Volume 43, Number 19
September 27, 2017

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

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

Washington Focus: In an editorial for The Hill, Ryan Mulvey, Counsel at Cause of Action Institute, has expressed concern about the apparent willingness of the Trump administration to ignore FOIA requests to agencies for records used in preparing testimony and other materials to respond to congressional queries. While several House committee chairs have publicly emphasized that they consider records sent to Congress to be congressional records and not agency records subject to FOIA, it is still unclear what policy the Trump administration has adopted in response. Mulvey pointed to the existence of an alleged presidential directive instructing agencies "not to cooperate" with requests except those from committee chairmen. This policy was apparently backed up by a May opinion letter from the Justice Department's Office of Legal Counsel. Although Marc Short, White House Director of Legislative Affairs, called the OLC opinion letter "merely advisory," Mulvey explained that Timothy Horne, GSA Acting Administrator, testified before the House Appropriations Committee in May that the Trump administration "has instituted a new policy that matters of oversight need to be requested by the Committee chair." Mulvey warned that "these developments and the White House's continued obfuscation of its position on other transparency issues should not be ignored."

Court Finds Local Rule Protects Confidentiality of Settlement Records

On remand from the D.C. Circuit, Judge Richard Leon has once again ruled that six letters and two draft settlement agreements exchanged between the Department of Justice and the House Committee on Oversight and Government Reform in an attempt to settle litigation involving the enforcement of the Committee's subpoena for records pertaining to the agency's "Fast and Furious" operation are protected by Local Civil Rule 84.9, which provides for confidentiality of records submitted to a court-authorized mediator.

The original litigation to enforce the subpoena was heard by Judge Amy Berman Jackson. She encouraged the parties to try to reach a settlement, but told them that she did not want to

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know the substance of those discussions. Judicial Watch filed a FOIA request with DOJ for the eight records. DOJ refused to disclose them, contending that they were subject to court-ordered non-disclosure. Judicial Watch sued and Leon agreed with the agency, citing not only LCR 84.9, but also finding that Jackson's instructions on settling the case suggested that she intended them to be confidential. Judicial Watch appealed to the D.C. Circuit. There the appeals court found Jackson's statement ambiguous and ordered the agency to clarify her intent. Jackson indicated that she had not intended to order the records sealed.

But when the case came back to Leon, he ruled that LCR 84.9 still provided a sufficient basis for non-disclosure. Leon found that because Jackson had told the parties that Senior Judge Barbara Rothstein had agreed to serve as mediator if they chose to pursue that course, the fact that the parties, after failing to settle the dispute without further judicial intervention, later agreed to mediation overseen by Rothstein indicated that the earlier draft settlement records were made in connection with court-ordered mediation. Judicial Watch argued that LCR 84.9 only applied to mediation through the U.S. District Court's Mediation Program and, further, that it only applied to protect confidentiality of records during mediation.

Noting that LCR 84.9 had never been used in the FOIA context before, Leon pointed out that "in this case, it is clear that the eight documents at issue were created following Judge Jackson's encouragement to engage in settlement discussions and after her admonition that she was prepared to order formal mediation. It is thus not necessary to define a precise temporal window for the phrase 'made in connection with.' On this record the documents plainly fit within it."

Treating LCR 84.9 as a judicial prohibition against disclosure under FOIA, Leon emphasized the importance of keeping such mediation confidential. "Keeping mediation confidential is an incentive for parties to mediate. It also broadens the scope of potential solutions. If the prohibition on disclosure were immediately lifted when mediation or litigation concluded, parties that frequently find themselves in court (such as the Government) would be limited in their ability to explore creative solutions in individual cases, and one of the key benefits of mediation would be lost." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 13-1344 (RJL), U.S. District Court for the District of Columbia, Sept. 25)

Views from the States…

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

New Hampshire

The supreme court has ruled that School Administrative Unit #55 did not violate the Right to Know Law when it declined to email the minutes of a non-public session to David Taylor because its policy for disclosing electronic records required the requester to furnish a thumb drive of their own or pay $7.49 for a thumb drive from the agency. Taylor filed suit and the trial court sided with the school district. On appeal, the supreme court upheld the lower court's ruling. The supreme court noted that "because a thumb drive falls into the catch-all category of some 'other device. . .used by the public body or agency to copy the government record requested,' we conclude that the SAU's policy complies with the statute." Taylor argued that by requesting an email file he was stating his choice of formats for delivery purposes and did not expect the SAU to copy the records. But the supreme court pointed out that "the SAU's procedure requiring use of a thumb drive simply calls for the use of a different type of electronic copying." Taylor also argued that the agency, by requiring the use of a thumb drive for dissemination of electronic records, was creating barriers to

dissemination. But the supreme court observed that "although the SAU used email on a regular basis for some purposes, it has articulated legitimate cyber security concerns with regard to the use of email to respond to Right-to-Know requests." (*David K. Taylor v. School Administrative Unit #55*, No. 2016-0702, New Hampshire Supreme Court, Sept. 21)

