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Washington Focus: Scott Hodes points out on the FOIA Blog that President Donald Trump's order freezing federal employment will have a significant impact on FOIA implementation. Since lack of resources is a primary reason for backlogs and delays, agency inability to address those resource problems in the future will likely have a trickle-down effect on FOIA implementation. . . Josh Gerstein of POLITICO points out that because of a three-month lag in publication of White House visitors' logs, the transition between the Obama administration and the incoming Trump administration will impact the availability of the logs for the last 110 days of the Obama administration. A spokeswoman at the National Archives told Gerstein that "NARA intends to work with the Office of Former President Obama to facilitate the release of the remaining Obama White House Visitor Access Records."

D.C. Circuit Affirms FOIA Remedy For Challenges Under Section (a)(2)

In a decision where the relief is so limited that it seems almost pointless, the D.C. Circuit has ruled that whereas the publication requirements under section (a)(2) of FOIA are enforceable under the FOIA rather than the "arbitrary and capricious" standard of the Administrative Procedure Act, CREW's possible relief in its suit to force the Department of Justice to publish Office of Legal Counsel opinions is at best limited to existing opinions. Relying on *Kennecott Utah Copper Corp. v. Dept of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), Circuit Judge David Tatel noted that "we think it clear that a court has no authority under FOIA to issue an injunction mandating that an agency 'make available for public inspection' documents subject to the reading-room provision. . . . Authorizing a court to order an agency to make documents 'available for public inspection' would reach beyond section 552(a)(4)(B)'s focus on 'relieving the injury suffered by the individual complainant' to remedy an injury suffered by 'the general public'—a result our precedent forecloses. That said, nothing in *Kennecott* prevents a district court from, consistent with 552(a)(4)(B), ordering an agency to provide *to the plaintiff* documents covered by the reading-room provision."

ACCESS REPORTS

The case started when CREW sent a letter asking the Justice Department to publish OLC opinions because of their binding nature under section (a)(2). DOJ responded that OLC opinions were considered confidential legal advice not subject to the publication requirements. Instead, DOJ analyzed the disclosability of opinions on a case-by-case basis pursuant to a FOIA request. CREW filed suit, basing its claim for relief on both FOIA and the APA. However, in response to Judge Emmet Sullivan's instructions to clarify its basis for relief, CREW dropped its FOIA claim and proceeded under the APA. The case was then reassigned to Judge Amit Mehta, who ruled that the APA did not apply because an adequate remedy was available under FOIA.

Tatel pointed out that CREW was asking for an injunction with four features. "First, the injunction would have prospective effect—*i.e.*, it would apply to opinions not yet written. Second, it would impose an affirmative disclosure obligation to disclose on OLC—*i.e.*, without need for a specific prior request. Third, it would mandate disclosure to the *public*, as opposed to just CREW. Fourth, it would require OLC to make available to the public an index detailing all documents subject to the reading-room provision." Noting that the D.C. Circuit had never addressed what constituted an adequate remedy under the APA in the context of possible FOIA relief, Tatel indicated that CREW contended that the relief under FOIA was too narrow to qualify as adequate under the APA, while DOJ argued that "an alternative remedy need not be 'identical' in order to be 'adequate.'"

Tatel acknowledged that *Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1988), clearly recognized courts' equitable powers to grant "a prospective injunction with an affirmative duty to disclose," but went on to explain that other precedent—particularly *Kennecott*—limited relief to individual plaintiffs and did not provide for any duty to disclose to the general public. But *Kennecott* involved a circumstance in which the plaintiffs were trying to force the Interior Department to publish a regulation that had been withdrawn by the agency, a legal attack aimed at forcing the agency to make a substantive policy decision rather than a routine publication one. The core of *Kennecott*'s ruling is that FOIA does not provide a right to insist on publication as a back-door tactic for challenging a regulation. Quoting from *Kennecott*, Tatel indicated that FOIA's judicial review right "allows district courts to order 'the production of any agency records improperly withheld *from the complainant*,' not agency records withheld from the *public*." As a result, he noted, neither of CREW's requests requiring DOJ to make public OLC opinions or an index of those opinions, was available under FOIA. Instead, he observed that "we see no obstacle, however, to a district court, in an appropriate case, and as an extension of its broad equitable power to fashion FOIA relief, ordering an agency to furnish such an index *to a plaintiff*."

