E. Burger – Chief Justice of the United States from 1969 to 1986, D.C. Circuit Judge from 1956 to 1969, and Chief of the Civil Division of the Justice Department from 1953 to 1956. This absurd dichotomy stretches credulity further, as the FBI claims that the review of that search did not yield a single responsive

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document. The Court finds it nearly impossible to believe that a search for every permutation of the name of the man charged with carrying out EO 10540, a robust federal mandate that built upon an established FBI initiative, yielded zero responsive documents."

In a rather unusual step, Lamberth found that the FBI had properly claimed Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records) to protect the names of individuals identified in the records, but because there was a strong public interest in disclosure of the records he required the agency to replace the names with unique alphanumeric markers. This result, he observed, 'will sufficiently protect the privacy interests of all parties involved, while also allowing the public to better study the effects of EO 10450 on lesbian, gay, bisexual, and transgender federal employees who were surveilled, harassed, and/or terminated under this program and others like it." (*Nina Gilden Seavey v. Department of Justice, et al.*, Civil Action No. 15-1303, U.S. District Court for the District of Columbia, July 20; and *Mattachine Society of Washington, D.C. v. United States Department of Justice*, Civil Action No. 16-00773, U.S. District Court for the District of Columbia, July 28)

Court Finds Exemption 7(A) Protects Records Related to Pending Litigation

In a case complicated by confusion about the existence of certain records, Judge John Bates has ruled that, for the most part, the SEC conducted an adequate search for records concerning the agency's enforcement action against Heart Tronics, Inc., a medical device manufacturing company, in which Mitchell Stein was convicted of securities fraud and mail fraud. Bates also found that the agency had properly invoked Exemption 7(A) (interference with ongoing investigation or proceeding) to withhold categories of records, because Stein's conviction was on appeal and the SEC was still prosecuting others involved with Heart Tronics. Bates agreed with the agency that Exemption 5 (privileges) applied to many of the records.

After he was convicted, Stein submitted several FOIA requests for records involved in the litigation, including records listed on a privilege log submitted by the agency. The agency located 2,715 documents responsive to Stein's request for records identified in the agency's privilege log and withheld 1,800 emails. The agency did not provide Stein with any records he had already received as part of the enforcement action.

Stein insisted that the SEC maintained a 200-million-file database which contained a number of unprivileged records that were not disclosed to him during the enforcement action or as a result of his FOIA requests. While Stein never adequately explained why he thought such a database existed, Bates concluded that he was referring to a database created and maintained by RenewData, a third-party e-discovery vendor hired by Heart Tronics' original counsel to help manage the discovery process during the SEC's investigation. Because Heart Tronics could no longer pay RenewData to store the database, its counsel turned over the records to the SEC. While the SEC never relied on these records, it told Bates that they were made available to Stein during the litigation.

Bates expressed concern about whether or not Stein had been able to access all these records during the enforcement litigation. He observed that "the SEC seems to think that its open file discovery policy during the *Heart Tronics* litigation has satisfied its FOIA obligations and that it need not search for documents responsive to Stein's second category of requests, because there is nothing it could search for or produce that Stein has not already seen, excepting the documents on the privilege log. Were the Court certain that Stein already received all documents responsive to his FOIA request in the prior litigation, the Court might agree. If an agency can demonstrate that it has already searched for and actually produced all documents responsive to a plaintiff's FOIA request, FOIA surely does not require it to duplicate those efforts. But it is not clear here that

this situation is so neat. . .” He pointed out that “while the SEC maintained an open file policy during the *Heart Tronics* litigation, it did not *produce* all of its records to Stein such that he now already has all of the SEC’s records in his possession. The RenewData materials were only ‘made available’ to him for review in Washington, D.C. during the discovery period. As discovery in *Heart Tronics* has now ended, and that case is on appeal, Stein presumably no longer has access to these materials, and the Court is not convinced that the fact that Stein once had a chance to examine these materials is sufficient to satisfy FOIA.”

