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In this Issue

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Washington Focus: Authorized by the House Bipartisan Legal Advisory Group, House General Counsel Thomas Hungar recently intervened in FOIA litigation to emphasize that records agencies provide to Congress are congressional records not subject to FOIA. The move comes in a suit filed by American Oversight for records about attempts to repeal the Affordable Care Act. Pointing out that four documents released by the Department of Health and Human Services and OMB originated with the House Ways and Means Committee, Hungar noted that "defendants have already demonstrated their unwillingness to defend that interest by failing to treat those documents as congressional records not subject to disclosure under FOIA and instead producing portions of those documents to plaintiff." Josh Gerstein, writing in Politico, noted that a Democratic leadership aide confirmed that "it has long been the position of the bipartisan leadership of the House of Representatives that congressional requests to agencies are also not subject to FOIA." . . . Immigration attorney Leon Wildes, who successfully represented John Lennon in his 1972 fight to stay in the U.S., revealed recently that he had learned through a FOIA request to the Immigration and Naturalization Service the existence of a program to defer action on deportations. Wildes told NPR that "the DACA program is really a tribute to John Lennon."

Court Finds DOE's Exemption Claims Lack Sufficient Support

Judge Amit Mehta has ruled that the Department of Energy has so far failed to substantiate any of its claims under Exemption 4 (confidential business information), Exemption 5 (privileges), or Exemption 6 (invasion of privacy) in responding to a request by Dan Zegart, a senior investigator for the Climate Investigations Center, for records concerning a $300 million contract awarded by the agency to Southern Company for construction and implementation of a clean coal project in Mississippi known as the Kemper Project.

Zegart sent his request to the National Energy Technology Laboratory, which was overseeing the project. Zegart clarified that he wanted several categories of documents – (1) contacts or meetings between NETL and Southern Company or entities related to Southern Company about

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clean coal technology, (2) research and development of clean coal technology at an NETL research facility in Wilsonville, Alabama, (3) the decision to move the Kemper Project from Florida to Mississippi, and (4) any connections between the Kemper Project and a lobbying firm called the BGR Group. NETL contacted DOE Headquarters because it believed Headquarters had materials responsive to certain portions of Zegart's request. DOE Headquarters sent Zegart's request to the Office of Fossil Energy, whose staff conducted manual and electronic searches, collected all responsive documents, and submitted them to the Office of Information Resources for review. NETL also consulted Southern Company for confidentiality claims. NETL disclosed several thousand pages, many with redactions, while the Office of Fossil Energy released 75 records with redactions.

Zegart challenged the adequacy of the agency's search, claiming that it failed to use certain search terms that would have provided more context to its search. But Mehta noted that "as a general matter, a plaintiff cannot dictate the search terms an agency must use to identify responsive records, and when an agency's search terms are 'reasonably calculated to lead to responsive documents, a court should neither "micromanage" nor second guess the agency's search.'" Mehta found the agency's affidavit sufficient, observing that "it reflects that Defendant selected search terms reasonably calculated to capture records responsive to Plaintiff's FOIA Request by searching for (1) the name of the power plant, (2) the name of the power plant in conjunction with its site relocation, (3) the name of the consulting group that purportedly met with government officials concerning the plant's relocation, and (4) the individual names of four members of the consulting group. In proffering that declaration, Defendant has met its burden; second-guessing what other terms the agency could have used would be inappropriate." However, Mehta indicated that the agency had not explained why it did not conduct a further search at DOE Headquarters. He observed that "[NETL's] declaration indicates that responsive materials involving the Office of the Secretary exist, which means additional responsive records could exist as well. Thus, after locating responsive records involving the Office of the Secretary, Defendant needed either to search that office or explain in a detailed affidavit or declaration why such a search would have been fruitless or redundant." Finding that neither party was eligible for summary judgment on the issue of the adequacy of the search, Mehta pointed out that the agency could either conduct a further search of the Office of the Secretary or explain why such a search would be redundant.

The agency argued that it withheld records under Exemption 4 because disclosure would both impair its ability to get quality information in the future and would cause Southern Company competitive harm. The agency provided an affidavit from Southern Company indicating the company would be reluctant to share information with the agency if it knew the information might be disclosed. Mehta noted this was insufficient to show impairment. He observed that "in the context of mandatory disclosures, 'the "continued reliability" or "quality" of the information obtained by the government is assumed because companies required to submit information would risk losing their government benefit for failing to comply fully and completely.' Southern Company's statement does not rebut that presumption." He added that "it is not clear, however, whether Southern Company would have the freedom to minimize the quantity or quality of information it supplies to Defendant and still obtain federal funding for any initiative like the Kemper Project, given that disclosure of the very information at issue appears to be a condition of receiving federal funding."

Mehta found Southern Company's claim that the information would be of value to potential competitors insufficient as well. He noted that "at no point does [Southern Company's affidavit] describe the market in which Southern Company faces competition or against whom Southern Company actually competes for the use of such technology." As a result, "while the proffered statements support the contention that Southern Company *might* have competitors or *may* make use of competitive bidding, they do not reflect *actual* competition under the case law."

