Volume 43, Number 16
August 16, 2017

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Court Finds Exemption 4 Privilege Applies to Attorney-Client Claims 1

Views from the States 3

The Federal Courts 5

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.
Copyright by Access Reports, Inc
1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
email: hhammitt@accessreports.com
website: www.accessreports.com

No portion of this publication may be reproduced without permission.
ISSN 0364-7625.

Washington Focus: The Agriculture Department's decision to remove personally-identifying information from its website pertaining to reporting under such statutes as the Animal Welfare Act and the Horse Protection Act has not only engendered several lawsuits challenging the agency's action, but, according to the Washington Post, has led to a significant increase in FOIA requests for such information and bills introduced in Congress to force the agency to repost the information. Karin Brulliard reported in the Post that between Feb. 3 when the agency removed the records until May 15, the agency received 751 FOIA requests for related information, more than double the number from the same period in 2016. Tanya Espinosa, a spokeswoman for the agency's Animal and Plant Inspection Health Service, told the Post that APHIS currently has 1,596 open FOIA requests. A provision in the House appropriations bill approved last month instructs the agency to "promptly finish reviewing the information on its website, restore all legally permissible records previously removed, and resume posting on the USDA website.". . . Sen. Ben Cardin (D.MD) has introduced S. 1728, a bill that would subject federal prisons that are privately operated to FOIA to the same extent as federally-operated facilities.

Court Finds Exemption 4 Privilege Applies to Attorney-Client Claims

Judge Rudolph Contreras has ruled that two emails submitted by DynCorp to the Office of Administrative Law Judges at the Department of Labor in a case brought under the Defense Base Act contain attorney-client privileged information and were properly withheld from Jack Jordan, an attorney representing his wife Maria against DynCorp International, under Exemption 4 (confidential business information), rather than the more obvious legal privilege claims in Exemption 5 (privileges). The circumstances of the case present a rather peculiar instance in which the agency relied on the "commercial or financial information [that is] privileged" protection in Exemption 4, rather than the more common claim that the information is commercially confidential and would cause competitive harm to the submitter if disclosed.

ACCESS REPORTS

Administrative Law Judge Larry Merck, who was hearing the DBA case, reviewed the emails *in camera* and ruled that they were protected by the attorney-client privilege and were not available in discovery. Perhaps faced with that reality, Jordan resorted to requesting them under FOIA. While by their very description the emails appear to be clearly privileged, because they were neither inter- or -intra-agency records, they did not qualify for those privileges incorporated under Exemption 5. But to the extent the emails could be considered commercial, they did qualify for a privilege claim under Exemption 4.

Contreras relied on *Baker & Hostetler v. Dept of Commerce*, 473 F. 3d 312 (D.C. Cir. 2006), to explain the meaning of commercial interest. He indicated that in *Baker & Hostetler* the D.C. Circuit had given commercial interest "a broad definition, one that includes records that 'reveal basic commercial operations,' 'relate to the income-producing aspects of a business,' or bear upon the 'commercial fortunes of the organization." He observed that 'like in *Baker*, the information in the DynCorp emails bears directly upon the 'commercial fortunes' of DynCorp as a company because this information addresses a business contract of the company."

Jordan argued that Labor was trying to use a commercial interest privilege when it was clear that the emails, to the extent that they were privileged at all, were protected by a legal privilege. But Contreras indicated that "'privileged' information is generally understood to be information that falls within recognized constitutional, statutory, or common-law privileges" and added that "though 'case law examining privilege under Exemption 4 is sparse,' courts have repeatedly found that Exemption 4's 'privilege' requirement covers properly-practiced attorney-client privilege. Though 'the mere fact that an attorney is listed as a recipient. . . does not make a document protected under [attorney-client] privileged,' confidential disclosures between an attorney and her client regarding factual and legal matters are certainly protected by attorney-client privilege." Applying these standards to the two emails, Contreras found that the agency's description of one of the emails "supports the inference that the DynCorp emails concern contractual information that DynCorp wishes to protect and thus this contractual information was sent to [its] in-house attorney for his legal advice." Contreras, however, found the confidential privilege claim covering the second email more tenuous because that email did not appear to deal directly with legal advice. He asked the agency to provide more information before ruling on whether the second email qualified as privileged under Exemption 4.

Trying to undercut the legitimacy of the DynCorp privilege claim, Jordan argued that DynCorp had waived its privilege by submitting the emails to the ALJ and allowing him to review them *in camera*. Contreras rejected the claim. He noted that "ALJs are judicial actors who, in the matters pending before them, must make determinations on the propriety of privilege claims asserted by the parties before them. There is no basis to conclude that they may not avail themselves of in camera review as a useful tool in making those determinations. If submission of information to such review jettisoned privilege, the review would have no purpose, because any privileged document submitted for in camera review would be immediately eligible for full disclosure under FOIA." He added that "Mr. Jordan unjustifiably disregards the fact that DynCorp submitted its emails for in camera review to validate its claim of privilege in accordance with an ALJ order. DynCorp's submission was consistent with attorney-client confidentiality and did not constitute a waiver of privilege. Indeed, ALJ Merck found that the attorney-client privilege applied, bolstering the Court's holding that the review process alone did not waive the privilege."

