Volume 43, Number 17
August 30, 2017

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: In response to a lawsuit filed by Public Citizen for visitors' logs of White House offices subject to FOIA, the Secret Service has agreed to stop deleting White House visitors' logs until the lawsuit is resolved. Public Citizen requested visitors' logs for OMB, the Office of Science and Technology Policy, the Office of National Drug Control Policy, and the Council for Environmental Quality. Politico reporter Josh Gerstein noted that in response to Public Citizen's request that District Court Judge Christopher Cooper issue a preliminary injunction prohibiting the White House from deleting the records, the Secret Service agreed to preserve the records for the time being. Another suit, filed by researcher Ryan Shapiro and Property of the People, asked specifically for visitors' logs from OMB and CEQ.

Ninth Circuit Finds FOIA Litigation Caused Disclosure of OLC Memos

A Ninth Circuit panel has found that the district court judge erred in finding that the First Amendment Coalition had not substantially prevailed in its suit against the Justice Department for records containing the legal basis for the 2011 drone strike that killed Anwar al-Awlaki in Yemen. The district court initially ruled against FAC. However, 10 days later, the Second Circuit found that the government had publicly acknowledged the existence of the legal analysis through the disclosure of a White Paper, waiving any privilege to withhold the memos. In light of the Second Circuit ruling, FAC asked the district court judge to order DOJ to provide them with the same records. DOJ did so. FAC then petitioned for attorney's fees. The district court then ruled that FAC had not substantially prevailed in its litigation because FAC had received the documents as a result of the Second Circuit ruling. FAC appealed to the Ninth Circuit. There, a three-judge panel agreed that FAC was eligible for a fee award, but could not agree on why. The ruling contains a fascinating discussion by Circuit Court Judge Marsha Berzon explaining that because of the 2007 amendments to FOIA's attorney's fees provision plaintiffs no longer need to show causation to be eligible for a fee award. Instead, she indicated that plaintiffs need only show that there was a voluntary or unilateral change in position by the agency and the plaintiff's claim was not

ACCESS REPORTS

insubstantial. Amazingly, although six other circuits have accepted that the 2007 amendments essentially reinstated the catalyst theory, Berzon becomes the first circuit court judge to examine the actual language of the 2007 amendments and conclude that Congress did not intend to require plaintiffs to show causation in determining whether or not they were eligible for attorney's fees.

Judge Frederic Block of the Eastern District of New York, sitting by designation, wrote the lead opinion explaining why FAC was eligible for attorney's fees. Block agreed with the other appellate courts that had ruled the 2007 amendments reinstated the catalyst theory which had been discarded in the aftermath of the 2001 Supreme Court decision in *Buckhannon Board & Care Home v. West Virginia Dept of Health & Human Resources*, 532 U.S. 498 (2001), where the Court ruled that attorney's fees under the Fair Housing Amendments Act and the Americans with Disabilities Act could only be awarded where the plaintiff received a court order in its favor. *Buckhannon*'s holding had immediately been applied to FOIA, meaning that FOIA plaintiffs were eligible for fees only where the court ruled in their favor. Because open government advocates lobbied Congress to overturn *Buckhannon*'s application to FOIA, it was clear from the beginning that one solution to the problem was to reinstate the catalyst theory as it had evolved in case law prior to *Buckhannon*. But, as Berzon emphasized, Congress chose not to resurrect the pre-*Buckhannon* case law. Although the catalyst theory was specifically included in an earlier version of the attorney's fees amendment, Sen. Jon Kyl (R-AZ) introduced a second alternative standard for determining if a plaintiff had substantially prevailed – "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."

Block relied on *Church of Scientology of California v. Postal Service*, 700 F. 2d 486 (9th Cir. 1983), the leading Ninth Circuit precedent recognizing the catalyst theory, to indicate that "under the catalyst theory, there still must be a causal nexus between the litigation and the voluntary disclosure or change in position by the Government. Thus, the plaintiff in this case had to present 'convincing evidence' that the filing of the action 'had a substantial causative effect on the delivery of the information.'" He explained that "in doing so we explicitly reject the notion that the 2007 amendment eliminated the need to establish causation once a lawsuit has been initiated. The statute cannot plausibly be read that way." Noting that one factor in determining whether a plaintiff had substantially prevailed was the level of government resistance after a suit was filed and the tenacity with which the plaintiff pursued the litigation, Block pointed out that "there is no question that the Second Circuit's decision in the [Southern District of New York] litigation was an impetus for FAC to continue its litigation. But what *actually triggered* the release of the OLC-CIA memo was that FAC sought to vacate the district court's grant of summary judgment. It was the appellant's 'dogged determination,' therefore, that led the district court to 'direct' the parties to discuss whether the litigation was moot, and resulted in the Government's decision – as acknowledged by the lower court – to 'voluntarily disclose the CIA memorandum to [FAC].' Because of FAC's efforts, the public learned that the OLC-DOD memo was not the first memo addressing the justification for the drone attack, nor was it identical to the prior OLC-CIA memo." Block pointed out that the district court's error in dismissing the complaint prolonged the litigation and forced FAC to endure protracted litigation. He observed that "it is counterintuitive to punish FAC for expending additional legal fees to pursue the litigation, when it would have sooner been entitled to the release of the memoranda – and the right to recoup its counsel fees – if not for the district court's error."