Ohio

A court of appeals has ruled that notes prepared by a private individual hired by the Board of Trustees of Liberty Township to investigate alleged misconduct by the fire chief preparatory to his termination are public records that must be disclosed in response to requests from James Hurt. The board hired Douglas Duckett, a private attorney, to investigate misconduct charges against Fire Chief Tim Jensen. Under state law, a township board was required to investigate charges against an employee of the fire department before terminating that individual. Such an investigation could be conducted either by the fire chief or a private individual. Since the charges were made against the fire chief, the township hired a private individual. Duckett conducted 16 interviews and prepared a report that became the basis of charges against Jensen. Jensen's attorney subpoenaed Duckett's notes. The board of trustees met to consider whether or not to comply with the subpoena, but concluded that since they never had possession of Duckett's notes, they were not public records. The Board settled the case against Jensen by dismissing the charges. In return, Jensen agreed to become the Fire Prevention Officer for the Township. James Hurt requested records about Jensen's case. In response, the township claimed that Duckett's notes were not public records. Hurt filed suit and the trial court ruled in his favor. On appeal, Liberty Township continued to insist that Duckett, as a private individual, was not subject to the Public Records Act. The appeals court disagreed. The court noted that "Duckett was hired to conduct an investigation. . . To that end, Duckett prepared his reports and interviews in order to carry out the Board's public responsibilities. If a fire chief rather than a private individual conducts the investigation, then the records of the fire chief, who is a Township employee, would be accessible by the Board and subject to disclosure." Having found that the records of Duckett's investigation were public records, the appeals court concluded that "Liberty Township did not introduce sufficient evidence to establish an exemption from disclosure or that Duckett's notes did not in their own right document the organization, functions, policies, decisions, procedures, operations or other activities of the Township. . . A custodian does not meet this burden to prove that records are exempt from disclosure if it has not proven that the requested records fall squarely within the exception." (*James Hurt v. Liberty Township*, No. 17 CAI 05-0031, Ohio Court of Appeals, Fifth District, Delaware County, Sept, 22)

Pennsylvania

A court of appeals has ruled Bruce Baron does not have a separate cause of action to enforce a challenged disclosure order issued by the Office of Open Records instructing the Department of Human Services to disclose rates paid to nursing homes by managed care organizations participating in the Medical Assistance program HealthChoices. The agency notified the MCOs and based on their exemption claims denied access to the rates. Baron complained to OOR, which ordered the agency to disclose the records. However, the MCOs filed suit to challenge OOR's disclosure order. Those consolidated appeals are currently pending before the appeals court. Although he participated in the consolidated appeals litigation, Baron brought a separate mandamus action against DHS and the MCOs, asking the court to enforce OOR's disclosure order. The court found that Baron's mandamus claim was based on enforcement of the OOR disclosure order, which did not mention the MCOs, and that because Baron was involved in the consolidated appeals as well, he could not maintain a separate action for the same records against DHS. The Right to Know Law contains an automatic stay of the enforceability of an OOR order if it is appealed. Baron argued the provision was restricted to appeals by a requester or an agency, not third parties. The court of appeals rejected

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Baron's claim, finding it too restrictive. Instead, the court of appeals noted that "we construe the automatic stay provisions to apply to Direct-Interest Participants' petitions for review. To do otherwise would nullify our RTKL jurisprudence recognizing third-party appeal rights as on equal footing with that of a requester or an agency as specified in the [statute]." (*Bruce G. Baron v. Commonwealth Department of Human Services*, No. 503 M.D. 2016, Pennsylvania Commonwealth Court, Sept. 21)

South Dakota

The supreme court has ruled that the phrase "of the parties to any civil or criminal action or proceeding" modifies "contract" as well as "stipulation" in an exemption in the Public Records Act protecting any documents declared closed or confidential by court order, contract, or stipulation of the parties to any civil or criminal action or proceeding. Although the supreme court noted that the legal doctrine of the last antecedent would suggest that a modifier at the end of a clause applied only to the last term, the court concluded that allowing the City of Sioux Falls to withhold a settlement agreement with subcontractors who worked on the Denny Sanford Premier Center solely because it had been filed with a court would be contrary to the mandate for openness included in the PRA. After the Sanford Center was completed, the City raised questions about the aesthetic appearance of the exterior siding. The City reached an agreement with the contractor and four subcontractors. After one of the subcontractors disputed the terms of the agreement, a new settlement was negotiated and the City filed a complaint to enforce the agreement but did not commence a lawsuit prior to settlement. When the Argus Leader requested a copy of the settlement agreement, the City denied the request, claiming the record was protected because it had been filed with the court. The newspaper filed suit and the trial court ruled in favor of the City. Reversing that decision, the supreme court observed that "the context of [the exemption] does not indicate the Legislature intended to create a broad exception allowing the government to execute a contract declaring 'any document. . .closed or confidential.' To read [the exemption] in such a manner would be contrary to the presumption of openness." The court added that 'instead, it is clear that the context of the [exemption] contemplates documents pertaining to the judicial process rather than allowing the government to conceal 'any document' that it possesses and does not wish to disclose." (*Argus Leader Media v. Lorie Hogstad, et al.*, No. 27903, South Dakota Supreme Court, Sept. 20)

