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Washington Focus: The Associated Press issued an analysis of the state of FOIA in the last year of the Obama administration based on agencies' annual FOIA reports. The analysis found that the government spent $36.2 million defending agencies in FOIA litigation. The Justice Department spent $12 million, while the Department of Homeland Security spent $6.3 million, and the Defense Department spent $4.8 million. According to the AP, government agencies received a record 788,769 requests and spent $478 million government-wide to process requests. The AP also noted the government either withheld records or found no records in response to 77 percent of processed requests. The AP added that in a third of the cases in which requesters sued, agencies released records as a result.

Court Finds Mosaic Theory Protects FBI FOIA Search Slips

In a recent decision pertaining to multiple requests filed by researcher Ryan Shapiro and others for records concerning the way in which the FBI processes FOIA requests, Judge Randolph Moss has discovered that his initial ruling that search slips are not protected by Exemption 7(E) (investigative methods and techniques) is considerably more complicated than he may have at first imagined. This time around, Moss agreed with the agency's refined position invoking the mosaic theory.

In his first decision in the case, Moss ruled that the FBI could not categorically withhold case evaluation forms used to track and evaluate the performance of FBI FOIA analysts in processing FOIA and Privacy Act requests. The FBI asked Moss to reconsider his ruling, explaining that it no longer claimed that case evaluation forms could be categorially withheld, but only to FOIA requests that had resulted in a "no records" response or a *Glomar* response neither confirming nor denying the existence of records. While Moss found that *Maydak v. Dept of Justice*, 218 F.3d 760 (D.C. Cir. 2000), in which the D.C Circuit held that agencies were required to make all their exemption claims at the beginning of litigation, he agreed that ordering disclosure of the records might

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compromise sensitive national security or privacy information and allowed the agency to brief the matter further.

Moss began by explaining that the exclusions under subsection (c) allowed the FBI to claim that it had no records in response to a request where "the explicit assertion of a FOIA exemption might permit a FOIA requester or other member of the public to infer the precise information that the FOIA exclusion is intended to secure." Moss explained that "plaintiffs' practice of filing FOIA requests for records generated in responding to prior FOIA requests, however, puts this practice to the test. Because the FBI inevitably generates records, such as search slips and processing notes, when it receives any FOIA request, the FBI faces a conundrum," because disclosure might reveal information protected by an exclusion. The FBI, however, had initially asserted a categorical exemption for such records, which Moss had rejected. But at this point in the litigation, the FBI was asserting a more targeted claim that Exemption 7(E) protected 42 "no records" responses to 58 of Shapiro's requests for records pertaining to the processing of previous FOIA requests. The FBI contended that "at least in the current context, which involves an array of FOIA requests relating to domestic terrorism investigations, the implicit disclosure of the *existence* or *nonexistence* of the use of the FOIA exclusion poses a risk of circumvention of the law."

Moss agreed with the refinements the FBI had made to its claim. He pointed out that "to be sure, those search records were not themselves compiled for law enforcement purposes; rather, they were compiled to comply with FOIA. But to the extent they replicate information that *was* compiled for law enforcement purposes, that distinction is immaterial. Nor does it make a difference whether any underlying records exist or not. Exemption 7 protects '*information* compiled for law enforcement purposes,' and the absence of a record can reflect 'information' compiled by the agency just as much as the existence of a record."

Having found that the records qualified as law enforcement records under Exemption 7, Moss considered the FBI's claim that the search slips were protected by Exemption 7(E). He noted that "the fact that the FBI is permitted to issue 'No Records' responses based on the §552(c) exclusion is not a confidential 'technique' or 'procedure'—rather, that fact is embodied in the statute and judicial precedent. Although the FBI has now further elaborated on its arguments, it is safe to say that it still has not identified a relevant law enforcement 'technique' or 'procedure' with crystal clarity." Having said that, Moss concluded the FBI had shown why such records could reveal investigative techniques or procedures. He pointed out that "there is little meaningful difference between records compiled for law enforcement purposes and information relating to the search of those records. In both cases, knowledge of the existence or non-existence of an investigation, for example, might assist those seeking to evade detection." The FBI relied on the mosaic theory—that even pieces of mundane information might disclose protected information when put together with other such information—arguing that disclosure of the search slips when put in context with other information could reveal protected information. Noting that there was little case law concerning when to apply the mosaic theory, Moss observed, that "the search slips at issue are part of a complex mosaic relating to on-going FBI operations, involving one of the FBI's domestic terrorism priorities, which has been the subject of a staggering number of FOIA requests seeking information about many specific individuals and organizations. In this context, the Court concludes that the FBI has met its modest burden of showing 'logically how the release of [the processing records] might create a risk of circumvention of the law.'"