Having found that FOIA provided a remedy, Tatel then turned to an examination of whether the remedy was adequate for APA purposes. He explained that "we have little doubt that FOIA offers an 'adequate remedy' within the meaning of [the APA], as it exhibits all of the indicators we have found to signify Congressional intent. FOIA contains an express private right of action and provides that review in such cases shall be '*de novo*.' As opposed to the 'uncertain' and 'doubtful' remedies we have rejected as insufficient to preclude APA review, our precedent establishes that a plaintiff in CREW's position may bring a FOIA claim to enforce the reading-room provision. . .The creation of both agency obligations and a mechanism for judicial enforcement in the same legislation suggests that FOIA itself strikes the balance between statutory duties and judicial enforcement that Congress desired." Tatel observed that "we see no yawning gap between the relief FOIA affords and the relief CREW seeks under the APA. . .True, courts lack authority under FOIA to order agencies to 'make [records] available for public inspection.' Significantly for our purposes, however, CREW itself can gain access to all the records it seeks. . .Thus, despite some mismatch between the relief sought and the relief available, FOIA offers an 'adequate remedy' within the meaning of [the APA] such that CREW's APA claim is barred."

Tatel commented about the potential consequences if CREW prevailed on the merits of its claim. He observed that "our conclusion that certain relief is *available* under FOIA says nothing about its propriety in an individual case. Indeed, we expect that only a rare instance of agency delinquency in meetings its duties under the reading-room provision will warrant a prospective injunction with an affirmative duty to disclose subject records to the plaintiff." (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice, et al.*, No. 16-5110, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 31)

Views from the States…

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

Connecticut

A trial court has ruled that the term "notice in fact," as it appears in a provision of the Freedom of Information Act allowing an individual to appeal to the FOI Commission when the individual learns of an improperly noticed meeting, means actual notice to the individual, and not implied notice, as argued by the Commission. After reading emails she received as the result of an unrelated request, Marissa Lowthert discovered that the Miller Driscoll Building Commission had held a meeting through the exchange of emails after its scheduled meeting had been cancelled because of a snowstorm. Although the existence of the email meeting became public March 27, 2014, at the time the Miller Driscoll Building Commission published its February meeting minutes, Lowthert did not learn about the meeting until June 2014. She then filed a complaint with the FOI Commission challenging the validity of the unnoticed meeting. Finding Lowthert had failed to file her complaint within 30 days after the public body published its meeting minutes in March, the FOI Commission rejected her complaint. Lowthert then filed suit, arguing that "notice in fact" meant actual notice, not constructive notice. Noting that the provision pertaining to challenging unnoticed meetings had been added to the FOIA in 1984, the court indicated that then FOI Commission Executive Director Mitch Pearlman had testified to the legislature that the provision had been included to allow challenges to unnoticed meetings and the possibility that such challenges might take place longer after the actual meeting had been considered and accepted. Ruling in favor of Lowthert, the court noted that "the legislature intended to allow 'any person' to appeal an unnoticed or secret meeting within thirty days after the person filing an appeal received notice in fact that the meeting has occurred. Notice in fact, used in such context, means actual notice to the person filing the appeal. The commission did not apply this interpretation in considering the plaintiff's appeal and, as a consequence, erroneously dismissed it. The court finds that a substantial right of the plaintiff was adversely affected and it accordingly remands the case to the commission for further consideration." (*Marissa Lowthert v. Freedom of Information Commission, et al.*, No. HHB-CV-15-6030425-S, Connecticut Superior Court, Judicial District of New Britain, Jan. 19)

Indiana

A court of appeals has ruled that a legal memo drafted by a deputy attorney general of Texas and sent to then-Gov. Mike Pence and other Republican governors to solicit support for a lawsuit Texas intended to file against President Barack Obama challenging his executive orders on immigration is privileged because Indiana and Texas shared a common interest in the litigation. After Indiana joined Texas as a plaintiff in its lawsuit, William Groth filed a request under the Access to Public Records Act for records concerning

ACCESS REPORTS

Indiana's decision. The Governor's Office provided 50 pages of records, but withheld the legal memo sent by Texas and made redactions in invoices for outside legal counsel fees. Groth complained to the Public Access Counselor, who upheld the Governor's Office's response, as did the trial court. A majority of the court of appeals agreed. As an initial matter, Pence argued that the Indiana Supreme Court's recent decision in *Citizens Action Coalition of Indiana v. Koch*, 51 N.E.3d 236 (Ind. 2016), in which the court found that a specific exemption for legislative work product prevented courts from deciding what constituted legislative work product, also applied here, meaning that the court did not have jurisdiction. The court rejected the claim, noting that "the Governor's argument would, in effect, render the APRA meaningless as applied to him and his staff. APRA does not provide for any such absolute privilege, and the separation of powers doctrine does not require it." The majority found the memo was privileged. The majority noted that "a group of like-minded governors shared legal theories and strategies via email to consider whether to join in litigation. The purpose of that consultation was to provide legal advice to the prospective co-plaintiffs. Thus, the communications made in furtherance of that purpose were confidential communications between attorney and clients and 'carried with them an expectation of confidentiality.'" Groth argued that the widespread disclosure of the memo waived the privilege. The majority observed that "the fact that such information was shared with other who may or may not have decided to join the lawsuit does not vitiate the common interest privilege." The majority also approved the redactions made in invoices from outside counsel. The majority pointed out that "the redacted information refers to the attorneys' research and legal opinions, theories, communications, or conclusions with respect to various aspects of litigation involving the State and the Governor." The dissenting judge found that the Texas email was sent for lobbying and solicitation purposes, not as legal advice. He pointed out that "the common-interest doctrine does not protect mere lobbying efforts but rather only joint strategy." (*William Groth v. Mike Pence*, No. 49A04-1605-PL-1116, Indiana Court of Appeals, Jan. 9)