Tennessee

A court of appeals has ruled that the Jefferson County Economic Development Oversight Committee is the functional equivalent of a government agency and is subject to both the Tennessee Public Records Act and the Open Meeting Act. The JCEDOC was created when the legislative bodies of Jefferson County, Jefferson City, and Dandridge requested the Jefferson County Chamber of Commerce to create a non-profit corporation to promote economic development. As a result, it played a significant role in a megasite development plan. Although no court had previously ruled that the EDOC was equivalent to a public agency for purposes of public access to records and meetings, the appeals court found it fit comfortably within the existing case law. The appeals court observed that "if the creation of EDOC was privately-driven, as it argues, it is unclear why all three legislative bodies voted on and approved written resolutions that were clearly designed to effectuate its creation." The court indicated that the EDOC's interactions with local government "illustrates that EDOC has had a significant role in not only expending substantial public funds, but also in making decisions and recommendations of enormous economic importance to the people of Jefferson County. In light of our duty to construe [the access statutes] 'broadly to promote openness and accountability in government,' we hold that [the statutes] apply to EDOC." (*Oliver Wood, et al. v. Jefferson County Economic Development Oversight Committee, Inc.*, No. E2016-01452-COA-R3-CV, Tennessee Court of Appeals, Sept. 29)

The Federal Courts…

Judge Colleen Kollar-Kotelly has ruled that the FBI cannot issue a ***Glomar* response** neither confirming nor denying the existence of records concerning contacts the government had with Imad Hage, a Lebanese national who tried to act as a diplomatic intermediary between the U.S. and Iraq. News reports had indicated that the FBI investigated Hage as the result of an incident at Dulles Airport in 2003. David Lindsey requested records concerning Hage's contacts with the U.S. government and the FBI issued a *Glomar* response, insisting that Hage's privacy would be invaded by revealing that the FBI had any records concerning him. Lindsey appealed to OIP, which upheld the FBI's use of a *Glomar* response. Kollar-Kotelly found the agency had improperly narrowed Lindsey's request to pertain only to alleged back-channel negotiations and not to the 2003 Dulles Airport incident. Kollar-Kotelly pointed out that "a FOIA requestor does not abandon the full scope of his request merely by showing a heightened interest in some documents over others. Here, the Plaintiff has plainly asked for 'FBI records of contact between Imad Hage and U.S. government officials,' without qualification as to the types of contact. True, the record indicates that Plaintiff has a particular interest in diplomatic contacts, but even on this point, Defendant's position is dubious. Defendant seeks to distinguish contacts related to the 2003 Dulles Airport incident from the diplomatic incidents in which Plaintiff has shown a heightened interest. But from Plaintiff's perspective, which is supported by citations to credible news media, the Dulles Airport incident was part-and-parcel of the alleged diplomatic contacts. The Court offers no view on whether or not the Dulles Airport incident was, in fact, related to the alleged diplomatic contacts. But Defendant cannot summarily conclude that contacts related to the Dulles Airport incident categorically fall outside of Plaintiff's FOIA request, when the plain language of that request seeks records of *all* contacts with U.S. officials." The FBI argued that it had not publicly acknowledged its investigation of Hage. But Kollar-Kotelly observed that "regardless, the fact that the *government* has not acknowledged a potentially personal piece of information, does not mean that the *third party's* acknowledgement of that information has no bearing on the private-public interest balancing test underlying the FOIA exemptions at issue. Rather, this circuit has held that the third-party's acknowledgment has a substantial effect on that balance." Pointing out that there was evidence that Hage had publicly acknowledged contacts with both the FBI and the Defense Department, Kollar-Kotelly dismissed the FBI's claim that Hage had not specifically acknowledged publicly any contact with the FBI regarding his alleged diplomatic proposals. Kollar-Kotelly observed that "but that draws too fine a point. . .Even if Mr. Hage did not have direct contacts with the FBI regarding his alleged diplomatic entreaties to U.S. officials, records of Mr. Hage's alleged efforts may still be in the possession of the FBI, perhaps collected as part of the 'official, public interaction' that the FBI had with Mr. Hage. How the disclosure of such documents would impose upon Mr. Hage's privacy interests. . .is a position on which Defendant must substantially elaborate if it intends to continue to pursue a categorical *Glomar* response in this matter." She added that "nor can the Court simply conclude that there is *no* public interest in the subject-matter of Plaintiff's FOIA request, given the substantial record evidence of media reports from credible news agencies regarding Mr. Hage's alleged diplomatic efforts. Even a modicum of public interest may suffice to warrant disclosure, if public acknowledgements by Mr. Hage have vitiated the claimed privacy interests in this matter." (*David Austin Lindsey v. Federal Bureau of Investigation*, Civil Action No. 16-2032 (CKK), U.S. District Court for the District of Columbia, Sept. 20)