Contreras rejected Jordan's claim that the agency should have segregated and disclosed the notation "Subject to Attorney-Client Privilege." Noting that even by Jordan's own logic the phrase provided no meaningful information, Contreras pointed out that "the Court will not adopt a rule that requires agencies 'to parse [privileged] emails, letters and general conversations on a statement-by-statement basis to determine which sentences or even clauses were protected and which were not' when there is no indication that the clauses have any substantive meaning."

Aside from his FOIA claims, Jordan also leveled a number of Rule 11 sanction motions against the agency's attorney. Finding all his sanction motions bordered on the frivolous, Contreras noted that "the Court reminds Mr. Jordan that 'Rule 11 is not a toy.' Sanctioning the conduct of a litigant is a solemn endeavor. The Court admonishes Mr. Jordan to 'think twice' before moving for sanctions in the future. Mr. Jordan's cavalier approach to sanctions motions could result in him being sanctioned himself." (*Jack Jordan v. U.S. Department of Labor*, Civil Action No. 16-1868 (RC), U.S. District Court for the District of Columbia, Aug. 4)

Views from the States…

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

Delaware

A trial court has ruled that the Chief Deputy Attorney General misinterpreted a provision in the Delaware FOIA indicating that emails sent or received by the General Assembly or its staff were not public records under the statute by finding that the provision violated the spirit and intent of the statute if such emails were exempt solely because of their classification rather than based on an examination of their content. However, the Chief Deputy Attorney General also found that the Office of the Governor had properly applied privileges to withhold records requested by former State Treasurer Chip Flowers. In response to Flowers' request, the Office of the Governor refused to provide any emails sent or received by the General Assembly, arguing they were not subject to disclosure. The Chief Deputy Attorney General found that the Governor's Office had interpreted the provision pertaining to legislative emails too broadly and must provide a more substantive reason for withholding them wholesale. Both sides appealed the Chief Deputy Attorney General's ruling. The court sided with the Governor's Office. The court pointed out that the plain language of the legislative exception did not countenance the Chief Deputy Attorney's General's interpretive gloss. The court observed that "the Legislative E-Mail Exemption states that emails sent or received by members of the General Assembly or their staff are not public records. There is no mention in the exemption of a 'content or context' limitation. Requiring the Governor's Office to review emails for 'content or context' adds an element of interpretive ambiguity not found in the statute." The Chief Deputy Attorney General had argued that without some sort of check, the exemption was ripe for abuse. While the court did not disagree with that claim, it pointed out that it was up to the legislature, not the courts, to remedy such a policy flaw. The Delaware FOIA requires a public body to provide reasons for denying access to records, but specifically indicates that public bodies are not required to provide an index of records. Examining the evolution of the *Vaughn* index in the federal FOIA case law, the court observed that such an index had emerged as a solution to the situation where neither the plaintiff nor the court had the ability to assess an agency's withholding without further explanation. Reflecting on the conundrum, the court pointed out that "the General Assembly appears to have consciously determined to deprive this Court of the very tool that the federal courts have found most useful in evaluating government privilege claims under FOIA. As a result, it is difficult to square FOIA's stated purpose of promoting governmental transparency and accountability. . .with the prohibition on requiring a Delaware version of the *Vaughn* Index. . ." Nevertheless, the court found Governor's Office had appropriately applied various privilege claims to the documents it withheld. (*Chipman L. Flowers, Jr. v. Office of the Governor*, No. N16A-05-004 FWW, Delaware Superior Court, Aug. 8)

# #

Nevada

The supreme court has ruled that a writ of mandamus is the appropriate action to enforce a right of access to information under the Nevada Public Records Act, but that the City of Sparks properly redacted the identities of companies operating medical marijuana establishments because the information was confidential under a statutory provision pertaining to the regulation of MMEs by the Division of Public and Behavior Health. The Reno *Gazette-Journal* requested the business licenses from the City of Sparks. Sparks disclosed the licenses with the names redacted. The *Gazette-Journal* sued. The City argued that writ of mandamus was not the appropriate remedy, but that the newspaper first had to seek a declaratory judgment finding that the City had violated the NPRA. The court noted that "as the RGJ was challenging the denial of its request for records, not merely seeking to determine its rights with respect to the regulation, [a writ of mandamus] is the applicable law." The newspaper argued that the provision from the health code could not serve as an exemption because exemptions had to be specifically included in the NPRA. The court rejected the claim, noting that "this court has held that regulations need not be expressly mentioned in the [the statute] to grant confidentiality and exemption from the NPRA." (*City of Sparks v. Reno Newspapers, Inc.*, No. 69749, Nevada Supreme Court, Aug. 3)