Bates observed that at this point “because Stein no longer has access to the RenewData materials, the onus is on the agency to search this set of materials for documents responsive to Stein’s second category of requests, or else explain to the Court why those materials are unlikely to contain responsive documents.” As to the mysterious 200-million-file database that Stein alluded to, Bates assumed he was referring to the RenewData materials. He indicated that “the SEC has also stated that it never had access to the actual database (if there was one) hosted by RenewData, thus, if Stein is referring to a greater ‘database’ of documents hosted by RenewData but never provided to the SEC, the SEC has no obligation to produce documents outside its custody or control at the time of the FOIA request.”

Stein also argued that the SEC had invoked a *Glomar* response by failing to identify in its *Vaughn* index what records were responsive to which portions of his requests. Calling this claim “misguided,” Bates noted that “the agency is not obligated to identify in the *Vaughn* index which documents are specifically responsive to which categories of Stein’s requests. The purpose of the *Vaughn* index, together with any declarations an agency may submit in support of its withholding decisions, is to provide the court with enough information about the withheld documents for the court to determine whether the claimed exemptions were appropriately applied.”

Stein contended that Exemption 7(A) no longer applied because the civil and criminal investigations against him were separate. But Bates pointed out that “the SEC is not arguing that release of the privileged documents would interfere with DOJ’s criminal case against him; instead, the agency is crystal clear that release of the documents could interfere with the ongoing civil enforcement actions against Stein and at least one of his co-defendants in the *Heart Tronics* litigation.” He noted that “because the work product, internal communications, and deliberative documents that Stein seeks essentially provide a road map for the SEC’s case in the *Heart Tronics* litigation, they are likely to give Stein insight into the way the investigation and the SEC’s legal strategies developed that he and [his co-defendant] would not otherwise have, which could make re-litigating the [cases] – or possibly even pursuing them on appeal—difficult.”

The SEC relied primarily on the attorney work-product privilege to withhold records under Exemption 5. Bates agreed that most of the privilege claims were appropriate, although he rejected several others. Finding that the agency had sufficiently explained its segregability analysis, Bates observed that “an agency withholding documents under Exemption 7(A) does not need to justify its segregability determinations document by document, as the exemption allows agencies to justify withholding based on *categories* of documents.” He noted that “the SEC need not demonstrate segregability with respect to those documents that are also withheld as attorney work product under Exemption 5, because where ‘a document is fully protected as work product, then segregability is not required.’” (*Mitchell J. Stein v. U.S. Securities and Exchange Commission*, Civil Action No. 15-1560 (JDB), U.S. District Court for the District of Columbia, July 24)

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Views from the States…

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

Tennessee

A court of appeals has ruled that an agreement between the City of Memphis and the International Association of Chiefs of Police to solicit application materials nationwide from candidates for a new chief of police for Memphis, perform an initial review of those resumes and cover letters, and identify the best candidates for initial screening did not constitute the equivalent of a government function so as to make the records prepared by IACP subject to the Tennessee Public Records Act. The Memphis *Commercial-Appeal* requested the records prepared by IACP after the Memphis failed to respond to the newspaper's request. While the case was pending, IACP provided Memphis with a list of six candidates, which the City disclosed the same day. Five days later, the City disclosed the candidates' biographies, resumes, photographs, and cover letters. The trial court ruled that all the materials provided by IACP were public records, ordered the City to disclose any other records it had received from IACP, and ruled that because the City had not acted willfully in withholding the documents the newspaper was not entitled to attorney's fees. Both the City and the IACP appealed, arguing that the records were not agency records. But the appeals court found that the services performed by IACP did not constitute the equivalent of a governmental function. It noted that "the governmental function here is the hiring of the director of police, and that function was never delegated or assigned to the IACP." The appeals court pointed out that "rather, the services IACP performed were incidental to the selection of the director – a task wholly assumed by the City." The court of appeals also agreed that a 2005 amendment requiring disclosure of records relating to hiring a chief public administrative officer was not intended to cover a chief of police. (*Memphis Publishing Company v. City of Memphis*, No. W2016-01680-COA-R3-CV, Tennessee Court of Appeals at Jackson, July 26)