Beyond the search slips, the FBI also contended that disclosure of file numbers would implicate the mosaic theory. Shapiro argued that file numbers were created for administrative purposes, not law enforcement purposes. Moss disagreed. He noted that "although Plaintiffs are correct that files numbers serve an administrative purpose—permitting the FBI to track and organize documents—they ignore the fact that the tracking system is based on information collected for law enforcement purposes. The relevant file numbers are not generated at random, but, rather, incorporate information compiled in the course of enforcing the

criminal laws. . . As relevant here, moreover, a collection or 'mosaic' of FBI file numbers might show—or at least suggest—whether the FBI devotes a small amount of attention, or a great deal of attention, to animal rights extremism in each relevant region of the country. That information is, as a matter of ordinary usage, 'compiled' in the FBI filing system—that is, it is 'collected and assembled from various sources or other documents.' It is not difficult to conclude, moreover, that a 'rational nexus' exists between the compilation of this information and 'one of the agency's law enforcement duties.'" Moss added that "moreover, as the FBI observes, although a single file number may be unilluminating, Plaintiffs' requests must be construed as part of a larger mosaic. Understood in that manner, aggregate information about the numbers of files or document that bear a designation for domestic terrorism/animal rights extremism may shed considerable light on the overall resources that a particular office of the FBI has devoted, or is devoting, to investigating related crimes. The conclusion that the disclosure of FBI filed numbers *can*—in theory—reveal sensitive law enforcement techniques, however, does not answer the question whether disclosure of the file numbers at issue here *would*, in fact do so."

Shapiro argued that the fact that the agency had not invoked Exemption 7(A) (ongoing investigation or proceeding) for any of the records implied that they did not concern ongoing investigations. Moss indicated, however, that "the Court is not convinced that the mere fact that an investigation is closed severs the 'logical' link between release of the information and the risk of circumvention; knowing that the FBI has historically focused its enforcement efforts in a particular region, for example, might aid a criminal in circumventing the law." He explained that because Shapiro now argued that the agency had waived its right to withhold some file numbers due to official acknowledgment, he would give the FBI a chance to respond to that claim. He revealed, however, that the records did confirm that the FBI had closed its investigation into the unsolved murder of Hyram Kitchen more than 25 years ago and told the agency that it could no longer claim those records were protected under Exemption 7(A).

Moss agreed with Shapiro that there was still a dispute over whether the agency had properly segregated non-exempt information from declarations filed in previous litigation. He noted that "in light of Plaintiffs' colorable contention that the declarations submitted in prior litigation revealed significant details about the searches and that the FBI has waived any right to object to disclosure of that *information* and given the potential value to Plaintiffs and the public of an ability to look behind the types of agency declarations that typically dominate FOIA litigation, the Court will require the FBI to file copies of the search slips from one randomly selected FOIA request, from which only the non-public information has been redacted." (*Ryan Noah Shapiro, et al., v. United States Department of Justice*, Civil Action No. 13-555 (RDM), U.S. District Court for the District of Columbia, Mar. 6)

Views from the States…

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

Connecticut

A trial court has ruled that statistical summaries of teacher evaluations for the Town of New Milford are not protected by the personnel records exemption. The New Milford Education Association filed suit against the FOI Commission after it ruled in favor of John Spatola and required New Milford to disclose the records. The court noted that the supreme court had recently addressed teacher evaluation

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records in *Lieberman v. Aronow*, finding the exemption applied narrowly to records evaluating teacher performance and did not apply merely because a record was in a teacher's personnel file. However, because the availability of statistical data from local school districts had been subject to recent legislative amendments, it was unclear the extent to which those records might be covered by the personnel records exemption. The FOI Commission sided with Spatola in finding that the statistical data was used by New Milford in community planning and did not pertain to evaluation of individual teachers. The court noted that the Connecticut Education Association argued that such statistical data could reveal information about individual teachers in school districts that had only a handful of teachers. Recognizing that could be a potential problem, the trial court observed that "in New Milford, it was represented to the court at oral argument, there are 1000 teachers. Therefore, the issue as raised by the Association does not arise. The court does not disagree with the Association that another case on other facts could possibly lead to another outcome." (*New Milford Education Association, et al. v. Freedom of Information Commission*, No. CV 16 6033328 S, Connecticut Superior Court, Judicial District of New Britain, Mar. 13)