New Jersey

The supreme court has ruled that the Millstone Valley Fire Department, a volunteer fire department that became part of the Franklin Fire District No. 1 in 1973, must disclose a copy of its constitution and bylaws in response to a request from Robert Verry because the district has an obligation under the Open Public Records Act to have access to such records, but that the MVFD is not an independent public agency subject to OPRA. The Franklin Fire District denied Verry's request claiming that it did not have access to MVD's records. Verry complained to the Government Records Council, which ruled that the MVFD was subject to OPRA because it was a part of the larger district. The supreme court noted that "when established, a fire district is a creation of a municipality – which is undoubtedly a political subdivision – that utilizes authority available to it to form a fire district. That makes the fire district an instrumentality of a political subdivision or multiple political subdivisions, as the case may be." The court observed that "as a result, a fire district is subject to OPRA and must respond to requests made under the statute." Turning to the volunteer fire department, the court pointed out that "because it aids in fulfilling the greater fire district's purpose, a volunteer squad may be regarded as an instrumentality of a fire district. However, because the District itself is not a political subdivision, but rather an instrumentality of one, the volunteer company is only the instrumentality of an instrumentality. Although OPRA provides that an instrumentality of a political subdivision constitutes a public agency, it does not provide that an instrumentality of an instrumentality constitutes a public agency. OPRA requires a direct connection to a political subdivision." As to MVFD's constitution and bylaws, the court observed that "the District, upon receiving a request for the constitution and bylaws of the MVFD, was obligated to provide access to those documents because the requested documents should have been on file with, or accessible to, the District pursuant to its authority to supervise the MVFD." (*Robert A. Verry v. Franklin Fire District No. 1 and Millstone Valley Fire Department*, No. A-77-15, New Jersey Supreme Court, Aug. 7)

In a case that stems from the conclusion that the Millstone Valley Fire Department is subject to OPRA, the supreme court has ruled that while the Firemen's Association may not file an action for declaratory judgment in an attempt to block disclosure under the OPRA, under the circumstances present in this case it was appropriate for the Association to assert the privacy interests of a John Doe firefighter who was given financial relief by the Association. Jeff Carter requested information about payments made to the John Doe firefighter, who had served as a member of the MVFD. After the Association denied Carter's request, he filed suit. The trial court ruled in favor of the Association, but the appellate court found that the public interest in

disclosure outweighed the privacy interest. The supreme court reversed. The Association argued that OPRA was subject to the same kind of action available under the Declaratory Judgment Act allowing a government entity to seek relief from a challenged judgment. The supreme court disagreed, noting that "section 6 of OPRA's special procedure for review of an agency's denial must prevail over the general DJA statute. Accordingly, after an agency has denied a request, section 6 is triggered, and only the requestor may seek judicial review of the agency's decision." A concurring judge was more emphatic, pointing out that "OPRA does not allow a public agency to haul a records requestor before a Superior Court judge on an order to show cause to justify why he requested a document. A citizen whose records request is denied may have no intention to take the matter further and cannot be forced to litigate a matter against his will." Nevertheless, the supreme court found that the Association had properly applied a six-factor test to determine that the privacy interest in non-disclosure of the financial relief payments outweighed the public interest in disclosure. (*In the Matter of the New Jersey Firemen's Association Obligation to Provide Relief Application Under the Public Records Act; Jeff Carter v. John Doe*, New Jersey Supreme Court, Aug. 3)

The Federal Courts…

Judge Amit Mehta has ruled that the State Department must **search** the state.gov email accounts of Huma Abedin, Cheryl Mills, and Jacob Sullivan, top aides to former Secretary of State Hillary Clinton, for records concerning Benghazi in response to a FOIA request from Judicial Watch. After reviewing the 30,000 emails turned over by Clinton from her private email server, emails turned over by Abedin, Mills and Sullivan from their private email accounts, as well as emails recovered from Clinton's server by the FBI, the State Department provided Judicial Watch with 348 responsive documents, disclosing 125 in full and 223 in part. Judicial Watch argued that the agency's search was not adequate because it had not searched the official agency email accounts for Abedin, Mills, and Sullivan, nor emails recovered by the FBI as part of a separate investigation of Abedin's former husband Anthony Weiner. State argued that it was unlikely that any further searches would turn up any new emails. Mehta noted that "although State expanded its search beyond its own records system to include review of records from certain non-State-controlled sources, FOIA requires it to do more. . .To date, State has searched only data compilations originating from outside sources – Secretary Clinton, her former aides, and the FBI. It has not, however, searched the one records system over which it has always had control and that is almost certain to contain some responsive records: the state.gov e-mail server." Mehta explained that "if Secretary Clinton sent an e-mail about Benghazi to Abedin, Mills, or Sullivan at his or her state.gov e-mail address, or if one of them sent an e-mail to Secretary Clinton using his or her state.gov account, then State's server presumably would have captured and stored such an email. Therefore, State has an obligation to search its own server for responsive records." Mehta rejected State's claim that a further search would be unlikely to produce any emails beyond those already reviewed. He noted that "State has offered no assurances that the three record compilations it received, taken together, constitute the entirety of Secretary Clinton's e-mails during the time period relevant to Plaintiff's FOIA Request." Mehta also found that the emails recovered in the Weiner investigation should also be searched. However, he indicated that "the court declines, at this time, to order State to search the e-mails that the FBI recovered last fall during an unrelated investigation. The court understands that State has now received the e-mails in question and is in the process of producing them to Plaintiff in parallel, ongoing litigation in this District. Accordingly, the court sees no need to rule on a search issue that might become moot in the near future and defers making any judgment until the related search comes to a close." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 15-00692 (APM), U.S. District Court for the District of Columbia, Aug. 8)