While Berzon agreed that FAC was eligible for attorney's fees, she completely disagreed on the issue of whether a plaintiff was required to show causation under the amended attorney's fees provision. Considering key elements of the provision, she first noted that "to 'obtain relief' from an agency simply means to receive the information a requestor is seeking. . .The fact of relief does not relate to the impetus behind the agency's action." Continuing, she noted that "voluntary" meant "not constrained, impelled, or *influenced* by another,' while a "unilateral" disclosure was one "'done, made, undertaken, or shared by one of two or more

persons or parties,' which includes action taken by one party independently of the other. These words, standing alone, indicate independent action *not* caused by the complainant's litigation."

She then offered the most thorough explication by a judge of the meaning of "not insubstantial," an element that had not existed before the 2007 amendments. Here, she pointed out that "whether a claim is 'substantial' or 'not insubstantial,' bears on the whether the claim has or may have merit. That the claim could have merit may well explain why the agency turned over the requested information after the lawsuit was filed. So the substantiality of the claim may serve as a proxy or substitute for causation (a notion borne out by the legislative history). But it is not itself a causation requirement; substantiality is a different inquiry from motive or causation."

Berzon criticized Block's opinion for adopting the catalyst theory, along with the other circuit courts that had considered the effect of the amendments. But Berzon noted that "none of those opinions did business with the language of the statute, or explained why courts should add to the statute a requirement that is simply not in the text." She indicated that "Congress surely *could* have reinstated the body of pre-*Buckhannon* case law, with its fact-intensive inquiry into causation, by adopting language similar to that used in the case law." However, she pointed out that "Congress did not do that. Instead, Congress opted explicitly to define 'substantially prevailing' when it amended the statute, and to do so differently than the pre-*Buckhannon* cases had." She focused on comments made by Kyl, who was the sponsor of the final version, explaining that a primary concern of the Supreme Court in *Buckhannon* was that "a request for attorney's fee should not result in a second major litigation." Berzon observed that "Senator Kyl, in other words, explained Congress's move away from the earlier 'catalyst' language as a quest for a more administrable standard – one in which substantiality, and not causation, is the basis of a fee award." She noted that "clearly, Congress could have chosen to – and initially did – draft a provision codifying the pre-*Buckhannon* catalyst theory, by using the very word 'catalyst,' which courts had construed for decades to include a causation requirement. But it ultimately decided not to do that. The statute enacted by Congress and signed into law by the president did not reinstate the pre-*Buckhannon* definition of 'substantially prevailing,' but instead devised a new one." She found Block's reliance on the catalyst theory irrelevant, pointing out that "to the extent [pre-*Buckhannon* case law] imposes a causal nexus requirement, they have been superseded by statute and have no bearing on whether fees are available to the First Amendment Coalition or any other requestor seeking fees under [the amended attorney's fees provision]."

Circuit Court Judge Mary Murguia supported Block's conclusion that a plaintiff needed to show a causal nexus to be eligible for attorney's fees, but disagreed as to how FAC had shown that its litigation caused the government to disclose the records. Instead of finding that the district court had erred in finding that FAC's suit had not caused the government to disclose the records, Murguia took the position that "the Department of Justice prevented the First Amendment Coalition from prevailing on the merits, and the district court erred by failing to take into account the DOJ's conduct when analyzing eligibility." Finding that the district court had not erred in its initial ruling based on the evidence before it, Marguia emphasized that the district court erred instead by failing to take into account DOJ's litigation conduct. She noted that "by characterizing the White Paper inconsistently between two federal fora, the DOJ deprived First Amendment Coalition of the chance for the court to hear its argument on the merits. The first and only federal court to consider the merits of whether official disclosure of the White Paper affected the FOIA analysis concluded that the White Paper made a decisive difference." Marguia added that "if the NDCA district court had in front of it the same information available to the Second Circuit, the NDCA district court would have reached the same result as the Second Circuit – or we would have, on appeal." (*First Amendment Coalition v. United States Department of Justice*, No. 15-15117, U.S. Court of Appeals for the Ninth Circuit, Aug. 25)

# #

ACCESS REPORTS

Views from the States…

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

California

A court of appeals has ruled that Ponani Sukumar substantially prevailed in his California Public Records Act litigation against the City of San Diego because his litigation forced the City to disclose an additional five photographs and 146 pages of emails as the result of court-ordered discovery. A number of neighbors complained that Sukumar's operation of a business out of his garage was causing a nuisance. Although the City had approved his use of large fans and industrial-sized refrigerator units, because of persistent complaints from neighbors, the City fined him for several offenses. Sukumar filed a PRA request with the City for records concerning his property and his interaction with the City. The City conducted two related searches, produced records, and told Sukumar that there were no more responsive records. Sukumar filed suit and the agency produced an additional five photographs and 146 pages of emails. Sukumar claimed he had substantially prevailed by forcing the City to disclose more records as a result of his litigation. The trial court found, however, that the records would have been disclosed anyway and that Sukumar's suit did not cause the City to disclose the additional records. But the court of appeals reversed. The court of appeals noted that "a plaintiff need not achieve a favorable final judgment to be the prevailing party in PRA litigation." The court pointed out that "in the face of the City's unequivocal assertion that it had already produced everything, the conclusion seems inescapable that but for Sukumar's persistent demand for discovery and the court-ordered depositions that resulted from these efforts, the City would not have produced any of the [subsequently disclosed] responsive documents." The court added that because "the City told the [trial] court and Sukumar that it had produced *everything* and there was nothing more to produce. . .the City would not have continued searching for documents it had just claimed did not even exist." The City argued that there was no evidence that it acted in bad faith. But the court observed that "the *effect* of the City's inability or unwillingness to locate and produce these documents until court-ordered discovery is tantamount to withholding requested information from a PRA request." The City had also argued at the trial court that Sukumar's fee request was excessive. Remanding the case to the trial court to determine a fee award, the appeals court indicated that 'because the [trial] court determined Sukumar was not entitled to any fees, the court never reached this issue." (*Ponani Sukumar v. City of San Diego*, No. D071527, California Court of Appeal, Fourth District, Division 1, Aug. 15)

