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Washington Focus: The Animal and Plant Inspection Service at the Department of Agriculture has removed documents from its website involving the Horse Protection Act and the Animal Welfare Act that contain personal information. Instead of routinely posting such records, APHIS indicated that the records will remain subject to FOIA requests. Although there have been a handful of cases filed by businesses challenging government agencies' disclosure of name and address information where such information could arguably fall within Exemption 6 (invasion of privacy), the APHIS action has already been the subject of two recent lawsuits arguing the decision to withdraw the records violates the affirmative disclosure provisions in section (a)(2) of FOIA. . .The FBI announced that it would no longer accept requests emailed directly to the agency, but instead would require requesters to use an eFOIA system being implemented by the Justice Department. In response to public outcry, the FBI modified its new email system so that it would not collect as much personal information. Commenting on the FBI's policy, Adam Marshall of the Reporters Committee noted that email "is the most ubiquitous form of communication. And the government should be doing everything it can to make it easier to request information—not harder."

Court Questions Application of Privilege in Confirmation Hearings

In another of a remaining avalanche of cases concerning various aspects of former Secretary of State Hillary Clinton's emails, Judge Rudolph Contreras has explored some interesting questions about when cabinet nominees are considered part of the deliberative process of the agency they intend to lead, as well as the privacy of domain email addresses when individual identifiers are redacted.

The case involved a request from Judicial Watch, which by now has more than a dozen cases against the Department of State, for all records relating to State Department review of donations to the Clinton Foundation for potential conflicts of interest. The agency searched its Office of Legal Adviser, the Office of the Executive Secretariat, and the Retired Records Inventory Management System. The agency found 16 responsive documents. It released six documents in full,

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five documents in part, and withheld five documents in full under Exemption 5 (privileges) and Exemption 6 (invasion of privacy).

Judicial Watch challenged the agency's search, particularly its decision to search the email accounts of Cheryl Mills and Jacob Sullivan, but not Huma Abedin. Judicial Watch questioned the agency decision to search both the records management content server in the Office of the Legal Adviser, as well as why it searched the individual files of the Assistant Legal Adviser but not those of other employees. Contreras found State had explained its decision in its opposition, noting that "the content server is not a repository of *all* records generated within the Office of the Legal Adviser—it only includes files specifically uploaded. Thus, it was reasonable for State to search both the 'state-of-the-art' content server and other locations that might reasonably have contained documents that were not uploaded to the content server." The agency's opposition also explained that the Assistant Legal Adviser managed the department's ethics program and would have been the most likely staffer to have responsive records. Judicial Watch also contended the agency had used different keyword searches in searching the content server as opposed to the Assistant Legal Adviser's files. But Contreras pointed out that State's search of the content server was broader than that used for the Assistant Legal Adviser's files. He observed that "there is no reason for the Court to believe that a *broader* search than that agreed upon by the parties would be less likely to produce responsive documents." Judicial Watch also challenged the agency's decision not to search its email archival system. Contreras, however, accepted State's explanation that employees in the Office of the Secretary did not use that system.

Judicial Watch strenuously objected to State's decision to search the emails of Mills and Sullivan, but not Abedin. State explained that "the subject matter of this FOIA request—which concerned potential conflicts of interest between the State Department and the Clinton Foundation—falls outside the scope of other staffers' job responsibilities." Judicial Watch argued that since Abedin had been given permission to work both at State and the Clinton Foundation it was highly likely that her emails might involve conflicts of interest issues. As to Abedin alone, Contreras agreed with Judicial Watch, noting that "with respect to Ms. Abedin, State has failed to show that it is not reasonably likely that Ms. Abedin's emails contain responsive materials. Although Ms. Abedin did not have any particular ethics training, she was simultaneously involved in both Clinton Foundation and State Department business. It is reasonable to expect that someone who had a role in both organizations would discuss the subject matter of potential ethical issues. Accordingly, the Court will order State to conduct a search of the records turned over by Huma Abedin."