A court of appeals has ruled that the Sumner County Board of Education violated the Tennessee Public Records Act when it refused to respond to Kenneth Jakes' email and phone requests for records. After consulting its attorney, the Board of Education told Jakes that its public records policy required a written request or an in-person visit. As a result, the Board of Education declined to respond to Jakes' email and phone requests. Jakes sued and the trial court ruled in his favor, although it found he was not entitled to attorney's fees. The court of appeals agreed, noting that the legislature had amended the Public Records Act to include email requests. The court pointed out that "plaintiff was forced to either make his request by mail or in person. These requirements, considered individually, have been specifically held unlawful. Likewise, we hold that these requirements, even when considered together, do not provide the fullest possible access to public records in accordance with the TPRA in its prior form." (*Kenneth L. Jakes v. Sumner County Board of Education*, No. M2015-02471-COA-R3-CV, Tennessee Court of Appeals at Nashville, July 28)

The Federal Courts…

The Seventh Circuit has ruled that the FBI properly applied **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** to withhold personally-identifying information of FBI agents and Chicago police officers who were mentioned in the FBI's investigation of former Chicago police officers Ronald Watts and Kallatt Mohammed, who were convicted on a single charge of stealing money after the investigation of a protection racket. Watts was sentenced to 22

months and Mohammed was sentenced to 18 months. Ben Baker argued the sentences were grossly inadequate, casting suspicion on the investigation itself. Writing for the Seventh Circuit panel, Circuit Court Judge Richard Posner indicated that there could be any number of reasons for the way Watts and Mohammed were charged. Pointing out that the FBI's only role was to investigate – not to charge – he noted that "Baker's theory that release of the names of the FBI agents who worked on the investigation would enable the public to determine whether the Bureau had adequately staffed the investigation with able and experienced agents is far-fetched." Baker also claimed that the privacy exemption in the Illinois FOIA required disclosure of information that bore on the public duties of public employees. But Posner explained that "Baker gives us no reason to believe that the Illinois Act determines the scope of FOIA exemptions, which are federal. The district court was correct, moreover, to express concern that disclosing the names of the Chicago officers could expose them to harassment without conferring an offsetting public benefit and would be an unwarranted invasion of their personal privacy." Posner rejected Baker's claim that he was entitled to **attorney's fees**. Instead, Posner observed that since "he never asked the district court to award attorney's fees, there is no ruling on them for us to review." He added, curiously, that "though as the district court's judgment did not forbid him to seek an award of attorney's fees, he still can do so." (*Ben Baker v. Federal Bureau of Investigation*, No. 16-4188, U.S. Court of Appeals for the Seventh Circuit, July 12)

Judge Rosemary Collyer has ruled that the Defense Department conducted an **adequate search** for records concerning legal analyzes of the harm to national security by the disclosures made in *No Easy Day*, an unauthorized account of the killing of Osama bin Laden by one of the participants. The James Madison Project submitted requests to the Civil Division at the Justice Department and to the Department of Defense. The Defense Department initially suggested that a search was unnecessary because all responsive records were exempt under **Exemption 5 (privileges)** or **Exemption 6 (invasion of privacy)**. In her prior opinion in the case, Collyer found such a response inadequate and told the agency to supplement its affidavits. In its subsequent affidavits, the agency explained that the relevant attorneys in the Office of General Counsel identified all information, including emails, likely to be responsive to the request. Those records were then reviewed and withheld under Exemption 5 and Exemption 6. JMP argued that the agency should have conducted a keyword search to locate all responsive records rather than consult individual attorneys who had been involved in the review of *No Easy Day*. Collyer disagreed. She noted that "although a reasonable search of electronic records *may* necessitate the use of search terms in some cases, FOIA does not demand it in all case involving electronic records." JMP pointed to *Toensing v. Dept of Justice*, 890 F. Supp. 2d 121 (D.D.C. 2012), in which the court had rejected a search based solely on the personal knowledge of an employee. But Collyer noted that JMP's reliance on *Toensing* was misplaced. She explained that "an agency cannot fail to search at all based upon alleged personal knowledge, but courts have not found that a particular type of search is required by FOIA, merely that a reasonable search must be conducted; and, in this case, the DOD did conduct a search." She indicated that "in this case, the responsive files were readily identifiable without search terms and the records in all the files were individually reviewed." Since JMP had acknowledged that both Exemption 5 and Exemption 6 applied, Collyer granted the agency's motion for summary judgment. (*James Madison Project v. Department of Justice, et al.*, Civil Action No. 15-1307 (RMC), U.S. District Court for the District of Columbia, July 25)