Kentucky

A trial court has ruled that records concerning the investigation of sexual assault allegations against former University of Kentucky professor James Harwood are protected by the federal Family Educational Rights and Privacy Act because disclosure, even with redactions, would allow knowledgeable individuals to identify the two female graduate students whose complaints resulted in the in the University's investigation of Harwood. The two students filed complaints of sexual assault against Harwood in the summer of 2015. As a result of the university's investigation, Harwood resigned, receiving pay and benefits until August 2016. After learning that Harwood would be able to deny the allegations and seek employment elsewhere, the two students approached the student-run newspaper, the *Kentucky Kernel*, which requested the investigation records under the Open Records Act. The university disclosed Harwood's separation agreement and resignation letter, but refused to release other records concerning the investigation because disclosure would violate FERPA. The newspaper complained to the Attorney General's Office. The AG asked the university to provide withheld records for in camera review. The university refused, and the AG ruled that because the university had not carried its burden of proof, it must disclose the withheld records. The university then filed an appeal with the circuit court. The *Kernel* argued that because the records related to Harwood rather than the students, they were not subject to FERPA. However, relying on a 2013 Florida decision, *Rhea v. Santa Fe College*, the trial court noted that "a plain reading of FERPA defines 'directly related' broadly. 'Directly related' is not a 'primarily related' test. A record can both relate directly to a student and a teacher." The court pointed out that "the investigative documents at issue not only relate to a former UK professor, but also to the complaining witnesses, who were UK students during the time of the alleged events." The court added that "further, the records contain information about classes, area of study, and matters specifically relating to the complaining witnesses' educational process." The *Kernel* argued that the records could be disclosed if redacted. But the court observed that "the record at issue is thoroughly interwoven with explicit details of the alleged sexual assault and other facts submitted by parties and witnesses. Although the records also contain information such

as names, addresses, and phone numbers, which could reasonably be redacted, the record is so extensively laced with details of the alleged assault that redaction alone would not protect these complaining witnesses." (*University of Kentucky v. The Kernel Press, Inc.*, No. 16-CI-3229, Fayette Circuit Court, Kentucky, Jan. 23)

New Jersey

A court of appeals has ruled that various state agencies improperly denied access to copies of all Open Public Records Act requests received during a certain time period based solely on dicta included in *Gannett Partners v. County of Middlesex* (2005). Henry Scheeler, John Paff, and Heather Greico requested copies of all OPRA requests filed with a variety of agencies. The agencies denied the request, claiming that the court in *Gannett* had held that requests for third-party requests filed under OPRA were inappropriate. Scheeler, Parr, and Greico all sued and the trial court ruled in their favor. The agencies appealed, arguing that the requests were insufficiently described. Rejecting that claim, the appeals court noted that "plaintiffs did not seek access to general categories of records, nor did they ask defendants to undertake any analysis or research to determine the records that fall within the scope of the requests. Rather, plaintiffs sought access to OPRA requests by other persons, which were received by defendants within specific time frames. Thus, plaintiffs requested the documents with sufficient clarity." Finding that OPRA requests were government records, the court observed that "receiving and responding to requests for government records is a government function. We must therefore presume that the Legislature intended that the public would have access to these records to 'maximize public knowledge about public affairs.'" The court explained that *Gannett* involved a request for copies of federal subpoenas issued by the U.S. Attorney's Office for records of Middlesex County officials. The newspaper made an OPRA request to the County for the federal subpoenas. When the County refused to provide the records, Gannett filed suit. The court ruled that a request for all records related to the subpoenas was overbroad and added that requests for third parties' record requests might be improper. Finding that the comment about OPRA requests in *Gannett* was dicta, the appeals court indicated that "the *Gannett* court's discussion of the OPRA request was not germane to the issues presented in that case, which were whether Gannett was entitled to the records the County had withheld. Furthermore, in *Gannett*, the court did not definitively state that the OPRA request was improper." The court concluded that "there is no justification for denying the public access to all third-party OPRA requests merely because of the possibility that a requestor might have an interest in preserving the confidentiality of a particular request." (*Henry Scheeler, et al. v. Office of the Governor, et al.*, No. A-1236-14T3, No. A-3170-14T4, and No. A-3335-14T3, New Jersey Superior Court, Appellate Division, Jan. 27)