The agency claimed that a number of records were protected by the deliberative process privilege, while four other email exchanges fell under the attorney-client privilege. Mehta pointed out, however, that

"Defendant cannot successfully claim the documents fall within the deliberative process privilege because Defendant has not shown that any withheld document actually predates an agency decision. In fact, not one entry in the DOE Headquarters *Vaughn* Index identifies any 'decision' to which the withheld material contributed." As to the four email exchanges the agency claimed fell under the attorney-client privilege, Mehta observed that "merely claiming that a communication is 'legal advice' is not enough for the court to assess whether the communication actually was a confidential communication and related to the matter for which *the agency* would seek advice about a legal matter." Mehta quoted from a recent district court decision by another judge in the D.C. Circuit observing that "the attorney-client privilege is not an all-purpose FOIA evasion mechanism," and indicated that "this court will not allow Defendant to treat it as one by rubberstamping the boilerplate language in the proffered declarations and DOE Headquarters *Vaughn* Index as sufficient."

As a way to undercut DOE's claim that contact information of Southern Company's employees was protected by Exemption 6, Zegart argued that the information was already publicly available in the company's SEC filings. Mehta found that the public availability of the information from the SEC mooted the privacy claim altogether. He noted that "as the information that Plaintiff seeks – the names of responsible Southern Company employees – is publicly available in Southern Company's Securities and Exchange Commission filings, any dispute concerning Defendant's reliance on Exemption 6 to withhold that same material is moot." He added that "although Mr. Zegart made this statement to suggest that Defendant's redactions are 'arbitrary' and unsupported by Exemption 6, his statement has the effect of mooting the dispute because it makes clear Plaintiff already has access to the same information that it requests from Defendant." (*Climate Investigations Center v. United States Department of Energy*, Civil Action No. 16-124 (APM), U.S. District Court for the District of Columbia, Sept. 11)

Views from the States…

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

California

The supreme court has ruled that automated license plate reader technology scans of license plates by the Los Angeles Police and the Los Angeles Sheriff's Department are not routinely exempt under the law enforcement investigation exemption, but that under the catch-all exemption, the privacy interest in non-disclosure outweighs the public interest in disclosure. Nevertheless, the supreme court indicated that the trial court had not sufficiently considered the possibility of anonymizing the data so that it would not reveal personally-identifying data and ordered the trial court to do so. The ACLU of Southern California and EFF jointly requested routinely scanned license plate data from the Los Angeles Police and the Los Angeles Sheriff's Department. Both agencies claimed the records were exempt because they could reveal information about criminal investigations. Both the trial court and the court of appeal sided with the government. However, the supreme court found the criminal investigation exemption applied only when the agencies could show that a license plate was connected to an investigation, and not merely by the fact that the agencies might later use some of the scanned data. The court noted the "process of ALPR scanning does not produce records of investigations, because the scans are not conducted as part of a targeted inquiry into any particular crime or crimes. The scans are conducted with the expectation that the vast majority of the data collected will prove irrelevant for law enforcement purposes." The court added that "a plate scan in itself always remains a result

of bulk data collection, rather than a record of investigation, even if it has the potential to match a future search inquiry. The fact that a database has been searched or that a plate in the database has been matched in a search does not increase concerns. . .with respect to disclosure of the database." But the supreme court agreed that the scans should be withheld under the catchall exemption. The supreme court pointed out that "although we acknowledged that revealing raw ALPR data would be helpful in determining the extent to which ALPR technology threatens privacy, the act of revealing the data would itself jeopardize the privacy of everyone associated with a scanned plate." The supreme court found that the data could probably be anonymized. Sending this issue back to the trial court for resolution, the court observed that "while [the agencies] may not have designed their system to facilitate CPRA disclosure as a 'native function,' randomizing license plate numbers or deleting columns from a spreadsheet, for example, would seem to impose little burden." The court added that "if the anonymized or redacted data are ultimately released, the court may exercise no restraint on how the data may be used apart from restrictions place on dissemination under the Civil Code." (*American Civil Liberties Union Foundation of Southern California, et al. v. Superior Court of Los Angeles County; County of Los Angeles, et al., Real Parties in Interest*, No. S227106, California Supreme Court, Aug. 31)

Connecticut

A trial court has ruled that the FOI Commission did not err when it found that the Department of Emergency Services and Public Protection properly responded to multiple requests from James Torlai for records concerning a traffic infraction. Not only had Torlai filed multiple requests with the department, he also had filed multiple complaints with the FOI Commission regarding the department's failure to properly respond to his requests. Torlai accused the department of not responding promptly to his requests. Upholding the FOI Commission's finding that the agency had responded promptly under the circumstances, the court noted that "by making multiple requests for the same materials, including requesting materials that the department had previously provided to him, the complainant created confusion that resulted in delay." The court added that "the plaintiff modified or expanded his request on multiple occasions, creating confusion, and deluged the department with other competing records requests and appeals to the commission while this request was pending. Given the totality of the circumstances, including the confusion to which the plaintiff contributed, the commission reasonably and properly determined that the department did not violate FOIA's promptness provisions." Torlai also challenged the commission's interpretation of a provision in Connecticut's statute implementing the federal Drivers Privacy Protection Act which restricted redisclosure of personal information obtained from the department of motor vehicles. Torlai argued that "disclosures of personal records under FOIA is 'reasonably related' to the official function of any governmental agency." However, the court agreed with the commission's interpretation of the restriction on redisclosure provision, noting that the restriction "requires that any redisclosure be for a purpose authorized under [the statute], which does not include disclosures to the general public merely upon request." (*James Torlai v. Freedom of Information Commission, et al.*, No. HHB-CV-16-5017450-S, Connecticut Superior Court, Judicial District of New Britain, Sept. 11)