Judge Beryl Howell has ruled that the Department of Interior conducted an **adequate search** and properly withheld five documents under **Exemption 5 (privileges)** in response to a request from Taylor Energy Company for records that formed the basis for statements posted on the Bureau of Safety and Environmental Enforcement website concerning Taylor Energy's response to an incident on one of their former oil platforms in the Gulf of Mexico which was the subject of ongoing litigation with the government.

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The incident involved damage to Taylor Energy platforms in 2004 as the result of Hurricane Ivan. Taylor Energy put $666 million in trust to cover the costs of clean-up, but six years later, the company asked for permission to recover the remaining $433 million. BSEE sought legal counsel from the Department of Justice concerning Taylor Energy's request, which was denied in April 2015. Taylor Energy then sued the government in the Court of Federal Claims. After learning that BSEE had posted several documents about the clean-up of Taylor Energy's oil discharge, Taylor Energy sent identical FOIA requests to BSEE, the Bureau of Ocean Energy Management, and the U.S. Coast Guard asking for records concerning the posts. Taylor Energy filed suit after the agencies failed to respond within the statutory time limit. BSEE located 15,377 pages of responsive materials, withholding 612 pages under Exemption 5. The Coast Guard produced 473 pages of responsive records, withholding 359 pages in full and 153 pages in part. Taylor Energy challenged the adequacy of the agencies' searches and five documents withheld by BSEE and BOEM, all of which were drafts of the April 2015 memorandum related to Taylor Energy's request for return of the trust funds, as well as parts of transmittal emails. Taylor Energy challenged the search because its search terms were overly broad and BSEE "did not explain how the agency ultimately determined that over 50,000 pages were not responsive to [its] request." But Howell noted that the agency had indicated that many of the pages were duplicates or not relevant to Taylor Energy's request. Taylor Energy also complained that the agency had not searched under the authors' names. Howell responded that "simply put, the adequacy of an agency's search is judged by the methods utilized, not by the result of the search. Notably, the plaintiff does not allege that BSEE's search failed to produce *any* document containing the website text enumerated in the FOIA request, but rather that additional sources used by the authors in drafting that text may exist. The plaintiff, however, simply points to no 'positive indication' that certain materials have actually been overlooked and thus the plaintiff's claims of the search's inadequacy seem merely speculative." She added that "in the instant case, BSEE was not required to answer the plaintiff's interrogatories by taking the plaintiff's desired steps. BSEE did not search by authors' names and instead used broader search terms because the agency believed the broader search terms would produce a greater number of responsive documents." Taylor Energy challenged the application of the attorney-client privilege in several emails because some participants were not attorneys. The agency claimed the exchanges were "confidential communications between agency officials and an agency attorney, encompassing facts provided by the client, responding to the attorney's request for clarification concerning specific statements in the draft document." Howell noted that "these statements not only explain how the redacted emails involved communications with an attorney, but also clearly link the four redacted emails to the 'attorney-client relationship' that the BSEE formed with DOJ to obtain 'legal counsel' regarding the plaintiff's trust dispute. . ." Howell found the rest of the documents claimed under Exemption 5 were protected by the deliberative process privilege since they were both predecisional and deliberative. (*Taylor Energy Company LLC v. United States Department of the Interior, et al.*, Civil Action No. 16-388 (BAH), U.S. District Court for the District of Columbia, Sept. 21)

Judge Amy Berman Jackson has ruled that the EPA failed to show it conducted an **adequate search** for records concerning the design phase of its EPAct Study on fuel effects on auto emissions, but that it had properly withheld 198 records under **Exemption 5 (privileges)**, as well as withholdings made under **Exemption 4 (confidential business information)** and **Exemption 6 (invasion of privacy)**. The Urban Air Initiative and the Energy Future Coalition requested the records. The EPA disclosed more than 4,000 documents in full or in part, but the plaintiffs only challenged the agency's Exemption 5 claims. However, Jackson pointed out that the D.C, Circuit's ruling in *Winston & Strawn v. McLean*, 843 F.3d 503 (D.C. Cir. 2016), a non-FOIA procedural decision holding that the burden of proof rested with the party moving for summary judgment, required her to determine whether the agency's search was adequate, as well as the sufficiency of its Exemption 4 and Exemption 6 claims. The EPA contended that the design phase ended on March 3, 2009, but the plaintiffs argued that the design phase continued for another 37 weeks until the final vehicles were chosen for testing. Jackson sided with the plaintiffs, finding the agency had inappropriately