\# #

Judge Christopher Cooper has ruled that the FBI properly responded to Ryan Shapiro's request for records mentioning Nelson Mandela by providing the pages on which Mandela was mentioned as the result of a cross-reference, along with several adjoining pages for context, rather than providing the entire document in which Mandela was mentioned. Shapiro sued the FBI, the CIA, and other intelligence agencies for records mentioning Mandela. Since the FBI had completed processing Shapiro's request, Cooper's decision dealt only with that agency's motion for summary judgement. Cooper had earlier ordered the agency to provide a document about the U.S. delegation's attendance at Mandela's funeral, which the agency had withheld under **Exemption 5 (privileges)**, for *in camera* review because he was uncertain whether or not the document actually contained recommendations and advice rather than just logistical details. After reviewing it *in camera*, Cooper agreed with the agency that the record was both pre-decisional and deliberative. He noted that "the plan was distributed between agencies; it was a pre-decisional draft that was 'recommendatory in nature' and could not have become final without additional inputs; and it was part of the 'give-and-take of the consultative process' that occurs between governmental agencies when preparing for an international event with potential security threats." Shapiro argued that documents containing mentions of Mandela should be released in their entirety since they qualified as serials, the basic unit used by the FBI for defining a responsive record. The FBI argued that Shapiro's characterization of serials was not applicable in this case, pointing out that "a serial could be a *single* document, but it also could be many documents covering different topics." Cooper observed that "that is why the FBI concluded that pages and not serials were the most appropriate unit for defining a record. And it is not Shapiro's place to dictate how an agency should manage or define its records as long as its actions are reasonable and supported by the record." (*Ryan Noah Shapiro v. Central Intelligence Agency, et al.*, Civil Action No. 14-00019 (CRC), U.S. District Court for the District of Columbia, Aug. 8)

After refusing to grant the Animal Legal Defense Fund a **preliminary injunction** to force the Animal and Plant Health Inspection Service to repost information it had taken down from its website, Judge William Orrick has dismissed the case after finding the ALDF's contention that it had a separate APA claim that Orrick did not address was not convincing. ALDF argued that it had a separate APA claim to challenge whether the agency's decision to take down the information in the first place was arbitrary and capricious. But Orrick pointed out that "plaintiffs' injury is an informational injury based on a lack of access to documents that they assert they are entitled to under FOIA. Plaintiffs' argument that this claim is 'independent' from FOIA because it is based on the USDA's obligations under the APA, rather than FOIA, misses the point. While the USDA may have obligations under both FOIA and the APA, the plaintiffs have only one injury – an informational injury that depends on statutory rights conferred by FOIA. In the context of assessing whether there is an adequate *remedy* to plaintiffs' claims, the focus is on plaintiffs' *injury* and the possible means of redressing it. It is irrelevant that FOIA does not provide a specific means of challenging an agency's arbitrary decision to remove databases because plaintiffs do not have independent standing to challenge that action beyond its impact on plaintiffs' ability to access information to which they have a statutory right. What FOIA does provide is a means of redressing the only injury plaintiffs have identified by providing a means through which plaintiffs can obtain the information and documents that were once available on the USDA databases. . . [W]hile this remedy may not be identical to the relief available under the APA, it is nevertheless adequate to redress the informational injury plaintiffs have identified and thus to bar separate review under the APA." (*Animal Legal Defense Fund, et al. v. United States Department of Agriculture, et al.*, Civil Action No. 17-00949-WHO, U.S. District Court for the Northern District of California, Aug. 14)

The D.C. Circuit has ruled that William Price, convicted of possession of child pornography, did not waive his right to pursue judicial relief through FOIA as part of his plea agreement because the government failed to identify any legitimate criminal-justice interest served by the **waiver**. Price was convicted in 2007

