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Washington Focus: After Judge Katherine Failla of the Southern District of New York ordered the Secret Service to turn over non-exempt portions of visitors' logs for President Trump's Mar-a-Lago resort in Florida, the agency has now told Failla that there are virtually no records and those that do exist are presidential records, not agency records. Writing in POLITICO, Josh Gerstein explained that the only record produced by the agency was a two-page list of 22 members of the delegation of Japanese Prime Minister Shinzo Abe during his visit in February. Although the plaintiffs – the National Security Archive, CREW, and the Knight First Amendment Institute – asked Failla to sanction the agency, Failla declined to do so. She noted that "having reviewed the parties' submissions, the Court shares Plaintiffs' surprise with the extent of Defendants' production; however, the Court is unable to find that Plaintiffs have set forth sufficient grounds for the Court to impose sanctions or issue an order to show cause."

Court Orders Trial to Settle Dispute Over Risk of Circumvention

To settle a dispute between TRAC and U.S. Immigration and Customs Enforcement as to whether disclosing metadata and database schema for its Enforcement Integration Database and its Integrated Decision Support Database, used to manage cases pertaining to the detention of undocumented immigrants, could lead to a risk of circumvention of the law as to qualify for protection under Exemption 7(E) (investigative methods and techniques), Judge Amit Mehta has set the case for trial. Since FOIA cases are almost always settled based on the parties' briefs, the need to hold an actual trial with witnesses is nearly unheard of. Making this case even rarer, the handful of cases that do go to trial almost always concern Exemption 4 (confidential business information), not Exemption 7(E). Nevertheless, sometimes a trial is the only way to ultimately settle a disputed issue.

TRAC was forced to file suit after ICE decided to no longer disclose the data sometime after 2010, even though the agency had provided essentially the same data before that time. Previously, TRAC had regularly submitted FOIA requests

covering current timeframes and the agency had released data that satisfied TRAC's requests. TRAC's lawsuit covered seven separate FOIA requests, only three of which were still in dispute. The agency withheld the metadata and database schema under Exemption 7(E), claiming that disclosure of the data from either database would risk a Structured Query Language (SQL) injection attack. TRAC argued that disclosure of the data could not result in an SQL injection attack because that type of attack requires a direct connection to a database and neither the EID nor the IIDS are publicly accessible.

In his previous ruling, Mehta had agreed that the data qualified under the threshold requirement for Exemption 7 – that the information was created or compiled for law enforcement purposes – but found that the agency had not shown that disclosure could reasonably risk circumvention of the law and, in light of TRAC's contention that such an attack was not possible, ordered the agency to provide a more detailed explanation of its claim. This time, the agency argued that disclosure would risk circumvention of law "because disclosing that information would make it easier for hackers to create convincing e-mails that lull unsuspecting, authorized users to click on nefarious links or attachments, also known as phishing, or spear phishing attacks, and inadvertently allow hackers to access the system and/or steal users' credentials."

Acknowledging that the D.C. Circuit's caselaw on Exemption 7(E) set a low bar for claiming the exemption, Mehta pointed out that "nonetheless, the Government cannot simply cite Exemption 7(E) and expect the court to rubber stamp its withholdings. At a minimum, the Government must show that its stated expectation of risk is reasonable." Rather than focus on the SQL injection attack that had been at the heart of its argument previously, the agency now focused on how a phishing attack might allow a hacker to gain entry. The agency told Mehta that "the information Plaintiffs requested would undermine its 'defense in depth' security strategy, in which it buries information about the system to prevent attackers from having the information that allows them to mount successful phishing and spear-phishing attacks. Additionally, release of this information would place other agencies' systems at risk, because once one system suffers a successful hack, any other connected system also can be breached." The agency also insisted that any prior disclosure of this information had been entirely "inadvertent." TRAC responded that "hackers do not need the metadata and database schema to launch an e-mail-based attack, but even if that information was disclosed, any risk of circumvention of law still depends on Defendant's system having some external access point, such as a web-based interface or internet connection, that would allow the hacker to remotely access or control the system – which the Defendant's system does not have." TRAC also pointed out that the agency had provided the data on at least 100 occasions and was still disclosing it currently. TRAC concluded that "any expected risk of circumvention of law is not 'reasonable,' given the agency's consistent and fulsome release of this information for roughly the last ten years, including throughout the length of this litigation."

Faced with these contrary positions, Mehta observed that "summary judgment is inappropriate because Defendant's affidavits do not state in any level of detail how a hacker could access a system with no external access point, and Plaintiffs have introduced specific facts that contradict Defendant's statements that all prior releases of this information were inadvertent. These uncertainties on the record create a triable issue of fact as to the reasonableness of Defendant's expectation of risk of circumvention of the law."

Mehta was puzzled as to whether or not such an attack could possibly be successful if there was no way for hackers to gain external access. He pointed out that "these questions are material because Defendant's argument centers on the fact that a circumvention of law only occurs when the hacker *accesses* the database. If there is no means of accessing the database, then Defendant's expectation that disclosure of the EID and IIDS metadata and database schema will risk circumvention of the law is not reasonable. Although Defendant continuously repeats that access to the EID is possible even in the absence of an external access point, Defendant has offered no explanation for how that would occur. At most, Defendant indicates that disclosure of the withheld materials would allow a hacker to study the database. But what then? The court could infer

from Defendant's submissions that the EID is connected to another government database that has an external access point and that interconnection makes the EID vulnerable, but that is impermissible speculation on the court's part. Defendant has not identified any database that is connected to the EID, has an external access point, and is vulnerable to attack."