narrowed the date scope of the request. She pointed out that "while plaintiffs clearly narrowed their request to distinguish records related to the design of the tests to be utilized from the results of the tests themselves, the request is broad enough to cover any efforts to fine turn and finalize the design of the study that may have occurred even after some initial testing had begun. EPA's search was incomplete because, even though March 12, 2009, may have marked the start of testing, it did not necessarily signal a complete end to design." She also faulted the agency for failing to explain why it did not use certain search terms specified by the plaintiffs. She observed that "plaintiffs sought documentation related to a number of topics, many of which were included as search terms. However, some topics, such as 're-design of fuel matrices,' were not included in the search in any way, and the declaration does not attempt to explain why this is the case." Relying on *Petroleum Information Corp. v. Dept of Interior*, 976 F.2d 1429 (D.C. Cir. 1992), a case in which the D.C. Circuit ruled that public records information about properties was not privileged merely because it was inserted into a database being developed by the agency, the plaintiffs argued that Exemption 5 did not apply to the development of scientific data. Jackson found the case was not relevant to the circumstances here since Congress had given the EPA considerably more leeway on how to conduct the study of fuel effects. She noted that "all of these choices were committed to the expertise and judgment of EPA, and the fact that the internal discussions leading up to the final conclusions entailed considerations of scientific principles does not mean that those discussions were not 'deliberative.'" Jackson added that "agency personnel engaged in extended discussions and analysis in order to execute the study, and EPA did far more that merely 'reorganize and repackage a mass of dispersed public information.'" (*Urban Air Initiative, Inc., et al. v. Environmental Protection Agency*, Civil Action No. 15-1333 (ABJ), U.S. District Court for the District of Columbia, Sept. 25)

A federal court in Illinois has ruled that the FBI is not entitled to an ***Open America* stay** to respond to a request by documentary filmmaker Assia Boundaoui for records about Operation Vulgar Betrayal, a now closed investigation that used profiling and surveillance of communities based on race, religion, and ethnicity. Boundaoui's film focuses on the Arab American community in Bridgeview. The FBI located 33,120 potentially responsive records and asked the court for a stay. Rejecting the stay, Judge Thomas Durkin noted that almost a year had gone by since Boundaoui had filed her request and the agency had provided no records. Observing that "this is not due diligence," Durkin pointed out that "rather than showing 'reasonable progress in reducing its backlog,' defendants note that the backlog is becoming worse. . .This is predictable, as are the delays that increased requests cause, absent some extraordinary measure defendants would need to take, of which there's no evidence." The FBI argued that granting Boundaoui expedited processing would unfairly impact other requesters in the queue. Durkin found the argument irrelevant, noting that "unfortunately, the Court can only focus on the fairness of defendants' treatment of plaintiff, who made a proper and valid request for documents under the FOIA statute. The consequences for other requesters of an order expediting processing of plaintiff's request is something the defendants must address internally with regard to their own allocation of resources." Durkin pointed out that courts regularly imposed production schedules ranging from 1,500 to 10,000 pages per month after finding an expedited schedule was warranted. Here, he ordered the FBI to first produce a specific set of records that contained 1,649 pages and then to process the records on a rolling basis of 3,500 pages a month. Boundaoui had suggested the FBI provide an index to help her narrow the scope of her request. The FBI said there was no index and Durkin indicated that "I can't order the production of an index that does not exist. But it would seem in the government's best interests to create even a rudimentary index to allow the plaintiff to prioritize, which may lead to a narrowing of the requests and then ultimately decrease the burden on defendants." (*Assia Boundaoui v. Federal Bureau of Investigation*, Civil Action No. 17-4782, U.S. District Court for the Northern District of Illinois, Sept. 26)

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Wrapping up a 10-year-old case, Senior Judge Frederick Scullin of the Northern District of New York has ruled that while a number of **Exemption 5 (privileges)** claims made by the Defense Department for records pertaining to ethical issues for medical professionals interrogating prisoners and detainees are sufficient, the agency failed to adequately support other claims. Ruling on a series of claims of deliberative process privilege or attorney-client privilege, Scullin noted that parts of a memo discussing talking points for training medical professionals in detainee operations were not deliberative. He pointed out that "commenting on another agency's training format is not deliberative, but rather explanatory. Although information that compares the sister service's training program to Defendant's own training program might possibly be described as deliberative, Defendant has not made this showing," Finding that another description also fell short, Scullin indicated that "Defendant merely labels this document 'draft guidance for policy and procedures for medical support of detainee operations.' There is no factual basis to support Defendant's claim." He also was skeptical of a redaction in an email discussing a *Washington Post* article. He observed that "although some of the material in the email may be privileged attorney-client communication, the context and the inclusion of the *Washington Post* article give this Court pause regarding whether Defendant properly segregated any factual material or general commentary regarding the article." (*M. Gregg Bloche, M.D. and Jonathan Marks v. Department of Defense, et al.*, Civil Action No. 07-2050 (FJS), U.S. District Court for the District of Columbia, Sept. 18)

