Volume 43, Number 5
March 15, 2017

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Court Finds No Competitive Harm in Disclosure of "Stale" Information 1

Views from the States 3

The Federal Courts 6

Washington Focus: Sunshine Week events will take place throughout the week of Mar. 13-17. Both DOJ and OGIS will host events on Mar. 13. The D.C. Open Government Coalition will hold an event at the National Press Club on Mar. 14. The week's events will culminate on Mar. 15, James Madison's birthday, at the annual symposium at the Newseum, hosted this year by the Project on Government Oversight and the American Library Association , entitled "Accessing Information in the Age of Trump: Advice for Journalists and Watchdogs."

Court Finds No Competitive Harm in Disclosure of "Stale" Information

Judge Tanya Chutkan has ruled that the U.S. Foreign Agricultural Service failed to show that companies with loans guaranteed by the Export Credit Guarantee Program to export agricultural products to Russia, Ukraine, and Kazakhstan would suffer competitive harm if information identifying exporters, the companies to whom they imported the products, and foreign banks providing payment for the exports, was disclosed to Pablo Calderon, who had been convicted of conspiracy and wire fraud for using falsified documents to support various trades.

Calderon sent a FOIA request to FAS for records concerning guarantee applications for banks in Ukraine, Russia, and Kazakhstan and claims made as a result of those guarantees, as well as compliance reviews for all program exporters involved in the Eurasia region from FY 2002 to FY 2012. After eight months of waiting for a response from FAS, Calderon filed suit. At that time, FAS identified more than 9,000 responsive pages and sent pre-disclosure notification letters to six companies and six banks. Four of the exporters and all six banks objected to disclosure, claiming they would suffer competitive harm as a result. FAS disclosed 9,212 pages, organizing the records into three categories—registration files, claim files, and compliance files. The agency redacted names and contact information of employees under Exemption 6 (invasion of privacy) and made extensive redactions under Exemption 4 (confidential business information).

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year. Subscription price is $400 per year.
Copyright by Access Reports, Inc
1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

No portion of this publication may be reproduced without permission.
ISSN 0364-7625.

Calderon attacked the agency's statement of material facts and its *Vaughn* index, claiming they violated Local Rule 7(h) by failing to provide certain information that the agency relied upon. Rejecting those claims, Chutkan noted that "Calderon was not prejudiced by any non-compliance, as he had a full opportunity to submit his own Statement of Material Facts in support of his cross-motion, to submit supporting declarations, and to otherwise address any factual issues he found with FAS's submissions." Calderon complained the *Vaughn* index did not provide explanations of each redaction. Chutkan, however, observed that "while the index itself does not include legal justifications for applying the exemptions, the accompanying agency and submitter affidavits are sufficiently descriptive for the court and for Calderon to understand the agency's reasoning for each redaction. Given the large number of documents at issue, and that the categories are frequently repeated in the various documents, FAS's decision to refrain from repetitive and redundant explanations in its *Vaughn* index in favor of explaining in its submitted declarations is satisfactory to the court."

The agency argued that disclosure of the information would impair its ability to get the same kind of information in the future because some exporters said they would no longer participate in the program if they knew that their confidential information might be disclosed. Chutkan pointed out that "while that may be true, the court is not convinced that whether private entities will *participate* in the GSM-102 Program is relevant to the court's analysis under FOIA of whether FAS will likely be impaired in its ability to obtain information in the future from those entities that *do* participate. When entities apply to FAS to take advantage of the Program's significant economic incentives, they will be obligated to provide the required transactional documents, and FAS has not asserted that the quality or substance of the information provided in these required documents might be diminished."

After finding that there was actual competition in the market for export guarantees, Chutkan turned to FAS's explanation of why disclosure would cause substantial competitive harm. The agency argued that "for nearly all of the different categories of information in the various types of documents, disclosures would enable competitors to enter the market, reach out to potential importers and banks, and undercut the prices offered by the objecting exporters, thereby causing competitive harm from losing out on potential competition." She indicated that "FAS also argued that disclosing the names of company officials and employees 'would allow competitors to contact them with more enticing employment offers' or to ask about their business practices, and that disclosing bank account information 'would subject the affected exporters to harm by competitors, which would have information about and access to the exporters' assets.'" She noted that the objecting exporters made the same broad allegations.

She pointed out that "FAS offers little explanation for how a new competitor, armed only with the disclosed names of importers, banks, and other pricing/quantity information, would overcome the 'high barriers to entry' built into structuring these program transactions. Nor does FAS or the submitters state that they, as existing market competitors, would use the disclosed information in competition with each other. Therefore, it is unclear to the court what entities would or could even make use of any of the redacted information here."