Turning to the exemption claims, Judicial Watch challenged the agency's decision to withhold discussions concerning Clinton's Senate confirmation hearings under the deliberative process privilege because they involved individuals who were not agency employees at that time. State responded that "these communications were made by the equivalent of State Department consultants, and pertained to the Department's decision-making process." Contreras noted that "Judicial Watch raises serious questions as to whether the documents withheld by State relating to officials' nominations fall within the scope of the deliberative process privilege." He indicated that the records concerned Clinton's ethical obligations if she became Secretary, as well as email exchanges between Mills, Sullivan, and Philippe Reines, none of whom were State employees at the time. Contreras found that "State has not adequately responded to Judicial Watch's legal contentions. Specifically, State does not adequately address whether, in its legal opinion, the subject-matter of these documents can fairly be said to relate to State Department policies and goals. The documents primarily relate to then-Senator Clinton's Senate confirmation hearings, many of them promulgated for the purpose of informing then-Senator Clinton's answers during her confirmation hearings. The Court queries whether the issues a prospective official is facing in her pursuit of public office fall within the gamut of an *agency's* policies such that deliberation of them is shielded by Exemption 5."

Judicial Watch also contended that the records contained non-exempt factual material that should be released. State argued that disclosure of such material would chill candor in deliberations. Contreras disagreed with the agency's claims. He noted that "State's conclusory argument that, at times, factual material can reveal an agency's deliberative process does not show that it would in this case. Nor does State's chilling-effect argument hold water. Although it may be true that the possible revelation of the source of ethical questions may have a chilling effect on employees' willingness to bring those questions to the Department, it would not have chilling effects on the Department's deliberations about them. Presumably, when presented with such a potential conflict, State has a duty to assess the conflict; it cannot be chilled from doing so. Judicial Watch seeks only certain raw factual information that the State Department deliberated upon; there is nothing about the *sources* of potential ethical conflicts that would chill ethics lawyers' candid discussion of them. State does not argue that either the submitter of the ethics inquiry or the third party subject to that inquiry has a privacy interest in not having his or her potential speech or action disclosed. Taken to its logical extreme, State's argument would justify the shielding of all factual material that is the subject of deliberations by agency officials."

State had redacted non-government email extensions other than those associated with Hillary Clinton. Judicial Watch argued that there was a public interest in knowing where these emails originated. Noting a specific problem, Contreras pointed out that since State had identified the personal email prefixes of three individuals, to now release their domain extensions as well would invade their privacy. Contreras rejected Judicial Watch's claim of public interest in the domain extensions. He observed that "the mere use of private email addresses by outsiders of the State Department does not show much of anything, much less a pattern." Regardless of the lack of a public interest, Contreras found that "mere domain extensions, however, do not trigger a substantial third-party privacy interest." Ordering the agency to disclose non-identifying domain extensions, Contreras added that "State does not show, however, that the email domain extensions contained within the documents where the email prefixes are still redacted are the types of 'bits of information' that 'can be identified as applying to that individual,' any more than the redactions themselves can be attributed to the unredacted identities of the authors." *Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 15-0688 (RC), U.S. District Court for the District of Columbia, Feb. 1)

Views from the States…

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

California

A federal court has ruled that AB 1687, which prohibits the publication of information about the ages of people in the entertainment industry, is likely unconstitutional because it violates the First Amendment rights of IMDb.com, a website that deals with the entertainment industry. Granting IMDb.com a preliminary injunction, the court noted that "it's difficult to imagine how AB 1687 could not violate the First Amendment. The statute prevents IMDb from publishing factual information (information about the ages of people in the entertainment industry) on its website for public consumption. This is a restriction of non-commercial speech on the basis of content." The State argued that the law was passed to combat age discrimination in the entertainment industry. But the court observed that "because the government has presented nothing to suggest that AB 1687 would actually combat age discrimination (much less that it's *necessary* to combat age discrimination), there is an

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exceedingly strong likelihood that IMDb will prevail in this lawsuit." (*IMDb.com, Inc. v. Xavier Becerra*, Civil Action No. 16-06535-VC, U.S. District Court for the Northern District of California, Feb. 22)

Louisiana

A court of appeals has ruled that Jeffrey Rouse, the coroner of New Orleans Parish, properly responded to inmate Gerald Hatcher's request for forensic evidence allegedly in Rouse's custody and control. After Hatcher did not hear back from Rouse, he filed suit. Rouse told the court that he had responded to Hatcher's request by letter indicating that he had no records relating to the item number provided by Hatcher. The trial court sided with Rouse. Finding Rouse had acted properly, the appeals court noted that "because Dr. Rouse was unable to even identify any records based on the information provided by Mr. Hatcher, his response clearly sought additional information so that he could search for the records requested. Mr. Hatcher's next letter provided the same information as that contained in his initial letter, although he repeatedly referred to records maintained by the City of New Orleans." The appeals court observed that "as Dr. Rouse was unable to identify records pertaining to Mr. Hatcher's request, we find no abuse of the trial court's discretion in denying the request for a Writ and dismissing it." (*Gerald Hatcher v. Jeffrey Rouse, M.D.*, No. 1016-CA-0666, Louisiana Court of Appeal, Fourth Circuit, Feb. 1)