and accepted a plea agreement that included a waiver of his right to sue under FOIA. But in 2011, Price requested records from the FBI about his ex-wife. The FBI refused to process his request because it was related to his case and he had waived his right to request them. Price filed suit pro se, arguing that such a waiver was unenforceable. The district court ruled in favor of the government, siding with a handful of other cases finding such waivers were appropriate. Price appealed to the D.C. Circuit. Writing for the panel, Circuit Court Judge Thomas Griffith explained that "the government argues that this suit is an attempt by Price to challenge his conviction or sentence that turns on whether his waiver was knowing, voluntary, and intelligent. We see it differently. This is a FOIA suit in which we are asked to determine de novo whether the FBI unlawfully withheld records that Price requested." Griffith rejected Price's claim that FOIA prohibited waiver of rights. Instead, analogizing government records to libraries, Griffith noted that "in short, Congress restricted agencies' ability to remove books from the library, but said nothing about an individual's freedom to give up his library card, if he so chooses." He also dismissed Price's suggestion that an agency could only deny access to records if they were protected by an exemption. Griffith observed that FOIA cases were frequently settled by the government by agreeing to provide some responsive records instead of all of them. He explained that Price's claim would discourage agencies from settling cases at all. Griffith indicated that plea agreements were intended to promote legitimate criminal justice interests. He faulted the government for failing to provide any such legitimate criminal justice interest. The government had pointed to its interest in finality, but Griffith noted that "as best we can tell, FOIA waivers promote finality only by making it more difficult for criminal defendants to uncover exculpatory information or material showing their counsel provided ineffective assistance. That argument takes the finality interest too far." He added that "FOIA thus provides an important vehicle for vindicating significant rights – and for keeping prosecutors honest. Indeed, in some cases it provides the *only* vehicle. And the government, at least in this case, has not told or shown us how taking that tool away from criminal defendants serves the interests of justice compared to the harms those waivers cause." Responding to Circuit Court Judge Janice Rogers Brown's dissent, Griffith indicated the limited nature of the court's decision. He pointed out that "we do *not* hold that FOIA waivers in plea agreements are always unenforceable. We simply hold that the government may not invoke *Price's* FOIA waiver as a basis for denying him access to the records he requests because, in *this* case, the government has given us no adequate rationale for enforcing this waiver in light of the public-policy harms Price has identified. That's it." Brown completely rejected the majority's analysis. She criticized the majority for crafting "a new guilty-plea-waiver standard." She noted that "the majority tap-dances around the Supreme Court's well-established standards by calling this a 'FOIA suit,' not a waiver case. Nonsense. No fake label will turn a rose into a saguaro. The FOIA statute plays no substantive role in the Court's novel analysis. This is a case about guilty-plea waivers." (*William S. Price v. U.S. Department of Justice Attorney Office, et al.*, No. 15-5314, U.S. Court of Appeals for the District of Columbia Circuit, Aug. 4)

Judge Royce Lamberth has ruled that a voluminous request by John Eakin for records concerning Americans who died as a result of being held in Japanese POW camps in the Philippines during World War II and whose remains were not recovered or identified does not qualify as being so **burdensome** that the Defense Department should be excused from processing it, but has found that the agency qualifies for an ***Open America*** **stay** allowing the Army Human Resources Command to finish reviewing three hard drives containing 280,000 Individual Deceased Personnel Files where the responsive records are located. The case involved a 2010 FOIA suit Eakin filed in the Western District of Texas. The court there rejected Eakin's request for a fee waiver and expedited processing, but did not reach the government's burden claim because it had not been raised at the administrative level. In 2016, Eakin filed a request for the records in electronic format. He also requested copies of the contracts for scanning the records. The agency told Eakin that unusual circumstances applied to his request and that it was being placed in the agency's complex processing queue with over 1,600 other requests. Eakin appealed and when the agency failed to respond, he filed suit,

# #

ACCESS REPORTS

this time in the District of Columbia. The agency told Lamberth that the AHRC had assigned three of its eight FOIA staff to process such requests at the rate of one hour a day. The agency argued the request was too burdensome and, alternatively, that it qualified for an *Open America* stay. Eakin argued that because the agency had already ascertained and located the files and merely needed to review them for exempt information, his request could not be considered too burdensome. Lamberth agreed. He noted that "while plaintiff's FOIA request is broad, the broad nature of the request is warranted given the necessarily broad nature of the information that the plaintiff is seeking." He observed that "that DoD has already identified the cache of data in which the universe of responsive documents is located, segregated it, and begun cataloguing documents for release, indicates that the plaintiff's FOIA request is sufficiently particular to enable the DoD to determine what records are being requested." Lamberth complained that the agency had never contacted Eakin to discuss narrowing the request, noting that "the fact that the DoD utterly failed to even make an attempt to communicate these realities to Eakin is disappointing and frustrating. The Court will not fault the plaintiff here for failing to limit or modify his request when the government could not even be bothered to satisfy its relatively simple obligations [to contact the requester]." To move the processing of Eakin's request along, Lamberth ordered the agency to provide a sample *Vaughn* index of the redactions from 100-150 documents chosen by Eakin. Lamberth found, however, that agency qualified for a stay. He noted the agency estimated that it would take 3,132 man-hours to complete Eakin's request. The agency had already processed over 30,000 IDPFs, showing both due diligence and good faith. Lamberth granted the agency a four-year stay to February 2021 and told the agency to provide a semi-annual production of records to Eakin. (*John Eakin v. United States Department of Defense*, Civil Action No. 16-00972-RCL, U.S. District Court for the Western District of Texas, San Antonio Division, Aug. 2)