Calderon argued that "the redacted information is not only stale, but in fact has no relevance or value because it concerns only transactions that occurred in Russia, Ukraine, or Kazakhstan, and these countries are no longer being used or no longer qualify for the Program." Chutkan agreed. She noted that "while it might be true that the submitters *may* engage in non-Program transactions in Russia, Ukraine, or Kazakhstan, there is simply no evidence in the record that the submitters are presently engaged in any of these markets with these transactional partners, or even that non-Program competitors are engaged in such transactions to take advantage of the disclosed information. In short, there is simply no evidence that disclosure of this information 'would *likely* cause substantial harm to the submitters' competitive position,' as required by the

statute." Chutkan found that the names and contact information of the exporters' employees were not protected under Exemption 4. She pointed that "while the submitters may be concerned about competitors giving their employees more lucrative or attractive job offers, that is a routine aspect of competition, and is not the concern of FAS, FOIA, or this court, and therefore does not support redaction under Exemption 4."

However, Chutkan agreed with the agency that the employees' contact information was protected by Exemption 6. She pointed out that 'in light of FAS's and the submitters' harassment concerns, there is a privacy interest in the employees' business e-mail addresses and business phone numbers." She rejected Calderon's claim that disclosure of such information served the public interest. Instead, she noted that "there is no logical connection between the e-mail addresses, signatures, and phone numbers of employees at entities involved in these transactions and what the government 'is up to.' As a result, the court concludes there is virtually no public interest in disclosure of this information." (*Pablo Calderon v. U.S. Department of Agriculture, Foreign Agricultural Service*, Civil Action No. 14-0425 (TSC), U.S. District Court for the District of Columbia, Feb. 21)

Views from the States…

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

California

The supreme court has ruled that records concerning public business contained in personal accounts is subject to the California Public Records Act. The case involved a request for records by Ted Smith to the City of San Jose including emails and text messages sent on private devices. While the trial court ruled in Smith's favor, the appellate court agreed with the City that it was not required to disclose emails from personal accounts because the City had neither custody nor control of the records. Reversing the court of appeals, the supreme court observed that "to qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public's business." The court rejected the City's claim that "if a local agency does not encompass individual officers and employees, only writings accessible to the agency as a whole are public records." The court pointed out that "a disembodied governmental agency cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can do these things. When employees are conducting agency business, they are working for the agency and on its behalf." The court explained that "documents otherwise meeting CPRA's definition of 'public records' do not lose this status because they are located in an employee's personal account. A writing retained by a public employee conducting agency business has been 'retained by' the agency within the meaning of [the CPRA], even if the writing is retained in the employee's personal account." The court added that "there is no indication the Legislature meant to allow public officials to shield communications about official business simply by directing them through personal accounts. Such an expedient would gut the public's presumptive right of access." The City claimed that requiring it to search personal accounts would itself constitute an invasion of privacy. However, the supreme approved of a procedure recently adopted by the Washington Supreme Court for searching personal accounts that allows individual employees to review their accounts for responsive records and then provide them to the agency, which would then review them for disclosure. (*City of San Jose v.*

ACCESS REPORTS

Superior Court of Santa Clara County; Ted Smith, Real Party in Interest, No. S218066, California Supreme Court, Mar. 2)

A court of appeals has ruled that the rules of discovery apply to actions under the California Public Records Act, but that because discovery is rare under federal case law applying to FOIA, the availability of discovery in a CPRA case is similarly limited. In another case involving access to a contractor-operated database used by the Los Angeles Police Department to keep track of impounded vehicles, Cynthia Anderson-Barker filed suit against the police, arguing that the database was an agency record because the LAPD had access to the data. The trial court ruled that because a CPRA suit was a civil matter, discovery was available. The trial court fined the City and ordered discovery. The appeals court agreed that discovery applied to CPRA cases, but following federal case law on FOIA, limited its use. Adopting the federal standards, the appeals court noted that "when assessing motions to compel discovery in CPRA proceedings, the trial court has discretion to consider whether the petitioner has made an adequate showing that the discovery is likely to aid in the resolution of the particular issues presented in the proceeding." (*City of Los Angeles v. Superior Court of Los Angeles County; Cynthia Anderson-Barker, Real Party in Interest*, No. B269525, California Court of Appeals, Second District, Division 7, Mar. 2)