New Hampshire

Relying on its recent decision in *Reid v. New Hampshire Attorney General*, 2016 WL 7436653 (NH 2016), the supreme court has ruled that rubric forms completed by members of the City of Dover's superintendent search committee are protected by the exemption for records pertaining to personnel practices. The City provided Jeffrey Clay with a blank rubric form, but withheld the forms completed by the search committee. The City provided the completed forms to the trial court under seal. After reviewing the forms, the trial court found they did not constitute test scores or examination results and were thus not covered by the personnel practices exemption. The City appealed the decision to the supreme court. After briefing was already complete, the supreme court ruled in *Reid*, finding the personnel practices exemption should be interpreted in line with the U.S. Supreme Court's decision in *Milner v. Dept of Navy* finding that Exemption 2 of the federal FOIA was limited to records pertaining to human resources matters. The supreme court found that "here, the completed rubric forms are 'internal' because they were filled out by members of the school board's superintendent search committee on behalf of the school board, the entity that employs the superintendent." Distinguishing the facts here from those in *Reid*, which involved an investigation of misconduct, the supreme court added that "because this case involves hiring and not investigation into misconduct, it is immaterial that there is no employment relationship between the applicants and the City. The information provided by the applicants and the superintendent search committee was gathered in the course of the hiring process, a process that was internal to the search committee and conducted on behalf of the superintendent's employer." (*Jeffrey Thomas Clay v. City of Dover*, No. 2016-0169, New Hampshire Supreme Court, Feb. 24)

New Jersey

A court of appeals has ruled that the Swedesboro-Woolwich School District Board of Education properly redacted the minutes of a closed meeting at which the superintendent resigned. The school district provided Dean Smith a two-page document describing the executive session. The document contained the heading "Personnel Matter – Discussion of Superintendent Contract" followed by two short bullet points that had been completely redacted, and the heading "Attorney-Client Privileged Communications & Personnel Matter," followed by 21 bullet points that had also been completely redacted. Smith sued and after reviewing the records *in camera*, the trial court agreed with the school district's redactions, finding that "there was, in fact, a give and take among the members of the Board relative to the issue of whether to renew the contract preliminarily to further action by the Board on that subject." Upholding the trial court's decision, the appeals court observed that "the Board's discussion, had with its legal counsel, assessing the superintendent's

performance in order to determine whether it would renew the superintendent's contract, is protected from disclosure under the personnel records exception under [the Open Public Records Act], as well as the deliberative process and attorney-client privileges." (*Dean Smith v. Swedesboro-Woolwich School District Board of Education*, No. A-0840-15T4, New Jersey Superior Court, Appellate Division, Mar. 6)

North Carolina

A court of appeals has ruled that the requirement in the Open Meetings Act to provide a "general account" of a closed meeting is satisfied when the public body keeps minutes that sufficiently explain what happened at the meeting. The Times News Publishing Company filed suit to obtain an unredacted version of a closed meeting of the Alamance-Burlington Board of Education at which the superintendent resigned. The trial court ruled in favor of the board of education, but on appeal the appellate court found that the trial court was required to review the closed meeting minutes *in camera* under the Open Meetings Act. After the trial court conducted its *in camera* review, it ruled that only a single paragraph was subject to disclosure. The Times News appealed once again, arguing that the "general account" provision required the board to provide more information. The appellate court disagreed, noting that "where a public body has kept minutes which are sufficient to give someone not in attendance 'a reasonable understanding of what transpired,' the public body has met its obligation to create a 'general account.'" The court added that "the statute is unambiguous in allowing a public body to prohibit public inspection of any portion of minutes *or* a 'general account' of a closed session where disclosure would 'frustrate the purpose of the closed session.'" (*Times News Publishing Company v. Alamance-Burlington Board of Education*, No. COA16-588, North Carolina Court of Appeals, Mar. 7)