Florida

A court of appeals has ruled that a newly enacted exemption to the Public Records Act covering witnesses to a murder applies retroactively to allow the Palm Beach County Sheriff's Office to withhold the identities of two individuals who, after witnessing the murder of Antoine Smith while he was driving on Interstate 95, pursued the shooter's vehicle and were shot at in return, although not injured. The *Sun –Sentinel* requested the identities of the two individuals and when the Palm Beach County Sheriff's Office refused to provide the records, the newspaper filed suit. Although the agency argued that it was withholding the identities of the two individuals because they witnessed Smith's murder, the trial court agreed with the newspaper that the criminal investigative information exemption specifically excluded the identities of victims

of a crime. The court of appeals also ruled that the criminal investigative information exemption did not apply. The appeals court noted that "PBSO's argument rests upon the premise that only a single crime occurred here, and that despite being shot at the good Samaritans who pursued the assailant were not victims of a crime because another and more deadly crime occurred moments earlier. These individuals, however, were clearly victims of 'a' crime and thus their identifying information fits within the exception to the exemption." Having ruled in favor of the newspaper on the criminal investigative information exemption, the court of appeals then pointed out that another newly enacted exemption prohibiting disclosure of identifying information about witnesses to murders applied retroactively instead. Here, the court pointed out that "just as a victim's information is subject to disclosure even if that victim also happens to be a witness, information regarding a witness to a murder is protected even if that witness also happens to be a victim. The two provisions are completely compatible and, even if they were not, the specific statute protecting the identify of witnesses to a murder would control." (*Palm Beach County Sheriff's Office v. Sun-Sentinel Company, LLC*, No. 4D17-1060, Florida District Court of Appeal, Fourth District, Sept. 6)

Michigan

A court of appeals has ruled that the City of Grand Rapids failed to show that its inadvertent recording of a police line that was intended for unrecorded communications violated either the federal or state wiretap laws, which might have prevented it from disclosing a copy of the recording to MLive. The case involved an incident in which a Kent County assistant prosecutor drove down a one-way street and hit a parked car. When the Grand Rapids police arrived, the responding officer called police headquarters and told a police lieutenant that the assistant prosecutor was "hammered." The police lieutenant told the officer to call back on a non-recorded line. Five calls took place on the non-recorded line. The police cited the prosecutor for driving the wrong way down a one-way street and drove the assistant prosecutor home. The police conducted an internal investigation. During the investigation, the City discovered that phone calls on the non-recorded line had been recorded. The City then filed for a declaratory ruling with the federal court to determine if the recordings violated federal wiretap statutes. The City also denied MLive's request for the recordings. MLive filed suit and the trial court dismissed the case on the basis that the federal court had not yet ruled on whether the recordings violated the federal wiretap statutes. The court of appeals found that the City had never claimed an exemption. The court pointed out that "the Federal Wiretapping Act does not prohibit inadvertent interception or disclosure of communication. . .[T]he City must argue that it violated the Federal Wiretapping Act in order to invoke the FOIA exemption and deny MLive's FOIA requests. The City never made that argument." The appeals court found MLive had substantially prevailed. The court noted that "without the suit, the City would not grant MLive's FOIA request at this time. Because MLive prevailed, the trial court must award MLive reasonable attorney's fees, costs, and disbursements." (*MLive Media Group v. City of Grand Rapids*, No. 338332, Michigan Court of Appeals, Sept. 12)

Mississippi

The supreme has ruled that a series of four meetings held by the Mayor of the City of Columbus, who met first with a group of three City Council members, followed by a meeting with a second group of City Council members, violated the Open Meetings Act. The supreme court noted that "the four pairs of subquorum gatherings, along with the fact that they were prearranged, nonsocial, and on the topic of public business, illustrated the City's *intent to circumvent or avoid* the requirements of the Act. The philosophy and spirit of the Act prohibit the City from intending and attempting to circumvent or avoid the requirements of the Act. Additionally, the plain language of Section 25-14-1 requires the subject gatherings to be open to the public. Thus, the City's failure to hold open gatherings violated the Act." (*Mayor and City Council of the City of Columbus v. Commercial Dispatch,* No. 2016-CC-00897-SCT, Mississippi Supreme Court, Sept. 9)