Mehta was also concerned about the agency's insistence that any disclosures were inadvertent, while TRAC provided evidence that the same data had been disclosed for the past ten years. He noted that "Plaintiff's representations that Defendant not only has disclosed large amounts of functionally indistinguishable information to that being currently withheld, but also has done so for nearly ten years – with the most recent disclosure occurring in February 2017 – directly contravenes Defendant's statement that the disclosures of the EID and IIDS metadata and database schema was entirely 'inadvertent' and the agency has acted to prevent such disclosures since June 2013." He observed that "these disputed facts are material because if Defendant has been knowingly and intentionally disclosing EID and IIDS metadata and database schema for year, including during the present litigation, then that would call into question the reasonableness of Defendant's expectation that disclosure of the presently withheld information could contribute to or increase the risk of phishing, spear phishing, APT attacks, or SQL attacks." He pointed out that if that were the case, then "it arguably would be patently *unreasonable* to claim an expected risk of attack from disclosing the presently withheld materials." (*Susan B. Long, et al. v. Immigration and Customs Enforcement, et al.*, Civil Action No. 14-00109 (APM), U.S. District Court for the District of Columbia, Sept. 29)

Views from the States…

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

Kentucky

The supreme court has ruled that the City of Danville improperly closed a meeting to discuss the price it was willing to pay for a building it had leased to house its public works department at an absolute auction, but the supreme court reversed the appeals court's finding that the violation was intentional. An exemption in the Open Meetings Act allows public bodies to go into closed session to discuss potential real estate purchases if public knowledge that the municipality is interested in purchasing the property could adversely affect its purchase price. When the Boyle Industrial Storage Company property the City had been leasing came up for sale at an absolute auction, the Board of Commissioners went into closed session to discuss purchasing the property and agreed to authorize an agent acting on behalf of the City to bid up to $1.5 million, which was the appraised value in 2007. The next week, the Danville mayor signed a confidential agreement with an agent providing a 10 percent buyer's premium if successful, meaning the City would bid no higher than $1.3 million to accommodate the buyer's commission of $136,364. At auction, the agent purchased the property for $1.2 million and was paid a commission of $123,750. At its next public meeting, the Board went into closed session and approved the purchase of the property. At its next meeting, the Board publicly announced the purchase for the first time. The Danville Advocate-Messenger complained to the Attorney General's Office, which found the City had violated the OMA. The Board filed suit and the trial court sided with the newspaper, but denying its request for attorney's fees after finding the City's actions were not an intentional violation. The case then went to the court of appeals, which upheld the violation, but found the City's actions constituted an intentional violation. The supreme court pointed out that because the property was sold at an absolute auction at which the property would be sold to the highest bidder, public knowledge that the City was

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interested in purchasing the property would not have affected the price. The supreme court noted that "the City's interest in bidding on the property could have been discussed in open session, giving all citizens an opportunity to discuss the idea without affecting the value of the property, to the City's detriment. The closed portion of the meeting, we believe, could have been used to discuss bidding strategy and the maximum price the mayor, or any other bidding agent, would have been authorized to bid." The supreme court added that "the Board's post-auction approvals, albeit conducted in public, were window-dressing because. . . the City was already compelled to complete the purchase – or answer a complaint for specific performance." The supreme court found the City's violation was not intentional. The supreme court observed that "the exception relating to real property acquisition directs its focus to avoiding publicity which could affect value. In hindsight, a public discussion and concomitant decision to bid, without public disclosure of the maximum bid the Board would authorize, would have satisfied the Act's requirements." (*Board of Commissioners of the City of Danville v. Advocate Communications, Inc.*, No. 2016-SC-000280-DG, Kentucky Supreme Court, Sept. 28)

New York

A trial court has ruled that the Board of Education of the East Ramapo Central School District violated the Open Meetings Law when it failed to provide adequate notice that the termination of bus drivers was slated to be discussed in closed session under an agenda item identified as "Routine Matters." According to minutes of the Board's meetings, the termination of bus drivers was scheduled under "Routine Matters" for a prior meeting, at which an attorney from the New York State Union of Teachers, representing the East Ramapo Employees Union, spoke to the Board about the proposed termination of the bus drivers. The Board went into executive session at the end of its next regularly-scheduled meeting and voted to terminate 20 bus drivers. The minutes of that meeting reflected that the Board had received a number of written comments about the proposed termination and that an attorney from the NYSUT also addressed the Board. The Board had received a Freedom of Information Law request prior to the first meeting for records concerning its transportation services. After the termination at the subsequent board meeting, the Board received three FOIL requests for further records pertaining to transportation services. The local union then filed suit after the Board failed to respond to its FOIL request. The court found the Board had failed to adequately describe the nature of its closed discussions by merely reciting to "litigation, personnel, real estate, and contract" as the basis for its closed session. The court pointed out that "without describing with some detail the nature of the proposed discussions, the Board of Education has done exactly what the Open Meetings Law was designed to prevent." The court added that "as a result, the public lacks the ability to determine whether the subjects may properly be considered in private." As a result, the court ruled that the termination of the bus drivers was void. The court also found that the plaintiffs were entitled to attorney's fees. (*In the Matter of the Application of Eugene Lucas, as President, East Ramapo, Transportation Special Services and Security Employee Union, et al. v. Board of Education of the East Ramapo Central School District*, No. 1640-2014, New York Supreme Court, Rockland County, Oct. 5)

Pennsylvania

A court of appeals has ruled that the Department of Human Services is not required to disclose rates paid to nursing homes by managed care organizations participating in the Medical Assistance program HealthChoices because they are not agency records. The case stems from a suit filed by Bruce Baron for access to rates paid by MCOs to nursing homes. The agency notified the MCOs and based on their exemption claims denied access to the rates. Baron complained to the Office of Open Records, which ordered the agency to disclose the records. However, the MCOs filed suit to challenge OOR's disclosure order. Recently, the court of appeals rejected another suit filed by Baron trying to enforce the OOR disclosure order. In that case, the court found that because the consolidated appeals were pending before the appeals court, and Baron had

participated in the consolidated appeals litigation, Baron did not have a separate cause of action to enforce the OOR order. In deciding that the nursing home rates could be disclosed, OOR relied heavily on the similar decision by the supreme court, *Dept of Public Welfare v. Eiseman*, 125 A.3d 19 (2015), in which the court ruled that while data concerning rates paid by MCOs to service providers were proprietary, to the extent that such data was provided to the government it constituted financial records subject to disclosure. The appeals court, however, explained that OOR had read too much into *Eiseman*. The appeals court pointed out that "OOR likened this case to *Eiseman* without acknowledging that our Supreme Court presumed DHS' possession, and such possession was a prerequisite for its holding. . .In stark contrast to *Eiseman*, here the credited evidence proves that the Requested Rates were not submitted to DHS, much less approved by DHS. OOR overlooked this material distinction that renders *Eiseman* inapplicable." To prevail, the court indicated that Baron needed to show that DHS had constructive possession of the financial records. Here the court noted that Baron "fails to establish that the Requested Rates, which are unknown to and not used by DHS in performing its functions, are an essential component of any account, voucher, or contract. Additionally, because the Requested Rates are not financial records under *Eiseman*, OOR erred in holding they were subject to disclosure on that basis." Because OOR had not considered whether the Requested Rates related to the MCOs performing a governmental function under the HealthChoices contract, the court sent the case back to OOR for further determination. (*United Healthcare of Pennsylvania, Inc, et al. v. Bruce Baron*, No. 1357 C.D. 2016, No. 1358 C.D. 2016, and No. 1427 C.D. 2016, Pennsylvania Commonwealth Court, Oct. 5)