Minnesota

A court of appeals has ruled that since Troy Scheffler failed to make his request for a police report concerning his attendance at a family court hearing of a police officer who had earlier arrested him for disorderly conduct to the City of Anoka's responsible authority or designee for receiving public access requests under the Data Practices Act he does not have standing to pursue his claim that the City improperly withheld a supplement attached to the incident report until much later. After the police officer reported the incident to a superior, the superior interviewed the police officer and prepared an incident report and a two-page supplement. The report was given to Michael Scott, whose law firm had a contract with the City of Anoka to serve as city attorney. Scheffler requested the report in person from the records manager of the Anoka police. He was given the incident report, but told that the supplement could not be released because the case was still under investigation. Scheffler's attorney then requested the supplement from Scott, who told Scheffler that he was unaware of the supplement. Scheffler filed suit. The trial court ruled in favor of the City, finding that Scheffler had failed to properly request the records from the City's responsible authority as identified in its data practices policy. Scheffler sent a request to the City's responsible authority, who provided the records, including a later version of the supplement. Scheffler was also assessed costs for bringing the suit. The appeals court agreed that the Data Practices Act required a request be made to the responsible authority or designee. The court rejected Scheffler's claim that under the common law apparent-authority doctrine, he was led to believe that the records manager at the Anoka police department could accept his request. The appeals court noted that "a person seeking data from a government entity must make his request to the government entity's specified responsible authority or designee before claiming a [Data Practices Act] failure to provide data or failure to provide a reason for denial. A government entity is not liable under the act for an alleged violation of these sections if the requestor did not satisfy the prerequisite. We also hold that the [Data Practices Act] does not recognize responsible authorities or designees by operation of common-law apparent-authority principles. Because [the Anoka police department] records staff were not the city's responsible authority or designees, the [trial] court properly granted summary judgment to the city.' (*Troy K. Scheffler v. City of Anoka, et al.*, No. A16-0252, Minnesota Court of Appeals, Feb. 6)

Texas

The supreme court has ruled that records that fall within the attorney-client privilege categorically meet the compelling reason standard for withholding under the Public Information Act and that a public body cannot be forced to disclose such information merely because it misses the deadline for filing an appeal with the Attorney General's Office. Ruling in two cases involving the City of Dallas' challenge to the Attorney General's conclusion that the City failed to show a compelling reason for non-disclosure because it appealed to the AG after the statutory deadline, the supreme court found the importance of recognizing the attorney-client privilege outweighed any policy encouraging agencies to respond promptly to PIA requests. Under the AG's precedent, the compelling reason standard was limited to exemptions considered mandatory or where disclosure could harm a third party. The AG reasoned that since the privilege could be waived it was discretionary rather than mandatory. In both cases, Dallas had failed to provide further justification to meet the compelling need standard. The supreme court found that since the attorney-client privilege was so well-recognized and accepted and since there was no dispute that the documents qualified for the privilege, such documents should be presumed to be exempt unless there was clear evidence that the public body had waived the privilege. Ruling in favor of Dallas, the supreme court noted that "meeting statutory deadlines is certainly important, but as the PIA plainly articulates, is not determinative. Weighing against the need for prompt action is the irremediable consequence of compelling disclosure; once privileged information is disclosed, confidentiality is lost for all times and all purposes. When the interests are balanced, the compelling nature of the attorney-client privilege is manifest." Justice Jeffrey Boyd dissented, noting that the compelling reason standard "imposes an *additional* requirement—not an *alternative* requirement—that applies when a governmental body fails to timely assert an applicable exception." Boyd indicated that he disagreed with the narrow interpretation of the AG, finding instead that a compelling reason should be determined on a case-by-case basis. (*Ken Paxton v. City of Dallas*, No. 15-0073, Texas Supreme Court, Feb. 3)

