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## In this Issue



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*Washington Focus: President Donald Trump tweeted Nov. 29 that members of Congress were looking into issuing contempt citations "against the Justice Department and the FBI for withholding key documents and an FBI witness which could shed light on surveillance of associates of Donald Trump." Trump called this "big stuff" and ordered DOJ and the FBI to "Give this information NOW!" Responding to Trump's tweet, James Madison Project attorney Brad Moss tweeted out that "OMG, are you stupid? You just blew apart two different cases your DOJ is defending against me. I'm going to take you apart, Mr. President." One of Moss's cases involves a request from USA Today for records supporting Trump's earlier assertion that President Barack Obama ordered surveillance on Trump Tower, while the other pertains to a request from POLITICO for records concerning whether DOJ briefed Trump on the allegations contained in the Steele dossier. The FBI had issued a Glomar response for both requests. In his filing with the court immediately after Trump's tweets became public, Moss told the court that "the president's tweet this evening is a rather clear and concrete official acknowledgement of the existence of records responsive to the Plaintiff's FOIA requests."*

## Court Finds Exhaustion Not Necessary For Affirmative Disclosure Request

Judge Ketanji Brown Jackson has rejected the Justice Department's claim that the Campaign for Accountability now must submit a new FOIA request subject to exhaustion of administrative remedies rather than allowing CfA to continue with its current suit against the department for failing to post opinions by the Office of Legal Counsel that met the threshold requirement for posting under the affirmative disclosure requirements in Section (a)(2). While Jackson recognized the validity of allowing an agency the opportunity to complete its administrative review of a request before making it subject to judicial review, she found that in this instance the dimensions of CfA's demands were sufficiently clear that requiring exhaustion of administrative remedies would serve no purpose.

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Jackson's ruling stems from her recent finding that the Campaign for Accountability had failed to state a claim for relief in its suit against the Department of Justice to force the Office of Legal Counsel to post all its opinions under the affirmative disclosure provisions in Section (a)(2) because it was unclear what OLC opinions might qualify as final under the threshold definition for affirmative disclosure. Although Jackson acknowledged CfA had clarified its demands to such a degree that it was close to stating a cognizable claim, she instructed CfA to submit an amended complaint it believed satisfied her earlier jurisdictional concerns.

As a result, CfA filed an amended complaint identifying five categories of OLC opinions – (1) opinions resolving interagency disputes; (2) opinions issued to independent agencies; (3) opinions interpreting non-discretionary legal obligations; (4) opinions finding that particular statutes are unconstitutional and that therefore agencies need not comply with them; and (5) opinions adjudicating or determining private rights – the publication of which it believed was required under Section (a)(2). In response, OLC argued that, in essence, CfA had filed a new FOIA request and the agency should have the opportunity to consider it anew, including a requirement that CfA file an administrative appeal. As Jackson pointed out, "the real nub of the parties' dispute is over whether CfA must *exhaust* the refined claims that it makes in the amended complaint by bringing a new FOIA request at the agency level before the instant amended action can proceed."

However, while OLC appeared confident that its position was correct, Jackson was not so sure. She noted that "the five delineated categories of records are mere subsets of the broader category of records that CfA referenced in its demand letter; therefore, CfA's amendment complaint does not allege 'new' claims in the relevant sense." Further, she noted, "OLC's exhaustion contentions appear to rely primarily on principles that courts have applied in the context of legal actions *brought under section 552(a)(3)* of the FOIA – which, unlike section 552(a)(2), mandates agency action only when the plaintiff has submitted a 'request for records' that 'reasonably describes such records' – and OLC does not acknowledge or address the substantial and significant differences between (a)(3) and (a)(2) claims." She observed that 'it is not at all clear that an (a)(2) plaintiff's demand letter to the agency contending that the agency is failing to comply with existing and outstanding mandatory disclosure obligations needs to contain the degree of specificity about the alleged illegally unpublished records that it requires in the (a)(3) context."