Judge Christopher Cooper has joined several district court judges in the D.C. Circuit in concluding that only the requester of records has **standing** to bring suit under FOIA, even if the requester indicates before the suit is filed that the request was made on behalf of a third party. Sunni Harris, the attorney for William Smallwood, submitted a request to the Justice Department in her name for records concerning a class action settlement in which Smallwood was a party. The Office of Information Policy told Harris that her request fell

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within the unusual circumstances exception. Harris filed an administrative appeal of that decision, noting that the request was "created on behalf of William H. Smallwood." The agency told Harris that it did not consider unusual circumstances constituted an adverse determination subject to appeal. As a result, Harris' only remedy was to sue. Instead, Smallwood sued himself, at which time the agency claimed he did not have standing because he was not the requester. Reviewing the case law on the issue, Cooper agreed with the agency that Smallwood did not have standing because he was not the requester of the records. Cooper noted that "courts routinely dismiss FOIA suits where an attorney filed the initial request without indicating that the request was made on behalf of the plaintiff. Although such a rule might seem somewhat rigid, 'a line must be drawn to assure that the "request" requirement does not devolve into a general interest inquiry' that would be at odds with both the Constitution's standing requirement and the intent of Congress in enacting FOIA." Cooper explained that "the FOIA request at issue in this case clearly indicates that Smallwood's attorney is the requester. The 'Request Description' portion of the request, moreover, does not indicate that the request was made on behalf of any client, let alone Smallwood. In fact, his name does not appear anywhere in the request." Cooper added that "while Smallwood's attorney might have standing to pursue her FOIA request in federal court, Smallwood himself 'has not made a formal request within the meaning the statute' and therefore lacks standing to do so." Smallwood argued that his connection to the request was explained in the administrative appeal. But Cooper pointed out that made no difference. He noted that "but 'the elucidation of [an attorney-client] relationship on appeal does not change the nature of the request itself.' A contrary rule 'would [do] nothing to prohibit a party from piggy-backing onto an existing request at any point in the administrative and/or judicial process. Such was not the intent of Congress.'" (*William H. Smallwood v. United States Department of Justice*, Civil Action No. 16-01654-CRC, U.S. District Court for the District of Columbia, July 19)

In her third decision in a week on whether or not public interest organizations have **standing** to bring suit against the Presidential Advisory Commission on Election Integrity, Judge Colleen Kollar-Kotelly has ruled that EPIC has standing because it suffered an informational injury because of the Commission's failure to prepare a Privacy Impact Statement as required by the E-Government Act, but that since the Commission does not qualify as a federal agency EPIC has no practical remedy. EPIC brought suit under the Administrative Procedure Act for the Commission's violation of the E-Government Act requirements to create a PIA, and under the **Federal Advisory Committee Act** to force the Commission to disclose a copy of its PIA. Besides arguing that it had standing because it had suffered an informational injury, EPIC also claimed it had associational standing through six members of its advisory board and organizational standing through its advocacy and educational efforts. While she found EPIC's informational injury claim sufficient, she agreed with EPIC that it also had organizational standing. However, she found that injuries suffered by EPIC's board members were not sufficient to bestow standing on EPIC. Kollar-Kotelly found EPIC satisfied the informational injury standard. She noted that "Plaintiff satisfies both prongs of the test for informational standing. First, it has espoused a view of the law that entitles it to information. Namely, Plaintiff contends that Defendants are engaged in a new collection of information, and that a course of action is available under the APA to force their compliance with the E-Government Act and to require the disclosure of a Privacy Impact Assessment. Second, Plaintiff contends that it has suffered the very injuries meant to be prevented by the disclosure of information pursuant to the E-Government Act – lack of transparency and the resulting lack of opportunity to hold the federal government to account." The government argued that EPIC's request for the PIA was a generalized grievance that affected the entire public, not just EPIC. But Kollar-Kotelly pointed out that "even putting aside the particularized nature of the information harm alleged in this action, however, the fact that a substantial percentage of the public is subject to the same harm does not automatically render that harm inactionable." She found EPIC qualified under the organizational standing standard as well. She observed that "Plaintiff's programmatic activities – educating the public regarding privacy matters – have been impaired by Defendants' alleged failure to comply with Section 208 of the E-Government Act, since those