Pennsylvania

A court of appeals has ruled that the trial court did not err in finding that the District Attorney of Philadelphia failed to show that its office was not required to disclose various documents requested by Ryan Bagwell either because Bagwell had already been denied discovery of the documents, a judicial order prohibited disclosure, or they were protected by the attorney work product privilege. While the Office of Open Records had agreed with the District Attorney on some aspects of Bagwell's multi-part requests, it found the District Attorney had not substantiated other claims and ordered those documents disclosed. The trial court agreed with OOR and eventually penalized the District Attorney $500 for its refusal to respond to certain parts of the requests. The court of appeals noted that "the City and the District Attorney did not offer any basis to dispute OOR's findings that the majority of the emails do not contain material protected by the attorney-work product privilege. . .They chose instead to rely on a mere assertion of privilege. They have done so again in this Court and we are as equally unpersuaded as the Trial Court that OOR erred. . ." The court rejected the District Attorney's claim that the records were protected because Bagwell had been denied discovery in a related case. The court pointed out that "under the Right to Know Act, the requester is empowered by the legislature—without explicit, enacted constraints—to go fishing, an exercise that is strictly prohibited even under the broad scope of the discovery rules. . ." The appeals court upheld the trial court's decision to penalize the District Attorney, noting that "the record is replete with evidence of the District Attorney's bad faith in denying Requester access to public records." (*Office of the District Attorney of Philadelphia v. Ryan Bagwell*, No. 2627 C.D. 2015, Pennsylvania Commonwealth Court, Feb. 16)

Texas

A court of appeals has ruled that the trial court did not abuse its discretion by awarding Randall Kallinen $92,000 in attorney's fees for his Public Information Act suit against the City of Houston for records concerning a traffic-light study. The court rejected the City's contention that the case was moot because it had disclosed the records before the trial court issued its amended decision awarding attorney's fees, finding instead that the City continued to challenge the fee award on grounds of sovereign immunity. The City

attacked Kallinen's billing practices, but the court observed that "none of the criticism of billing practices or legal strategies offered by the City's expert, which the City itemized in its brief, conclusively negates the testimony and evidence supporting the award. The trial court was entitled to give more credit and weight to the testimony of Kallinen's counsel than to that of the City's expert in determining a reasonable fee award. We hold that the trial court acted within its discretion in determining the reasonable amount of attorney's fees for the services rendered." (*City of Houston v. Randall Kallinen*, No. 01-12-00050-CV, Texas Court of Appeals, Feb. 28)

Washington

A court of appeals has ruled that Arthur West has standing to bring a suit for an alleged violation of the Open Public Meetings Act through an exchange of emails by members of the Pierce County Council and the Pierce County Prosecuting Attorney, but that he has failed to show that the email exchange constituted a meeting. The County argued that the Washington Supreme Court had ruled in *Kirk v. Pierce County*, 630 P.2d 930 (1981), that the "any person" standard in the OPMA did not provide standing to challenge the validity of an action taken as the result of an improperly noticed special meeting. But the court of appeals explained that the facts in *Kirk* differed from those here, noting that a previous decision involving an OPMA challenge by West "addressed standing under the plain language of the OPMA, not standing for the implied cause of action voiding an agency action, [so] the opinion in *West* does not conflict with *Kirk*." But the appeals court found the Council had not violated the OPMA. It pointed out that "there is no evidence that any of the council who engaged in email communication with the prosecutor's office intended to meet to transact official business. Because West cannot demonstrate a genuine issue of material fact as to whether there was a collective intent to meet to transact official business, we do not address [any further claims.]" (*Arthur West v. Pierce County Council*, No. 48182-1-H, Washington Court of Appeals, Division 2, Feb. 22)

Wisconsin

For the second time in two months, the supreme court has reversed lower court rulings requiring disclosure of data, finding instead that the data is exempt. In a case involving a request by the immigration advocacy group Voces de la Frontera for copies of I-247 forms showing detainees held at the request of U.S. Immigration and Customs Enforcement in the Milwaukee County Jail, the supreme court reversed rulings by the trial court and the court of appeals that such forms were exempt only when a detainee was in federal custody and did not apply when a detainee was held by state or local law enforcement. Citing 8 C.F.R. § 236.6, the majority noted that "the regulation must be read to protect a detainee's information regardless of when an I-247 form was received and regardless of whether a detainee is in the forty-eight hour hold requested in a I-247 in order to protect a detainee's privacy. After all, the sensitivity of a detainee's information cannot, and we conclude does not, depend on when the I-247 form was received by the state or local entity. . .As a consequence, the regulation must be interpreted to cover all information contained within an I-247 form regardless of whether the individual that is the subject of the detention request is solely in state or federal custody or has been released." Concluding that federal regulations should inform the public records law, the majority pointed out that "the federal government is in a better position to determine whether there are privacy and safety risks innate in releasing records that it created." Justice Ann Walsh Bradley dissented, observing that the regulation on which the majority rested its decision had not even been brought up until the case was before the court of appeals and explained that the regulation related to the detention of immigrants shortly after 9/11. Finding that Sheriff David Clarke had failed to show why the forms were sensitive, Bradley observed that "unlike a police report which contains details about a specific crime under investigation, the detainer forms contain generalized information, much of which Sheriff Clarke already disclosed on its