The Federal Courts…

Judge Tanya Chutkan has refused to reconsider her ruling finding that comments made by President Barack Obama about the U.S. role in providing intelligence resources to Israel constituted an official acknowledgment that such funding exists, requiring the CIA to search for the records. Grant Smith, head of the Institute for Research: Middle Eastern Policy, requested a copy of the intelligence budget showing line items supporting Israel from 1990 to 2015. Smith filed suit after the agency failed to respond. In responding to his request, the agency issued a *Glomar* response neither confirming nor denying the existence of records. Smith contended that Obama's statement confirmed that the U.S. was providing intelligence funds to Israel. Chutkan agreed, noting that Obama's statement defeated the agency's use of a *Glomar* response and that the

agency was required to search for responsive records. Asking Chutkan to reconsider, the CIA explained that while Obama's statement confirmed that some U.S. intelligence agency provided funding to Israel, it did not confirm that the CIA was that agency. Chutkan recognized that "President Obama did not explicitly confirm or deny that the CIA itself provides intelligence assistance to Israel. But Plaintiff's specific request was for 'the intelligence budget' line items pertaining to support for Israel. President Obama's statement, while perhaps not an official acknowledgement that the CIA is the actual intelligence agency that provides support to Israel, is an acknowledgement that some intelligence agency does so, and, therefore that intelligence agency would have budget line items." She added that "because the CIA is the *central* agency for intelligence, the court can reasonably assume that the CIA would have some involvement, or at least some intelligence interest, in the provision of assistance to a foreign nation. President Obama's statement would quite likely preclude a *Glomar* response to a request for 'any and all records' pertaining to intelligence assistance to Israel, even if a different intelligence agency actually provides the assistance." She pointed out that Obama's "statement implies that some intelligence agency or government entity does have budget line items related to such intelligence assistance, and the court must determine whether the CIA has a relationship with that agency that would require production of the budget information under FOIA." The CIA argued that the Director of National Intelligence developed the National Intelligence program budget. But Chutkan observed that "if the CIA regularly accesses the NIP budget as part of its typical responsibilities, then the *Glomar* response remains inappropriate in light of President Obama's official acknowledgement." In a footnote, Chutkan inserted a caveat to the agency's requirement to search for responsive records. While Smith indicated that budget items from 1990 to 2004 were likely the most revealing, Chutkan pointed out that "the only records at issue here are those that existed during President Obama's tenure, because his statement did not acknowledge the existence of any records pertaining to U.S. intelligence support for Israel created before or after his administration." (*Grant F. Smith v. Central Intelligence Agency*, Civil Action No. 15-1431 (TSC), U.S. District Court for the District of Columbia, Aug. 23)

The Ninth Circuit has ruled that the district court erred when it found that Stephen Yagman **failed to exhaust his administrative remedies** because his FOIA request to the CIA was framed in the form of a question. Yagman submitted a FOIA request to the CIA for records indicating the "we" referred to by President Obama when he publicly admitted that the United States had participated in torture during the war on terror. The agency rejected Yagman's request, explaining that it was not required to respond to questions. Yagman then filed suit. The agency contacted Yagman to discuss his request, but when Yagman did not respond, the CIA told the court that it was unable to process his request as worded. The district court ruled in favor of the CIA and agreed that Yagman had failed to exhaust his administrative remedies because he did not submit a proper request. The Ninth Circuit reversed, siding with Yagman on all counts except for the agency's claim that Yagman's request was too vague. But the court pointed out that the issue of vagueness was related to the need to clarify the request and was not a basis for finding that the court had no jurisdiction. The court noted that "his request does not identify specific persons, much less specific documents, types of documents, or types of information." The court added that "although FOIA does not require requesters to do more than 'reasonably describe' the records sought, it does require more than Yagman has offered." The court agreed with the D.C. Circuit and other circuits that FOIA required agencies to liberally interpret requests. The court noted as well that a provision of FOIA required agencies to contact requesters if necessary to help requesters clarify or modify requests. The court rejected the agency's argument that failure to exhaust administrative remedies served to bar the district court from hearing a FOIA case. Instead, the court pointed out that "to the extent Defendants argue that the requirement must be satisfied for the purposes of exhaustion and exhaustion itself is jurisdictional, we reject that argument. . .Significantly, FOIA does not expressly require exhaustion, much less label it jurisdictional, nor does FOIA include exhaustion in its jurisdiction-

ACCESS REPORTS

granting provision." (*Stephen Yagman v. Michael Pompeo, Central Intelligence Agency*, No. 15-55442, U.S. Court of Appeals for the Ninth Circuit, Aug. 28)