The Federal Courts…

Judge Tanya Chutkan has ruled that the FBI properly withheld records concerning the identity of the company that provided the software that allowed the agency to hack into an iPhone belonging to the San Bernardino terrorist and the amount of money the agency paid the company under **Exemption 1 (national security), Exemption 3 (other statutes)**, and **Exemption 7(E) (investigative methods and techniques)**, but the information does not qualify under **Exemption 4 (confidential business information)**. In December 2015, Syed Rizwan Farook and Tashfeen Malik killed 14 people and injured 22 others in an attack on the Inland Regional Center in San Bernardino. Farook and Malik were both killed by the police, but a company-owned iPhone assigned to Farook was discovered. However, the iPhone was password-protected and set to delete its contents after ten failed attempts to enter the correct password. The FBI filed suit against Apple to force it to provide access to the phone. Apple refused to do so, but while the case was ongoing, the FBI announced it had found an alternative way to get into the phone and dropped its suit against Apple. Then-FBI Director James Comey told reporters that the cost of the tool was more than his salary due at the end of his term, about $1.2 million, and that the tool only worked on an iPhone 5C operating on IOS 9 and the FBI had not identified any other phones on which the tool could be used. The Associated Press, *USA Today*, and Vice News all filed FOIA requests for information about the identity of the third-party company. The FBI initially claimed **Exemption 7(A) (interference with ongoing investigation or proceeding)**. After the media requesters filed suit, the FBI disclosed 100 of 123 responsive pages in full or in part. The plaintiffs challenged only the withholding of the identity of the vendor and the amount paid to the vendor for the tool in question. The FBI argued that disclosure of these two pieces of information could harm national security by providing potential adversaries insight into the resources the agency was willing to commit to such cyber-security needs. Chutkan agreed, noting that "this line of reasoning logically and plausibly demonstrates how the FBI could reasonably expect the release of the vendor's identity to cause identifiable harm to national security. If an adversary were determined to learn more information about the iPhone hacking tool the FBI acquired, it is certainly logical that the release of the name of the company that created the tool could provide insight into the tool's technological design. Adversaries could use this information to enhance their own encryption

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technologies to better guard against this tool or tools the vendor develops for the FBI in the future." The plaintiffs contended that if the tool was so important to national security it made no sense to allow the company to retain custody of it. Chutkan observed that "but the vendor may continue to possess the tool for any number of reasons related to national security interests, and even if the possibility of an attack on the vendor's system is remote, the FBI has still demonstrated a logically reasonable risk of harm to national security in this respect." The plaintiffs also argued that since Comey had publicly indicated that the tool had limited use, groups trying to evade detection could just use another kind of communication device. However, Chutkan pointed out that "this overlooks the tool's potentially valuable technical capabilities. The FBI may find a way to enhance the tool's capabilities, choose to continue using advanced versions of similar technology in the future, or re-employ the vendor to develop another similar product." The plaintiffs argued that Comey's comments had constituted a public acknowledgment of the cost, particularly in light of the fact that Sen. Diane Feinstein (D-CA) had additionally suggested that the cost was $900,000. Chutkan found Feinstein's comments did not support the plaintiffs' case. She pointed out that "Director Comey did not acknowledge or verify Sen. Feinstein's comment, and Comey's testimony therefore fails the third element of the [public acknowledgment] test, since the information was not made public through an *agency's* official disclosure." Since the FBI's Exemption 3 claim paralleled its Exemption 1 claim, once Chutkan concluded the information was protected under Exemption 1 it became evident that it was protected by Exemption 3 as well. For essentially the same reasons, Chutkan found the identity of the vendor and the price the agency paid for the tool fell under Exemption 7(E) as well. Although the plaintiffs argued that the tool's value was limited to a certain type of iPhone, Chutkan pointed out that "this overlooks the tool's potential value to the FBI in future iterations of the technology, and Plaintiffs themselves acknowledge that Exemption 7(E) presents a low bar for the agency." Chutkan was sympathetic to the FBI's Exemption 4 claim, but indicated that "since there is no evidence that any actual competition exists over current or future contracts, the FBI has failed to demonstrate that the vendor actually faces competition." (*Associated Press, et al. v. Federal Bureau of Investigation*, Civil Action No. 16-1850 (TSC), U.S. District Court for the District of Columbia, Sept. 30)

Judge Beryl Howell has ruled that the EPA has not yet shown that it conducted an **adequate search** for records pertaining to its decision finding that Enlist Duo, a herbicide manufactured by Dow AgriSciences, would have no effect on endangered species living in a 16-state area, nor has it provided sufficient support for its exemption claims. In response to two FOIA requests from the Center for Biological Diversity, the agency conducted three searches for electronic and paper records. Its first search focused on the Environmental Fate and Effect Division within the Office of Pesticide Programs and involved seven custodians. The second search included six custodians in the Office of General Counsel, as well as two more custodians in the Office of Pesticide Programs' Registration Division. A year later, a supplemental search was conducted by the four attorneys in OGC and the two OPP Registration Division employees. EPA disclosed at least 138 documents and withheld 150 emails under **Exemption 5 (privileges)**. Howell faulted the EPA's use of the CBD's FOIA requests as the cut-off date for searches. She indicated that "EPA has articulated no compelling justification for using either September 26, 2014, or October 20, 2014, as a cut-off date for searches of records responsive to CBD's requests. Although October 20, 2014 may have been 'convenient' due to a large number of similar FOIA requests, 'convenience' is not a compelling justification. Accordingly, EPA should have used the 'date of the search' as the cut-off date." Further, the email correspondence identified an additional 11 staff members who might have had responsive records. EPA argued those 11 were only copied on emails, but Howell pointed out that "the prudent approach would have been simply to search the files of these remaining possible custodians rather than cavalierly to dismiss them as unlikely to have responsive documents." Howell also found the agency had not explained whether or not it searched for responsive text messages or instant messages. The agency withheld a number of records under Exemption 5. CBD argued that the determination whether to list a chemical as having no effect on endangered species could not be deliberative in nature. Howell noted that "given that the 'no effect' determinations is statutorily required to be based on 'the best