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Pennsylvania

A court of appeals has ruled that the Office of Open Records erred when it issued a deemed denial to Cynthia Diveglia in response to her complaint that the State Police withheld dash-cam videos concerning her being charged with drunk driving under the criminal investigative information exemption because the issue was still being litigated in the state courts and had not yet been resolved. OOR explained that its policy was to temporarily put aside complaints dealing with issues that were currently being litigated and had not yet been resolved. But the court noted that the matter of public access to dash-cam videos had already been litigated in several cases, including a decision by the supreme court. Sending the case back to OOR for resolution, the court pointed out that "in this case, OOR has refused, improperly, to issue a determination on the merits. First, OOR's Appeals officer never explained to Requester that OOR could not decide her case without an extension of time. Second, OOR has no authority to require Requester to submit to an 'indefinite' extension. Third, and most importantly, OOR has not established that it was unable to reach a decision on the merits without an extension." (*Cynthia Diveglia v. Pennsylvania State Police*, No. 1378 C.D. 2016, Pennsylvania Commonwealth Court, Sept. 1)

Virginia

The supreme court has ruled that the trial court erred when it ordered the Department of Education to disclose student growth percentile data for certain students in Loudon County public schools because the data had not been used by the school board to evaluate teachers' performance. The trial court agreed with Brian Davison that the data was only confidential when it had been used in evaluating teachers. Not only did the trial court rule in favor of Davison, it also ordered the Loudon County School Board to pay Davison's costs as the prevailing party. The supreme court first found that the SGP data constituted teacher performance indicators that normally would be considered confidential. Examining the placement of commas in the statutory provision, the supreme court noted that "the phrase 'used by the local school board' refers solely to the phrase 'other data' and not to the phrase 'teacher performance indicators.' Read through that prism, it is only the 'other data' that must be used by the local school board in order for it to be held confidential. Actual use does not apply to teacher performance indicators." The court added that "the information in the SGPs are teacher performance indicators and disclose identifiable teacher information, including names and license numbers. We find that the SGPs requested by Davison are confidential pursuant to [the statutory provision]." Since the supreme court had ruled against Davison, it sent the issue of attorney's fees back to the trial court for reconsideration. (*Virginia Education Association v. Brian C. Davison*, No. 161017, Virginia Supreme Court, Aug. 31)

The Federal Courts…

Judge Amit Mehta has ruled that the Supreme Court's holding in *FCC v. AT&T*, 562 U.S. 397 (2011) and *Dept of Justice v. Landano*, 508 U.S. 165 (1993) placed limitations on the privacy interests of companies to such an extent that it is unclear whether the FDA can claim either **Exemption 7(C) (invasion of privacy concerning law enforcement records)** or **Exemption 7(D) (confidential sources)** to withhold information that allegedly originated from a company. The law firm of King & Spaulding, representing Abiomed, which was the subject of an investigation into whether the company had engaged in off-label marketing practices based on information received from an anonymous source, filed three FOIA requests about the investigation. Although the source had not been publicly identified, Abiomed believed the anonymous source was Maquet, a rival company. The agency withheld 67 pages in full containing information that would identify the source,

including the identity of an attorney representing the source. King & Spaulding argued that neither Exemption 7(C) or Exemption 7(D) applied because of the strictures in the *AT&T* and *Landano* decisions. Mehta agreed that more briefing was required for the agency to prove its case. He noted that in *FCC v. AT&T*, the Supreme Court held that Exemption 7(C) "does not extend to corporations," and that in *Dept of Justice v. Landano*, the Court indicated that an implied assurance of confidentiality may be more difficult to establish in cases where a "private institution" as opposed to an individual, cooperates in a criminal investigation. Sending the case back for further briefing on the issue, Mehta pointed out some of the concerns that needed to be addressed. "For example, if the source is an entity, does the outside lawyer acting on behalf of the source possess a personal privacy interest against disclosure of his or her identity, or does the lawyer lack a privacy interest because he or she is in fact acting on behalf of an entity that itself has no such interest? The same question pertains to an executive or employee who may be acting on behalf of the entity in providing information to the Government. By contrast, the identity of the source would likely have no impact on the privacy interests of Government personnel involved in the investigation of Abiomed or third-party individuals whose names happen to appear in the responsive records. As to those persons, the standard public-private interest balancing required under Exemption 7(C) would apply." (*King & Spaulding, LLP v. United States Department of Health and Human Services*, Civil Action No. 16-01616 (APM), U.S. District Court for the District of Columbia, Sept. 6)