Jackson pointed out that "OLC does little to persuade the Court that CfA's general demand that the agency affirmatively publish the records that section 552(a)(2) mandates is legally insufficient to support the claims that CfA makes in the amended complaint." She noted that "even though the Court determined that CfA's initial complaint failed to state an enforceable claim for the purposes of *maintaining* the instant action – i.e., the complaint did not allege an ascertainable category of records that FOIA plausibly required the agency to disclose affirmatively – it may well be that plaintiff can say far less to the allegedly offending agency before *bringing* a legal claim under 5 U.S.C. §552(a)(2), and OLC certainly has not demonstrated that, in order to sustain the pending (a)(2) lawsuit, CfA must first submit a letter to OLC that specifically delineates the five categories of records that CfA now says section 552(a)(2) requires OLC to publish on its own."

Jackson explained that she was "not prepared to hold that CfA must submit a new FOIA request to the agency, and pursue that new request through the administrative appeal stage, in order to be deemed to have exhausted the claims in the amended complaint, as OLC suggests. Nor does this court understand why the submission of another FOIA request letter is *necessary* here as a practical matter. OLC is now well aware of the five categories of legal opinions that CfA claims the agency should have been publishing affirmatively under 5 U.S.C. § 552(a)(2), and as far as this Court can tell, there is nothing to be gained either legally or practically from forcing CfA 'simply to submit a new request for the records now described in its Amended Complaint.' To the contrary, requiring CfA to undergo the full administrative process from step zero seems like an obvious *loss*, not only because such a mandate might cause unnecessary delay as OLC methodically marches through its entire administrative process regarding an overarching claim of illegal withholding that

CfA has long maintained, but also because ordering CfA to submit a new FOIA request under the circumstances presented here might be construed as an improper dismissal of CfA's amended complaint under the guise of a motion to stay."

Jackson decided to "address this instant request by exercising its prudential authority to stay this matter briefly so that OLC can evaluate its position regarding the refined legal claims that CfA is making about the agency's failure to publish certain opinions." She pointed out that "as often happens in FOIA cases, the claims in the amended complaint are likely to facilitate a dialogue between the parties regarding what materials the agency is willing to disclose, on the one hand, and what materials the parties will continue to dispute in the context of this lawsuit, on the other." She indicated that "in this regard, then, this Court envisions a post-stay process that is akin to the agency's consideration of a case upon voluntary remand, which, as the D.C. Circuit recently clarified, does not require a reanimating action on the plaintiff's part." (*Campaign for Accountability v. U.S. Department of Justice*, Civil Action No. 16-01068 (KBJ), U.S. District Court for the District of Columbia, Dec. 1)

# Views from the States…

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

## Arizona

A court of appeals has ruled that the Department of Public Safety and the Department of Transportation responded properly to a series of requests submitted by John and Robin Lunney about the death of their son in December 2012. Initially, the two departments sent responses directly to the Lunneys. But in July 2014, Assistant Attorney General Fred Zeder asked the departments to forward all requests and responses to the attorney general's office, which then forwarded them to the Lunneys. The Lunneys sued in 2015, arguing that the departments failed to provide information about various officers and their use of personal cell phones while on duty. The trial court ruled in favor of the departments and the Lunneys appealed. The Lunneys first argued that the government violated the Arizona Public Records Law by requiring the departments to pass their responses through the attorney general's office. While the trial court had agreed with the Lunneys that such an extra layer of review violated the statute, she also found that the Lunneys had not shown they were denied records as a result. The appellate court found there was no violation, noting that "because the agencies are entitled to receive legal assistance from the attorney general's office, and because the procedure employed by the State is this case did not violate Arizona's Public Records Law by unnecessarily delaying the responses, we affirm the superior court's decision on this issue." The Lunneys had requested information about on-duty officers at the time of their son's death. The agencies, however, interpreted that request as requiring a compilation of data, which would impermissibly require them to create a new record. The court of appeals reversed, observing that "here, the Lunneys did not request information *about* information, they simply wanted the names and related information about the officers on duty during a specified period." The court pointed out that "the State is not required to create a single comprehensive document responding to the Lunneys' request. But to the extent the information requested is a public record, the State is required to 'query and search' its electronic databases and produce any responsive documents that result from those searches. This is true even if the search would require the agency to search various databases." The court found that "mere use of a private cell phone during working hours is insufficient to meet the threshold showing; rather, the requester must present evidence the information on, or use of, a private