The D.C. Circuit has ruled that the FBI conducted an **adequate search** for records from FBI informant Gregory Scarpa's main file, properly withheld records under **Exemption 7 (law enforcement records)**, and that the district court judge properly used her discretion in refusing to grant Angela Clemente **interim attorney's fees** for her litigation pertaining to Scarpa's files. Clemente has made a number of requests to the FBI for records on Scarpa. The request at issue here was for the first 500 pages of three categories contained in Scarpa's informant file. Clemente submitted the request in May 2008 and clarified it in a letter dated July 9, 2008. However, Clemente insisted that her attorney submitted a second letter on July 9, 2008, significantly broadening her request. Clemente filed suit on July 21, 2008. After processing Clemente's request as clarified by the first letter, the FBI responded to Clemente's request in November 2008, charging Clemente $107 and disclosing 1153 pages. Clemente argued the agency had not processed her request in accordance with the second letter. The FBI claimed it never received the second letter. The D.C. Circuit agreed, finding that the agency had acted appropriately in processing Clemente's request based on the clarifications contained in the first letter. Clemente argued the agency had interpreted her request more broadly because it disclosed more than the 500 pages requested for each category. But, Circuit Court Judge Sri Srinivasan, writing for the court, observed that "[Clemente's clarification letter], while requesting only the first 500 pages of responsive records, specifically asked the agency to advise her of the number of additional responsive pages it had found. The FBI eventually released the additional records because Clemente paid the duplication costs for them." Clemente argued that the agency's search was insufficient because the FBI should have searched for files in which Scarpa was cross-referenced as well as his main file. But Srinivasan pointed out that "because Clemente's request was directed to Scarpa's informant file, the FBI was not required to search cross-references, which by definition indicated references to Scarpa in files on *different* subject matters." Clemente's request was caught up in the FBI's decision to abandon its old policy of requiring requesters to send their requests to field offices that they wanted searched to a more centralized policy requiring requesters to submit their requests in the first instance to the FBI's main FOIA office. In Clemente's case, some records from Scarpa's informant filed had been relocated to the FBI's New York office. Srinivasan noted that "we have no basis to conclude that the FBI acted unreasonably in requiring requests for records held by a field

office to be directed to the relevant office. That regulation by nature generally aims to promote an agency's ability to respond to requests in an efficient manner." Clemente contended that because Scarpa's FBI handler had allegedly misused information gathered from Scarpa, the records did not qualify for protection under Exemption 7. Srinivasan disagreed, noting that "even if Scarpa and his handler took and misused FBI information, however, records reflecting some of the same information could have been *compiled* for a law enforcement purpose." The district court had twice rejected Clemente's request for an interim award of attorney's fees based on the hardship of litigating under a contingency agreement. Srinivasan observed that "the district court's decision to exclude Clemente's ability to pay from its analysis was logical because, by definition, a plaintiff in a contingency case has no obligation to pay counsel out of pocket." (*Angela Clemente v. Federal Bureau of Investigation, et al.*, No. 16-5067, U.S. Court of Appeals for the District of Columbia Circuit, Aug. 11)

Judge Ketanji Brown Jackson has ruled that the FDIC has failed to justify its claims that 12 documents responsive to Vern McKinley's two FOIA requests for records about the agency's consideration of placing Citibank in receivership between October 2008 and April 2009 and the agency's analysis of Citibank's solvency during the same period are protected by **Exemption 4 (confidential business information), Exemption 5 (privileges)**, or **Exemption 8 (bank examination reports)** and has ordered the agency to provide the documents for *in camera* review. In response to McKinley's requests, the FDIC located 19 documents, all of which it claimed were exempt. After the agency upheld its decision on appeal, McKinley filed suit. At that time, the agency provided a *Vaughn* index and after reviewing the index McKinley decided to only challenge the exemption claims on 12 documents. He argued that the agency had failed to provide sufficient justification for any of its exemption claims. Jackson first found the agency had failed to explain whether the records were provided voluntarily or involuntarily for purposes of Exemption 4. She pointed out that "in the absence of details from the FDIC regarding its acquisition of the allegedly exempt information from Citibank, this Court cannot identify and apply the appropriate text for privilege or confidentiality." She found the agency had failed to explain what role records it claimed were protected by the deliberative process privilege under Exemption 5 had played in any decision. Here, she explained that "while the eight documents that the FDIC has withheld pursuant to Exemption 5 in the context of the instant case certainly *might* contain information that the deliberative process privilege protects, this Court cannot conclude that they do on the record before it." Although she acknowledged the breadth of coverage under Exemption 8, she found the agency's affidavit parroted the language of the exemption without explaining why the records were covered by Exemption 8. She pointed out that "this Court has no doubt that the agency must, at the very least, specify whether it characterizes the relevant report as an examination report, an operating report, or a condition report. The FDIC's *Vaughn* index does not do so; instead, it reveals that the document at issue is a 'table' or a 'memorandum,' and then merely parrots the statute in regard to the document's content." She added that "absent from this description is any sense of the agency's position regarding *how* or *why* –precisely – these tables fall within the specific contours of Exemption 8." She also found the agency's claims that no non-exempt information could be **segregated** and released wanting. Ordering the agency to provide the 12 documents for *in camera* review, she noted in a footnote that "the Court cannot determine whether any portions of the withheld records can be reasonably segregated without first addressing whether the document is subject to exemption. Reviewing the documents *in camera* will assist the Court in making both the exemption and segregability determination." (*Vern McKinley v. Federal Deposit Insurance Corporation*, Civil Action No. 15-1764 (KBJ), U.S. District Court for the District of Columbia, Aug. 7)