Judge Reggie Walton has ruled that Landmark Legal Foundation's suit against the Department of Labor for records showing the use of personal email accounts by agency officials is precluded by the doctrine of **collateral estoppel** because Landmark Legal had already litigated and lost the same issue in another suit filed against the Department of Justice. In response to two FOIA requests submitted by Landmark Legal, Labor disclosed 798 pages. Based on the D.C. Circuit's ruling in *Competitive Enterprise Institute v. Office of Science and Technology Policy*, 827 F. 3d 145 (D.C. Cir. 2016), finding agencies were required to search for emails discussing government business even if created on a private email account, Landmark Legal told the Labor Department that it had to search private servers for potentially responsive records. The agency refused to do so and filed for summary judgment, arguing its initial search was sufficient and Landmark Legal was estopped from arguing that its request was valid because of the prior decision in its suit against DOJ. Walton agreed that collateral estoppel applied in this case. He noted that "Landmark's FOIA request in this case and in [its case against DOJ] are substantively identical. . .Therefore, because the two FOIA requests are in essence identical, collateral estoppel applies, as the same issue now being raised (i.e., whether Landmark's FOIA request as drafted is a valid FOIA request) has been 'previously tried, and decided in a court of competent jurisdiction.'" Landmark Legal argued that the circumstances were different because Landmark had modified its request to Labor. Walton rejected that claim, noting instead that "Landmark has not cited, nor could the Court find, any authority that supports Landmark's position that negotiations to narrow the scope of an agency's search amount to a new, and consequently, valid FOIA request. In any event, none of these proposed modifications sufficiently distinguish Landmark's FOIA request in this case from its FOIA request in [its suit against DOJ] because both do not adequately describe what records are being sought. . ." He observed that "Landmark's 'good faith effort' [to narrow the scope of the search] cannot convert an invalid and unreasonable request into a valid and reasonable one.'" Walton concluded that since "collateral estoppel precludes Landmark from pursuing the identical request in this case, Landmark is precluded from arguing that its FOIA request is proper. Accordingly, because Landmark's FOIA request is not a proper FOIA request given that it fails to adequately describe the records sought, the Court will grant summary judgment to the Department." (*Landmark Legal Foundation v. Department of Labor*, Civil Action No. 13-1468 (RBW), U.S District Court for the District of Columbia, Aug. 16)

Judge James Boasberg has resolved the remaining issues in a suit brought by Lonnie Parker for records concerning disciplinary action taken against former U.S. Assistant Attorney Lesa Gail Bridges Jackson, who had worked as an AUSA in the Eastern District of Arkansas with an expired bar license, by finding that an attachment to a letter was a **responsive record** and that the agency was required to disclose two of the attachment's three sections since they were not protected by **Exemption 5 (privileges)** or **Exemption 6 (invasion of privacy)**. Boasberg examined whether or not the attachment could be considered responsive since it did not deal with Jackson's bar-lapse discipline, but was related to other disciplinary action the U.S. Attorney considered taking against Jackson. Boasberg noted that "considered *alone*, it is unclear whether the document is encompassed by Parker's FOIA request. Yet the Court need not decide that issue, as it considers the draft letter's possible responsiveness as an *attachment* to an already-produced responsive record – namely, the [letter written by U.S. Attorney Paula Casey]." He pointed out that "it is not disputed that the Casey Letter is, in fact, responsive." He observed that "a single record cannot be split into responsive and non-responsive bits. If the Casey Letter and its attachment are one record – *i.e.* 'a unit' – then FOIA requires disclosure of both together." Noting that "the Casey Letter, in fact, itself touches on the subject matter of the attachment and refers the recipient to examine its contents," Boasberg indicated that "although there is no *per se* rule that letters and their attachments must be treated as one, the Court finds that these two pieces belong together." As

a result, Boasberg turned to whether the attachment was exempt. He found the draft letter could be broken up into three discrete sections – an introductory paragraph proposing a five-day suspension, the six following paragraphs discussing a specific incident and the justification for the suspension, and the final section detailing DOJ suspension procedures. He explained that the middle section was clearly deliberative, but that "the rest of the attachment, however, is not privileged." He indicated that Exemption 6 only protected the middle section as well. He observed that "the remainder of the first paragraph and the final section of the attachment, again, reveal nothing more than neutral summaries of applicable agency regulations that contain only public information, not private facts about Bridges Jackson." (*Lonnie J. Parker v. United States Department of Justice, Office of Professional Responsibility*, Civil Action No. 15-1070 (JEB), U.S. District Court for the District of Columbia, Aug. 16)