scientific and commercial data available,' EPA has generally failed to explain how this determination involves the type of policy judgment protected by Exemption 5." Faulting the EPA for failing to make any segregablity determinations, Howell pointed out that "if EPA intends to withhold any document, in full or in part, and disclaims any segregable information, EPA must provide a particularized explanation of non-segregability for *each* document." Although she found in favor of CBD as to both the search and the exemption claims, Howell rejected CBD's argument that EPA's processing of their requests showed a **pattern or practice** of violating FOIA. She noted that "EPA not only disclosed documents, but took steps to communicate with CBD about the pending FOIA requests. CBD does not allege that EPA ever decided to refuse to produce any records. Consequently, the undisputed factual record does not support CBD's pattern and practice claims." (*Center for Biological Diversity v. U.S. Environmental Protection Agency*, Civil Action No. 16-175 (BAH), U.S. District Court for the District of Columbia, Sept. 28)

Judge Ketanji Brown Jackson has ruled that the software used by OPM in conducting background checks is protected by **Exemption 7(E) (investigative methods and techniques)**. Richard Sheridan requested the source code for OPM's "Electronic Questionnaires for the Investigations Processing (e-QIP)" and after OPM failed to respond to his request, he filed suit. Once in court, OPM claimed the source code was protected by Exemption 7(E). Siding with OPM, Jackson noted that "the e-QIP source code and related design and operation documents were created for law-enforcement purposes, and that releasing those documents could reasonably be expected to increase two risks, both of which relate to circumvention of the law: the risk that undeserving job applicants will evade the background-investigation process, and the risk of cyber-intrusion into OPM's electronic files." OPM argued that *Mittleman v. OPM*, 76 F.3d 1240 (D.C. Cir. 1996), in which the D.C. Circuit ruled that Exemption 7 could be used to protect background investigation records, applied here as well. Sheridan asserted that *Mittleman* did not apply because it dealt only with specific records. Jackson, however, pointed out that "this Court discerns no meaningful difference between records that are collected during a background investigation and records related to the background-investigation system generally when it comes to the question of whether those records 'were compiled for law enforcement purposes.'" She added that "here, there is no dispute that the e-QIP source code and the related design and operations manuals exist to serve OPM's background-investigation function." Jackson found that OPM had provided more than enough evidence of a possible risk of circumvention by allowing individuals to game the investigation process and by increasing threats to cyber security. Sheridan challenged the cyber security claim, noting that OPM's database had previously been hacked without using any source code, implying that the source code was not a crucial element. Calling this argument rational, Jackson indicated that "but the law requires more: courts must account for the language and purposes of a statute as precedents have interpreted it, and it is by now well-established that an agency that invokes Exemption 7(E) need not show that an identified risk will actually increase substantially, or that the risks it relies upon will necessarily come to fruition; rather, 'exemption 7(E) only requires that the [agency] demonstrate *logically* how the release of [the requested] information *might* create a risk of circumvention of the law.'" Sheridan contended that some information could be **segregated** and disclosed. Jackson observed that "but counsel for OPM persuasively responded that risks of cyber-intrusion that it has identified – and in particular the risk of phishing – apply uniformly throughout the source code and related manuals, including portions that would not otherwise be exempt because they do not themselves reveal investigative techniques." (*Richard L. Sheridan, Jr. v. U.S. Office of Personnel Management*, Civil Action No. 16-805 (KBJ), U.S. District Court for the District of Columbia, Sept. 29)

Judge Amit Mehta has resolved two separate, but related suits brought by Richard Goldstein against the IRS and the Treasury Inspector General for Tax Administration pertaining to the Samuel Goldstein Estate,

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for which he and his sister were the primary beneficiaries. Goldstein discovered that his sister, Carol Jones, and David Capes, one of their attorneys, planned to improperly evade paying taxes on much of the estate. He reported the allegations to TIGTA, which conducted an investigation of two IRS employees. As a result, Goldstein filed requests with both the IRS and TIGTA for records. In his prior ruling in the cases, Mehta found that neither agency had properly responded to Goldstein's requests and sent the case back to the agencies for further proceedings. This time, however, Mehta found the agencies had responded satisfactorily, except to the extent that the IRS had continued to resist Goldstein's right to have access to the estate's records. The IRS took the position that Goldstein was not entitled to access to the estate's records unless he could show a material interest. After reviewing the language of § 6103(e), which allows broader disclosure to estate and trust tax returns if beneficiaries can show they have a material interest in accessing the records, Mehta found Goldstein was not entitled to access to the Estate's tax records before his father's death. He noted that "Plaintiff has not established a material interest in the Estate's tax records that reach back to years before his father's death. . . Plaintiff bears the burden of proving that he has a material interest in the requested records; merely questioning the sufficiency of the IRS' explanations for denying him access will not do." Mehta then noted that although he had found in his first ruling that Goldstein was a beneficiary of the Living Trust, he had remanded the issue to IRS to determine if Goldstein had the requisite material interest to qualify for access. He observed that the IRS "treated as advisory the court's finding that Plaintiff qualified as a beneficiary of the Living Trust" and "instead determined Plaintiff had *failed* to establish his legal relationship with the Living Trust based on" an amendment to the Trust. Mehta indicated this conclusion was incorrect. He pointed out that "both the Uniform Trust Code, as well as the Restatement of Trusts, take a broad view of who qualifies as a beneficiary, thus undermining Defendant's narrow interpretation. In short, under Missouri law, Plaintiff was a beneficiary of his father's Living Trust, and Defendant's conclusion to the contrary was incorrect." He ordered the agency to reprocess Goldstein's request based on his ruling. Mehta then found Goldstein did not have a material interest in records pertaining to the SRG Investment Limited Partnership, an entity established to hold and manage Goldstein's family's assets. Mehta rejected Goldstein's **Privacy Act** claim, noting that "although Plaintiff's whistleblowing activity may have generated records responsive to Item 8, those records decidedly do not 'pertain' to Plaintiff. If those records exist, they are 'about' the taxpayers who Plaintiff alleged violated the law, namely, his sister and others whom he claims conspired to evade tax obligations." In his suit against TIGTA, Goldstein argued that its search was not adequate because it had not consulted with the IRS. Mehta explained that Goldstein seemed to be turning FOIA's consultation requirement on its head. He pointed out that "understood correctly, the section permits an agency to extend the time to respond in the event *the agency determines* that another agency maintains a substantial interest in the responsive records, such that interagency consultation is appropriate prior to making any decision concerning whether to produce those records. It does not compel such interagency consultation in the first place." (*Richard Goldstein v. Internal Revenue Service*, Civil Action No. 14-02186 (APM), and *Richard Goldstein v. Treasury Inspector General for Tax Administration*, Civil Action No. 14-02189 (APM), U.S. District Court for the District of Columbia, Sept. 29)