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cell phone created a public record. If the threshold is met, the burden then shifts to the party claiming the record is private to so establish." In this instance, department policy required police officers to use their private cell phones to conduct police business while working. However, because the department did not collect personal phone records from officers, the records requested by the Lunneys no longer existed. The court of appeals indicated that a response that took the department 135 days to complete violated the statute, noting that "because the State did not provide a legally sufficient reason for the delay, we find the State's response to this request was not prompt." But as to several other requests, the appeals court concluded the agencies responses were timely. (*John M. and Robin M. Lunney v. State of Arizona, et al.*, No. 1-CA-CV-16-0457, Arizona Court of Appeals, Division 1, Dec. 7)

## Connecticut

A trial court has revised its September ruling in favor of the FOI Commission and the Department of Emergency Services and Public Protection after the department informed the court that testimony from a department witness, stating that three phone numbers that had been redacted came from DMV records that were statutorily protected, was incorrect. Noting that it was only revising that section, the court pointed out that "counsel for the department learned that the motor vehicle department does not provide telephone numbers through its [database]. Counsel notified the court of this information. . .and acknowledged that the department's witness was mistaken in testifying that the telephone numbers were received from the motor vehicle department." The court explained that "the department concedes that its witness was mistaken and that there is therefore no substantial evidence to support the commission's decision that the telephone numbers were exempt." The court added that "to remand this case to the commission, which could only rule in favor of the plaintiff based on the department's factual correction and legal concessions, would unduly delay the plaintiff's receipt of the unredacted documents to which he is entitled. Accordingly, the plaintiff's appeal is sustained as to the issue of the telephone numbers he was seeking, and the department is ordered to provide the unredacted documents to him [by the next day]." (*James Torlai v. Freedom of Information Commission, et al.*, No. HHB-CV-16-50174508, Connecticut Superior Court, Judicial District of New Britain, Nov. 27)

## Maine

The supreme court has ruled that the Department of Environmental Protection properly claimed the attorney work-product privilege to withhold records from Marcel Dubois and Sol Fedder concerning the operation of a composting facility operated by Dubois Livestock, but that the agency had not shown that names of witnesses were protected by the informant identity privilege. In response to a broad-based request from Dubois and Fedder, the agency disclosed a number of records. Dubois and Fedder filed suit and the trial court upheld the two privilege claims. Dubois and Fedder then appealed to the supreme court. Dubois and Fedder argued that the trial court violated their due process rights by preventing them from seeing the privileged documents so that they could argue for their release. The supreme court rejected the claim, noting that "allowing such disclosure before determining whether the documents were privileged would eviscerate the protections provided by the exceptions within [the Freedom of Access Act] and the law of privilege. It is simply not possible to maintain an alleged privilege if FOAA plaintiffs are permitted to access the challenged records before a court has acted on the assertion of the privilege." The supreme court then pointed out that a 2015 amendment to FOAA had done away with automatic *de novo* review by trial courts, allowing courts to conduct a "review, with taking of testimony and other evidence as determined necessary." But because Dubois and Fedder had brought their litigation before the 2015 amendment took effect, the supreme court found it necessary to review their challenges *de novo*. The court pointed out that the attorney work-product privilege was limited to records prepared in anticipation of litigation, noting that "it is plain on the face of these documents that they were prepared in anticipation of regulatory enforcement or other compliance-related litigation, and Dubois and Fedder present no plausible argument that evidence of any other *facts* would have

informed the court on the question." Turning to the informant privilege, the court observed that "it is not clear from the face of the records that were withheld based on the Department's assertion of the information identity privilege that the privilege would apply." (*Marcel Dubois, et al. v. Department of Environmental Protection*, No. Yor-17-23, Maine Supreme Judicial Court, Dec. 7)