activities routinely rely upon access to information from the federal government." However, she rejected EPIC's claim of associational standing through six members of its advisory board. She explained that "even if the Court were to find that Plaintiff is functionally equivalent to a membership organization, the individual board members who submitted declarations do not have standing to sue in their own capacities" because "these individuals are registered voters in states that have declined to comply with the Commission's request for voter roll information, and accordingly, are not under imminent threat of either the statutory or Constitutional harms alleged by Plaintiff." At the beginning of the litigation, the Commission told Kollar-Kotelly that it planned to rely on a secure system operated by the Department of Defense to maintain the voter roll information. As a result, EPIC amended its complaint to include DOD, providing a federal agency defendant. But perhaps faced with that legal predicament, the Commission changed course and indicated it would instead use a secure system operated by the Director of White House Information Technology, leaving no federal agency involved except for the logistical services provided to all FACA committees by the General Services Administration. Finding that there was no longer a federal agency to sue, Kollar-Kotelly observed that "the fact that the DWHIT coordinates the information technology support provided by other agencies for the President, Vice President, and their close staff, does not change the ultimate conclusion that the DWHIT is not 'authorized to perform tasks other than operational and administrative support for the President and his staff,' which means that the DWHIT 'lacks substantial independent authority and is therefore not an agency." (*Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity, et al.*, Civil Action No. 17-1320 (CKK), U.S. District Court for the District of Columbia, July 24)

Resolving most of the issues remaining from his prior opinion, Judge James Boasberg has ruled that the U.S. Patent and Trademark Office has sufficiently explained its **search** for records concerning its discontinued Sensitive Application Warning System (SAWS) for flagging patent applications involving particularly sensitive subject matters. Patent Attorney R. Danny Huntington requested the records and the agency disclosed 4,114 pages and five spreadsheets, withholding one document entirely and redacting 132 pages under Exemption 3 (other statutes), **Exemption 5 (privileges)**, and Exemption 6 (invasion of privacy). In his prior opinion, Boasberg approved the majority of the agency's search, but observed that certain portions of the search were insufficiently explained. He ordered the agency to either conduct further searches or provide sufficient explanations for why its search was adequate. Boasberg upheld all the agency's exemption claims. After submitting supplemental affidavits, the agency moved for summary judgment. Huntington continued to contend that the search was inadequate and that the agency should have disclosed information showing the date of SAWS application, which Boasberg had allowed the agency to withhold under Exemption 5. This time, Boasberg found the agency had rectified the deficiencies of its first affidavits, except for a misunderstanding as to the scope of a search Boasberg had previously ordered. Rejecting Huntington's claims that the new descriptions of the agency's search were insufficient, Boasberg pointed out that "plaintiff may hypothesize, for example, that all [Technology Center] Directors participated substantively in the SAWS Program and must have responsive records or that other employees must have records because what has been produced to date is thinner than desired. As shown, however, Plaintiff offers no *evidence* to support those or other suppositions, without which the Court cannot infer an inadequate search." In his prior opinion, Boasberg ordered the agency to explain its search of the records of chief judges of the Patent Trial and Appeal Board. Now, Boasberg agreed with Huntington that Boasberg's first order required the agency to search for records of all PTAB judges, not just the chief judges. He told the agency to conduct such a search and provide an explanation of the results. Boasberg had approved the agency's claim that it could not disclose certain application dates because it would allow requesters to determine when SAWS applications were received. Huntington argued that the agency should have either redacted that data or reorganized it in such a way that the dates on which SAWS applications were submitted could not be determined. Rejecting Huntington's suggestion, Boasberg noted that "despite his ingenuity, it is hard to see how either of Plaintiff's solutions

resolves the problem raised by Defendant. A gap will be created by the deletion of all the low-volume-day application information just as if only the filing date were redacted." (*R. Danny Huntington v. United States Department of Commerce*, Civil Action No. 15-2249 (JEB), U.S. District Court for the District of Columbia, July 21)