A federal court in New York has ruled that the Department of Homeland Security conducted an **adequate search** for records of unclaimed funds in the amount of $25,000 or more in response to a request from tracer Bernard Gelb. The agency determined that U.S. Immigration and Customs Enforcement was the only component that would maintain such deposits. ICE told Gelb it could conduct a manual search for unclaimed fund deposits in excess of $25,000, but that the search would cost $4,264. Gelb declined to pay the estimated fee and filed suit instead. During the litigation, the agency disclosed a two-page list of unclaimed immigration bonds. The agency disclosed the list with all personal information redacted. The court found the agency's search was adequate, indicating that the agency had concluded that ICE was the only component that would have responsive records and that Gelb had declined to commit to paying fees when the agency provided an estimate. The court also found the personally-identifying information had been properly withheld under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The court rejected Gelb's contention that DHS has failed to show that some individuals might be deceased. Instead, the court pointed out that "there is no basis to presume that the records for the period in question involved detainees who were at least ninety-one years old in 2008. Moreover, as ICE's *Vaughn* index makes clear, Exemptions 6 and 7(C) were applied to redact certain information about 'individuals,' and not businesses." (*Bernard Gelb v. United States Department of Homeland Security, et al.*, Civil Action No. 15-6495 (RWS), U.S. District Court for the Southern District of New York, Sept. 15)

A federal court in Louisiana has once again ruled that immigration attorney Michael Gahagan is not entitled to **attorney's fees** as a *pro se* attorney, although he is entitled to costs. After Judge Martin Feldman of the Eastern District of Louisiana recently ruled that *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), another judge in the district has found that Gahagan is not entitled to attorney's fees for litigation he brought against the Department of Justice for records of a disciplinary complaint made against him by a DOJ attorney. Finding that Feldman's decision was dispositive, Judge Kurt Engelhardt nevertheless noted that Gahagan was entitled to $506 in costs because his litigation caused the agency to disclose the records. He pointed out that "although Plaintiff certainly had a personal and commercial interest in obtaining the requested information, the public's interests in the administration of justice and the availability of experienced immigration lawyers likewise were served by Plaintiff's pursuit of judicial relief relative to his FOIA request

and by the Court's resulting directives. Plaintiff's information requests and this litigation also have provided important information to the public regarding the pertinent department's record-keeping systems and clarified necessary search parameters and protocol." (*Michael Gahagan v. United States Department of Justice, et al.*, Civil Action No. 13-05526-KDE-DEK, U.S. District Court for the District of Eastern Louisiana, Sept. 20)

Judge Emmet Sullivan has ruled that the IRS conducted an **adequate search** for records concerning procedures for church tax inquires or examinations, referred to as the § 7611 regulations. The Alliance Defending Freedom requested the records. The agency searched the legal file created for the § 7611 regulation project, the file associated with the Notice of Proposed Rulemaking for the § 7611 regulation, the archive for the revision of the section of the Internal Revenue Manual relating to church tax inquiries and examinations, and other custodians determined to potentially have responsive records. The IRS identified 16,439 pages of documents potentially responsive to ADF's request, withheld10,672 pages and released the rest in full or in part. ADF's sole challenge was to the adequacy of the search, arguing that the agency should have searched more broadly offices of higher level IRS policymakers. Sullivan accepted the agency's explanation of the thoroughness of its search. He noted that "when faced with ADF's concern that additional documents may exist outside of the IRS Office of Associate Chief Counsel, the IRS explained in its affidavit that the IRS Office of Associate Chief Counsel is '*solely* responsible for issuing published guidance, including regulations.' Moreover at the Chief Counsel Directives Manual makes clear, the Associate Office responsible for drafting the particular regulation is also responsible for creating a legal file that contains '*all* documents related to the publication of the regulations.' Here, because the § 7611 regulation fell within the jurisdiction assigned to the Associate Chief Counsel Office, that office was responsible for maintaining the legal file associated with that regulation." Rejecting ADF's second contention that the agency failed to search the records of higher level policymakers, Sullivan pointed out that "any such files, if they exist, should be in the legal file, which must contain [all policy reports, memos, and internal comments]. The fact that no such memoranda were found, absent some other compelling evidence that the documents exist or of bad faith on the part of the agency, 'does not undermine the finding that the agency conducted a reasonable search for them.'" (*Alliance Defending Freedom v. Internal Revenue Service*, Civil Action No. 15-525 (EGS), U.S. District Court for the District of Columbia, Sept. 27)