A federal court in Virginia has ruled that the Department of State properly redacted ten documents concerning discussions of climate change policy under **Exemption 1 (national security), Exemption 5 (privileges)**, and **Exemption 6 (invasion of privacy)**. The Energy & Environment Legal Institute and the Free Market Environmental Law Clinic submitted joint requests to the State Department for emails and text messages between five State Department employees and individuals from four environmental advocacy groups containing a list of keywords concerning climate change. After EELI and FMELC filed suit, the State Department agreed to complete its searches within three months. For two of the individuals, however, an unexpectedly large number of responsive records were located and the State Department asked for more time to process the records for those individuals. Eventually, the State Department disclosed more than 6,500 pages with redactions. EELI and FMELC chose to challenge ten documents as representative of the agency's exemption claims. EELI and FMELC argued that they should be able to submit separate summary judgment motions. However, the court found that a previous ruling in the case finding that one summary judgment motion was sufficient was binding. Rejecting the plaintiffs' claims, the court noted that "Plaintiffs jointly filed the FOIA requests at issue. They then jointly filed this lawsuit, maintaining the same attorneys to represent them. They also requested the same relief and their interests perfectly aligned in that respect. Plaintiffs cannot attempt to evade this Court's order by reorganizing and reframing their request for two summary judgment motions." The plaintiffs argued that Exemption 1 did not apply because the documents were not classified at the time of their request. But the court pointed out that "EELI provides no support for the proposition that a document's status as 'classified' at the time of the FOIA request governs the entire process. In fact, the case law suggests that classification challenges are based on the law when the classification was made." The court upheld the agency's Exemption 5 claims as well. EELI claimed that one redacted email dealt with the response to foreign official. The court noted that "climate change is a sensitive political issue, both abroad and domestically. Therefore, when developing an official position and debating how to best approach a foreign diplomat, the Agency should be granted some shield of confidentiality." EELI also argued that a list of "climate change validators" could not be considered deliberative. The court indicated that "this list was subsequently edited and reduced before Defendant created a final list. Therefore, the draft list plainly reveals the process through which the final list was decided. Namely, it shows which individuals or organizations Defendant chose to exclude, and which ones it ultimately included." EELI contended that discussions about how to approach Congress were not inter-agency. The court explained that "the redacted portions of the emails are from emails that occurred *prior* to the request for advice from the-non agency. . ." State had redacted information about career discussions under Exemption 6. The court agreed with the agency that the discussions qualified as "similar files" and noted that "individuals' career strategy and personal goals and aspirations are often just as private and personal as their medical history and are therefore entitled to the same protection." The court also agreed that the list it had found could be withheld under Exemption 5 also qualified under Exemption 6. The court observed that "they are not government officials, and they are not aware that they were included on the list. Moreover, they did not reach out to the government in order to

ACCESS REPORTS

obtain a place on the list, rather, they were unwittingly selected by State Department officials as potentially helpful to the Agency's policy goals." (*Energy & Environment Legal Institute and Free Market Environmental Law Clinic v. United States Department of State*, Civil Action No. 15-423, U.S. District court for the Eastern District of Virginia, Alexandria Division, Aug. 28)

Lamenting the cost of FOIA litigation that often boils down to isolated words or sentences, Judge Royce Lamberth has resolved the remaining issue in a case brought by Jeffrey Labow, finding that the FBI properly withheld information about the existence of a pen register under **Exemption 3 (other statutes)**. The D.C. Circuit had previously questioned whether the FBI's explanation for its withholdings was sufficient. The agency had claimed both the Pen Register Act and Rule 6(e) on grand jury secrecy. Upholding the FBI's claims for both provisions, Lamberth noted that "the mere existence of a pen register order does not allow the FBI to automatically withhold or redact other documents that may coincidentally contain the same information that appears in that order. But Exemption 3 allows an agency to withhold information for which Congress has recognized a danger associated with its disclosure. Congress specifically recognized the dangers of disclosing information contained in a pen register order in such a manner that doing so would undermine the very purpose for the secrecy of the order, and Congress expects such a disclosure to be, in certain instances, punished as contempt of court." The D.C. Circuit had expressed concern over whether the FBI's disclosure that a pen register order had been provided to a grand jury had unnecessarily brought up the issue of grand jury secrecy. While Lamberth found the agency's supplemental explanations insufficient, he upheld the agency's claims after reviewing the grand jury materials *in camera*. He pointed out that once records were actually provided to a grand jury, the FBI had no choice but to withhold them under Rule 6(e). But he observed that 'original FBI documents, copies of which are later submitted to a grand jury (and are stamped and marked accordingly upon their processing and submission), do not fall under the protection of Rule 6(e)." He indicated that Rule 6(e) also qualified under the second prong of Exemption 3 because they referred to particular types of matters to be withheld. He observed that "the grand jury material the FBI seeks to withhold here is directly connected to the type of matter, the secrecy of which Rule 6(e) is designed to protect." (*Jeffrey Labow v U.S. Department of Justice*. Civil Action No. 11-1256 (RCL), U.S. District Court for the District of Columbia, Aug. 16)

Judge James Boasberg has ruled that the IRS properly refused to process EPIC's two FOIA requests for President Donald Trump's tax returns because EPIC had not made a **proper request** in compliance with the agency's regulations, which require a requester to get consent for disclosure of third-party tax returns. EPIC argued that the public interest in disclosure of Trump's tax returns was high and, further, that the agency was required to ask the congressional Joint Committee on Taxation to exercise its authority under § 6103(k)(3) to order the agency to disclose Trump's tax returns. Rejecting both claims, Boasberg explained that "the Internal Revenue Code and various Treasury regulations on FOIA well articulate what must happen for the public release of an individual's private return information. EPIC must either obtain President Trump's consent to initiate a FOIA request or, as the organization itself suggests, convince Congress's Joint Committee on Taxation to sign off on the IRS's disclosure. As neither of these key missing actions can happen in court, Plaintiff's claims must be dismissed." He noted that "absent [third-party consent], a FOIA request for confidential third-party return information is incomplete, exhaustion is wanting, and litigation is premature." He added that "without such consent to release otherwise confidential information, the conclusion of this tax syllogism is plain: EPIC simply has not perfected, or completed, its request, and its FOIA claims must therefore be dismissed for failure to exhaust." Noting that the IRS had never asked the Joint Committee on Taxation to order disclose of tax information, Boasberg pointed out that "the plain terms of [§ 6103(k)(3)], which *require* congressional approval, foreclose any relief from the exhaustion barrier. In other words, the