Judge Royce Lamberth has ruled that the CIA still has not justified certain **searches** it conducted in response to Roger Hall's 2003 request for records concerning POW/MIAs from the Vietnam War and that the public interest in disclosure outweighs the privacy interests of CIA employees under **Exemption 6 (invasion of privacy)**. However, he found the agency had appropriately invoked **Exemption 1 (national security), Exemption 3 (other statutes)**, and **Exemption 5 (privileges)** to withhold records and that neither discovery nor *in camera* review was necessary to resolve the remaining issues. Hall provided nearly 1,800 privacy waivers from next-of-kin as part of his request. Lamberth agreed with Hall that the agency had not sufficiently explained why it destroyed 114 folders out of the 569 originally identified as potentially responsive, noting that "the conclusory assertion that folders were 'properly' destroyed' [undermines] what otherwise appears to be an adequate search of the sources of files it searched. The Court therefore directs the CIA to provide further specificity as to the regulations and schedules applied to its decision to destroy the files." He also questioned if records dating back to the Vietnam War era could still be considered operational. He observed that "although the Court is strongly inclined to defer to the CIA's determinations as to classification and [whether records qualify as operational], the present record fails to demonstrate how such dated records can reasonably be considered operational under the statute." Hall suggested that because the CIA had shared information on POW/MIAs with other agencies and Congress it had lost its ability to claim they were protected operational files. But Lamberth pointed out that "whether compelled or voluntary, the CIA's decision to share its operational information with other government agencies or with Congress, does not sacrifice that information's protection from disclosure under FOIA." However, he agreed with Hall that the CIA had not shown how the existence of congressional requests for such information was protected as well. He explained that "what is troublesome is not necessarily *that* the CIA has not produced in this litigation certain information that may be exempted from disclosure, but that the CIA has failed to squarely address plaintiffs' evidence strongly indicating that the agency does possess the information sought." Lamberth rejected the agency's Exemption 6 claims. He noted that "the CIA's speculation that disclosure of certain names in decades-old documents might bring 'unwanted attention from the media. . .especially in the social media age' is insufficient to overcome the strong presumption favoring disclosure." Hall argued that the agency's deliberative process claim probably would not survive a request under the 2016 FOIA amendments requiring agencies to disclose records protected by the deliberative process privilege that were more than 25 years old. Lamberth noted that "the CIA has met its burden under the pre-FOIA Improvement Act standard. The CIA's affidavits and accompanying *Vaughn* indices adequately establish the context for properly applying the deliberative process privilege, and also attest to the non-segregable nature of the information underlying the redactions." (*Roger Hall, et al. v. Central Intelligence Agency*, Civil Action No. 04-814 (RCL), U.S. District Court for the District of Columbia, Aug. 2)

The Judicial Panel on Multidistrict Litigation has rejected the government's attempt to consolidate 13 FOIA suits filed across the country by state ACLU affiliates for records concerning U.S. Customs and Border Protection's implementation of the travel ban issued early in the Trump administration and transfer the proceedings to the U.S. District for the District of Columbia. The panel noted that "these factual issues, which principally concern the adequacy of CBP's searches for requested records, as well as CBP's coordination of the searches by its Washington, D.C. headquarters appear relatively straightforward and unlikely to entail extensive pretrial proceedings." The government also argued that consolidating the cases would save litigation costs. But the panel observed that "the potential for litigation cost savings, without more, does not

warrant centralization, particularly where, as here, there is little likelihood of complex pretrial proceedings." (*In re: American Civil Liberties Union Freedom of Information Act (FOIA) Requests Regarding Executive Order 13769*, MDL No. 2786, U.S. Judicial Panel on Multidistrict Litigation, Aug. 2)