A court of appeals has ruled that the Department of Education properly redacted home address information from financial disclosure forms on file with the School Ethics Commission for seven Woodbine Board of Education members because disclosure would be an invasion of privacy. After the agency redacted the home address information, Harry Scheeler complained to the Government Records Council. Although the GRC had previously required disclosure of home addresses in another complaint, it distinguished the circumstances here, finding the privacy interest outweighed any public interest. Deferring to the GRC, the court noted that "a home address alone does not invoke the privacy interest, but combining one personal identifier with other information can heighten the privacy interest. Here, we have school board members' clearly identified names and other information on the forms, including details on their finances and the public positions they hold. The fact that the board members may disclose their home addresses on other forms that may or may not be publicly available does not lead to the conclusion that it is necessary on these financial disclosure forms." Scheeler argued that home addresses were required to be disclosed by the School Ethics Act, but the court pointed out that, while home addresses had been a data element in the past, the School Ethics Commission had stopped requiring them in 2013. (*Harry B. Scheeler, Jr. v. New Jersey Department of Education*, New Jersey Superior Court, Appellate Division, Jan. 19)

ACCESS REPORTS

New York

A trial court has ruled that the New York City Office of Payroll Administration must disclose non-identifying data concerning undercover police officers in response to a request from the Empire Center for Public Policy for an electronic copy of the payrolls for all New York City employees. While the agency agreed to provide the records, it indicated that it would withhold any information about undercover police officers for security reasons. The trial court agreed with the agency that it had shown legitimate generic reasons for withholding the information, but concluded that the agency "has failed to sustain its burden that disclosure of the payroll information for undercover police officers, without any accompanying identifying information, would in any way endanger them, impede their work, or give valuable information to those attempting to evade their investigations." Noting the requester was willing to accept aggregate data, the court pointed out that "although this information would reveal the size of city law enforcement agencies' undercover program that is the only information it would provide. Standing alone, it is an insufficient basis on which to implicate this exemption." The court observed that "petitioner is entitled to know, at a minimum, the number of undercover officers employed by the NYPD and their salaries in the aggregate." Finding the plaintiff had substantially prevailed, the trial court indicated it would award attorney's fees and costs. (*Empire Center for Public Policy, Inc. v. New York City Office of Payroll Administration*, No. 100079, New York Supreme Court, New York County, Jan. 18)

Washington

A federal court in Washington has ruled that the City of Seattle is prohibited from disclosing information about covert surveillance cameras mounted on Seattle City Light poles by the FBI. Learning that Seattle planned to disclose the information provided to Seattle City Light by the FBI in response to a Public Records Act request, the United States filed suit to block disclosure. Siding with the FBI, the court noted that "the requested information is (1) protected by the federal law enforcement privilege; (2) federal property, subject to the FBI's right to control and prohibit the disclosure of information by the City, absent the express authorization of the FBI; and (3) expressly protected from disclosure by the PRA. The Court is further persuaded that the disclosure of the requested information by the City will cause irreparable harm to important federal interests, namely, the ability to carry out effective investigations of criminal violations and national security threats." (*United States of America v. City of Seattle and Its Department, Seattle City Light*, Civil Action No. 16-889 (RAJ), U.S. District Court for the Western District of Washington, Jan. 17)

The Federal Courts…

A federal court in New York has once again ruled that the Department of Defense has not sufficiently complied with its obligations under the 2009 Protected National Security Documents Act to justify withholding photos of detainees under **Exemption 3 (other statutes)**. The case started in 2004 when the ACLU filed suit against the government for access to photos of detainee abuse at Abu Ghraib prison in Iraq. After Judge Alvin Hellerstein ruled against the agency's claim that the records were protected by the privacy exemptions, the agency asserted that they were protected by **Exemption 7(F) (harm to a person)** because disclosure could endanger U.S. personnel abroad. Hellerstein rejected that claim as too broad and the Second Circuit agreed. The government petitioned for Supreme Court review, but after that review was granted, the case became moot after Congress passed the PNSDA in 2009, allowing the agency to withhold the photos based on a certification from the Secretary of Defense that disclosure would pose a danger. However, the agency was required to renew the certification every three years, based on a personal review by the Secretary.