ACCESS REPORTS

website." (*Voces de la Frontera, Inc. v. David A. Clarke, Jr.*, No. 2015-AP-1152, Wisconsin Supreme Court, Feb. 24)

The Federal Courts…

A federal court in Florida has ruled that the FBI has not justified its redactions of identifying information under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in several reports prepared as part of the Meese Commission investigation of the September 11, 2001 terrorist attacks because it failed to consider the public interest in disclosure and failed to justify its decision to redact some names while withholding others. Generally, however, the court found the agency had properly invoked **Exemption 7 (D) (confidential sources)**, **Exemption 7(E) (investigative methods and techniques)**, **Exemption 5 (privileges)** and **Exemption 1 (national security)** to withhold various records. The case involved a suit by the Broward Bulldog for records concerning an FBI interview of Abulaziz and Anoud Al-Hijji of Sarasota, who had allegedly met with several of the 9/11 hijackers and fled to Saudi Arabia days after the attack. While the Meese Commission ultimately concluded that the Al-Hijjis had no connection to the plot, Sen. Bob Graham (D-FL), a co-chair of the Commission came to believe that some sort of cover-up took place to protect the Saudi family. Judge Cecilia Altonaga rejected the agency's redaction of names in two reports. She pointed out that "there are questions of material fact whether disclosing the names would constitute an unwarranted invasion of privacy and whether the public interest in knowing this information is paramount." She observed that "tellingly, some of the redacted names are already in the public domain, and Plaintiffs know the names of the individuals investigated by the FBI and the agents involved. Given the rationale for Exemption 6 and 7(C), once the information is in the public domain, there is no longer a privacy interest justifying nondisclosure." Noting the inconsistency of the redactions, she pointed out that "the FBI's posture that these two agents' personal privacy warrants protection, while the third agent's does not, is unsupported." She found inconsistencies in redactions in another document as well, indicating that "there are multiple unredacted names throughout the memorandum and the Government does not explain why the redacted individuals' names warrant protection because of privacy interests, but the individuals whose names are unredacted do not." While she agreed with many of the agency's Exemption 7 (D) claims, Altonaga rejected several claims based on implicit assurances of confidentiality. As to a claim that a local law enforcement agency was presumed to be confidential, she pointed out that "to be clear, a local authority may be a confidential source, but the FBI posits the confidential source here is the confidential source of the local authority, and therefore the local authority is a confidential source. The FBI fails to explain if there is any identifying information about the local authority's confidential source in the redacted material and does not properly explain how the local authority itself is a confidential source." (*Broward Bulldog, Inc. v. United States Department of Justice*, Civil Action No. 16-61289-CIV-ALTONAGA/O'Sullivan, U.S. District Court for the Southern District of Florida, Feb. 27)

A federal court in New York has ruled that most of the information contained in five memos concerning the DOJ investigation into whether certain overseas interrogations by the CIA and the deaths of detainees in CIA custody violated federal law is protected by **Exemption 1 (national security)**, **Exemption 3 (other statutes)**, **Exemption 5 (privileges)**, or **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The decision resolves remaining potential exemption claims for the memos after Judge Paul Oetken concluded in his previous opinion that Exemption 5 did not protect the five memos in their entirety because their rationale had been expressly adopted by former Attorney General Eric Holder. The DOJ investigation was conducted by John Durham, who was then an Assistant U.S. Attorney in Connecticut. Durham concluded that two instances in which detainees died while