central problem is that the Joint Committee on Taxation has not approved the disclosure of President Trump's tax returns – and, in fact, it does not appear that it has ever exercised this authority in regard to anyone. Without the Committee's authorization, this potential exception to the consent requirement could not possibly apply, and EPIC's litigation this case remains premature." Boasberg also rejected EPIC's claims under the APA. He observed that since FOIA provided an adequate remedy, the APA did not apply. (*Electronic Privacy Information Center v. Internal Revenue Service*, Civil Action No. 17-670 (JEB), U.S. District Court for the District of Columbia, Aug. 18)

A federal magistrate judge in California has ruled that neither **Exemption 5 (privileges)** nor **Exemption 6 (invasion of privacy)** applies to records concerning the U.S. Postal Service's response to Douglas Carlson's request for information about the identity of two employees at a Postal Service branch office in Santa Cruz who accosted Carlson while he was taking pictures of the branch office before it opened. After Carlson requested the identities of the workers, a USPS attorney conducted a search. Carlson had filed suit after the agency failed to respond. The agency ultimately disclosed records but withheld a number of records, including the identities of the individuals and other agency employees, under the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege, claiming the records had been compiled in anticipation of litigation since Carlson had sued the agency a number of times in the past. The court found that none of the agency's privilege claims applied. The court noted that "in the FOIA context, the government's right to withhold attorney-client communications in response to a FOIA request does not entitle it to withhold basic facts to which a litigant in a civil action would be entitled." As to the attorney work product privilege, the court pointed out that "communications between [the agency attorney who responded to Carlson's request and an employee who assisted her] would have been created in substantially the same form regardless of whether litigation was anticipated." Turning to Exemption 6, the court found that agency employees had some non-trivial privacy interest in not being identified, but it was small. By contrast, the court noted that "to the extent the Postal Service appears to be endorsing what amounts to the use of surveillance by Postal employees as to members of the public who have engaged in no wrongful conduct, the public has an interest in understanding who was involved in this incident and how it was handled." (*Douglas F. Carlson v. United States Postal Service*, Civil Action No. 15-06055-JCS, U.S. District Court for the Northern District of California, Aug. 18)

Judge Christopher Cooper has affirmed that peer reviews of articles written by agency scientists are protected by **Exemption 5 (privileges)**. Judicial Watch requested records concerning an article authored by scientists at the National Oceanic and Atmospheric Administration that had been published in the journal *Science*. Known as the Hiatus Paper, NOAA withheld drafts, internal correspondence and outside peer review comments on the basis that they were protected by the deliberative process privilege. Judicial Watch argued that the records could not be deliberative because they concerned science rather than policy. Cooper pointed out, however, that the D.C. Circuit had found that peer reviews of scientific articles written by NIH scientists were privileged in *Formaldehyde Institute v. Dept of Health & Human Services*, 889 F. 2d 1118 (D.C. Cir. 1989). Cooper explained that "Judicial Watch offers no basis on which to distinguish *Formaldehyde Institute*. The drafts of the Hiatus Paper, the NOAA scientists' deliberations, and the peer review materials are equally predecisional because they involve drafts and 'recommendations (with suggestions) regarding an article's suitability for publication.'" Based on an allegation from a British tabloid that the report contained misleading data, Judicial Watch claimed the agency had waived the privilege because of its misconduct. But Cooper noted that "since the very purpose of FOIA is to help uncover government misconduct, if any allegation of misconduct sufficed to pierce the deliberative process privilege, the exception would soon swallow the privilege whole. Rather, as the cases applying the exception have explained, the misconduct conducted must

ACCESS REPORTS

be particularly severe, as where 'the policy discussions' sought to be protected. . .were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government.'" (*Judicial Watch, Inc. v. U.S. Department of Commerce*, Civil Action No. 15-2088 (CRC), U.S. District Court for the District of Columbia, Aug. 21)

A federal court in Colorado has reconsidered its earlier ruling finding that the U.S. Forest Service had failed to show that it was a mixed-function agency for purposes of claiming **Exemption 7 (law enforcement records)**, instead, accepting the agency's tardy explanation for why its investigation concerning the treatment of wild horses by agency employees should be considered a law enforcement matter. The agency told the court that the misconduct investigation involved 14 specific allegations that could constitute violations of the Wild Free-Roaming Horses and Burros Act, and that although the investigation was conducted by its human resources office, the result could have been referred to either the Office of the Inspector General or Law Enforcement and Investigations. The plaintiff argued that human resources had no apparent law enforcement function. The court observed that "the fact that no further action was taken by LEI or OIG is not dispositive of whether the withheld information was compiled for law enforcement purposes." The court also rejected the argument that the agency should not be rewarded for failing to explain its position earlier. The court noted that "the interests of justice are best served by my consideration of the evidence now presented by the Forest Service. I further conclude that with this evidence the Forest Service has now met its burden of demonstrating that the information it seeks to withhold from Plaintiff pursuant to Exemption 7 was compiled for 'law enforcement purposes.'" As a result, the court indicated that it would consider the agency's exemption claims under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)**. (*Kathy Whitson v. United States Forest Service*, Civil Action No. 16-01090-LTB-NYW, U.S. District Court for the District of Colorado, Aug. 29)