Hellerstein accepted the original certification of then-Defense Secretary Robert Gates, but had since questioned a subsequent certification provided by then-Defense Secretary Leon Panetta. This time, Hellerstein found that a certification provided by then-Defense Secretary Ash Carter, which included a multi-level review, still did not satisfy the requirements of the PNSDA that the Secretary certify that he had reviewed each photo before determining not to disclose them. As a result of DOD's review, the agency decided to disclose 198 photos, but withheld an unspecified number. The government argued that the PNSDA was a stand-alone statute that operated independently of FOIA and was not subject to an Exemption 3 analysis. Finding no basis for the claim, Hellerstein noted that "there is nothing in the legislative record to suggest that when passing the PNDSA, Congress intended to depart from both 'the specific policies underlying FOIA and the general presumption of judicial review.'" The government asserted that judicial review of national security judgments was precluded. But Hellerstein pointed out that "but that is not the law. Deference with respect to national security issues may limit the *scope* of judicial review, but it does not *preclude* judicial review." DOD described a tiered review that had yielded a sample of photos for Carter to review. Finding this procedure insufficient, Hellerstein noted that "based on this scant information, it is impossible to know how this tiered review process yielded the recommendations that Secretary Carter adopted." He added that "the Government concluded that 198 photos could be released, but we do not know what distinguishes those photographs from all the others, nor do we know how many photographs the Government seeks to withhold. No matter how many levels of administrative review took place, the Government may not rely on a process that the Court is unable to review." Hellerstein indicated that the Secretary could delegate much of the review process to his staff, but that "he must establish the criteria to be utilized in categorizing the photographs and assessing the likely harm upon release." He observed that "the Secretary has failed to sufficiently explain the terms of his delegation." Based on the ruling in *EPIC v. Dept of Homeland Security*, 777 F.3d 518 (D.C. Cir. 2015), the agency tried once again to claim the photos were exempt under Exemption 7(F). Hellerstein noted, however, that "the danger [in *EPIC*] was sufficiently specific, and the zone of endangerment was sufficiently concrete, to justify application of Exemption 7(F). By contrast, the Carter certification is vague and unlimited. . .This vast and amorphous group does not satisfy the standard described by the Second Circuit, now would it likely satisfy the standard adopted by the D.C. Circuit in *EPIC*." (*American Civil Liberties Union v. Department of Defense*, Civil Action No. 04-4151 (AKH), U.S. District Court for the Southern District of New York, Jan.18)

Judge Amy Berman Jackson has ruled that the State Department has not yet shown that it conducted an **adequate search** for records concerning the agency's decision to allow David Kendall, the personal attorney for former Secretary of State Hillary Clinton, to retain personal control over a thumb drive containing Clinton's emails, some of which were classified. The James Madison Project and Daily Beast reporter Shane Harris submitted the request, setting a time-frame from January 21, 2013 to August 12, 2015. The agency searched the Bureau of Diplomatic Security, the Office of the Undersecretary for Management, the Bureau of Administration, and the Office of the Legal Advisor. The components' searches included a variety of keywords, which often differed from component to component. Several searches were limited to 2015, although the request had identified a time frame of 2013-2015. JMP and Harris argued that the searches varied widely and the agency's affidavit had provided no explanation for the inconsistency. The agency argued that courts had previously upheld searches done by various offices. Jackson, however, pointed out that "but the agency misses the point: the problem with the declaration in this case is that it is conclusory, and the searches are deficient because the agency—for no discernible reason—searched different data sets using different search terms and different date restrictions, even within the same bureau or office." She observed that "the agency official responsible for coordinating the supervision of the FOIA search would be wise to ensure on remand that the search terms are more uniform, and that it is clear from the declaration that the terms are reasonably calculated to uncover relevant documents." Jackson found that the name of a mid-level employee in the Bureau of Diplomatic Security who had been involved in the decision to provide Kendall with

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a secure safe was properly redacted under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Because Undersecretary for Management Patrick Kennedy had been identified as the official who approved the use of the safe, Jackson found identifying the mid-level employee would not further the public interest. She pointed out that "the agency withheld just his name; it released the Division Chief's title, the names of the higher-level officials with whom he communicated, and the substantive information in the documents in which his name appears. So the Court finds that any public interest in the name of a mid-level manager at the State Department is outweighed by the employee's interest in privacy, especially where his recommendation was ratified by more senior managers whose names have been made public." (*James Madison Project, et al. v. Department of State*, Civil Action No. 15-1478 (ABJ), U.S. District Court for the District of Columbia, Jan. 30)