Judge Randolph Moss has ruled that the State Department properly withheld an investigatory report prepared on Bryan Pagliano, who had previously worked as the IT specialist on Hillary Clinton's presidential campaign and was subsequently appointed to run her IT operation at the State Department, in the course of his appointment under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)**, that the agency conducted an **adequate search** for records in responding to three FOIA requests filed by Judicial Watch for records relating to Clinton's use of a non-government email account, but that while portions of an email exchange between Clinton and then-CIA Director David Petraeus were protected by **Exemption 5 (privileges)**, the agency had not yet shown that two redactions of identifying information it made under **Exemption 6 (invasion of privacy)** were appropriate. Moss found that the ROI pertaining to Pagliano was clearly created for law enforcement purposes. He noted

that "the State Department produces ROIs as part of a process to determine if a potential employee has any law enforcement- or security-related issues in his background that might indicate that he should not be entrusted with classified information or that he might pose a security risk to the Department." He found the report was protected by Exemption 7(C). Balancing Pagliano's privacy interest against the public interest in disclosure, he observed that "the fact that the State Department placed great 'trust and confidence' in Pagliano does nothing to distinguish him from thousands of other government employees and members of the military who perform sensitive duties of enormous national importance and who – like Pagliano – have substantial privacy interests in the information contained in their background checks and ROIs." Moss indicated the ROI was protected by Exemption 7(E) as well. Here, he pointed out that "knowing what information [Diplomatic Security] personnel consider, where they look, and how they evaluate the information necessarily reveals their techniques and procedures, and disclosing that information poses 'a chance of a reasonably expected risk' of circumvention." Moss agreed with State that redactions made in email exchanges between Clinton and Petraeus shortly after her confirmation were protected by Exemption 5, but found that there was insufficient evidence to conclude whether or not two redactions were appropriate under Exemption 6. Sending the issue back to the agency to supplement the record, he noted that "it is easy to imagine a set of facts that might implicate substantial privacy concerns, and it is equally easy to imagine a scenario under which a reasonable person would not care about disclosure – and indeed, might even welcome it." (*Judicial Watch, Inc. v. Department of State*, Civil Action No. 15-689 (RDM), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in New York has ruled that while a number of claims made by the Department of Justice and the Department of Defense under **Exemption 5 (privileges)** pertaining to records referred to in the Senate torture report are appropriate, others are not. Perhaps Judge Alvin Hellerstein's most intriguing conclusion is that the majority ruling in *National Security Archive v. CIA*, 752 F.3d 460 (D.C. Cir. 2014), finding that a draft history of the Bay of Pigs was protected by the deliberative process privilege, is unconvincing and that Circuit Judge Judith Rogers' dissent is more persuasive. The case involved a suit brought by the ACLU against DOD, DOJ, the Department of State, and the CIA for records referenced in the Senate torture report. By the time Hellerstein ruled, only 19 documents were still at issue. Although the government claimed **Exemption 1 (national security)** and **Exemption 3 (other statutes)** as well, the ACLU focused its challenge on the Exemption 5 claims, contesting the Exemption 1 and Exemption 3 claims only for a single document. After finding two email exchanges were protected by the attorney-client privilege and the deliberative process privilege, Hellerstein found that while the next two documents were protected by the deliberative process privilege, they did not fall within the attorney-client privilege even though they had involved agency attorneys. Hellerstein noted as to one cable that "the cable, however, which was authored by 'agency employees in the field,' is completely devoid of any request for legal advice. The requested policy guidance was operational and logistical in nature, not legal." Another email exchange dealt with the waterboarding of Abu Zubaydah. Hellerstein rejected the government's privilege claims for this exchange, noting that "it is public knowledge that the CIA adopted a policy of waterboarding Zubaydah." He added that "the email appearing on the first page of [the document] is not pre-decisional; it is the decision itself." The government withheld a draft report entitled "Summary and Undated Reflections of Chief of Medical Services on OMS Participation in [the interrogation] Program" under Exemption 5 as well as Exemption 1 and 3. Hellerstein first ruled that the government had failed to explain what portions of the document were classified. As to its privilege claims, the government primarily relied on the fact that the draft contained the reflections of one individual and did not constitute government policy. But Hellerstein pointed out that "a government employee's 'impressions' of past events are not deliberatively merely because they are unofficial or personal to the author, absent some non-peripheral connection to an as-of-yet-made policy decision." The government argued that under *National Security Archive v. CIA*, the agency only needed to show that an apparent draft

history was never finalized. Hellerstein rejected *National Security Archive v. CIA*'s holding and embraced Roger's dissent instead. He observed that "in situations such as this, where no final version of a draft document exists, shielding the draft from disclosure does not serve the purpose of the deliberative process privilege because the public cannot scrutinize the draft against the final version." (*American Civil Liberties Union v. Department of Defense, et al.*, Civil Action No. 15-9317 (AJH), U.S. District Court for the Southern District of New York, Sept. 27)