in U.S. custody should be pursued. Two criminal investigations involving grand jury proceedings were held, but resulted in no indictments. Durham submitted two reports to Holder and the Deputy Attorney General, referred to as Declination Memoranda, explaining his conclusion that no criminal charges should be brought. Several months later, Holder accepted Durham's findings and closed the investigation. In his previous decision, Oetken indicated that other exemptions might well be applicable and ordered DOJ and the New York Times to address those issues further. In a discussion in which two pages were redacted, Oetken found that the Recommendation Memorandum did not qualify for protection under Rule 6(e) pertaining to grand jury secrecy, but that the Declination Memoranda could be withheld. Noting that Rule 6(e) protected only matters occurring before the grand jury, Oetken pointed out that "simply put, courts consistently interpret Rule 6(e) as inapplicable to 'disclosures of information obtained independently of the grand jury process, even if the same information might later be presented to the grand jury.' Rule 6(e) is not violated, therefore, by the disclosure of the Recommendation Memoranda, which contains information gathered from an independent investigation." He found most of the Declination Memoranda was protected but indicated that certain conclusions about the legal strength of the charges may not have occurred before the grand jury. He observed that "such information is not properly withheld pursuant to Rule 6(e) if it is related to an independent investigation, conducted by Mr. Durham and not concerning matters occurring before the grand jury." The CIA provided affidavits supporting the government's claims that portions of the remaining memos were protected by Exemption 1 and the National Security Act. The *New York Times* primarily objected to withholding the location of various overseas sites were detentions took place, arguing the information was already public. Rejecting that claim, Oetken noted that "but the Government has never officially acknowledged the locations of the CIA;s covert facilities and installations and the Times' reliance on the alleged disclosure of such information by others does not function as official acknowledgment by the Government for purposes of waiver under the FOIA exemptions." Finding the government had justified its redaction of names under the privacy exemptions, Oetken observed that "this grant is to be narrowly limited to the personally identifying information contained in the memoranda as the agency is not permitted 'to exempt from disclosure *all* of the material in an investigatory record solely on the grounds that the record includes some information which identifies a private citizen or provides that person's name and address.'" The government argued that attached exhibits that predated Durham's investigation contained factual material protected by Exemption 5. Oetken, however, explained that "those 'facts' upon which Mr. Durham and his team relied in their reasoning or conclusions, which were later expressly adopted by the Attorney General, are subject to the express adoption doctrine as applied to the work-product doctrine. . .Accordingly, the express adoption doctrine applies to the referenced exhibits, such that they do not fall within FOIA Exemption 5." (*New York Times Company and Charlie Savage v. United States Department of Justice*, Civil Action No. 14-3777 (JPO), U.S. District Court for the Southern District of New York, Feb. 21)

A federal court in New York has ruled that the National Day Laborers' Organizing Network has not shown that it is entitled to **expedited processing** for its April 2016 request concerning the Department of Homeland Security's Priority Enforcement Program. At the same time, Judge Katherine Forrest rejected the agency's request for a **stay due to exceptional circumstances**, as well as the Network's request to speed up the agency's processing. Noting the paucity of case law interpreting the expedited processing provision, Forrest found the Network had failed to show that it was primarily engaged in disseminating information. Although the Network submitted a supplemental affidavit focusing on its dissemination activities, Forrest pointed out that "even if disseminating information is a primary *activity* of [the Network], this does not necessarily mean that [the Network] is primarily *engaged* in disseminating information." Forrest indicated that the agency had not shown it faced an unusual increase in the number of requested received. She noted that "defendants do not address at all whether they currently face a volume of requests on a level unanticipated by Congress." She added that 'defendants do not allege that they have made reasonable progress in reducing any existing backlog

ACCESS REPORTS

of pending requests." Noting that "the Court is mindful of the strain that defendants' FOIA responsibilities may pose. . .particularly in this case given the significant breadth of plaintiffs' request and plaintiffs' failure to effectively narrow their request at the administrative stage during this litigation." She ordered DHS's Office of Civil Rights and Civil Liberties to finish processing records by October 2017 and for U.S. Immigration and Customs Enforcement to finish its processing of records by July 2018. (*National Day Laborer Organizing Network, et al. v. United States Immigration and Customs Enforcement*, Civil Action No. 16-387 (KBF), U.S. District Court for the Southern District of New York, Feb. 17)

Judge Amy Berman Jackson has ruled that the Department of Defense, the Department of Justice, and the EPA have failed to show that they conducted an **adequate search** for records of an investigation of toxic contamination at former Army base Fort McClellan. Raymond Pulliam's request to DOD asked for all correspondence related to the toxic contamination at Fort McClellan. After DOD told Pulliam his request was too broad, he narrowed the request to ask for "all correspondence to, from or carbon copied to Elizabeth King and Mary McVeigh." The agency interpreted the narrowed request to apply to email only. After deciding its first search was insufficient, DOD conducted a second search, which included its Enterprise IT Services Directorate. That search located 57 pages, which were redacted under **Exemption 6 (invasion of privacy)** and disclosed to Pulliam. Pulliam's requests to the EPA and DOJ asked for investigations of the complaint filed by Heather White against former EPA Administrator Christine Todd Whitman and DOJ Senior Counsel William Weinischke. Both agencies searched their Offices of the Inspector General and found no records. Jackson faulted all three searches. She found DOD had improperly narrowed Pulliam's request to emails. She pointed out that "here, nothing in plaintiff's 'narrowed request suggests any intent to restrict the scope of his request' to email only The request contained clear instructions to search for other types of documents and the agency had an obligation 'to construe the FOIA request liberally.' At the very least, the record leaves substantial doubt as to the sufficiency of the search in that certain materials may have been overlooked despite plaintiff's well-defined request." Since Pulliam had not challenged the agency's redactions, Jackson found they were appropriate. The EPA searched the OIG Office of Investigation and its OIG Immediate Office. Jackson indicated that the searches were insufficient, noting that, while the agency searched certain databases, its affidavit "fails to indicate that the searches were conducted for the broader category of records that plaintiff requested. For instance, the declaration does not explain why a search was not conducted in the Inspector General's email or electronic files when the request sought *all* documentation *related* to the complaint filed by Heather White. And none of the search terms even included Heather White's name or position." The DOJ's OIG had searched its database using the terms "Todd Whitman" and "William A. Weinischke." Jackson observed that this was insufficient because it would not have picked up variants of the names and "the use of just these two names demonstrates that [the OIG staffer who conducted the search] did not understand the scope of plaintiff's request, which sought all documents *relating* to the complaint filed by Heather White." (*Raymond C. Pulliam v. United States Environmental Protection Agency, et al.*, Civil Action No. 15-1405 (ABJ), U.S. District Court for the District of Columbia, Feb. 16)