The Federal Courts…

Judge Amit Mehta has ruled that the FBI has not has not shown that it conducted an **adequate search** for Privacy Impact Assessments and Privacy Threshold Analyses and has not justified redactions made under **Exemption 7(E) (investigative methods and techniques)**. EPIC requested the PIAs and PTAs, which are required by the E-Government Act, from the FBI. The request was forwarded to the Privacy and Civil Liberties Unit. The agency located 2,490 pages and withheld in full or in part 215 pages. EPIC challenged the agency's search, arguing that its affidavit failed to provide the search terms used, failed to show why the agency decided to search only the PCLU and did not explain whether all potentially responsive files were searched. Mehta agreed, noting that "the declaration does not, for instance, say whether PCLU staff searched paper files, electronic files, or both. If it searched electronic files, then the declaration does not say what search terms were used. Nor does it identify the persons within PCLU who most likely possessed responsive materials. A declaration lacking such basic facts does not satisfy an agency's burden to demonstrate the adequacy of its search." Turning to Exemption 7(E), Mehta noted that under the E-Government Act the PIAs and PTAs were required to be made public, if practicable. Mehta found that the agency's affidavit was "insufficient to establish that the withheld materials were compiled for law enforcement purposes within the meaning of FOIA. It devotes most its attention to establish a single, generic point: The FBI uses various technologies to carry out its law enforcement duties. No one disputes that." He observed that the agency's affidavit "does not adequately explain how or why the PTAs and PIAs are created or used to enforce the law. It tells the court nothing about the connection between the contents of the assessments and the agency's law enforcement function. Rather, the declaration simply asserts, without any elaboration, that there is some unspecified 'nexus' between the privacy assessments and the agency's law enforcement responsibilities. Such

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a conclusory assertion does not enable the court to conduct a de novo review of the FBI's withholdings under Exemption 7(E)." He added, however, that "none of this should be taken to mean that the privacy assessments required by the E-Government Act do not, in theory, have a rational nexus to the act of enforcing the law. Law enforcement agencies, like the FBI, cannot effectively carry out their law enforcement function unless their technology systems are capable of securing sensitive personal information that comes into the agency's possession." He pointed out that "technology systems that are vulnerable to being compromised, whether by internal or external means, do not merely put investigations at risk, but also imperil the privacy interests of those individuals whose personal information happens to comes into possession of a law enforcement agency." Faulting the technical jargon used by the agency to explain its Exemption 7(E) claim, Mehta observed that "the court does not mean to diminish the difficulties attendant to describing technology systems and concepts to a non-technical audience. Nevertheless, those descriptions cannot be written as if the court possesses an advanced degree in computer science. Unfortunately, it does not. Thus, when the FBI revises its declaration, the court urges the agency to use less jargon and opt instead for plain language that will more easily enable the court to determine if the requirements of Exemption 7(E) are met." (*Electronic Privacy Information Center v. Federal Bureau of Investigation*, Civil Action No. 14-01311 (APM), U.S. District Court for the District of Columbia, Feb. 21)

Judge Ketanji Brown Jackson has ruled that the Department of Defense improperly narrowed its **search** to a single office in response to two FOIA requests from Robert Rodriguez, a former Army officer who had unsuccessfully petitioned the Army Board for Correction of Military Records for relief under the Military Whistleblower Protection Act. Rodriguez appealed the denial to Pasquale Tamburrino, the Under Secretary of Defense, Personnel, and Readiness, who affirmed the agency's denial. Rodriguez then appealed to the D.C. Circuit. He also submitted two FOIA requests to DOD—one for records concerning his appeal, and the other for records Rodriguez had submitted as part of his appeal and records relating to Tamburrino's review of his appeal. Because DOD had already provided records to the D.C. Circuit in relation to Rodriguez's appeal, the agency provided those records to Rodriguez in response to his first appeal. However, he indicated he thought there were more records and the agency agreed to continue its search. The search was conducted by Lt. Col. Ryan Oakley, an official in the Office of Legal Policy of Personnel and Readiness who had prepared the documents for Tamburrino's review. Rodriquez argued that the agency's search was inadequate because it was limited to the Office of Legal Policy at Personnel and Readiness. While Oakley described in detail the searches he conducted, Jackson noted that "what the agency has *not* done, however, is explain clearly why its search was *limited* to the Office of Legal Policy, when the FOIA requests at issue plainly encompassed records that could have been located in other subdivisions of DOD." Jackson observed that Rodriguez's requests encompassed records from the Office of the Chief of Staff where Tamburrino was located. She pointed out that "the fact that the Office of Legal Policy *recommended* that decision does not necessarily mean that it alone possessed documents regarding how that determination was made. . ." She added that "it was manifestly unreasonable for DOD to decide to respond to Rodriguez's two FOIA requests by looking no further than files maintained by the Office of Legal Policy, and even more significant, failing to search *Tamburrino's own office* (including his email database), which Plaintiff specifically noted was the likely place where all of the records regarding Tamburrino's review would be located." Jackson indicated that "this Court simply cannot fathom any legitimate reason for the location limitation that DOD imposed with respect to Rodriguez's two FOIA requests, and thus, it is difficult, if not impossible, to conceive of the agency's search for records as a reasonable one." DOD asserted that Rodriguez had narrowed his request in an email exchange concerning the agency's progress in responding. But Jackson observed that "but to view this communication as necessarily disclaiming an interest in documents relating to Tamburrino's review—and thereby foregoing any search of Tamburrino's own records—when the email plainly confirms Rodriguez's interest in that very subset of records 'is manifestly inconsistent with the text and spirit of Plaintiff's inquiry.'" Addressing Oakley's