The Ninth Circuit has ruled that the Department of Homeland Security properly withheld identifying information about 149 detainees who were released in 2013 prior to removal proceedings under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. When DHS released 2,200 individuals who were considered non-dangerous, *USA Today* submitted a FOIA request for statistical information about the released detainees. Those statistics showed that two-thirds of the released detainees had no criminal record, but also revealed that 149 detainees had been charged with more serious crimes. Based on the *USA Today* article, Edward Tuffly, treasurer of the National Border Patrol Council, the union for Border Patrol agents, requested records identifying the 149 detainees with more serious charges. DHS disclosed statistical data on the 149 detainees, but redacted identifying information under **Exemption 6 (invasion of privacy)** and Exemption 7(C). Tuffly filed suit and the district court found that the redacted information was protected under Exemption 7(C). Tuffly appealed to the Ninth Circuit. The Ninth Circuit noted that "disclosing names of the released detainees would give rise to significant privacy concerns," allowing Tuffly to "identify the individuals in question as subject to immigration enforcement proceedings and as having been previously detained." The court rejected Tuffly's contention that the public interest in disclosure was fostered by allowing the public to better understand agency decisionmaking and possibly expose government misconduct. But the court agreed that "there was a significant enough public interest in examining the success or failure of government programs to reach the balancing state of the analysis. Discovering that a government policy has deleterious consequences can be important information for the public to have, even if those consequences were unforeseeable and the government in no way acted improperly or negligently in adopting the policy. Evidence about the effects of prior policy decisions helps in evaluating the wisdom of future policy proposals. . ." The court then noted that "while that interest is significant in the abstract, here the information Tuffly seeks would only minimally advance public understanding of the government's actions." The court noted that the data on the 149 detainees was only a subset of the more than 400,000 undocumented immigrants held by DHS every year and explained that "there is no reason to think that [DHS's] release decisions in the cases involved in this FOIA request are different from the hundreds of thousands of other similar decisions [DHS] makes each year – decisions to release individuals who are less likely to commit serious crimes than are citizens of this country." The Ninth Circuit pointed out that the detainees, if identified, could become victims of harassment, discrimination or even violence and concluded that "this invasion of personal privacy is not, in this case or in this era, outweighed by the public interest." (*Edward Tuffly v. U.S. Department of Homeland Security*, No. 16-15342, U.S. Court of Appeals for the Ninth Circuit, Sept. 13)

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Judge Rudolph Contreras has ruled that U.S. Citizenship and Immigration Services properly invoked **Exemption 5 (privileges), Exemption 6 (invasion of privacy)** and **Exemption 7(E) (investigative methods and techniques)** to withhold portions of Florent Bayala's asylum application, although, after *in camera* review, Contreras concluded that the first eight paragraphs in the agency's Assessment to Refer report were not deliberative and could be disclosed. Bayala did not dispute that the Assessment to Refer was both predecisional and deliberative, but argued that the asylum officer did not have an expectation that the report would remain confidential because such Assessments had been disclosed previously. Contreras noted that "although an agency may waive the deliberative process privilege as to *a particular document* by releasing it to the public, an agency does not waive the privilege as to an entire class of documents by voluntarily releasing one document of that type." He observed that "indeed, the D.C. Circuit in *Abtew v. Dept of Homeland Security*, 808 F. 3d 895 (D.C. Cir. 2015), specifically rejected Mr. Bayala's argument here and held that an Assessment to Refer could still be withheld despite the release of other Assessments to Refer in other litigation." But after reviewing the report *in camera* Contreras pointed out that "here, the first eight paragraphs of the Assessment to Refer are a dispassionate narration of facts, similar to material which has been found segregable in other cases. The facts contained in the first eight paragraphs are presented without interpretation, characterization, or analysis by the author, and appear in chronological order." The agency argued that disclosure could reveal the way in which the asylum officer chose to include certain facts. Rejecting this claim, Contreras observed that "the first eight paragraphs of the Assessment to Refer carry no signs that they were plucked from a broader array of facts. Furthermore, even if DHS's assertion was correct, the D.C. Circuit has held that selected facts may still be segregable if – as the Court has concluded here based on its *in camera* review – they do not reveal the agency's decisionmaking process." Contreras also found the agency had properly supported its Exemption 6 and Exemption 7(E) claims. (*Florent Bayala v. United States Department of Homeland Security*, Civil Action No. 14-0007 (RC), U.S. District Court for the District of Columbia, Sept. 1)

Judge James Boasberg has ruled that the State Department and the National Archives and Records Administration must disclose virtually all of a redacted FBI declaration describing grand-jury subpoenas issued to former Secretary of State Hillary Clinton's service providers because the information has already been publicly acknowledged. On remand from the D.C. Circuit to determine if further enforcement efforts by the Attorney General under the **Federal Records Act** would yield more information about the agencies' efforts to recover deleted emails from Clinton's private email server, the dispute boiled down to whether or not the government could submit an *ex parte in camera* declaration to persuade Boasberg that the case was moot. The *in camera* declaration was submitted by FBI Special Agent E.W. Priestap, whose original unredacted declaration had provided public confirmation that grand-jury subpoenas had been sent to third-party providers. This time around, however, the government argued that it was protecting grand jury secrecy by redacting the information. Rejecting the claim, Boasberg pointed out that "this argument might have more force had Defendants not already made public that 1) the FBI issued grand-jury subpoenas to 'providers' and 2) Clinton used a "Blackberry device with service initially from Cingular Wireless and later AT&T wireless.' It is not hard to connect the dots." But he added that "there is little value in redacting those identities, with one exception: the Second Declaration states that the FBI also subpoenaed Clinton's e-mail service provider. The agency has never previously disclosed the identity of that company and thus maintains and interest in its secrecy. For plaintiffs, it should suffice to know that the FBI subpoenaed a third party (and not, as they suggest, 'Clinton's staff or attorneys')." (*Judicial Watch, Inc. v. Rex W. Tillerson*, Civil Action No. 15-785 (JEB), and *Cause of Action Institute v. Rex W. Tillerson and David S. Ferriero*, Civil Action No. 15-1068 (JEB), U.S. District Court for the District of Columbia, Aug. 31)