A federal court in California has ruled that while two environmental organizations are entitled to **attorney's fees** for their suit against the National Marine Fisheries Service for records concerning water diversions by Stanford University that the groups contended harmed the Central California Coast steelhead, their request for $723,000 is excessive, primarily because its attorneys used an hourly rate based on complex litigation in the San Francisco area, rather than rates for FOIA or environmental litigation. Our Children's Earth Foundation and the Ecological Rights Foundation filed a number of requests with NMFS for records related to the Stanford claim. In two lawsuits, the court found NMFS had grossly violated FOIA time limits and ruled that the requesters could seek declaratory relief. The court eventually found that NMFS had conducted an adequate search and accepted most of its exemption claims. After finding the agency had taken

steps to improve its backlog, the court decided the agency no longer had a pattern or practice of violating the time limits. The two organizations than filed a motion for $723,202 in attorney's fees, as well at $3,190 in costs. Judge William Orrick found the plaintiffs had succeeded in a number of their contentions and were entitled to attorney's fees for both cases. However, he found that the hourly rate was excessive. Orrick explained that "I do not find plaintiffs' focus—on large scale, complex class action cases to be persuasive. That is not to say that FOIA cases cannot be complex. But the high rates awarded for complex class action cases can be explained in large part by the necessity in those cases for plaintiffs' counsel to incur significant cost outlays. . .and attorney time to review [documents]. . .which are not typically required in FOIA cases and were not required in these cases." He added that "plaintiffs shall recalculate their lodestar based on hourly rates that are consistent with the rates they requested in prior FOIA or environmental cases for the same time periods." Although NMFS argued that much of the time claimed was either for issues the plaintiffs lost or was redundant, Orrick accepted most of the plaintiffs' claims with occasional reductions. Orrick rejected compensation claims for document review, noting that "plaintiffs do not cite any case law allowing for recovery of time spent reviewing document productions where the review is necessary for a plaintiff to be able to challenge the adequacy of the search or the propriety of withholdings." (*Our Children's Earth Foundation, et al. v. National Marine Fisheries Service, et al.*, Civil Action No. 14-01130-WHO, U.S. District Court for the Northern District of California, Mar. 1)

In another of his myriad of decisions concerning multiple requests from Jeremy Pinson to the Bureau of Prisons, Judge Rudolph Contreras has ruled that, while the agency has conducted **adequate searches** for a number of Pinson's requests, there still remain various problems preventing him from granting summary judgment. Pinson, a federal prisoner who uses the feminine pronoun, filed multiple requests with BOP for records about herself and about various incidents occurring in the prison system. During the processing of some of Pinson's requests, the agency temporarily lost access to its email archive. Access was restored in October 2016 and the agency conducted the requested email searches. However, because those records were still being reviewed for exemption claims, the agency agreed that portion of Pinson's requests remained open. Contreras found the agency had conducted an adequate search. Pinson objected to the agency's claim that responsive records for one request had been destroyed during a dispute over fees. Finding the agency had acted appropriately. Contreras noted that "in this case, the documents were destroyed not before the initial FOIA request, but while that initial request was closed due to Pinson's unpaid fees. Because the request was closed when the documents were destroyed—and may never have been reopened, if Pinson's bills had languished unpaid—this situation is equivalent to the situation in which records were destroyed before the request was filed. The alternative would bind agencies to indefinitely maintain files potentially related to any procedurally defective FOIA request, on the possibility that a request might someday ripen into a perfected FOIA request." Pinson argued the agency improperly withheld records concerning After Action Review Reports pertaining to her incarceration under **Exemption 5 (privileges)** because she had gotten them in discovery in unrelated litigation. Contreras explained that the availability of records through discovery had no relevance to whether the information could be withheld under FOIA. But after reviewing the agency's claims, Contreras found they fell short. He noted that "the BOP does not sufficiently describe the function or significance of the After Action Review Reports to [its deliberative] process, or the nature of the decisionmaking authority of the author and recipient." One of Pinson's requests dealt with the amount of money paid to settle claims against the agency. The agency withheld personally-identifying information under **Exemption 6 (invasion of privacy)**. But Contreras pointed out that the D.C. Circuit had rejected the same kind of categorical use of the privacy exemption to withhold such information in *Prison Legal News v. Samuels*, 787 F.3d 1142 (D.C. Cir. 2015). Contreras observed that "here, the BOP likewise does not sufficiently explain the privacy interests of the individuals 'involved' in each claim." He added that "as in *Prison Legal News*, this oversimplification prevents this Court from understanding the privacy interests that