affidavit, Jackson pointed out that "FOIA clearly contemplates that an agency will undertake a focused search for records in response to a particular request for documents, but the affidavit here indicates that Lt. Col. Oakley primarily cobbled together the results of various document reviews that he had previously undertaken (by request) in a different context. Therefore, far from demonstrating adequacy, Oakley's sworn statement strongly suggests that DOD failed to undertake any diligent or targeted search for records at all." She faulted the search terms Oakley used, noting that "the fact that three out of four key search terms that Lt. Col. Oakley purportedly used appear nowhere on the face of Plaintiff's request is also evidence that the search terms he employed were not reasonably calculated to uncover all responsive documents." Explaining the next steps, Jackson indicated that "as a practical matter, DOD's records search will have to be redone." (*Robert W. Rodriguez v. Department of Defense*, Civil Action No. 14-0101 (KBJ), U.S. District Court for the District of Columbia, Feb.15)

Judge Rosemary Collyer has ruled that the EPA conducted an **adequate search** for records concerning emails or text messages sent to or from the Office of the General Counsel that was either to or from former EPA administrator Gina McCarthy and referred to text messaging. She also found the agency had properly invoked **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)** to withhold 380 pages in full and 384 pages in part out of a total of 1702 pages. Although CEI had filed an administrative appeal, EPA had rejected the appeal because it arrived late. CEI argued that it had filed its appeal by email on Thursday, January 8, 2015, within the time for appealing, and that the agency had received it at that time. However, the EPA's records indicated that the appeal was not logged into its system until Monday, January 12, 2015, several days after the deadline. EPA explained to Collyer that CEI's appeal was sent through FOIAonline on Thursday evening and because the staff member who would normally have logged the appeal on Friday was on medical leave, the appeal was not logged into the agency's system until Monday morning. EPA argued that receipt of the appeal occurred when the agency actually opened the email for the first time and logged CEI's request into the agency's system, while CEI contended receipt meant when the appeal arrived at the agency. Collyer noted that she had previously "distinguished the law governing FOIA *requests* versus FOIA *appeals*, explaining that in the context of an appeal the relevant question is 'when the Institute's appeal was received *by EPA*.' FOIA requests, on the other hand, may be appealed within twenty days of receipt by 'the appropriate component of the agency.' EPA clearly received the Institute's appeal on January 8 and thus failed to respond in a timely basis." Finding the search was adequate, she observed that the agency's affidavit "describes a search reasonably calculated to uncover responsive documents and the Institute provides nothing to challenge the presumption of good faith afforded the declaration." CEI questioned whether emails shared with a contractor and two non-lawyers qualified for the attorney-client privilege. She found the contractor had been acting within the scope of the contract on matters related to CEI's litigation. As to emails involving the two non-attorneys, she pointed out that "the challenged emails between [the two non-attorneys] were exchanged at the request of attorneys and to provide information to attorneys for the purpose of obtaining legal advice." Collyer also found that emails discussing a media strategy qualified for protection under the deliberative process privilege. She indicated that "emails 'generated as part of a continuous process of agency decision-making regarding how to respond to' a press inquiry are protected by the deliberative process privilege. The documents in Categories B and C were clearly generated as part of a media strategy in response to FOIA litigation." (*Competitive Enterprise Institute v. United States Environmental Protection Agency*, Civil Action No. 15-215 (RMC), U.S. District Court for the District of Columbia, Feb. 8)

The D.C. Circuit has ruled that a cover memo forwarding eight letters to members of Congress to be signed by former Secretary of Defense Chuck Hagel to explain his reasons for sending five Guantanamo detainees to Qatar in exchange for Sgt. Bowe Bergdahl is protected by **Exemption 5 (privileges)** and was not