Judge Emmet Sullivan has ruled that the Bureau of Land Management did not conduct an **adequate search** for records about buying or selling wild horses or burros in response to a request from Debbie Coffey. After researching the wild horse and burro program online, Coffey submitted a request in which she asked for records of communications between Bureau employees and individuals or organizations interested in buying or selling wild horses and burros. Based on her online research, Coffey identified several BLM employees who were likely to have records. The agency told Coffey the records would cost $2,440, which she paid. She then received 671pages, 240 of which were partially redacted under **Exemption 6 (invasion of privacy)**. The agency subsequently refunded the $2,440 fee after Coffey complained that because the agency missed its statutory deadline it was prohibited from charging fees. Although a number of emails referenced attachments, BLM argued that it was not obligated to provide the attachments because they were outside the scope of Coffey's request. Sullivan disagreed, noting that "here, the Bureau produced documents that reference other specific documents, potentially responsive records that have not been produced." He rejected the agency's claim that the attachments were outside the scope of the request, explaining that "an agency has a duty to construe FOIA requests liberally, and Ms. Coffey's request clearly encompasses 'all emails.' To the extent the agency intends to argue that the attachments should be treated as separate 'records' from the emails to which they were attached, the Court rejects this approach. Many of the emails cited by Ms. Coffey make explicit reference to, or include discussion of, the missing attachments. Although the Court need not adopt a *per se* rule that an email and its attachment must be treated as a single record, the Court finds that many of these attachments should reasonably be considered part and parcel of the email by which they were sent." Sullivan rejected Coffey's argument that the agency's search was not adequate because it did not use the search term "proposal," finding instead that the search was reasonable. However, Sullivan sided with Coffey on the matter of whether the agency should have searched the emails of certain identified individuals. Here, Sullivan indicated that "nor has the agency explained whether the additional custodians identified by Ms. Coffey are likely to have responsive material and, if so, whether there is any practical obstacle to searching for those materials." (*Debbie Coffey v. Bureau of Land Management*, Civil Action No. 16-653 (EGS), U.S. District Court for the District of Columbia, Sept. 29)

A federal court in California has ruled that the SEC has failed to show that it conducted an **adequate search** for records pertaining to the Empire State Realty Trust or that it has sufficiently supported its **Exemption 4 (confidential business information)** or **Exemption 5 (privileges)** claims. Responding to two FOIA requests from Richard Edelman, the agency located 1,442 pages of responsive records, withholding some records under a variety of exemptions. The agency also discovered the existence of two CDs containing 44.000 documents prepared by Malkin Holdings for use in a class-action suit that were probably responsive to Edelman's requests, but which the agency withheld entirely under Exemption 4. The court found that "nowhere in [the agency's] declarations does [its affiant] describe in any meaningful detail *the process or procedures* by which the SEC undertook the searches for records responsive to Plaintiff's requests." As to the status of the Malkin Index, the court pointed out that "although the SEC has identified the type of injury Malkin might suffer, the SEC has not put forward a detailed explanation of how the injury would result from disclosure of the documents." The court added that "in particular, the Court is not convinced that the Malkin Index, which the SEC indicates is a 'spreadsheet' that describes an 'index of documents [Malkin] produced in

'class action litigation' could ever be considered confidential under Exemption 4." Turning to the agency's Exemption 5 claims, the court observed that "the record and admissible evidence before it is insufficient to make such a determination." (*Richard Edelman v. United States Securities and Exchange Commission*, Civil Action No. 15-02750-BEN-BGS, U.S. District Court for the Southern District of California, Sept. 27)

Although she ruled in favor of the agency's ability to claim **Exemption 7(A) (interference with ongoing investigation or proceeding)** under the circumstances, Judge Rosemary Collyer raised serious questions about the continued viability of using the exemption because of a habeas corpus petition filed by Michael Sarno, who was convicted of racketeering and conducting an illegal gambling business. Sarno sent requests to Bureau of Alcohol, Tobacco and Firearms and the Tax Division at the Department of Justice for records pertaining to his case. The agency located more than 30,000 records, but withheld them all under Exemption 7(A) because Sarno was appealing his conviction. Addressing the ATF's use of Exemption 7(A), Collyer noted that "ATF cites no case, and the Court can identify no controlling precedent, in which Exemption 7(A) was held to be applicable solely on the basis of an ongoing habeas proceeding." She explained that because a habeas petition was filed at the election of the prisoner, "the law enforcement proceeding is 'pending' only because the prisoner is attacking the basis for his conviction; the law enforcement investigation has otherwise concluded and would be dormant – and therefore not exempt under 7(A). In other words, the pendency of the proceeding is not dependent on the activities of law enforcement agencies, in contrast to a criminal trial and appeal. Because a habeas proceeding could be brought a considerable time after an investigation has concluded, the specter of a potential later-filed habeas petition could lead agencies to seek to exempt otherwise dormant casefiles under Exemption 7(A)." Collyer pointed out that "with the conclusion of a trial and appeal, the agencies have already had their opportunity to – successfully – present their case in court without interference. The fruit of the efforts protected by Exemption 7(A) have already been presented to the public in court. The other 'latticework' exemptions protecting confidential information and law enforcement strategies would remain in place, and material that falls under them would continue to be exempted from disclosure under FOIA. In a post-conviction habeas proceeding, therefore, it is not necessarily clear what non-public information Exemption 7(A) would be protecting that would not already be subject to withholding under another exemption." But she then noted that "Mr. Sarno's [habeas] challenge to his conviction is an ongoing proceeding in which prosecutors must defend their prosecution and his convictions. . .There is no doubt that ATF's casefile on Mr. Sarno's criminal proceeding was compiled for 'law enforcement purposes,' and should his [habeas] motion succeed, a new trial would be a reasonable likelihood." However, having found that Exemption 7(A) applied, she observed that Sarno still had discovery rights that would allow him to access relevant records. ATF had claimed a variety of other exemptions as well. Sarno claimed some of those records were in the public domain because they were used during his trial. Collyer noted that because ATF had not provided a *Vaughn* index, she had no way of assessing such claims. Because she found the agency had also failed to make a **segregability** determination, she ordered the agency to provide an index describing the records more specifically. Collyer found that the Tax Division had properly referred records to other agencies and that all exemption claims were appropriate. (*Michael John Sarno v. United States Department of Justice, et al.*, Civil Action No. 16-677 (RMC), U.S. District Court for the District of Columbia, Sept. 29)