### New York

A trial court has ruled that the City of New York Office of the Chief Medical Examiner properly denied Mazaltov Borukhova, a Queens physician who was convicted in 2009 of hiring a relative to shoot her husband, access to her husband's autopsy records because a provision in the city charter prohibits the disclosure of such records to anyone, including family members, when there is any indication of criminality without the consent of the appropriate district attorney's office. In this case, the district attorney rejected Borukova's request. Borukova, who was incarcerated in the Bedford Hills Correctional Facility in Bedford, New York, argued that the city charter conflicted with county law. The trial court disagreed, noting that "permitting access to the records in these circumstances would open the floodgates to the OCME files, and therefore adversely impact and negatively reflect on the efficient, expeditious, safe and fair dispersion of justice." (*Mazaltov Borukhova v. City of New York, et al.*, No. 101901/2016, New York Supreme Court, New York County, Dec. 5)

### Virgin Islands

A trial court has ruled that the Virgin Islands Economic Development Authority, established in 2001 to help develop the economy, is a public agency subject to the Public Records Act. In response to two requests from the Daily News, the EDA claimed it was not subject to the public records act because it was not a public agency and, alternatively, because the records constituted confidential business information. Finding that the EDA was a public agency, the court noted that "it is hard for this Court to believe that the Authority is separate from the government of the Virgin Islands especially when the government had a firm hand in its creation and management." The court indicated that there was no competitive harm from disclosing information about entities receiving loans because the EDA was the "lender of last resort." The court observed that "such a process negates any type of competition between the Authority and other loan agencies within the Territory." The court rejected the claim that the loan information constituted a trade secret. The court pointed out that "lacking a display by the Government of the manner in which someone could gain economic value from knowing this information, the Court is unable to find that one exists." (*Daily News Publishing Company, Inc. v. Wayne L. Biggs, Jr.*, No. St-16-CV-209, Virgin Islands Superior Court, Division of St. Thomas and St. John, Nov. 30)

## The Federal Courts…

Judge Ketanji Brown Jackson has ruled that Keeping Government Beholden **failed to state a claim** when it asked Jackson to allow it to add an **expedited processing** charge pursuant to the Federal Courts Civil Priorities Act to its FOIA suit against the FBI for emails sent or received by former FBI Director James Comey between January 1, 2017 and May 9, 2017 containing the word transitory. Keeping Government Beholden argued that 28 U.S.C. § 1657(a) allowed litigants to ask a federal court to expedite its review of a case for good cause. Rejecting the claim, Jackson noted that "Plaintiff has not clearly demonstrated that section 1657(a) is a generally acceptable route for seeking expedition of the processing of documents under the FOIA. By its terms, that statute authorizes a court to 'expedite the consideration of any *action*' filed

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pursuant to various provisions and says nothing about a court's authority to order an agency to expedite its own processing of records under FOIA." Further, Jackson pointed out that FOIA already contained a specific provision for requesting and litigating expedited processing. "By contrast," she explained, "the FOIA itself expressly addresses that authorized procedure for the expedition of the agency's processing obligations. . .The fact that Congress has provided an avenue for requesters seeking expedited processing for an agency and also judicial review of that agency decision, renders dubious Plaintiff's contention that FOIA requesters can do an end-run around the prescribed procedures by requesting that a court order the agency to expedite its document processing under 28 U.S.C. § 1657(a) instead." Keeping Government Beholden pointed to two cases in which courts suggested that court-ordered expedition was available. Finding neither case supported Keeping Government Beholden's claim, Jackson observed that "Plaintiff here has not made any similar showing of significant need, much less the kind of *urgent* need that could possibly justify this Court's application of section 1657(a) to excuse Plaintiff's failure to seek expedition directly from the agency. There is nothing about the requested records themselves that indicates that fast processing is warranted; in fact, Plaintiff appears to acknowledge that very little is even known about the content of these records." She indicated that "moreover, the fact that these particular records may be of public interest at the moment is not, standing alone, sufficient to justify expedited processing of Plaintiff request. And this is especially so where, as here, there are other potential avenues for public release of the same information that Plaintiff has requested." Jackson also rejected Keeping Government Beholden's assertion that the FBI might potentially destroy the records. She pointed out that the FBI "has already located all documents potentially responsive to [the request] and that those documents have been preserved. Thus, rather than creating additional delay by continuing to press for expedition under a statutory provision that is not plainly applicable to the instant circumstances, this Court suggests that Plaintiff engage with the government to negotiate a processing and production schedule that is more generous than the one that the government intends to follow." (*Keeping Government Beholden, Inc. v. U.S. Department of Justice*, Civil Action No. 17-01569 (KBJ), U.S. District Court for the District of Columbia, Dec. 1)