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adopted by the Hagel when he signed the letters. After the exchange for Bergdahl was announced, Judicial Watch requested records concerning Hagel's decision. DOD disclosed redacted copies of the eight letters and indicated that they had been accompanied by a cover memo prepared for Hagel by Assistant Secretary of Defense Michael Lumpkin. However, the agency found the cover memo was not responsive and, even if it was, it was protected by the deliberative process privilege. Judicial Watch argued that the agency had waived its privilege because the memo embodied Hagel's final decision. The D.C. Circuit disagreed, noting that "to adopt a deliberative document, it is not enough for an agency to make vague or equivocal statements implying that a position presented in a deliberative document has merit; instead, the agency must make an 'express' choice to use a deliberative document as a source of agency guidance." Judicial Watch pointed out that the Lumpkin memo was characterized as being responsive in the district court's decision. Bu the D.C. Circuit observed that "we are sensitive to the fact that plaintiffs in FOIA litigation must of necessity rely on inferences from limited information available to them about documents asserted to be privileged. In this case, that means Judicial Watch is reading a great deal into the district court's description of the Lumpkin Memo. But after reviewing the memo in camera, we conclude that the memo is neither a signed memo nor a secretarial determination regarding the detainees." Judicial Watch also claimed Hagel must have adopted the memo to meet his recordkeeping obligations. The D.C. Circuit observed that "but, to satisfy his obligations under that statute, the Secretary need only preserve the memo and signed letters to Congress. He need not also produce them or any other nondecisional records of the agency's internal workings and 'essential transactions.'" (*Judicial Watch, Inc. v. United States Department of Defense*, No. 26-5054, U.S. Court of Appeals for the District of Columbia Circuit, Feb. 7)

Judge James Boasberg has ruled that the Department of State properly withheld 30 pages of records concerning communications between the agency and former Secretary of State Hillary Clinton or her associates pertaining to the production of 55,000 emails sent from non "state.gov" email addresses under **Exemption 5 (deliberative process privilege)**. Judicial Watch requested the records and State disclosed 87 documents, but withheld 153 documents in full or in part. Judicial Watch claimed the 30 records withheld under Exemption 5 were subject to the government misconduct exception because the records would show the agency's complicity in Clinton's misuse of a private server or, alternatively, show that the agency had discussed how to create misinformation to minimize the public's perception of the misconduct. After reviewing the records *in camera*, Boasberg indicated that "even assuming that the conduct hypothesized by Judicial Watch would rise to the level required for the narrow government-misconduct exception, the records show no such acts. More specifically, the material withheld does not provide insight into Clinton's misuse of the private server, not does it reveal any purported Department complicity in that act or effort to downplay her misconduct after the fact." Discussing various emails that were withheld, Boasberg pointed out that "while others do discuss the scope and methodology of State's efforts to recapture emails, the communications again appear to be well within the realm of legitimate policy ends. These records, in other words, demonstrate only that State employees were actively offering various opinions as they worked to ensure that the agency appropriately responded to the news swirling around Clinton's emails." (*Judicial Watch, Inc. v. United States Department of State*, Civil Action No. 15-687 (JEB), U.S. District Court for the District of Columbia, Feb. 21)

Ruling on two separate fee issues, the D.C. Circuit has found that National Security Counselors was not entitled to a **fee waiver** because it had not shown how it would disseminate information about Department of Justice declarations in FOIA and Privacy Act cases between 2002 and 2006. The D.C. Circuit also found that the FBI had not sufficiently justified the fees it assessed reporter Jeff Stein for copying 21,000 pages of records on to 44 CDs. Dealing with Stein's clams first, Circuit Court Judge Sri Srinivasan rejected the Justice Department's contention that Stein had not **exhausted his administrative remedies** because he had not filed