Pennsylvania

A court of appeals has ruled that the Office of Open Records erred in finding that the State Employees' Retirement System was required to provide Simon Campbell with a copy of a request submitted to the agency by Kenneth Fultz and the response to his request for names and addresses of retired employees listed as European expat retirees. OOR based its decision on earlier cases in which the courts had found that there was not a privacy interest in names and addresses. However, in *Pennsylvania State Education Association v. Office of Open Records*, 148 A.3d 142 (Pa 2016), the supreme court ruled that names and addresses of public employees were protected unless there was a public interest in disclosure. Dismissing OOR's order, the court noted that "*PSEA III* established there is a constitutional right to privacy in one's home address in connection with [Right to Know Law] requests and that information will not be disclosed unless there is a countervailing public interest to be served by the disclosure." (*State Employees' Retirement System v. Simon Campbell*, No. 871 C.D. 2016, Pennsylvania Commonwealth Court, Mar. 3)

The Federal Courts…

In a decision that may have serious repercussions as to how the FBI conducts searches of its Electronic Surveillance Indices database, Judge Amit Mehta has granted James Jett limited **discovery** to ascertain whether the agency can search its Central Records System and its ELSUR databases simultaneously or whether it has to search each database separately. The case involves a FOIA request by James Jett, an unsuccessful candidate from Florida for a seat in the U.S. House of Representatives. While he was a candidate Jett informed the FBI that he had been offered a bribe by two intermediaries from one of the opposing candidates to drop out of the race. Jett agreed to wear a wire during a meeting with the opposing candidate,

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but inexplicably told his opponent of the investigation instead, at which time the FBI closed the investigation. Jett then filed a FOIA request for records concerning the investigation. In a previous opinion, Mehta found the FBI had not shown that it conducted an adequate search, based in part on its failure to search the ELSUR database. Mehta ordered the agency to conduct another search, using more key words. That search yielded no further records, but the agency disclosed another 19 records, claiming they had been inadvertently overlooked originally. Jett complained that the FBI had claimed in earlier affidavits in his case, as well as in other FOIA litigation in the D.C. Circuit district courts, that ELSUR records could only be located through a separate search of that database. But the FBI now told Jett that it could search both the CRS and the ELSUR databases simultaneously and no longer needed to conduct separate searches. Mehta indicated that the agency's new position was puzzling, leaving more questions unanswered. He pointed out that "these unanswered questions and the inconsistencies in the FBI's statements, not only within this case but also across different cases over the course of years, give rise to the kind of serious misgivings that may evidence agency bad faith and warrant discovery to resolve. Jett, the court, and the public have a profound interest in achieving clarity regarding the searchability of the ELSUR indices and resolving the conflicting representations that the FBI has made about the characteristics of that database. Consequently, the court concludes the FBI has not satisfied its burden to prove it performed an adequate search within the meaning of FOIA as to responsive records that might be found within the ELSUR indices." Mehta found that the agency had properly redacted information from the records disclosed to Jett under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques**). The FBI withheld a questionnaire under Exemption 7(E). Mehta agreed that withholding the questionnaire was appropriate under the circumstances. He observed that the questionnaire "though perhaps publicly known in a generic sense, becomes sensitive when filled out with content related to a specific investigation, as is the case here." (*James B. Jett v. Federal Bureau of Investigation*, Civil Action No. 14-00276 (APM), U.S. District Court for the District of Columbia, Mar. 13)

Judge Gladys Kessler has resolved the remaining issue of whether the Office of Science and Technology Policy failed to disclose work-related emails from director John Holdren's personal email account, ruling that since the agency was not required to disclose duplicate records under the **Federal Records Act** and since the Competitive Enterprise Institute had failed to undermine Holdren's claim that he always copied work-related emails from his personal account to his official agency account for preservation purposes, the agency had conducted an **adequate search** by disclosing more than 600 pages of email from Holdren's agency account. After Kessler ruled previously that the agency was not required to search Holdren's account from his Woods Hole account because the agency did not have access to the account, CEI appealed to the D.C. Circuit, which ruled that work-related emails created by agency employees were subject to FOIA regardless of where they resided physically. On remand, Kessler first looked at the Federal Records Act issue, noting that "the Government has established, and CEI has failed to convincingly challenge, that Dr. Holdren complied with agency policy requiring him to forward all work-related emails from his private email account to his OSTP email account." Accepting statements from Holdren and the agency's General Counsel attesting that Holdren had consistently followed the practice of forwarding work-related emails received on his private email account to his official email account, Kessler pointed out that "the presumption that Dr. Holdren complied with OSTP policy is further strengthened by evidence submitted by the Government showing that Dr. Holdren complied with the policy on approximately 4,500 occasions." She added that "the fact that Dr. Holdren forwarded work-related emails from the Woods Hole account to his OSTP account on 4,500 occasions makes it more likely than not that he forwarded any particular work-related Woods Hole email to his OSTP account." CEI argued that while Holdren may have customarily complied with this policy, that presumption did not support a conclusion that he always complied. But Kessler observed that Holdren's affidavit explained that he tried to follow that practice at all times. She noted that "plaintiff's creative exercise in semantics is insufficient to overcome the presumption of credibility to which Dr. Holdren's declaration is