The D.C. Circuit has ruled that a draft indictment of Hillary Clinton by the Independent Counsel as part of the Whitewater investigation is protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. In March 2015, Judicial Watch filed a request with the National Archives for a copy of the draft indictment of Clinton. The existence of the draft indictment had been publicly revealed, but the actual document itself had not been disclosed. While acknowledging that Clinton had a privacy interest in the indictment, Judicial Watch argued that her multiple official positions meant her privacy interest was minimal. However, writing for the court, Circuit Court Judge Judith Rogers observed that "this position overlooks the fact that Mrs. Clinton's privacy interest is heightened in the context of a draft indictment." Rogers found that *Fund for Constitutional Government v. National Archives*, 656 F.2d 856 (D.C. Cir. 1981), which also involved an attempt to learn more about an unindicted individual, was almost directly on point. Rogers explained that "although she may not be entitled as a public figure to any more protection under Exemption 7(C) than the average person, the potential immediate harm to her would appear to be augmented simply because the Independent Counsel's investigation of President and Mrs. Clinton attracted great public attention." She noted that "not only would she be without the procedural protections accorded to a person accused of a crime, but the release after so many years also means the defunct Office of Independent Counsel would be unavailable to explain its decision not to seek an indictment against her." Rogers added that "it is difficult to imagine circumstances where a draft indictment could ever be disclosed without seriously infringing an individual's privacy interest." Judicial Watch claimed that there was a public interest in learning more about why the Independent Counsel had not indicted Clinton, as well as a public interest in the concept of an independent counsel to investigate alleged wrongdoing by the President or his staff. Rogers observed that "the instant case concerns a draft indictment where voluminous information about the Independent Counsel's investigation has been released. Judicial Watch and the public at large can more readily assess whether the Independent

Counsel 'pulled its punches.'" (*Judicial Watch, Inc. v. National Archives and Records Administration*, No. 16-5366, U.S. Court of Appeals for the District of Columbia Circuit, Dec. 1)

A magistrate judge in California has ruled that the Federal Emergency Management Agency improperly withheld records about its implementation of the National Flood Insurance Program in California from the Ecological Rights Foundation under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. Some of the agency's Exemption 5 claims were made to protect communications made to the Fish and Wildlife Service or the National Marine Fisheries Service. However, Magistrate Judge Maria-Elena James found that both FWS and NMFS had already disclosed most of the redacted records in their own responses to FOIA requests from the Ecological Rights Foundation. James noted that "this shows NMFS and FWS found that the documents should not be withheld as deliberative process. FEMA offers no reason why that production was improper and no reason to find these same documents are not subject to the deliberative process privilege." James also noted that the agency had failed to show why the foreseeable harm test codified by the 2016 FOIA Improvement Act allowed the agency to continue to withhold the records. She pointed out that "absent a showing of foreseeable harm to an interest protected by the deliberative process exemption, the documents must be disclosed." James also found FEMA's invocation of attorney-client privilege was undermined by the fact that NMFS had concluded that the information was not subject to the attorney-client privilege. FEMA claimed it withheld personally-identifying information to ensure compliance with the Privacy Act. Rejecting that claim, James found that "the unredacted records do not contain personnel or medical records. They instead appear to be applications from property owners or developers for Flood Insurance Rate Map Amendments, or requests to exclude properties from Special Flood Hazard Areas where appropriate. FEMA's Flood Insurance Rate Maps are publicly available, and any alterations to the maps are likewise public documents." Requiring FEMA to disclose most of the information redacted under Exemption 6, James observed that "while FEMA has requested more bites, the Court agrees with EcoRights' assessment that the apple is down to its core." James found that the agency's use of the date of the search was appropriate, but also concluded that "FEMA has repeatedly failed to comply with its statutory responsibility to respond fully to EcoRights' FOIA requests within the statutory timeframe." She noted that "the recurring nature of these violations and the possibility that they might reoccur with any of EcoRights' future FOIA requests show that declaratory relief is appropriate under these circumstances." (*Ecological Rights Foundation v. Federal Emergency Management Agency*, Civil Action No. 16-05254-MEJ, U.S. District Court for the Northern District of California, Nov. 30)