an administrative appeal of the FBI's assessment of fees for producing multiple CDs. But Srinivasan noted instead that "the fact remains that both Truthout, [which had been a plaintiff in the district court but was not a party to the appeal] and NSC exhausted administrative remedies with regard to the same claim brought jointly with Stein's in the same case. In the circumstances, denying review of Stein's companion claim on grounds of his own non-exhaustion would not serve the purposes of requiring administrative review–i.e., enabling the agency to 'function efficiently' and to 'have an opportunity to correct its own errors.'" The FBI's policy for burning multiple CDs was to limit individual CDs to approximately 500 pages and charge $15 per CD. The agency claimed that it needed to run an Integrity protocol for each CD, which took about 50 minutes. Stein challenged the agency's 500-page standard, arguing it could put far more pages on a CD. But Srinivasan agreed with the agency that its 500-page limit allowed it to deal with requests for a smaller number of pages. He explained that "FOIA does not stand in the way of an agency's formulation and application of a reasonable, generally applicable release protocol." Stein was more successful in challenging the agency's conclusion that the Integrity protocol took 50 minutes of staff time. Stein questioned whether running the Integrity protocol actually required 50 minutes of dedicated operator time. Srinivasan pointed out that "the FBI, despite its awareness of Stein's argument, gave no supplemental information addressing whether the operation of the Integrity program in fact entails any ongoing employee interaction. Given those circumstances, we conclude that there remained a genuine issue, foreclosing the entry of summary judgment, concerning whether the fees assessed by the agency exceeded direct costs." Srinivasan found that NSC's fee waiver request floundered on its inability to show how it would disseminate the information. He noted that "NSC provided some barebones indication of how it intended to use its requested information, [but] it failed to provide sufficiently specific and non-conclusory statements demonstrating its ability to disseminate the disclosures to a 'reasonably broad audience of persons interested in the subject.'" (*National Security Counselors and Jeffrey Stein v. United States Department of Justice*, No. 15-5117, U.S. Court of Appeals for the District of Columbia Circuit, Feb. 14)

Judge James Boasberg has ruled that personnel review records of former U.S. bankruptcy trustee Jeremy Gugino contain discussions of his allegedly inadequate bond coverage and that pro se litigant Allen Wisdom should be given a chance to argue that their disclosure is in the public interest. Although the U.S. Trustee Program characterized the records as performance reviews and withheld them under **Exemption 6 (invasion of privacy)**, after Boasberg reviewed them *in camera* he realized that they were directly pertinent to Wisdom's public interest argument. Ordering supplemental arguments from both parties, Boasberg noted that "the public does have some interest in these evaluations. . .Not only do these records appear to include [information that would shed light on government activities], but they also contain much more of it than Wisdom previously could have surmised." Boasberg observed that "to give Plaintiff a fair shot at meeting his burden, the Court must give him another chance to brief the issue as to these particular records." (*Allen L. Wisdom v. United States Trustee Program*, Civil Action No. 15-1821 (JEB), U.S. District Court for the District of Columbia, Feb. 8)

A federal court in California has ruled that the Marine Corps **conducted an adequate search** and properly withheld records under **Exemption 5 (privileges)** in response to Dennis Buckovetz's request for records concerning a sexual harassment complaint. Although Buckovetz was not a party to the complaint, he was reprimanded as a result of the investigation of the complaint. In its earlier ruling, the court found the Marine Corps had not sufficiently explained its search, but this time the court found the agency had provided an adequate justification. Buckovetz argued that the agency had not contacted him to clarify his request. But the court observed that "it is Plaintiff's responsibility to be specific in his request. He does not declare that he affirmatively sought to clarify his request. Plaintiff could have submitted other FOIA requests specifying the

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records he sought. Plaintiff is no novice to FOIA requests and has submitted several requests in connection with the sexual harassment complaint." Buckovetz also complained that the agency's search for emails was too narrow. The court noted that "as to whether Defendant needs to conduct a broader email search, Defendant argues that without additional detail from Plaintiff about what he sought, it would have been burdensome for the government to search the emails of all government employees during the time to determine whether any discussed the sexual harassment complaint." (*Dennis M. Buckovetz v. U.S. Department of the Navy*, Civil Action No. 15-00838-BEN-MDD, U.S. District Court for the Southern District of California, Feb. 3)

Judge Amit Mehta has ruled that the DEA conducted an **adequate search** for records concerning its investigation of Randee Gilliam for drug trafficking and properly withheld records under **Exemption 7 (law enforcement records)**. Mehta has previously ruled that wiretap authorization records were protected by Exemption 3 (other statutes). The agency had also relied on Exemption 7(A) (interference with ongoing investigation or proceeding), but during the pendency of his FOIA suit, Gilliam accepted a plea agreement, foregoing any further appeal, mooting out the application of Exemption 7(A). The agency also found more records and ultimately disclosed 59 pages, withholding some records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, **Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods and techniques)**. Gilliam complained that the agency's search was inadequate because it had not turned over certain records. Mehta noted that "plaintiff's speculation that records *might* exist in a field office does not render the DEA's search inadequate." He added that "here, the DEA searched the computer database that most likely would identify responsive records. Nothing more is required." Gilliam was particularly interested in the shipping label for several FedEx packages he had received. He argued that the labels would not disclose a confidential source's identity. Mehta pointed out, however, that "while that may be true, Plaintiff broadly sought all records relating to the searches [in which his packages were seized], not just the FedEx label. The court has no reason to doubt that such a sweeping request might include information relating to confidential sources." (*Randee A. Gilliam v. U.S. Department of Justice*, Civil Action No. 14-00036 (APM), U.S. District Court for the District of Columbia, Feb. 22)