A federal court in North Carolina has ruled that personally-identifying information in records about Social Security disability adjudications are protected by **Exemption 6 (invasion of privacy)**. Clarence McGuffin requested information about productivity rates of disability adjudicators. The agency responded to his request, but withheld identifying information in productivity reports of individual adjudicators that included the employee's name, the employee's available hours to write decisions, the percentage of time worked on decisions, and the learning curve that applies to each employee. The court first found that the data qualified as "similar files" under Exemption 6. The court noted that 'the productivity reports of individual decision writers from which the information was redacted contains the names of individual employees as well as information about their personal on-the-job productivity. The reports comfortably fit the definition of 'similar files.'" The court pointed out that "federal employees have a 'substantial' privacy interest in employee evaluations, because 'disclosure of even favorable information may well embarrass an individual or incite jealousy in his or her co-workers.'" McGuffin argued that there was a public interest in knowing about the productivity of disability adjudicators because Congress had shown an interest in the issue. Rejecting McGuffin's claim, the court observed that "although that interest may well be a public one, McGuffin has cited nothing suggesting how the information redacted from the individual-level productivity reports 'would produce any relevant information that is not set forth in the documents that have already been produced.' For example, McGuffin does not show how the individual-level productivity reports further this interest in a way office-level reports do not." (*Clarence Andrew McGuffin v. Social Security Administration*, Civil Action No. 16-843-D, U.S. District Court for the Eastern District of North Carolina, July 17)

Judge Tanya Chutkan has ruled that Alex Rios, who was convicted of drug-trafficking, has **exhausted his administrative remedies** for his requests for records about misconduct charges brought against former DEA agent Bruce Lange. After learning that Lange had been charged with misconduct, Rios asked for records about Lange. The agency told Rios it would not process a request for third-party information without an authorization from the third-party individual. Rios contacted the agency and explained that Lange's misconduct charges had been made public. DEA affirmed its decision, which was upheld on appeal to the Office of Information Policy. Rios reformulated his request for records from a Merit Systems Protection Board appeal file pertaining to Lange. The agency found no records, but charged Rios $160 for search time. Rios then submitted another request for records pertaining to his DEA criminal case and for disciplinary proceedings against Lange to the extent they related to Rios' criminal case. The agency once again told Rios it would not process his request without the appropriate authorization. Rios then filed suit. The agency argued that Rios had failed to exhaust his administrative remedies because he did not provide the required authorizations. Although the agency claimed Rios had not provided an authorization for himself, Chutkan found Rios, in his request, had provided all the information required. She pointed out that "plaintiff signed the request with his full name and provided his declaration pursuant to 28 U.S.C. §1746. Because the regulation requires 'no specific form,' the fact that Plaintiff failed to execute DOJ Form 361 is of no material consequence." She then noted the agency had accepted his request for records on Lange, processed the request, and charged him $160 in fees. She observed that "consequently the court finds that DEA's changed position during the course of litigation has rendered the exhaustion defense moot. . ." (*Alex Rios v. United States of America*, Civil Action No. 15-1183-TSC, U.S. District Court for the District of Columbia, July 31)

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ACCESS REPORTS

A federal magistrate judge in California has ruled that the FBI did not violate subsection (e)(7) of the **Privacy Act**, which restricts an agency's ability to collect and maintain records reflecting an individual's exercise of his or her First Amendment rights, because the disputed records were collected pursuant to a legitimate law enforcement investigation, but found that Dennis Raimondo and Eric Garris, founders of the website Antiwar.com, may proceed with their Privacy Act claims based on two recently discovered documents that had not been before the court at the time she made her ruling. After learning that they may have been investigated by the FBI, Raimondo and Garris submitted a FOIA request to the FBI for records about themselves. The agency initially told them that it found no records connected to their names, but a subsequent search found records pertaining to a 2004 investigation of Antiwar.com for allegedly posting terrorist watchlists. The agency located 290 pages and released 26 pages in full and 104 pages in part. Magistrate Judge Jacqueline Corley ruled in favor of the FBI, but Raimondo and Garris asked her to reconsider based on further evidence that the FBI had violated subsection (e)(7). Rejecting their claim based on several already uncovered memos, Corley noted that "once the government has established that documents which it has maintained were 'pertinent to and within the scope of an authorized law enforcement activity' – which it has – Section (e)(7) does not authorize the Court to substitute its judgment for that of the FBI regarding the manner or scope of the investigation." Pointing out that two newly discovered memos had not previously been before her when she granted the agency summary judgment, Corley indicated that Raimondo and Garris could proceed with their (e)(7) claim based on those documents. She observed that "the record currently before the Court, however, is not adequate for the Court to consider such a claim now. The memos themselves are heavily redacted, the Court has only Plaintiffs' characterization of the purpose of the memos and no statement from the government regarding the nature of the memos or the law enforcement investigation memorialized in the memos." She concluded that "accordingly, the parties are ordered to meet and confer to discuss a briefing schedule to bring Plaintiffs' claims regarding these two documents to the Court for resolution." (*Dennis Joseph Raimondo, et al. v. Federal Bureau of Investigation*, Civil Action No. 13-02295-JSC, U.S. District Court for the Northern District of California, July 18)