A federal court in Pennsylvania has ruled that the Office of Foreign Assets Control did not conduct an **adequate search** in response to a request from the law firm of Cozen O'Connor for records about granting licenses to individuals or companies to conduct business in Cuba. OFAC decided that its Licensing Division was the only component likely to have responsive records. However, after conducting a database search containing five key words, OFAC located no records. Cozen O'Connor filed an administrative appeal, which was denied. Cozen O'Connor then filed suit. The court rejected the agency's allegations, finding that on its face the search was clearly insufficient. The court noted that the agency's affidavit indicating that the Licensing Division was the only component likely to have responsive records "shows the opposite: there are divisions or entities within OFAC that should have been included in defendant's search," including the Office of Compliance and Enforcement. The court observed that "in this case, defendant has failed to explain why it limited its search to the Licensing Division, when the agency's own declaration shows that documents in the possession of other divisions 'may be relevant.' Viewing the record in the light most favorable to defendant, the Court concludes that there is no genuine issue of material fact that the scope of defendant's search was inadequate." The court criticized the search terms as well. The court pointed out that "defendant's search

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terms were not reasonably calculated to uncover documents relevant to [the third item in plaintiff's request] for the 'criteria that OFAC uses to determine' whether to grant licenses. None of the search terms used by defendant are related to that 'criteria.' Defendant's search terms instead focus only on plaintiff's first two requests covering defendants' procedures and policies for reviewing applications." Cozen O'Connor argued that materials available on OFAC's website indicated other sources of information about licenses. OFAC asserted the references only applied to licenses in general, not to licenses for Cuba. However, the court noted that "the documents distinguish between general and specific licenses, instruct applicants on what to include in applications for specific licenses, and provide guidance to applicants on specific topics. It is reasonable to infer that defendant has additional documents related to the policies and procedures embodied in the documents supplied by plaintiff. Considered in light of the inadequacy of the scope of defendant's search and the inadequacy of the search terms used by the defendant, the 'positive indications of overlooked materials' in this case show that there is no genuine issue of material fact as to the inadequacy of defendant's search." The court sent the case back to the agency for a more thorough search. (*Cozen O'Connor v. Office of Foreign Assets Control*, Civil Action No. 17-1490, U.S. District Court for the Eastern District of Pennsylvania, Nov. 30)

A federal magistrate judge in New York has ruled that the Executive Office for U.S. Attorneys properly withheld records from William Sorin, convicted of backdating stock options when he was the attorney for Comverse Technology, under **Exemption 3 (other statutes), Exemption 5 (privileges)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Sorin requested records related to his prosecution. The agency found 36 boxes of documents relating to Sorin's prosecution, as well as that of his co-defendant, Jacob "Kobe" Alexander, who had fled to Namibia after his indictment. Because of the volume of records involved, the parties agreed to narrow the scope of the request. As a result of the stipulated searches, the agency located 500 pages. It released 28 pages and withheld 482 pages on the grounds that they would either violate grand jury secrecy or interfere with Alexander's ongoing proceedings. After Alexander's criminal conviction became final, DOJ released an additional 165 documents and withheld 203 pages. Magistrate Judge Gabriel Gorenstein found that Rule 6(e) protecting grand jury secrecy applied to many of the records. He noted that Sorin's primary objection was the conduct of the law firm Dickstein Shapiro, which was hired to help the government. Gorenstein pointed out that "Sorin's allegations of DOJ misfeasance as they relate to these documents do not turn on matters that occurred 'before' the grand jury, but instead concern the allegedly improper relationship between DOJ and Dickstein Shapiro. Thus, even if [the exception for disclosing records from a grand jury because of improper behavior] applied in the FOIA context, it would not bar the Government from withholding the documents pursuant to Exemption 3." Gorenstein found a number of documents qualified for protection under the attorney work-product privilege. Sorin argued that two drafts written to be sent to Dickstein Shapiro were outside the privilege. Gorenstein noted that "DOJ has not asserted that any correspondence with Dickstein Shapiro is work product that may be withheld pursuant to Exemption 5. To the extent that the drafts were addressed to Dickstein Shapiro, the drafts were not actually sent and thus no disclosure occurred. Case law makes clear that drafts of documents not actually disclosed to an adversary are generally protected as work product." Gorenstein agreed that 45 witness interviews done by Dickstein Shapiro were properly withheld under Exemption 7(C). Sorin contended the witness interviews were improper and should be released instead. Gorenstein, however, observed that "but this allegation does not show any 'Government impropriety' sufficient to outweigh the privacy interests at stake. While Sorin finds it improper that DOJ used witness interviews conducted by a private law firm to further its criminal investigation, the Court is not aware of any bar to DOJ considering such witness interviews in deciding whether to investigate or prosecute, or in using them to seek a plea from a potential defendant." (*William F. Sorin v. U.S. Department of Justice*, Civil Action No. 15-06774-GWG, U.S. District Court for the Southern District of New York, Nov. 28)