Judge Ketanji Brown Jackson has ruled that the Department of Homeland Security and the CIA properly responded to William MacLeod's broad requests for records. MacLeod, a Canadian citizen, applied twice for a NEXUS card, which allows for expedited customs processing when crossing the border between the United States and Canada. In his youth, MacLeod had been convicted of threatening bodily harm. As a result of that conviction, U.S Customs and Border Protection rejected his applications for a NEXUS card. MacLeod filed suit pro se to challenge the denial. Because he had also filed FOIA requests with the Department of Homeland Security and the CIA, and contended that he had sent requests to the National Security Agency and the General Services Administration, although neither agency could find a record of having requests a request from him, he included claims against those agencies under FOIA as well. In challenging the denial of his application for a NEXUS card, MacLeod contended that his conviction should have been expunged by Canada and that he had a constitutionally-based right to travel between Canada and the United States. Jackson found none of his arguments relevant to whether or not CBP improperly denied his application and dismissed the charges. Although none of the FOIA requests related directly to the denial of his NEXUS application, Jackson found the agencies had done nothing wrong in handling his requests. Both the NSA and the GSA provided affidavits explaining that they never received MacLeod's requests and since MacLeod had provided no evidence to contradict those claims, Jackson accepted their explanations. MacLeod claimed to be a Member of Parliament and argued he should have a diplomatic status. Nevertheless, after

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conducting a search, U.S. Citizenship and Immigration Services found no records. Jackson observed that "having made the unrebutted representation that it does not maintain the records that MacLeod requested, DHS is likewise entitled to summary judgment on MacLeod's FOIA claim." DHS subsequently decided that the Department of State might have relevant records and referred the request there. State declined to process the request unless MacLeod made the request directly to State and DHS explained that situation to Jackson. The CIA had rejected MacLeod's request as too broad. Jackson agreed, noting that "the agency is right to assert that a plaintiff who has not presented a reasonably specific request for documents, in violation of that agency's own FOIA regulations, can also be conceived of as having failed to exhaust available administrative remedies prior to bringing suit." She added that "it is clear on the face of MacLeod's letter that the categories of records he seeks are not at all specific, and the records sought are far from reasonably described." (*William Dale MacLeod v. United States Department of Homeland Security, et al.*, Civil Action No. 15-1792 (KBJ), U.S. District Court for the District of Columbia, Sept. 21)

Judge Reggie Walton has ruled that the Bureau of Alcohol, Tobacco and Firearms conducted an **adequate search** for an alleged tape-recorded confession obtained during the investigation and conviction of David Wilson for a double murder in Washington, D.C. After searching its TECS and N-Force databases, the Bureau located no records. It also searched its Washington Field Office, but found no records. It queried the National Archives to determine whether or not NARA could locate records without a NARA transmittal form and was told that the agency could not locate the records without more information. Wilson argued that the search was inadequate. Walton noted that "based on these considerable details, the Court is satisfied that the Bureau conducted an adequate search reasonably calculated to uncover the requested records, even though its search yielded no responsive documents. Although not expressed exactly as the plaintiff would like, [the agency's] declaration provides that the Bureau searched all sources likely to uncover responsive documents and searched those sources using all the information provided by the plaintiff within the parameters established for searching those sources. Contrary to the plaintiff's assertion, the fact that the Bureau did not uncover any responsive records despite these efforts does not undermine the adequacy of the Bureau's search and its search methods, given the extensive details outlined in [the agency's] declaration." (*David Wilson v. U.S. Department of Justice, et al.*, Civil Action No. 16-1015 (RBW), U.S. District Court for the District of Columbia, Sept. 18)

Judge Randolph Contreras has ruled that the Bureau of Alcohol, Tobacco and Firearms, the DEA, and the Justice Department's Criminal Division conducted **adequate searches** for records about Calvin Hall and that the Bureau of Prisons properly told Hall that his request was too vague for it to search. But because it was unclear whether or not Hall had provided an authentication form to EOUSA, Contreras declined to rule on that agency's summary judgment motion. BATF and DEA told Hall that they had conducted a search and found no records. The Criminal Division told Hall that it had transferred his request to EOUSA after deciding that while the Criminal Division did not have any responsive records, EOUSA might have responsive records. Hall's request had already been referred to EOUSA by the Office of Information Policy. In response to that direct referral, EOUSA told Hall it would not process his request without a certification of identity. BOP told Hall his request was too vague and he did not appeal that decision. Contreras found that the searches conducted by BATF, DEA, and the Criminal Division's were adequate. He also agreed that Hall had **failed to exhaust administrative remedies** as to BOP because he had not appealed the agency's decision that his request was too vague. Turning to EOUSA's decision not to process Hall's request without a certification of identity, however, Contreras pointed out that Hall had filled out a certificate of identity in response to a query from the Criminal Division and that certificate should have been provided to EOUSA when Criminal referred Hall's request there. He noted that "EOUSA has not indicated what, if anything, it did with the request itself that the Criminal Division re-directed to it. If nothing, that un-responded to request may be ripe for

consideration by this Court as having exceeded the statutory time periods and, thus, having been constructively exhausted." (*Calvin James Hall v. U.S. Department of Justice*, Civil Action No. 16-1591 (RC), U.S. District Court for the District of Columbia, Sept. 19)