A federal court in Colorado has ruled that records generated by a contractor to the Forest Service prepared during preparation of an environmental impact statement for a proposed expansion of the Wolf Creek Ski Area near the Rio Grande National Forest are not **agency records** because the Forest Service never saw or relied upon them. Rocky Mountain Wild requested records about the ski resort expansion, which involved swapping 177 non-federal acres for 205 federal acres. In his earlier decisions in the case, Judge William Martinez had ruled that the Forest Service's interpretation of the request was too narrow and that it included intra-agency communications. The Forest Service interpreted this to potentially include records generated by third-party contractor Western Ecological. Although its contract with Western Ecological provided the agency with access to records generated under the contract, the Forest Service concluded that records it had never used or seen were not agency records under FOIA. Pointing out that both parties agreed that the D.C. Circuit's decision in *Burka v. Dept of Health and Human Services*, 87 F. 3d 508 (D.C. Cir. 1996), was on point, Martinez, after reviewing the memorandum of understanding, noted that "although not all of these provisions are directly relevant, the Forest Service certainly claims an ownership interest in Western Ecological's and its subcontractors' work product, and it can do as it pleases with those records." But Martinez found the requirements in *Burka* that the agency rely upon the records and integrate them into their file system, suggested the Forest Service did not exercise the needed level of control. He pointed out that the fact that the records were not physically maintained by the Forest Service was pertinent to whether the agency had integrated the records into its own filing system. Martinez observed that "this Court certainly believes that ownership is *relevant* to control. But at present, the Forest Service's ownership amounts to little more than the *ability* to obtain information, which does not create a *duty* to obtain information. Weighed against the fact that Forest Service employees have never obtained or even seen the records at issue, the Court finds that the Forest Service does not exercise sufficient 'control' to make those records 'agency records' for FOIA purposes." Rocky Mountain Wild claimed that a provision added by the 2007 OPEN Government Act requiring access to agency records maintained by a contractor for records management purposes did not apply here. Martinez noted that "it cannot fairly be said that Western Ecological was hired for records management. The primary purpose of the contract was to prepare the EIS itself; document management was only one of many subsidiary tasks related to that purpose. In any event, even if Western Ecological could be deemed to have managed the Forest Service's records. . .that subparagraph would still only extend to whatever documents the Forest Service sent to Western Ecological, not to documents Western Ecological generated and kept for itself." (*Rocky Mountain Wild, Inc. v. United States Forest Service*, Civil Action No. 15-0127-WJM-CBS, U.S. District Court for the District of Colorado, Jan. 27)

A federal court in New York has ruled that a 2003 memo prepared by the Justice Department's Office of Legal Counsel concerning common commercial service agreements is properly classified and that the agency properly withheld it under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. The ACLU requested the memo after Sen. Ron Wyden (D-OR) revealed its existence and challenged its

conclusions. In response to the ACLU's request, DOJ withheld the memo entirely under **Exemption 5 (privileges)** as well as Exemption 1 and Exemption 3. The ACLU appealed to the Office of Information Policy, but because the ACLU had already filed suit, OIP declined to address the appeal. However, in court, the government relied primarily on Exemption 1 and Exemption 3 as the basis for withholding the memo. Judge P. Kevin Castel agreed with the government's claims, noting that "there is no evidence to suggest that the Memorandum was not properly classified in the first instance. After reviewing the government's submissions, the Court is persuaded that the information in the Memorandum would reveal intelligence activities, sources, and methods, and that disclosure of the Memorandum would risk harm to the national security." Since he had found the memo was exempt under Exemption 1, Castel observed that it was also exempt under the National Security Act. The ACLU did not challenge the classification of the document, but argued that the government's affidavits were insufficient to support its claims. But Castel noted that "having reviewed the government's Classified Declaration along with its unclassified submissions, the Court concludes that the government has said all that it can about the Memorandum publicly and any further disclosures would pose a risk to national security." The ACLU argued that the legal analysis contained in the memo could be separated out and disclosed. Castel disagreed, pointing out that "this Court recognizes that it is unlikely that each and every word in the Memorandum is classified. But case citations and quotations standing in a vacuum would be meaningless. If sufficient context was disclosed to make the non-exempt material meaningful, the circumstances warranting the classification of the Memorandum would be revealed. FOIA does not require redactions and disclosure to this extent." (*American Civil Liberties Union v. U.S. Department of Justice*, Civil Action No. 15-9002 (PKC), U.S. District Court for the Southern District of New York, Jan. 18)

A federal court in Pennsylvania has ruled that it is appropriate for it to conduct an *in camera* review of affidavits from the NSA and the CIA concerning records on the Occupy Philly movement. Paul Hetznecker, an attorney who had represented various members of the Occupy Philly movement against the City of Philadelphia, requested information about the Occupy Philly movement from the NSA, the CIA, and the FBI. Both the NSA and the CIA issued a *Glomar* response neither confirming nor denying the existence of records. The court ordered the two agencies to conduct a search for responsive records, compile a *Vaughn* index and submit the indices for *in camera* review. The agencies argued the court erred in ordering an *in camera* review and in refusing to consider the agencies' public affidavits as support for their *Glomar* responses. Relying on *Patterson v. FBI*, 893 F.2d 595 (3rd Cir. 1990), the court explained that the Third Circuit had upheld the district court's discretion in ordering an *in camera* review. The court noted that "even with a sufficiently detailed affidavit, the district court may still conduct *in camera* review when the agency claims the existence or nonexistence of certain records falls within an exemption of FOIA." As justification for ordering the *in camera* review, the court observed that "because this is a purely domestic records request of two internationally-focused agencies, the Court feels it must tread carefully, taking all responsible steps in order to arrive at the correct outcome. It therefore behooves the court to exercise its discretion under FOIA to conduct *in camera* review." The court indicated that "in the interim, Hetznecker and the general public will not be privy to any further interactions, if they occur, between the Court and the Agencies since the Court will conduct them *ex parte*. Thus, the Court's order preserves the status quo by not revealing to Hetznecker or to the public whether documents responsive to his request exist and the Agencies suffer no manifest injustice." (*Paul Hetznecker v. National Security Agency, et al.*, Civil Action No 16-945, U.S. District Court for the Eastern District of Pennsylvania, Jan. 20)