Judge Randolph Moss has ruled that, aside from a dispute over the status of records that were awaiting remediation because they were damaged as a result of Hurricane Sandy, the FBI has shown that it conducted an **adequate search** for records pertaining to Michael Spataro, who was serving a lengthy sentence for attempted murder and racketeering. Spataro requested records on himself, including cross-references. The agency disclosed at least 70 pages with redactions and withheld 143 pages. Spataro claimed there were

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several pre-wiretap authorizations checks the agency should have disclosed. Indicating that there was some confusion over exactly what Spataro was seeking, Moss noted that "although it is possible – or even likely – that such information would be subject to one or more FOIA exemptions, the Court cannot grant summary judgment in favor of the FBI on this question without further clarification of what exactly was withheld." Moss satisfied himself that Spataro was requesting identifying information on the targets of wiretaps. Here, he found that "neither type of information need be disclosed." He added that "because a court's order authorizing a wiretap is protected, the same is also true of the identity of the person 'targeted' for interception; a person's status as a 'target' exists solely by virtue of the substance of the court's *ex parte* order, and thus all information regarding that status is necessarily derived (directly or indirectly) from the court's order." He then found the agency had properly invoked **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(D) (confidential sources)** to withhold identifying information, particularly since the investigation pertained to organized crime. Addressing the remediation issue, Moss pointed out that "the Department has drawn the wrong conclusion from the fact that the files are still 'awaiting' remediation. If the FBI reasonably concludes, after the remediation effort is complete, that the files are so severely damaged that they are inaccessible, so be it; the FBI will have made all reasonable efforts, and it cannot be faulted for failing to release records that were, in effect, destroyed. But, on the other hand, if the remediation process yields records that are both responsive to Spataro's request and non-exempt under FOIA, the FBI should release those records. The fact the FBI does not yet know whether it will bear fruit, does not permit the Court to conclude that the FBI has reasonably exhausted its efforts to locate responsive records." (*Michael Spataro v. Department of Justice*, Civil Action No. 14-198 (RDM), U.S. District Court for the District of Columbia, Sept. 29)

Judge Beryl Howell has ruled that the Bureau of Indian Affairs has not yet shown that it conducted an **adequate search** in response to 10 FOIA requests submitted by the Forest County Potawatomi Community, a Native American tribe located in Crandon, Wisconsin for records concerning an unsuccessful 2004 application submitted by the Menominee Indian Tribe of Wisconsin for a gaming establishment, but Howell agreed with the agency that records created by Analytical Environmental Services, a third-party contractor responsible for preparing the draft and final version of the required environmental impact statement, were not **agency records** and that the agency had properly withheld certain records under **Exemption 4 (confidential business records)**. The Menominee's application was contingent on the purchase of land suitable for building a casino. In assessing the Menominee's application, the BIA's Midwest Regional Office entered into an agreement with the Menominee and AES. The Secretary of the Interior denied the Menominee's application, the tribe sued, and the case was resolved with an agreement that DOI would withdraw its denial and reconsider the Menominee's application. DOI then approved the Menominee's application, but the Governor of Wisconsin refused to concur, killing the application. In response to the FCPC's requests, the agency disclosed 22,954 pages, but withheld 71 documents. The FCPC challenged the adequacy of the search and the agency's decision to withhold some records under Exemption 4. Howell faulted the agency for failing to produce two records that were attachments to the Secretarial Determination, although the agency insisted without providing any evidence that they had disclosed the two records. Noting that "these constitute 'positive indication of overlooked materials' that preclude a grant of summary judgment to the defendants. . .They may either supplement their declarations to address the genuine issues of material fact the plaintiff raises or else perform an additional search to locate these missing records." FCPC also contended that because the agency oversaw AES's preparation of the EIS, it exercised constructive control over those records. Howell indicated that "that the defendants did not understand AES's internal records to be agency records, is immaterial – the objective nature of an agency-third party relationship, not the agency's subjective understanding of a document's status, controls whether an agency 'created or obtained' the document." Nevertheless, after assessing the four factors for determining constructive custody – the intent of the creator to relinquish control, the ability of the agency to use and dispose of the record as it sees fit, the extent to which agency personnel read or relied on the record,

and the degree to which the document was integrated into the agency's record system – Howell found the agency did not exercise constructive control over AES's internal records. Turning to the Exemption 4 claims, the FCPC argued that a tribal government could not have a commercial or financial interest for purposes of the exemption. Howell disagreed, noting instead that "this argument is predicated on a false dichotomy. Simply put, governmental and commercial information are not mutually exclusive categories and, accordingly information provided by a tribal government relating to governmental operations does not preclude such information from being commercial or financial." Howell then explained that because provision of the information was required for the tribe to qualify for a casino its disclosure could not impair the agency's ability to obtain similar information in the future. But she found that the agency had met its burden to show that 'the Menominee faced actual competition with regard to gaming operations in Kenosha and that production of the withheld documents likely would cause them substantial competitive harm." (*Forest County Potawatomi Community v. Ryan Zinke*, Civil Action No. 14-2201 (BAH), U.S. District Court for the District of Columbia, Sept. 30)

For the third time in the past year or two, a district court judge in the D.C. Circuit has concluded that a plaintiff not normally entitled to a **fee award** deserves some level of compensation because of the agency's behavior in responding to or litigating the plaintiff's request. Leroy Alford, a disabled veteran, had his vocational rehabilitation and employment benefits terminated by the Department of Veterans Affairs. In an attempt to appeal the termination, Alford submitted a series of FOIA requests, which were largely ignored by the agency until Alford filed suit. Alford initially received his Counseling/Evaluation/Rehabilitation file. He then requested a certain type of record created after June 2011. The agency did not respond to this request, but argued in litigation that the CER file contained all the records. Judge Royce Lamberth noted that "the fact that Alford's CER folder had already been produced gave no reason to be non-responsive to a request for something other than the exact thing that had already been released." He also pointed out that the agency misinterpreted the time-frame Alford had requested. While Lamberth found the agency had not acted in bad faith, he awarded Alford his costs. Lamberth observed that "the Boolean change in the VA's approach – going from wholly non-responsive, to providing a reasonably detailed explanation as to why there were no documents responsive to Mr. Alford's request, for the purposes of this case where Mr. Alford was subject to agency-imposed deadlines in a related matter, represents the kind of changed course that merits an award of costs to Mr. Alford, at least to the extent of his filing fee." (*Leroy Alford v. Department of Veterans Affairs*, Civil Action No. 16-2170 (RCL), U.S. District Court for the District of Columbia, Sept. 28)