Judge John Bates has ruled that the FBI properly withheld seven surveillance tapes recorded in 2001-2002 of Anwar Aulaqi while he was living in the D.C. metropolitan area under **Exemption 7(E) (investigative methods and techniques)**, but that the State Department has not yet sufficiently justified whether it conducted an **adequate search** for records on Aulaqi. The day after Aulaqi was killed by a drone attack in Yemen in 2011, Judicial Watch requested all records about Aulaqi from the FBI and the State Department. The FBI disclosed 4,400 pages in full or in part, while the State Department released 448 records in full or in part, supplementing its disclosure with two additional records the FBI recovered from former Secretary of State Hillary Clinton's email server. Judicial Watch narrowed its challenges to whether the FBI could withhold the seven surveillance tapes and whether the State Department had conducted an adequate search. Judicial Watch argued that the FBI's exemption claim was undercut by the age of the surveillance tapes and the possibility that some images from the tapes could be segregated and disclosed. The FBI argued that releasing still photos from the videos would be tantamount to creating a new record. Bates rejected that claim, noting that "the Court is unconvinced that isolating portions of the videos (either in still photos or video clips) constitutes the creation of a new record." Judicial Watch contended that the age of the tapes raised doubts as to whether disclosure would risk circumvention of the law. Bates, however, pointed out that "disclosure of these 'tried-and-true techniques' would allow the surveillance targets, including those in residential neighborhoods, to develop and employ countermeasures." Turning to the State Department's search, Bates agreed with Judicial Watch that the agency had failed to explain how it conducted its search for six offices. He noted that "because the State Department has not provided for these six offices a 'reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched,' it is not entitled to summary judgment." However, Bates told State that it might well be able to show that its searches were adequate by providing supplementary affidavits. He rejected Judicial Watch's claims that the State Department had also failed to adequately explain its search terms and the time frame for its search. (*Judicial Watch, Inc. v. U.S. Department of State and Federal Bureau of Investigation*, Civil Action No. 12-893 (JDB), U.S. District Court for the District of Columbia, Sept. 6)

A federal court in Pennsylvania has ruled that the FBI may not issue a *Glomar* response neither confirming nor denying the existence of records for surveillance records pertaining to John Gilmartin, who was charged with violating anti-fraud laws by the SEC. Eric McPhail, a co-defendant, requested the records from the FBI. The agency issued a *Glomar* response and McPhail filed suit. McPhail claimed that the existence of investigatory records on Gilmartin had been publicly acknowledged when the SEC charged hm. But the FBI argued that a public acknowledgement of the existence of FBI records could only be based on an acknowledgement of the FBI itself, not another agency. The court rejected that argument. Instead, the court pointed out that the FBI "appears to argue that only the FBI can 'officially confirm or acknowledge' an investigation because any investigation must be by the FBI to violate Mr. Gilmartin's privacy interest here. Yet, Mr. Gilmartin not only knew that he was investigated by *the government* for securities fraud, he was *charged* by the government (albeit a different agency) for securities fraud. These charges against him as one of 6 co-defendants were the subject of a press release issued by the SEC, that were reported by local news outlets, and the charges were, of course, of public record. How can the FBI assert that Mr. Gilmartin has any privacy interest in precisely the same securities fraud investigation based on the precise set of circumstances at the precise time and place simply because the FBI may have participated? The law does not support this reading of the exemption." The court noted that "courts have held that under the 'officially acknowledged doctrine' as applied to *Glomar* responses, agencies lose their right to assert the response when the existence or non-existence of an investigation has been publicly disclosed *by the government*. The FBI has provided no support for the assertion that the public disclosure has to have been made by the same agency." (*Eric McPhail*

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v. Federal Bureau of Investigation, et al., Civil Action No. 16-233Erie, U.S. District Court for the Western District of Pennsylvania, Sept. 7)

A federal court in Louisiana has ruled that the Fifth Circuit's long-time exception allowing **attorney's fees** for *pro se* attorneys in *Cazalas v. Dept of Justice*, 709 F.2d 1051 (5th Cir. 1983) is no longer valid because it was implicitly overruled by the Supreme Court in *Kay v. Ehrler*, 499 U.S. 438 (1991). In *Kay*, the Supreme Court ruled that the fee-shifting provision in the Civil Rights Act was intended to allow plaintiffs to hire an attorney to represent them and that the purpose was not served by allowing attorneys representing themselves to recover fees. The D.C. Circuit ruled in *Burka v. Dept of Health and Human Services*, 142 F.3d 1286 (D.C. Cir. 1998), that the holding in *Kay* was applicable to FOIA as well. But since the Fifth Circuit's holding in *Cazalas*, which predated *Kay* by eight years, had never been challenged by the government, it remained good law. Now, ruling in a case brought by immigration attorney Michael Gahagan to collect attorney's fees for his litigation against U.S. Citizenship and Immigration Services, Judge Martin Feldman found that *Kay* impliedly overruled *Cazalas*. Feldman indicated that a post-*Kay* decision, *Texas v. Interstate Commerce Commission*, 935 F.2d 728 (5th Cir. 1991), dealing with the issue of whether attorneys for Texas were eligible for attorney's fees, suggested in dicta that any prevailing plaintiff who incurred legal fees as the result of successful FOIA litigation was eligible for a fee award. Analyzing *Kay*, Feldman observed that "what the Supreme Court impliedly held is equally clear: the same bright line rule applies to attorneys representing themselves in successful actions based on similar federal fee-shifting statutes fulfilling similar statutory policies. Statutes like FOIA." He added that "the Court is not bound by the Fifth Circuit's dicta [in *ICC*] in the face of Supreme Court precedent to the contrary. Having found that *Kay* implicitly overruled the holding of *Cazalas*, that the *ICC* panel mentioned *Cazalas*'s holding (a holding that was not essential to *ICC*'s holding) does not resurrect the holding of *Cazalas*." Although Gahagan had contended from the start that he had made the FOIA request on behalf of a client, Feldman found that was not enough. Instead, he noted that "but this does not alter the fact that his client is not named as the real party in interest, not does it alter the fact that Mr. Gahagan is, by definition, a *pro se* attorney-litigant, rendering him ineligible for attorney's fees." Feldman, however, found that Gahagan was entitled to costs of $451.47. (*Michael W. Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 16-1538, U.S. District Court for the Eastern District of Louisiana, Sept. 12)