Judge James Boasberg has ruled that the U.S. Patent and Trademark Office has not yet shown that it conducted an **adequate search** for records concerning its recently retired Sensitive Application Warning System program, which flagged patent applications based on subject, but that the agency's **Exemption 5**

ACCESS REPORTS

(privileges) claims are appropriate. Patent attorney Danny Huntington requested records about the SAWS program, which flagged patent applications based on criteria such as the likelihood that they would cause media controversy; were pioneering or frivolous; posed a danger to individuals, the environment, or national security; or involved controversial or illegal subject matter. After several months of back and forth discussions yielded no response, Huntington filed suit. The agency ultimately disclosed 4,114 pages and five spreadsheets, withholding information under Exemption 3 (other statutes), Exemption 6 (invasion of privacy), and Exemption 5. By the time Boasberg ruled on the case, Huntington was only challenging the agency's search and its Exemption 5 withholdings. Boasberg noted that the agency had not indicated that it had searched all locations likely to contain responsive records. He pointed out that "Defendant has failed to invoke 'the magic words' concerning the adequacy of the search—namely, the assertion that [the Department] searched *all* locations likely to contain responsive records.' It has stated only that it 'identified offices reasonably likely to have responsive information and those offices conducted a reasonable search for responsive records.'" Huntington argued that because SAWS had begun in 1994 the agency had failed to digitize all responsive records. But Boasberg observed that "without any evidence that the USPTO's current electronic systems do not contain older records, the Court will not require the agency to describe documents, systems, or equipment that may or may not have once existed and their status now, nor will it infer inadequacy from the absence of such information in Defendant's declarations." Boasberg agreed with Huntington that the agency's description of its search of laptops for responsive records was too vague. He noted that the agency's affidavit "leaves open to question how many work laptops were searched, why those locations but not others were thought to be reasonably likely to contain responsive records, and how the agency concluded that no paper files contain responsive records." Boasberg rejected Huntington's claim that the agency's decision to flag applications was not deliberative because it did not affect whether or not patents were granted. Boasberg indicated that "that view of the privilege is too narrow. Although flagging an application for the SAWS program is not dispositive as to whether the patent will be allowed, it can trigger an additional internal quality-assurance check, the result of which 'could have an impact on the ultimate decision by the patent examiner.'" (*R. Danny Huntington v. U.S. Department of Commerce*, Civil Action No. 15-2249 (JEB), U.S. District Court for the District of Columbia, Jan. 18)

A federal court in Texas has ruled that the Inclusive Communities Project is entitled to $90,280 for prevailing in its lawsuit against the Department of Housing and Urban Development for records concerning HUD Housing Choice Vouchers in the Dallas area. After HUD failed to respond to its request within the statutory time limits, ICP filed suit. HUD provided a first batch of records, but withheld some records for privacy concerns. The agency provided a second batch of records that did not respond fully to ICP's request. The court ruled in favor of ICP and the organization then filed its motion for attorney's fees. HUD did not challenge whether ICP was eligible or entitled to fees. It only challenged 18.3 hours claimed by ICP for reviewing the records produced and the agency's *Vaughn* index. Noting that HUD disclosed documents in three batches before the court decided the case – none of which were fully responsive to ICP's original request, the court observed that "all but 3.5 of the 18.3 disputed hours are for document reviews conducted before ICP filed its motion for summary judgment—on which it eventually prevailed—supports this contention. Thus, in the present case, continued litigation following review of the records produced to ICP ultimately resulted in more records being turned over to ICP." The court added that "ICP requested documents, received some but not all of the requested documents—which it could have discovered only after reviewing the documents—and then successfully litigated to obtain the withheld documents. Therefore, the Court finds that the disputed 18.3 hours for time spent reviewing the records and the *Vaughn* index is recoverable." (*Inclusive Communities Project, Inc. v. United States Department of Housing and Urban Development*, Civil Action No. 14-3333-B, U.S. District Court for the Northern District of Texas, Jan. 26)