Judge Rosemary Collyer has ruled that the IRS properly invoked **Exemption 7(A) (interference with ongoing investigation or proceeding)** for 15,150 records pertaining to a tax investigation involving multiple individuals. Agrama requested his own tax records from 1982-2014. The IRS disclosed 3,708 pages to Agrama and withheld 1,055 pages. It also withheld entirely 15,150 pages from a larger tax investigation that involved Agrama. Agrama only challenged the agency's *in camera* affidavit supporting its claim to withhold the 15,150 pages under Exemption 7(A). Noting that she was able to rule based on the public affidavits without resorting to the *in camera* submissions, Collyer pointed out that "IRS is in the process of an investigation, the records of which Agrama is seeking. IRS is withholding many of these records, as well as details regarding them, on the grounds that doing so would prematurely disclose the fruits and directions of the investigation. This justification falls well within the boundaries of Exemption 7(A), and Mr. Agrama has given the Court no reason to believe that IRS has acted in bad faith. While Mr. Agrama calls for further detailed descriptions of the documents as well as a *Vaughn* Index, such detailed descriptions of withheld documents are not required under Exemption 7(A), and the Court concludes that, based on the public and *in camera* submissions by the IRS, that such further detail is unwarranted. To require further disclosure of

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information would destroy the purpose of the claimed exemption." (*Frank Agrama v. Internal Revenue Service*, Civil Action No. 16-716-RMC, U.S. District Court for the District of Columbia, Sept. 28)

Judge Beryl Howell has ruled that David Codrea, Len Savage, and FFL Defense Research Center are not entitled to **attorney's fees** because their lawsuit did not cause the Bureau of Alcohol, Tobacco and Firearms to respond to their request. After the agency failed to respond, Cordea, Savage, and the FFL Defense Research Center filed suit. A year after receiving the request, the agency responded, disclosing 6,875 responsive pages. Codrea, Savage, and the FFL Defense Research Center then asked for attorney's fees, asserting that their lawsuit caused the agency to respond when it did. The agency argued that several voluminous requests, particularly ones for the "Fast and Furious" records, had created a temporary backlog delaying its response to their request. Howell agreed that the agency had explained the delay and that there was no evidence that Codrea's lawsuit had caused the agency to act more quickly. She pointed out that "in the instant lawsuit, ATF fully explained both in connection with the plaintiffs' motion for attorney's fees and repeatedly during the course of litigation that the delays in its pre- and post-litigation searches were due to backlogs and the press of other work deadlines. In sum, the agency was transparent about the volume of records gathered for review as well as technical and other difficulties requiring additional time to process responsive records. The plaintiffs have not demonstrated that their litigation caused ATF to produce over 6,875 documents by March 2016, and thus the plaintiffs are not 'eligible' for an award of attorney's fees." (*David Codrea, et al. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, Civil Action No. 15-0988 (BAH), U.S. District Court for the District of Columbia, Sept. 28)

A federal court in Massachusetts has ruled that the FBI properly withheld records pertaining to Ayyub Abdul-Alim, who found out that he had been investigated by the Joint Counterterrorism Task Force as the result of a pretrial hearing on a state charge. Abdul-Alim requested records on himself. The FBI located two CDs containing 5,600 pages. The FBI disclosed a number of the records as the result of a series of interim releases, but withheld others. Abdul-Alim only challenged 30 pages of documents that pertained to his ongoing appeal of his conviction in state court for unlawful possession of a firearm. The court upheld all the agencies exemption claims, including those made under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(D) (confidential sources)** and **Exemption 7(E) (investigative methods and techniques)**. Abdul-Alim argued that he already knew that his former wife was one of the agency's confidential sources. The court noted that the agency considered all the sources confidential "because the provided valuable and detailed information concerning the activities of Abdul-Alim and other subjects of investigative interest to the FBI or other law enforcement agencies. These individuals could be harmed if their identities and cooperation with the FBI was revealed. This is particularly true given that the investigation involved counterterrorism." (*Ayyub Abdul-Alim v. Christopher A. Wray*, Civil Action No. 14-30059-TSH, U.S. District Court for the District of Massachusetts, Sept. 29)

Ruling in an age discrimination suit brought by former Department of Justice attorney David Thompson, Judge Randolph Moss has allowed Thompson's claim that the agency had a **pattern and practice** of not responding to his FOIA requests to continue. In 2007, Thompson, a senior trial attorney in the Environmental Defense Section of the Environmental and Natural Resources Division, was accused of losing his temper and using profanity in dealing with a female colleague. The female attorney told her supervisor that she could not work with Thompson during an upcoming trial involving considerable travel. Thompson's supervisor reprimanded him and told him he could no longer participate in such trials because of his reputation for losing his temper under stress, but that he could continue to do other supervisory work. As a result, Thompson indicated he intended to retire. He took an extended health leave, giving his supervisors the

impression that he would retire sometime soon. Because of a potential hiring freeze, his supervisors wanted to settle his status one way or the other. Instead of retiring, Thompson came back to work. He decided that the restrictions placed on him were too onerous and he retired immediately. In 2016, he filed an age discrimination case against the agency. As part of his preparation for the suit, Thompson filed several FOIA requests. Moss ruled against Thompson on his age discrimination suit, but allowed his pattern and practice claim to proceed. Noting that it was unclear whether Thompson had **standing** to bring the claim, Moss pointed out that while Thompson's claim that he might continue to make FOIA requests did not constitute evidence of future injury, "the Department has failed to offer evidence that would permit the Court to conclude that there is no material dispute of fact with respect to Thompson's intentions at the time of filing. Indeed, much of the Department's briefing to date focuses on whether its responses to Thompson's past FOIA requests were adequate. Under these circumstances, the Court cannot resolve the threshold question of standing, and, without deciding that issue, it cannot reach the merits of Thompson's 'policy and practice' claim." (*David Thompson v. Jefferson B. Sessions, III*, Civil Action No. 16-3 (RDM), U.S. District Court for the District of Columbia, Sept. 30)

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