ACCESS REPORTS

weigh against disclosure, and the Court thus cannot correctly balance the public and private interests." The agency withheld records concerning its litigation with Pinson under **Exemption 7 (law enforcement records)**. While Contreras acknowledged that BOP had a law enforcement function, he indicated that "on its face, BOP's role as a defendant in a lawsuit appears distinct from its role as a law enforcement agency. Because the BOP does not explain how the settlement documents could satisfy Exemption 7's threshold requirement through either test, Exemption 7 cannot be applied to the claimed documents. . ." The agency had withheld Pinson's pre-sentence report under **Exemption 7(F) (harm to a person)**, explaining that prisoners were not allowed to have PSRs because other inmates might coerce them into sharing them. Noting that he had appointed a counsel to represent Pinson, Contreras told the agency that it "should use Pinson's pro bono counsel to meet its FOIA obligation with regard to Pinson's PSR, rather than simply denying Pinson's request." Contreras also rejected the agency's application of Exemption 7(F) to withhold the responses of staff members questioned about Pinson's referral to another prison. Contreras pointed out that since the agency had already redacted the names under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** there was no longer a danger in disclosing the substance of their comments. (*Jeremy Pinson v. Department of Justice, et al.*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, Feb. 17)

A federal court in Illinois has ruled that James Chelmowski failed to **exhaust his administrative remedies** when he appealed the FCC's decision to OGIS rather than to the FCC. But the court found that the agency was not permitted to charge Chelmoswki $917 in fees for searching for records because it had missed the statutory time limit for responding and had not shown that its delay was due to exceptional ot unusual circumstances. Chelmowski submitted four FOIA requests to the FCC. The agency provided a consolidated response to his first two requests, disclosing 14 pages. Chelmowski appealed that decision and the agency provided an additional 87 pages and told him that if the agency did not hear back from him within a month it would consider the appeal resolved. Rather than respond to the agency, Chelmowski filed a complaint with OGIS, which he emailed to the FCC as well. Chelmowski submitted two more requests to the FCC. The agency responded to one request indicating it had no more records than those that had already been sent to him. Chelmowski filed an appeal of that request. The agency finally sent a consolidated response to both requests indicating that the second request would require a further database search that would cost $917. The agency argued that Chelmowski had not exhausted his administrative remedies when he appealed to OGIS rather than the agency. The court agreed, noting that "there is no authority on which this Court could find that submitting a request to OGIS for assistance can supplant an application for review from the full Commission. . ." Chelmowski argued the agency had violated Section (a)(4)(A)(viii)(I)(II), which prohibits an agency from assessing fees if it misses a deadline for responding. The agency argued that an exception to the prohibition for the existence of exceptional circumstances applied. But the court noted that "the FCC does not provide any reason for the delay." The FCC also claimed its response constituted a new search, but the court observed that "this argument is too bare for this Court to properly find as a matter of law that the FCC may assess the $917 fee." (*James Chelmowski v. Federal Communications Commission*, Civil Action No. 16-5587, U.S. District Court for the Northern District of Illinois, Feb. 24)

Judge Richard Leon has ruled that the FBI conducted an **adequate search** for records concerning the agency's alleged practice of impersonating journalists and found the agency properly invoked a number of exemptions in withholding records. The Reporters Committee and the Associated Press requested the records from the FBI. Because of the specificity of the incident, which involved an anonymous bomb threat at Timberline High School near Seattle, the agency decided not to search its Central Records System, but instead searched its Operational Technology Division. However, the agency ultimately conducted a search of the CRS as well. The plaintiffs argued that based on other publicly available information the agency should have

uncovered other responsive records. Leon disagreed, noting that "plaintiffs face an uphill climb in this regard. I have reviewed the information identified by plaintiffs for 'positive indications of overlooked materials.' Nothing in these materials persuades me that plaintiffs' arguments are any more than 'mere speculation that as yet uncovered documents may exist.' Accordingly I conclude the FBI has carried its burden to show that its search was adequate." Approving the withholding of an email under **Exemption 5 (privileges)**, Leon noted that "the unredacted portions of the email messages, submitted by plaintiffs, show that agency personnel were discussing changes to, and legal review of, an application for a search warrant before submitting it to a court. Such information is both pre-decisional and privileged." As to redactions of identifying information about agents, Leon noted that under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, courts had recognized a strong privacy interest in not being unwarrantedly associated with a criminal investigation. He observed that "the FBI has invoked that weighty interest here and plaintiffs offer little to counterbalance it." (*Reporters Committee for Freedom of the Press, et al. v. Federal Bureau of Investigation, et al.*, Civil Action No. 15-1392 (RJL), U.S. District Court for the District of Columbia, Feb. 23)