Judge James Boasberg has ruled that the U.S. Trustee Program, which oversees bankruptcy trustees, has now sufficiently explained its **search** for records concerning former private trustee Paul Gugino and its withholding claims made under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. Allen Wisdom had filed for Chapter 7 bankruptcy in Idaho. He was assigned Gugino, who as a private trustee was not a government employee. Wisdom did not get along with Gugino, who, with the approval of the bankruptcy court, ordered Wisdom to liquidate his life insurance policies. Wisdom filed three FOIA requests with the U.S. Trustee Program for records concerning Gugino. In a prior opinion, Boasberg found the agency's explanation of its search and exemption claims was inadequate and ordered the agency to remedy its shortcomings. Wisdom complained that the agency's *Vaughn* index was inadequate because it did not explain to which of his 15 categories each document corresponded. But Boasberg noted that "although thoroughness is certainly preferable, FOIA requests are not interrogatories; as long as the Agency provided all responsive documents to all request categories and listed all those withheld, it has complied with the statute." Wisdom also argued that in his earlier opinion Boasberg has rejected the agency's exemption claims. But Boasberg pointed out that he had previously indicated that the agency had not provided sufficient justification for its exemption claims, not that they did not apply. This time, however, Boasberg agreed that the agency had now shown that both the deliberative process privilege and the attorney work-product privilege justified its Exemption 5 claims. Turning to Exemption 6, Boasberg noted that "private trustees like Gugino occupy a

position somewhere between public officials and private citizens. As a private individual, Gugino certainly has a strong privacy interest in the details of his evaluations. Even if Gugino *were* a government employee (which he is not) he would still have some privacy interest in his performance evaluation." Finding that the agency had struck the right balance in disclosing information pertinent to the agency's evaluation of Gugino while redacting more personal information, Boasberg observed that 'any further information disclosing the particulars of Gugino's evaluations would not illuminate the subject enough to overcome Gugino's privacy interest." (*Allen L. Wisdom v. United States Trustee Program*, Civil Action No. 15-1821 (JEB), U.S. District Court for the District of Columbia, Sept. 1)

Judge Rudolph Contreras has ruled that the Department of State has now shown that it conducted an **adequate search** for records concerning Lawrence Davidson's claim that the former Libyan government owed him $28 million on a contract to deliver food. Davidson, the sole proprietor of Export Strategic Alliance, tried to collect from the Libyan government without success. He then turned to the State Department for diplomatic assistance, again without success. Davidson then made three FOIA requests to the State Department for records concerning communications between him, his company, and the State Department since June 2009. He indicated he was specifically interested in investigations conducted by the Bureau of Diplomatic Security, consular assistance given to U.S. citizens in Libya, and communications with or from the U.S. Embassy in Libya that mentioned Davidson or his company. Unsatisfied with the agency's response, Davidson filed suit. Contreras granted summary judgment to the agency on the basis of its *Vaughn* index, but found the agency had inexplicably failed to explain how it processed forty documents. He told the agency to provide supplemental information for those documents not covered in its first *Vaughn* index. This time around, Contreras found the agency had rectified the previous deficiencies. Davidson argued the agency's search was inadequate because it only searched for his name and that of his company. Contreras disagreed, noting that "an agency is under no obligation to search its records for information such as aliases, unless that information is specifically requested. Furthermore, an agency is not required to search for any records that 'do not mention or specifically discuss' the subject of the request, nor is it required to divine Mr. Davidson's intent when he submitted the request." The agency withheld 10 documents in full and 30 documents in part under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. Upholding the agency's claims under the deliberative process privilege as it related to consideration of potential litigation against State by Davidson, Contreras pointed out that "before the agency had made up its mind on how to proceed, it discussed the prospect of a lawsuit, 'next steps,' and the potential for employees to be represented by the Justice Department. These communications 'were generated before the adoption of an agency policy' on the litigation at a time when the Department was actively formulating a litigation strategy and thus reflect 'the give-and-take of the consultative process.'" The Department had also claimed that some records were protected by subsection (d)(5) of the **Privacy Act**, allowing an agency to withhold records compiled in contemplation of litigation. Although Davidson had not challenged the agency's claim, Contreras reviewed it nonetheless. He noted that "many of the Department's withholdings fall squarely within the category of 'documents prepared for actions in a district court,' and are thus exempt from disclosure." (*Lawrence U. Davidson, III v. United States Department of State*, Civil Action No. 14-1358 (RC), U.S. District Court for the District of Columbia, Aug. 31)