Judge James Boasberg has ruled that a FOIA request filed by Freedom Watch to the Criminal Division at the Department of Justice asking for "any and all documents and records as defined. . .which constitute, refer, or relate in any way to any memoranda prepared, written and/or issued by former FBI Director James Comey concerning Barack Obama, Hillary Clinton, Bill Clinton, Lieutenant General Michael Flynn, and President Donald Trump" is too vague to search and, since Freedom Watch did not file an administrative appeal, should be dismissed for **failure to exhaust administrative remedies**. Boasberg emphasized that exhaustion was "not merely [a formality] to be routinely ignored, some unseemly morass of bureaucratic red tape," but that "rather 'exhaustion has long been required in FOIA cases' as a core component of 'orderly procedure and good administration.'" He noted that "in this case, DOJ's regulations require that a requester 'describe the records sought in sufficient detail to enable Department personnel to locate them with a reasonable amount of effort.'" He observed that "as the D.C. Circuit recently held, such upfront procedures are permissible as long as they are 'reasonable.' They clearly are in this case." He pointed out that "here, Justice concluded that the language 'relate in any way to' certain Comey memos was too vague. Courts in this district have agreed with such an appraisal, including in cases involving the same Plaintiff." Dismissing the case, he indicated that "of course, Justice gave Freedom Watch the opportunity to narrow or rephrase its request, but Plaintiff never accepted the invitation." (*Cable News Network, Inc. v. Federal Bureau of Investigation*, Civil Action No. 17-1167 (JEB), U.S. District Court for the District of Columbia, Sept. 22)

Judge Reggie Walton has ruled that George Houser's failure to appeal the IRS's initial determination on his request because he did not receive it in prison does not prevent him from pressing that claim. However, Walton also found that Houser's claims for expedited processing and a fee waiver were **moot** because the agency had already responded to his request without charging any fees and that the agency had no obligation to further explain the records to him. Houser was convicted of health care and tax fraud. He sent a request to the IRS for records about himself and five corporate entities. The agency initially refused to process his request without an affirmation subject to perjury. After receiving such an authorization, the agency processed his request and sent him an encrypted CD containing responsive information. However, since BOP did not allow prisoners to have encrypted documents, the prison did not provide the CD to Houser. Instead, the agency subsequently provided him with hard-copies of the records. Asking Walton to dismiss Houser's suit, the agency argued that Houser failed to appeal its initial determination dated February 24, 2016. Houser argued that he never received the February 2016 letter until January 2017. Refusing to dismiss the count, Walton noted that "the plaintiff has submitted declarations sufficient to show that there is a genuine issue of material fact as to when he received the IRS's February 24, 2016 determination letter. Exhaustion is not a jurisdictional prerequisite, and in the circumstances of this case, the plaintiff cannot be expected to have pursued an administrative appeal of an agency determination he had not received prior to filing this lawsuit. Walton dismissed Houser's challenge to expedited processing "because the IRS already has processed the plaintiff's FOIA request, this Court no longer may entertain the plaintiff's request for expedited processing of that request." Rejecting Houser's fee waiver claim, he added that 'the IRS has processed the plaintiff's FOIA request and has released responsive records at no cost to the plaintiff." Walton also dismissed Houser's claim to force the agency to better explain the documents. Here, he pointed out that Houser "essentially demands an explanation from the IRS regarding the processing of his FOIA request. The plaintiff is therefore attempting not only to expand the scope of this FOIA case, but he is also requesting that the IRS create documents by responding to this request. The FOIA does not require either action on the part of the IRS. . ." (*George D.*

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Houser v. Diana Church, et al., Civil Action No. 16-1142 (RBW), U.S. District Court for the District of Columbia, Sept. 22)

Judge John Bates has ruled that the Department of Veterans Affairs properly responded to Tyrone Murray's request for his claims file, but that because Murray **failed to exhaust his administrative remedies** by appealing the agency's decision not to correct his records, he cannot pursue any **Privacy Act** claim he may have had to force the agency to amend his records. Although Murray characterized his suit as having been brought under the Privacy Act and not FOIA, Bates noted that the agency properly processed his request for records, which seemed to include a request for information about his son, under both the Privacy Act and FOIA. Bates observed that "Plaintiff's arguments [that his claim was solely under the Privacy Act] are simply untenable. The complaint arises from the VA's responses to a 'Request for Documents,' and it identifies both the FOIA and the Privacy Act as the bases for jurisdiction." Explaining that he was dismissing Murray's claim alleging that his records contained false information for failure to state a claim, Bates pointed out that "'the problem is that plaintiff has failed to clearly identify those documents and show that he 'asked the VA to amend any of his records' before filing suit and was denied amendment; consequently, 'he has failed to state a claim for a violation of the Privacy Act's amendment provision.'" (*Tyrone E. Murray v. David J. Shulkin*, Civil Action No. 16-2295 (JDB), U.S. District Court for the District of Columbia, Sept. 19)

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