A federal court in Pennsylvania has ruled that the FBI, the CIA, and the NSA properly responded to Paul Hetznecker's request for records concerning surveillance of the Occupy Philly protesters. Hetznecker was an attorney who represented some of the protesters after they were arrested by Philadelphia police. He requested records about the Occupy Philly Movement as well as "Occupy encampments in cities around the country" from the three agencies. The FBI located seven documents and disclosed them with redactions. The CIA and the NSA issued a *Glomar* response neither confirming nor denying the existence of records. The court was unsatisfied by that response and ordered the CIA and NSA to provide *in camera* affidavits better explaining their positions. After reviewing those materials, the court agreed that all three agencies had responded properly to Hetznecker's requests. Hetznecker argued that the FBI's search was inadequate because it did not look for records on Occupy encampments in other cities. The court noted that "Hetznecker's letter indicates 'Occupy Philly' no fewer than eight times without any reference to different Occupy movements. In the context of the request, 'Occupy' without more is reasonable shorthand for 'Occupy Philly,' and Hetznecker reasonably could have been asking for documents pertaining to the Occupy Philly movement in other cities. Without specifying *other* Occupy movements across the county, as in movements separate and discrete from Occupy Philly, the FBI's search terms were 'reasonably calculated to uncover all relevant documents.'" The FBI's redactions had been made under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods and techniques)**. The court approved all of the agency's exemption claims. As to Exemption 7(D), the court noted that "the FBI redacted the unique identifying number of their confidential source, which could be used to ascertain the confidential source's identity. If FOIA required the FBI to disclose confidential source numbers, several FOIA requests across multiple investigations could be used to discern the identity of the confidential source." The court agreed that

database identifiers could be withheld under Exemption 7(E). The court observed that "while information about individual units and sensitive case file numbers may not create the same risk in a vacuum, repeated disclosures of the information across a range of investigations would allow suspects to piece together a more complete picture of the FBI investigation." The court found that the *Glomar* response from both the CIA and the NSA was appropriate under **Exemption 1 (national security)**. (*Paul Hetznecker v. National Security Agency, Central Intelligence Agency, and Federal Bureau of Investigation*, Civil Action No. 16-945, U.S. District Court for the Eastern District of Pennsylvania, Aug. 23)

Judge Amy Berman Jackson has ruled that the Justice Department's Office of Professional Responsibility conducted an **adequate search** for records about Mickey Pubien's complaint against Assistant U.S. Attorney Julia Vaglienti, who had prosecuted his case in Southern Florida, after first issuing a *Glomar* response neither confirming nor denying the existence of records on Vaglienti. Pubien requested records about any investigation resulting from his complaint of misconduct by Vaglienti. However, the agency interpreted the request for records concerning all complaints or investigations of Vaglienti. As a result, the agency issued a *Glomar* response since Pubien had not provided a third-party authorization to obtain Vaglienti's records. When Pubien told the agency that he was only interested in his complaint, the agency disclosed 126 pages with minimal redactions on two pages. Pubien argued the agency acted in bad faith by misinterpreting his request. Jackson noted that "upon reinterpreting the request as seeking only records in plaintiff's name, OPR had no duty under FOIA either to conduct a broader search in Vaglienti's name or to explain why it did not do so, as it had initially with its *Glomar* response." Jackson found that Vaglienti and other third parties mentioned in the records had a privacy interest in not disclosing the redacted information and that because Pubien had not shown a public interest in disclosure the agency had properly withheld the records under **Exemption 6 (invasion of privacy)**. (*Mickey Pubien v. U.S. Department of Justice*, Civil Action No. 16-1809 (ABJ), U.S. District Court for the District of Columbia, Aug. 29)

Judge Rosemary Collyer has ruled that the Agricultural Marketing Service conducted an **adequate search** in response to a request from the Cornucopia Institute for records of the investigation of Diamond D Organics and that it properly withheld records under **Exemption 5 (privileges)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The Cornucopia Institute, a public interest farm policy organization, requested records concerning the investigation of Diamond D Organics after seeing references to it in records the Institute had previously received under FOIA. Matthew Michael, the Director of the Enforcement Division; and the specialist in charge of the investigation, searched their computer files for records concerning the investigation of Diamond D Organics. That search located 119 records. The agency disclosed 28 pages in full, 78 pages in part, and withheld 13 pages entirely. Cornucopia appealed the decision and the agency released additional information from nine pages. Michael and the specialist also conducted a second search of hard-copy records. They found an additional 21 pages that were released to Cornucopia with redactions. Cornucopia challenged the agency's description of the search. Collyer found the two affidavits filed by Michael were sufficient to explain the search. She noted that "Cornucopia's argument that the description of the second search is conclusory and vague because Mr. Michael failed to explain 'how they applied those two search terms,' cannot prevail because Cornucopia suggests no greater specificity needed to understand [the search] and none is required. Whether further records might exist is not the test to measure the adequacy of a search." Cornucopia suggested that the second search was conducted specifically because the first search was inadequate. But Collyer pointed out that "the fact that the second search identified further records does not invalidate either search." Finding that several records were properly withheld under the deliberative process privilege, Collyer turned to Cornucopia's claim that records withheld under Exemption 7(C) should be disclosed because they served a general public interest. She observed that "while the Court