In yet another of five suits by Smart-Tek Services against the IRS for records concerning the company's tax liability for a number of alleged alter ego corporations, a federal court in California has ruled that the IRS still has not shown that it conducted an **adequate search**, has once again held off on ruling on the agency's **Exemption 3 (other statutes)** and **Exemption 7 (C) (invasion of privacy concerning law enforcement records)** because the exemption claims may be undercut by its search claims, has rejected the agency's **Exemption 5 (privileges)** and **Exemption 7(D) (confidential sources)** claims, but has accepted its **Exemption 7(A) (interference with ongoing investigation or proceedings)**. The primary focus in all of Smart-Tek's suits has been the company's attempt to discern the identities of the alter ego companies for which the IRS claims the company is liable. Unfortunately, the investigation that resulted in the tax liability decision involved the commingling of documents identifying the various alter egos in a file containing 141,000 pages. For each suit, the agency claimed it had searched these files for responsive records, but refused to identify any alter ego company without an authorization. Smart-Tek took the position that it could not confirm whether a company was related to it without knowing the identities. Judge Barry Moskowitz once again found the agency's explanation of its search insufficient. He noted that "the IRS spent months reviewing [65] boxes and removing particular documents, but it has not explained what criteria the review team used to determine which documents to remove. Although an agency need only prove its search was 'reasonably calculated to uncover all relevant documents,' to evaluate the adequacy of the IRS's search, the Court needs to know what the search of the 65 boxes entailed to determine whether it was reasonable." Once again holding off on the Exemption 3 and 7 (C) claims, Moskowitz observed 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' search," but since the agency's search was not yet complete, Moskowitz said he would reserve ruling at this

time on the exemption claims. Moskowitz rejected the agency's deliberative process claim, indicating that the agency "fails to indicate in non-conclusory fashion how the withheld information was 'actually related' to the IRS's efforts to decide how to proceed with the collection action in this case." Although the agency claimed that a source had received an implicit assurance of confidentiality, Moskowitz found the agency's assertion lacking. He noted that since the agency "does not explain what [it] means by an 'implicit assurance of confidentiality' the Court cannot determine whether the circumstance [it] is referring to was one 'from which such an assurance could reasonably be inferred.'" Approving the agency's Exemption 7(A) claim, Moskowitz noted that "'the IRS need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings.'" (*Smart-Tek Automated Services, Inc. v. United States Internal Revenue Service*, Civil Action No. 15-0453-BTM-JMA, U.S. District Court for the Southern District of California, July 20)

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In a companion case, Moskovitz essentially made the same ruling. In this opinion, Moskowitz agreed with the agency's exemption claims under **Exemption 5 (privileges), Exemption 7(A) (interference with ongoing investigation or proceeding),** and **Exemption 7(D) (confidential sources)**, but found the agency had not shown under **Exemption 7(E) (investigative methods and techniques)** that a Risk Score was not a publicly known technique. (*American Marine, LLC v. United States Internal Revenue Service*, Civil Action No. 15-0455-BTM-JMA, U.S. District Court for the Southern District of California, July 26)

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