A federal court in New Mexico has ruled that Eddie Beagles **exhausted his administrative remedies** when the Department of Labor, after acknowledging receipt of his administrative appeal, had still failed to respond to his appeal after two years. Beagles requested records about his former employer. The agency responded to his request, but withheld 18 documents. Beagles appealed that decision. The agency acknowledged receipt of the appeal, but told Beagles that his appeal would be handled on a "first in, first out"

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basis. Beagles filed suit, alleging that he had constructively exhausted his administrative remedies. The agency argued that he was required to wait until his appeal was resolved. Ruling in favor of Beagles, the court explained that while "the statute does not require actual production of documents within the statutory time frame, the Court notes that the statute *does* require the agency to 'make a *determination* with respect to any appeal.' The Court agrees with Plaintiff's argument that the DOL's response, indicating mere receipt of the appeal, is insufficient to satisfy the statute's requirement that the agency make a *determination* on the appeal and communicate that determination to the requester." The court added that "in the present case, more than 30 days has passed. Moreover, the Court finds no evidence of exceptional circumstances requiring additional time. Likewise, given the substantial amount of time that has elapsed since Plaintiff filed his appeal, the Court sees no indication that the DOL has exercised anything remotely resembling due diligence in responding to this request." The court observed that "here, the DOL had more than 2 years to provide a final determination on Plaintiff's appeal. To allow a simple acknowledgement of receipt of an appeal to satisfy the agency's statutory requirements, without any determination on the merits, thus preventing Plaintiff from exhausting his administrative remedies, creates a Catch-22." (*Eddie Beagles v. George Watkins, et al.*, Civil Action No. 16-506-KG/CG, U.S. District Court for the District of New Mexico, Sept. 6)

Judge Randolph Moss has ruled that the Secret Service conducted an **adequate search** for records containing the signatures of two individuals requested by prisoner Darryl Burke. Burke, who was convicted of bank fraud, submitted three separate requests for records pertaining to a real estate contract between two third parties, and notes taken by the Secret Service special agent about that page. Although the agency initially declined to search for the records without a third-party authorization, the agency ultimately conducted three searches of the files of the special agent involved in Burke's case, finding records that pertained to a grand jury subpoena to Wells Fargo, but were unable to locate the specific pages Burke requested. While both Burke and the agency insisted that a protective order issued in Burke's case was relevant, Moss pointed out that "the Service does not ultimately rely on that protective order in seeking summary judgment. With or without a protective order, the Secret Service cannot release records it does not have." Commenting on Burke's assertions about the effect of the protective order, Moss noted that "Burke appears to misunderstand the nature of a protective order. A protective order does not create a new class of documents that are necessarily filed and maintained separately from other documents, but rather governs how covered documents may be used and to whom they may be disclosed." (*Darryl Burke v. U.S. Department of Homeland Security*, Civil Action No. 16-1670 (RDM), U.S. District Court for the District of Columbia, Sept. 8)

A federal court in New Jersey has ruled that the FBI conducted an **adequate search** for records concerning Tokyo Gatson, whose conviction on federal charges relating to conspiracy to transport stolen property was pending on appeal, and that the agency properly asserted a number of exemptions when it withheld more than 1,500 of the 1,750 responsive pages it located. Gatson requested records about himself, the "James Bond Gang," 13 FBI agents, and his prison cellmates. The FBI split the request into two separate requests, one on Gatson, and the other on the "James Bond Gang." It used a number of Gatson's known aliases, as well as date of birth and other specific identifying information in conducting its searches. Although Gatson contended that the search was inadequate, the court found that both the search and the agency's *Vaughn* index explanations were sufficient. Because Gatson's appeal of his conviction was still pending, the court agreed with the FBI that the many of the records could be withheld under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. The court pointed out that the FBI "also states that the release of records exchanged between the FBI and other law enforcement agencies could harm pending proceedings by revealing the scope, focus, and targets of those investigations, thereby permitting suspects to potentially destroy evidence or alter their behavior." The court approved the agency's **Exemption 3 (other statutes)** claims, including Rule 6(e) on grand jury secrecy, wiretapping under Title III, the Bank Secrecy Act,

and the Pen Register Statute. The court accepted all the claims the agency made under **Exemption 7(E) (investigative methods and techniques)**, including intra-agency email addresses, private intranet web addresses, and "a secure internal email tool." Here, the court noted that "the release of this information could permit suspects to circumvent the law by gaining unauthorized access to and manipulating data within the FBI's non-public intranet. Additionally, disclosure of FBI employees' internal emails could expose them to harassing communications." (*Tokyo Gatson v. Federal Bureau of Investigation*, Civil Action No. 15-5068, U.S. District Court for the District of New Jersey, Aug. 31)

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