A federal court in Arizona has ruled that some of the **searches** conducted by components of the Department of Homeland Security were adequate where they provide sufficient explanation of the way the

# #

ACCESS REPORTS

searches were conducted, but in other instances, particularly where the components relied on subject experts to conduct searches, the agency's explanations were insufficient. The case involved a request by the ACLU of Arizona for records concerning claims that unaccompanied immigrant minors were abused while in the Border Patrol custody. The agency ultimately disclosed more than 32, 000 pages of records, but the ACLU challenged many of the searches. The court noted that "those searches that fail to detail the terms or criteria used to identify responsive documents are inadequate. Specifically, any declaration that simply relies on a subject matter expert and manual searches or merely identifies the locations searched, but does not discuss subject matter, search terms, or other criteria, must be supplemented." Observing that "plaintiffs are entitled to knowledge of what that search involved – a process that is not particularly cumbersome or difficult when a manual search is conducted," the court explained that "a FOIA responder's task is clear: it must describe what records were searched, by whom, and by what process. Here, multiple agencies have failed to describe that process, other than by identifying the who and where and omitting the what, or vice versa." The court added that while the agency did not have to identify the individuals who conducted the searches, "the plaintiffs are entitled to sufficient detail on the employees' qualifications to ensure that they have the requisite skillset or knowledge base to conduct a compliant search." The court found many of the agency's search terms were adequate, but indicated that the agency needed to search for the term "UAC," which stood for unaccompanied minor. The ACLU argued that the agency's *Vaughn* indices were too confusing. But the court observed that "the categorical approach employed conveys enough information to Plaintiffs and the Court to identify the records referenced and understand the reasoning behind the claimed exemptions – all that is required under FOIA." The agency argued that case numbers were protected under **Exemption 7(E) (investigative methods and techniques)** because disclosure might allow a requester to better understand the agency's law enforcement databases. Calling this "too implausible," the court noted that "the case numbers are not information connected to law enforcement databases, as there is no evidence before the Court that the numbers are anything other than identifiers for organizational and classification purposes." (*American Civil Liberties Union of Arizona v. United States Department of Homeland Security Office for Civil Rights and Civil Liberties*, Civil Action No. 15-00247-PHX-JFT, U.S. District Court for the District of Arizona, Aug. 14)

The D.C. Circuit has ruled that the DEA has not sufficiently explained whether or not it has possession of software requested by prisoner Stephen Aguiar to help him interpret GPS data provided to Aguiar in spreadsheet form and, further, whether or not it conducted an **adequate search** for four administrative subpoenas issued during the agency's investigation of Aguiar. Aguiar was convicted of drug-trafficking charges stemming from an investigation focused on Burlington, Vermont. He made a series of FOIA requests to the DEA, including GPS tracking data of his vehicle. The agency disclosed the data in paper form, but when Aguiar asked for access to the software in order to better understand the data, the agency ultimately indicated that it did not have possession of the software. The district court granted the agency summary judgment and Aguiar appealed. Writing for the court, D.C. Circuit Chief Judge Merrick Garland found the agency still had not sufficiently explained its processing of the contested portions of the Aguiar's requests. Garland noted that "the DEA's principal argument on appeal is that it simply 'does not have the requested software,'" after it searched two offices and could not locate it. Garland observed that "the DEA asks us to read that statement to mean that the DEA searched for the software and – as a matter of fact – found nothing. But that is not what it says. It says only that the DEA 'was not in possession or control' of any responsive software – which is a legal assertion, and a conclusory one at that. By using that legal language, the declaration appears to conclude as a matter of law that the software is not in the agency's 'possession or control,' rather than to explain as a matter of fact that the software was not found." Garland pointed out that the agency provided seven different alternative explanations of why it did not have the software, noting that "presented with these seven inconsistent descriptions, we do not know how to square the heptagon." He observed that "at bottom, we simply do not know enough about the software to credit [any] of the DEA's arguments: that it does not have the software, or that it did not 'obtain' and does not 'control' the software in a

way that satisfies the legal definition of an 'agency record.'" Garland found the agency's affidavits explaining why it did not find the four administrative subpoenas, even though the agency admitted they once existed, fell short as well because they failed to describe how the two files the agency believed most likely to contain the subpoenas were searched and, further, why those files were the only reasonable location to search. Garland pointed out that "under these circumstances, which include 'well defined requests and positive indications of overlooked materials,' the DEA's declarations are too sparse to assure the court on summary judgment that the search was reasonable." (*Stephen Aguiar v. Drug Enforcement Administration*, No. 16-5029, U.S. Court of Appeals for the District of Columbia Circuit, Aug. 4)