A federal court in Wisconsin has ruled that the U.S. Marshals Service and the FBI conducted an **adequate search** for a security plan developed during the 2000 trial of Kevin O'Neill and other members of the Outlaws biker gang for racketeering. Because O'Neill had threatened to have Assistant U.S. Attorney Paul Kanter killed, the Marshals Service developed a 56-page security plan for the trial. However, the plan was lost when it was left behind in a hotel lobby. Learning about the incident 15 years later, O'Neill requested the plan from the Marshals Service and the FBI. After searching their records, neither agency found the requested record. O'Neill argued that the Marshals Service's search was inadequate because it did not locate communications about the security plan. But the court observed that "Plaintiff's FOIA request only asks for a copy of the 56-page courtroom security plan, and does not ask for 'communications related to the plan.'" O'Neill argued the FBI should have contacted Kanter and O'Neill's co-defendant, who had made a previous FOIA request for the documents. The court noted that "the security plan and other records plaintiff seeks are about fifteen years old at this point. Therefore, both agencies were justified in limiting their search to the records in their possession and were not required to contact other individuals associated with the case in order to comply with FOIA." The FBI told the court that the FOIA request submitted by O'Neill's co-defendant involved other trials he was involved in and was not identical to O'Neill's. However, the FBI had reviewed its response to the co-defendant's request and found that "the responsive records pertained only to [the co-defendant] and the security plan was not among those documents." (*Kevin O'Neill v. United States Department of Justice*, Civil Action No. 16-425, U.S. District Court for the Eastern District of Wisconsin, Jan. 25)

A federal court in New Jersey has ruled that the Executive Office for U.S. Attorneys and the FBI properly withheld records concerning Christopher Rad's conviction as part of an E-gold investigation under **Exemption 3 (other statutes)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)**. Rad's request focused on subpoenas and records that were used during his conviction. The court found the agency had properly claimed Rule 6(e) on grand jury secrecy to protect most of the records, noting that "the release of information contained in these documents has the potential to reveal substantive information about a grand jury investigation." The court found that personally-identifying information had been properly redacted under Exemption 7(C). Rad argued the FBI had not done enough to ascertain whether the individuals were still alive. Rejecting Rad's assertion, the court observed that "defendant has undertaken substantial efforts to attempt to ascertain the life status of relevant individuals here, including searching an external database named Consolidated Lead Evaluations and Reporting. The Court is satisfied that the Government's efforts were reasonable, and the Court declines to require the relevant agencies to affirmatively demonstrate the life status of the individuals involved here." (*Christopher Rad v. United States Attorney's Office*, Civil Action No. 15-2415, U.S. District Court for the District of New Jersey, Jan. 31)

A federal court in West Virginia has ruled that U.S. Customs and Border Protection has now conducted an **adequate search** for records concerning Dennis Murphy's equal employment opportunity complaint, but that the agency has not provided sufficient information in its *Vaughn* index to allow the court to assess its exemption claims. Murphy, a security guard at the CBP facility at Harper's Ferry, requested records concerning his EEO complaint. The agency's first search located 146 pages of records. The court found the agency's first search inadequate. The agency's second search located 269 pages. Finding the second search sufficient, the court pointed out that the agency's *Vaughn* index did not sufficiently explain its exemption claims. The court also noted that the document numbers listed in the *Vaughn* index were missing from the accompanying documents. The court observed that "accordingly, it is not possible for the Court to undertake any meaningful review of the provided index and documents because it is entirely unclear which entries

correspond to what documents." (*Dennis Finbarr Murphy v. U.S. Customs and Border Protection*, Civil Action No. 15-133, U.S. District Court for the Northern District of West Virginia, Jan. 23)

Judge Ellen Segal Huvelle has certified a class action challenging the payments required to use the Public Access to Court Electronic Records system as a violation of the E-Government Act, which prohibits government agencies from charging more for publicly available information than the actual costs of providing the service. The National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice filed suit against the government, claiming that an increase from seven cents a page to ten cents a page did not reflect the actual costs of dissemination. Huvelle tweaked the parameters of the class, noting that since the plaintiffs had alleged the violation took place in the past six years, she would instead specifically identify the time frame as 2010-2016. She also dropped the term "class counsel" from the plaintiffs' definition. The government argued that the three advocacy groups were not sufficiently representative of the potential plaintiffs for purposes of certification as a class under Rule 23 of the Federal Rules of Civil Procedure. Huvelle found the plaintiffs had met the four factors for certification—sufficient numbers, common goals, sufficiently representative of the class as a whole, and ability to argue the plaintiffs' position. The government contended that the fact that three groups were non-profit organizations suggested that they did not have the same interests as other individuals or groups without non-profit status. Certifying the class, Huvelle indicated that "in fact, the nonprofit organizations who are named plaintiffs in this case make particularly good class representatives. They are interested in reducing PACER fees not only for themselves but also for their constituents. As nonprofit organizations, named plaintiffs exist to advocate for consumers, veterans and other public-interest causes." She added that "thus, the named plaintiffs have dual incentives to reduce PACER fees, both for themselves and for the constituents that they represent." (*National Veterans Legal Services Program, et al. v. United States of America*, Civil Action No. 16-745 (ESH), U.S. District Court for the District of Columbia, Jan. 24)