A federal court in Arizona has ruled that the FAA failed to show that personally-identifying information in records pertaining to complaints submitted as result of a change in its policy to no longer give preference to students participating in specified college programs under the Qualified Applicant Register was protected by either **Exemption 6 (invasion of privacy)** or **Exemption 7(A) interference with ongoing investigation or proceeding)**. Jorge Rojas, who was in such a program studying to become an air traffic controller, filed a number of requests to the agency. The court agreed that the agency had properly issued a ***Glomar* response** neither confirming nor denying the existence of records for Rojas' requests concerning complaints filed against named individuals. But the court rejected the agency's use of Exemption 6 more broadly to protect generic personal information. Addressing a spreadsheet listing EEO complaints, the court noted that "the disclosure of subject lines, case numbers, and attachment titles will not likely allow Mr. Rojas or any other observer to identify individual claimants." The court added that "any potential privacy interest in the redacted portions are trivial at best, and as such, the Court does not address the public interest in obtaining this information." As to an allegation that identifying information contained in a complaint alleging cheating in hiring practices, the court found the public interest outweighed any privacy interest. Here, the court pointed out that "the public has an interest in knowing information about hiring officials who unfairly support specific job applicants, especially for positions that maintain public safety." (*Jorge Alejandro Rojas v. Federal Aviation Administration*, Civil Action No. 16-03067-PHX-GMS, U.S. District Court for the District of Arizona, Dec. 4)

Judge James Boasberg has ruled that the IRS has now shown that it conducted an **adequate search** for multiple FOIA requests filed by William Powell concerning taxes for Powell Printing, his family's business, and that because the agency provided the requested records for many of Powell's requests, those claims are now **moot**. Addressing the adequacy of the search, Boasberg indicated that the agency had sufficiently explained the elements of a reasonable search. Powell contended that certain records should have existed, but Boasberg noted that the agency's affidavit "even lays out the likely reasons why some documents were not located. It makes sense, for instance, that there was only one transcript available for the Estate of William A. Powell – for the tax year after his death when the estate tax was filed. And the lack of [certain other specific types of] transcripts is reasonable, [the agency] explains, because Powell seeks transcripts for tax years so long past that there are likely no more active accounts for those years and, consequently, no [specific] transcripts." He added that the agency's "declaration thus contains three essential statements that courts require: the search terms used, the database or location searched, and an averment that all locations likely to contain responsive records were searched." Rejecting Powell's arguments, Boasberg observed that 'most of his contentions about the adequacy of the search terms, however, are based solely on speculation that hidden documents and information exist." Boasberg added that "plaintiff attempts to establish 'positive indications of overlooked materials,' but these arguments – that the IRS has repeatedly changed the filing requirements for partnerships, corporations, and estates in order to conceal records, and that, if complete transcripts for an entity were found, specific ones exist and should have been located as well – are unsupported guesses." (*William E. Powell v. Internal Revenue Service*, Civil Action No. 16-1682 (JEB), U.S. District Court for the District of Columbia, Dec. 4)

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**Editor's Note:** This is the last issue of *Access Reports* for 2017. The next issue, v. 44, n. 1, will be dated January 10, 2018.