Judge Randolph Moss has ruled that the Transportation Security Agency conducted an **adequate search** for records pertaining to travel by Darryl Burke, his son Lorin, and his wife Vicki Garland in July 2009. Burke, a federal prisoner, claimed he submitted his FOIA request for records concerning himself and his son on October 26, 2014, but the TSA told Moss that it never received his request until he attached it to his complaint when he filed suit in 2016. At that time, TSA searched for records in its Performance Results Information System database, but found no records, which the agency told Moss was not surprising since travel records are generally deleted after seven days. Although the agency insisted that Burke's request had not included Garland, the agency searched its database for records pertaining to her on the basis of requests Garland had made in 2015. Again, the agency found nothing. The agency also told Moss that it had asked the relevant airport authorities to check for any video recordings, but found nothing, since, the agency pointed out, such recordings were typically deleted after 30 days. Since Burke had not filed a motion in opposition, Moss indicated he would rely on the agency's uncontested version of the facts. Moss agreed that the agency had searched all record systems likely to contain responsive records. He observed that while the agency contended that the airports' records were not agency records, it never developed that argument. Finding the agency had conducted an adequate search, he noted that the FOIA requests submitted by Burke and Garland were received *many years* after any video footage of their July 2009 travel might have been created, and, then, deleted pursuant to [agency] practice. Burke, moreover, has failed to respond to any of this." (*Darryl Burke v. United States Department of Homeland Security*, Civil Action No. 16-1595 (RDM), U.S. District Court for the District of Columbia, Aug. 8)

A federal court in Louisiana has ruled that U.S. Citizenship and Immigration Services has now provided a sufficient explanation of its **Exemption 5 (privileges)** claims as well as its **segregability** analysis. Immigration attorney Michael Gahagan challenged the qualifications of the agency's declarant, arguing that he did not have personal knowledge of the agency's processing of his request for records about a client. In an earlier ruling, the court agreed and ordered the agency to provide a further explanation. This time, the agency came back claiming that a series of email chains were protected by the attorney-client privilege and the deliberative process privilege. Finding the agency had supported both privileges, the court pointed out that "the redacted portions of [the records] involve confidential communications between USCIS and its counsel, and also explain the connection between those communications and a litigation matter." As to its deliberative process privilege claim, the court pointed out that the redacted portions of the records "involve initial discussions between USCIS counsel and agency personnel related to defending a lawsuit. The revised *Vaughn* index also explains the connection between these communications and concerns for candid decisionmaking discussions regarding agency functions." Although the court found the agency's statement regarding segregability too general, it nevertheless found that, in conjunction with the supplemental *Vaughn* index its explanations were now adequate. The court observed that "these detailed *Vaughn* index entries, combined with USCIS's declaration that a segregation analysis was conducted, demonstrate that the documents in

# #

question are not further segregable." (*Michael Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 15-2540, U.S. District Court for the District of Columbia, Aug. 8)

A federal court in South Dakota has awarded Argus Leader Media $68,422.67 in **attorney's fees** for the company's litigation against the Agriculture Department for records concerning redemptions at the individual store level under the Supplemental Nutrition Assistance Program. The extensive litigation included two trips to the Eighth Circuit. Finding that Argus Media might have some commercial interest in obtaining the information, the court observed that "the primary purpose of publishing such data is to inform the public how and where government resources are being used. Argus is not using its FOIA request to further a private interest in a dispute with the government." Although the government lost on its claim that Exemption 3 (other statutes) or Exemption 4 (confidential business information) protected the data, the court noted that "neither party disputes that USDA had a 'reasonable basis in law' to withhold the documents. FOIA Exemptions 3 and 4 provided a reasonable legal basis to withhold the requested information." The newspaper's attorney requested an hourly rate of $200, a rate the court found was within the range of rates previously approved in the district. But the court found that the attorney's claim that he spent 1,000 hours on the litigation was too high an estimate, particularly since the attorney admitted he did not normally keep hourly records for his client work. Instead, the court reduced the amount to 300 hours, providing an award of $60,000. The court also approved an additional $8,422.67 in costs. (*Argus Leader Media v. United States Department of Agriculture*, Civil Action No. 11-04121-KES, U.S. District Court for the District of South Dakota, Aug. 3)

ACCESS REPORTS

1624 Dogwood Lane, Lynchburg, VA 24503 (434) 384-5334

Please enter our order for Access Reports Newsletter. It will help us stay on top of developments in FOI and privacy.

- ❑ Access Reports Newsletter for $400
- ❑ Bill me
- ❑ Check Enclosed for $________________

Credit Card
Master Card / Visa / American Express
Card # _________-_________-_________-_________ Expiration Date (MM/YY):______/______
Card Holder:___________________________________ Phone # (______) _______-_____________

Name:____ Phone#: (____) _____-______
Organization: ____ Fax#: (____) _____-______
Street Address: ____ email: _____________________
City: ________________________ State:____________________ Zip Code: __________________