A federal court in Washington has ruled that the CIA was required to participate in a Rule 26(f) discovery conference in response to a suit filed by Leslie Kinney, but that because of the sensitive nature of any potentially responsive records, the CIA will not be required to provide any initial disclosures under Rule 26(a)(1). Rejecting the agency's request to be excused from the discovery conference requirement, the court noted that "Defendant lacks any basis to fear improper discovery prior to discussing these issues with Plaintiff, as discovery is prohibited prior to the Rule 26(f) conference. Had Defendant simply fulfilled its obligations to confer with Plaintiff under Rule 26(f), it appears very likely that its concerns could have been resolved without requiring any Court intervention." Granting the CIA's request to be excused from initial discovery, the court observed that "in this case, in order to identify a specified individual as an intelligence source for the CIA, Plaintiff seeks potentially classified CIA documents that are almost certainly exempt from FOIA disclosure. Although Plaintiff is correct that the requested documents are likely quite old, the mere passage of time does not mean these documents are no longer exempt from FOIA requests. Therefore, because this case potentially implicates highly sensitive information, and because it is likely to be resolved on summary judgment, the Court finds it prudent to relieve Defendant of its initial disclosure obligations under Rule 26(a)." (*Leslie G. Kinney v. Central Intelligence Agency*, Civil Action No. 16-05777-BHS, U.S. District Court for the Western District of Washington, Feb. 22)

A federal court in Washington has ruled that the FBI conducted an **adequate search** for records about Lewis Albers. Albers requested all records pertaining to him. The agency searched its Automated Case Support system and found no records under his name, but ultimately found two pages in which his name was cross-referenced. It disclosed a redacted copy of those pages. Albers, who had filed suit before the FBI finished processing his request, argued that the agency had not conducted an adequate search because it should have done a manual search of files between 1960, when Albers were born, and 1995, when its Automated Case Support system became effective. Rejecting the claim, the court pointed out that "Defendant FBI used the ACS case management system to conduct a main entries search of the Central Records System, which is where information about individuals, including Plaintiff Albers, is indexed. Any records about Plaintiff Albers, if any, could be found with an ACS search." Albers also argued that "pertaining to" required a broader search than just a name search. But the court observed that 'while one interpretation of 'pertaining to' could include Albers as a primary subject or an ancillary subject, it is not unreasonable to interpret 'pertaining to' in such a way as to search only for the primary subject of a particular matter." (*Lewis F. Albers v. Federal Bureau of Investigation*, Civil Action No. 16-05249-BHS, U.S. District Court for the Western District of Washington, Feb. 24)

ACCESS REPORTS

A federal court in New York has ruled that Charles Robert's 2002 suit against the CIA and the Justice Department for records concerning Oliver North's involvement in the Iran-contra affair may continue. However, the court ordered Robert to produce documentary evidence that Robert had requested and been denied records from the CIA in 2000 and 2001. CIA, however, indicated that, according to its records, the only request it had received from Robert was in 2010. Allowing Robert to provide documentary proof of his claims, the court noted that "it is impossible for the Court to determine whether the CIA improperly withheld agency records absent a review of Plaintiff's specific FOIA request and the CIA's alleged response, particularly in light of the CIA's position that Plaintiff failed to file any FOIA requests prior to 2010." (*Charles Robert II v. Central Intelligence Agency and Department of Justice*, Civil Action No. 02-6788 (JS)(ART), Feb. 28)

ACCESS REPORTS

1624 Dogwood Lane, Lynchburg, VA 24503 (434) 384-5334 Fax (434) 384-8272

Please enter our order for Access Reports Newsletter. It will help us stay on top of developments in FOI and privacy.

- ❑ Access Reports Newsletter for $400
- ❑ Bill me
- ❑ Check Enclosed for $________________

Credit Card
Master Card / Visa / American Express
Card # _________-_________-_________-_________ Expiration Date (MM/YY):______/______
Card Holder:__________________________________ Phone # (______) _______-____________

Name:____ Phone#: (____) _____-______
Organization: ____ Fax#: (____) _____-______
Street Address: ____ email: _____________________
City: _______________________ State:____________________ Zip Code: _________________