A federal court in Maryland has ruled that Jim Gray **failed to exhaust his administrative remedies** when he did not appeal the Washington Metropolitan Area Transit Authority's assessment of a $252 fee for records concerning an incident in which WMATA police allegedly improperly stopped Gray. Gray requested the records under the Maryland Public Information Act and WMATA agreed to process his request under its Public Access to Records Policy, modeled after the federal FOIA. WMATA responded to Gray's request with a fee estimate of $252 and told Gray that if it did not hear from Gray within 30 days it would close his request. Instead, Gray filed suit under FOIA. The court pointed out that "WMATA is not a federal agency, but rather an interstate compact. . ." Nevertheless, the court decided to analyze Gray's request under the PARP. Gray argued that because WMATA had failed to respond within the appropriate time limits he had constructively exhausted the requirement the he appeal. Rejecting that argument, the court noted that "plaintiff did not commence his litigation immediately, however, and this type of 'constructive exhaustion' is only valid 'so long as the agency has not cured its violation by responding before the requester files suit.' Therefore, even if Defendant violated the PARP timing provisions as Plaintiff indicates, Plaintiff was still required to file an administrative appeal once Defendant sent its responsive letter [before Gray filed suit]." (*Jim Gray v. Washington Metropolitan Area Transit Authority*, Civil Action No. DKC 16-1792, U.S. District Court for the District of Maryland, Feb. 8)

A federal court in Washington has dismissed the Department of Energy's request for reconsideration of its prior ruling that one of two reports requested by agency employee Julie Reddick, pertaining to concerns

she submitted to the agency's Employee Concerns Program, was not protected by **Exemption 5 (privileges)**. The court had previously found that one report was covered by Exemption 5, but that the other, referred to as the Van der Puy report, was not. The agency then asked the court to reconsider its decision. Rejecting the agency's motion, the court noted that "defendant's motion focuses on. . .whether the evidence would have changed the disposition of the summary judgment motion, while neglecting to address how the evidence is newly discovered and whether Defendant exercised 'due diligence' in bringing it to the Court's attention." The court observed that "here, DOE waited for the Court to issue its order to bring the information to the Court's attention, despite having had the documents and information in its possession since October 2016. Moreover, DOE provided no explanation for the delay in providing these documents." Alternatively, DOE asked the court to redact certain personally-identifying information under **Exemption 6 (invasion of privacy)**. Rejecting that request as well, the court pointed out that "DOE has waived FOIA Exemption 6 by not asserting that Exemption 6 protected the Van der Puy report from disclosure in its original FOIA determinations. In addition, the Court notes that the Van der Puy report will be produced to Plaintiff subject to a protective order." (*Julie Reddick v. United States Department of Energy*, Civil Action No. 15-5114-RMP, U.S. District Court for the Eastern District of Washington, Feb. 10)

A federal court in Idaho has ruled that the Postal Service has not shown that Martin Bettwieser, a rural letter carrier in the Boise Post Office, failed to **exhaust his administrative remedies** when he hand-delivered a FOIA request to Billy Gans, the station manager at the Five Mile Station. Bettwieser filed suit over a labor dispute, but one of his allegations was that the agency had not responded to his FOIA request given to Gans. The agency argued that since Gans was not an authorized recipient for FOIA requests, Bettwieser had failed to properly submit the request. Bettwieser introduced eyewitness testimony of another employee supporting Bettwieser's allegation that he had given Gans the request. He also indicated that Gans had accepted FOIA requests previously. The magistrate judge noted that "in a summary judgment context, such circumstances prevent this Court from finding as a matter of law that Plaintiff failed to exhaust his administrative remedies or that such an argument cannot be viably defended, with such matters left to be resolved by the fact-finder." (*Martin Bettwieser v. William Gans, et al.*, Civil Action No. 15-00493-EJL-REB, U.S. District Court for the District of Idaho, Feb. 1)