ACCESS REPORTS

does not discount a general public interest in full disclosure, that general interest is insufficient to allow the release of identities and personal information of third-party individuals named in the files of the [Diamond D Organics] investigation. This Circuit places a strong priority on maintaining individual privacy rights, unless certain kinds of agency misconduct requires their relaxation. Cornucopia fails to grapple with this precedent and fails to specify anything more than the public's general interest. This does not suffice." She upheld the agency's Exemption 7(C) claims as well. (*The Cornucopia Institute v. Agricultural Marketing Service*, Civil Action No. 16-0654 (RMC), Aug. 16)

Judge Christopher Cooper has ruled that the Executive Office for U.S. Attorneys conducted an **adequate search** for records concerning Henry Francis' probation and any contacts the U.S. government made with the Jamaican government. The agency told Francis that it had no responsive records, but that the U.S. Probation Office in Florida might have records. That office conducted a search and found nothing beyond Francis' presentence report, which was not specifically responsive to his request. Noting that EOUSA's affidavits were somewhat vague, Cooper pointed out that "EOUSA has also proffered the declaration of the employee of the local office in Florida who actually searched for responsive records during the course of this litigation. As a result, any claim on the pre-litigation search is moot." Cooper indicated that the employee who conducted the search at the probation office "was not required to answer Francis' questions or opine about the 'evidence' he requested." He added that the probation office employee "has otherwise described a good-faith search reasonably calculated to locate responsive records maintained by the EOUSA." (*Henry Francis v. United States Department of Justice*, Civil Action No. 15-1683 (CRC), U.S. District Court for the District of Columbia, Aug. 21)

A federal court in New Hampshire has ruled that prisoner Richard Villar **failed to exhaust his administrative remedies** because he did not appeal the FBI's *Glomar* response neither confirming nor denying the existence of records on Shauna Harrington, a witness who testified at Villar's trial for conspiracy to commit bank robbery, but instead only appealed the agency's decision to withhold records from its file on Villar. Villar requested records about himself. The agency split his request into two requests – one about Villar, and one about Harrington. Because Villar did not have Harrington's permission, the FBI declined to process the request. In response to the request for Villar's records, the agency located 615 responsive pages, disclosed 388 pages in full and 126 pages with redactions, and withheld 227 pages entirely. Villar appealed that decision to the Office of Information Policy, which affirmed the FBI's decision. In court, the FBI argued that Villar had not exhausted his administrative remedies as to the request for Harrington's records because he failed to appeal that issue to OIP. The court noted that "although some of Villar's appeal letters discuss his need to obtain information about Harrington, those letters appeal to request that the FBI disclosure any Harrington-related material from the 615 pages in Villar's file, not that the FBI conduct an independent search for records about Harrington." However, the court found the FBI's *Vaughn* index woefully inadequate. The court pointed out that "several long ranges of pages are withheld in their entirety based on a uniform set of codes, which raises doubt about whether the FBI correlated each exemption to a particular portion of a document, as it is required to do." The court ordered the agency to supplement its affidavits. (*Richard Villar v. Federal Bureau of Investigation*, Civil Action No. 15-270-LM, U.S. District Court for the District of New Hampshire, Aug. 21)

Judge Beryl Howell has declined to consolidate two FOIA cases brought by National Security Counselors involving six different agencies who are part of the intelligence community after finding that NSC had not made its case for consolidation. Howell recognized that the only issue remaining to be resolved in the

two cases dealt with whether or not NSC was entitled to attorney's fees. Rejecting NSC's consolidation request, Howell pointed out that "given the similarity in arguments made by the plaintiff and the defendants in connection with the pending fee petitions in both cases, regarding the applicable rate and the criticisms of, the plaintiff's eligibility and billing practices, another consolidated opinion addressing these petitions may be warranted. Nevertheless, the differences in parties and specific FOIA request issues related to individual agency defendants continue to weigh more heavily against consolidation." (*National Security Counselors v. Central Intelligence Agency*, Civil Action No. 11-444 (BAH) and No. 11-445 (BAH), U.S. District Court for the District of Columbia, Aug. 21)

A federal court in Hawaii has awarded *pro se* plaintiffs Joseph and Sandra Demoruelle **costs** for their multiple FOIA suits against the Department of Veterans Affairs because the agency failed to respond until long after the Demoruelles filed suit, but has ruled that the Demoruelles are not entitled to any other relief. The court noted that "the Complaint states a single claim for a FOIA fee waiver for the aforementioned appeals. There is no allegation pursuant to FOIA or any other statute, including the Privacy Act, that the VA has wrongfully withheld any documents. Consequently, Plaintiffs have provided no grounds upon which the Court may grant the requested relief." The court added that "while the Motion only seeks costs of the instant suit, the Complaint also seeks attorneys' fees. It is well-established that 'a pro se litigant who is not a lawyer is not entitled to attorney's fees.'" (*Joseph Louis and Sandra Lee Demoruelle v. Department of Veterans Affairs*, Civil Action No. 17-00077-LEK-KJM, U.S. District Court for the District of Hawaii, Aug. 21)

# #