entitled." She noted that "any work-related emails in Dr. Holdren's Woods Hole account are duplicates of emails located in his OSTP account." She added that "FOIA does not require agencies to produce duplicate records." Having found that Holdren consistently copied emails from his private account to his official account, Kessler concluded the agency's search of his official email account was sufficient. She pointed out that "Dr. Holdren admittedly used his private email account for work-related emails. However, plaintiff has presented absolutely no concrete evidence that he failed to forward any work-related Woods Hole email to his OSTP account. . .The Court finds that the Government need not produce Dr. Holdren's work-related Woods Hole emails because its search was reasonably calculated to uncover duplicates of all of the records located in the Wood Holes account." (*Competitive Enterprise Institute v. Office of Science and Technology Policy*, Civil Action No. 14-765 (GK), U.S. District Court for the District of Columbia, Mar. 13)

Judge Randolph Moss has ruled that the SEC conducted an **adequate search** for records concerning the agency's review of the conversion of ownership in the Empire State Building into a real estate investment trust and that it properly withheld portions of attorney's notes under **Exemption 5 (privileges)**, but that the agency has not shown that personally-identifying information of individuals who filed complaints about the real estate trust conversion is categorically protected by **Exemption 6 (invasion of privacy)**. Richard Edelman, an investor who maintained a website about the real estate trust, sued the SEC after it failed to respond to his request. The agency located 2,034 pages, withholding 112 pages of attorney's notes and redacting the names of complainants. After Moss ruled in favor of Edelman in a previous opinion, finding that the agency had interpreted his requests too narrowly to exclude the complaints themselves and that the agency had not shown that the attorney's notes were completely protected, the agency released 71 pages with redactions and withheld 41 pages entirely. It also disclosed 1,446 pages of complaints with personally-identifying information redacted. Edelman challenged the search, claiming the agency failed to disclose complaints from eight individuals who had independently contacted Edelman to say their complaints were missing. Moss rejected the claim, noting that "to the extent that some of the declarants made oral complaints, any records pertaining to those complaints—the notes taken during telephone interviews and emails describing interviews between SEC staff members and oral complainants—were (subject to other exemptions) already produced after a search that this Court has previously determined was 'reasonable and adequate.'" Edelman complained about the lack of detail supporting some of the agency's Exemption 5 claims. Moss observed that "although Edelman seeks greater detail, the Court has already explained that there is 'no basis to require the SEC to specify the decisions to which each specific [document] was antecedent' because, as the supplemental *Vaughn* index states, the documents were produced 'in anticipation of the SEC's determination about whether to allow the ESRT transaction to proceed.' Greater detail is not necessary to facilitate judicial review or to promote any other purpose embodied in FOIA." Moss found the SEC's conclusion that disclosure of identifying information about complainants would not shed light on government operations was too narrow under the circumstances, indicating the agency should consider the public interest in who may have been exerting influence on the agency to approve the transaction and the relative weight the agency gave to various complaints. Citing *Board of Trade v. Commodity Futures Trading Commission*, 627 F.2d392 (D.C. Cir. 1980), Moss explained that "the Court takes from this line of precedent that personal information that relates to commercial activity is not categorically beyond the reach of Exemption 6, but that the Court must engage in a case-specific weighing of interests at stake and that it is likely, as Edelman suggests, that the names of commenters on commercial matters implicates less weighty privacy interests than the type of information that lies at the core of Exemption 6." He added that "given the fact-intensive nature of the required inquiry, the Court cannot accept the SEC's invitation to sustain its application of Exemption 6 to all identifying information about all of the complainants. This is not to say, however, that the SEC cannot make a sufficient showing that the identities of *some* of the complainants implicate privacy interests that outweigh the public interest in disclosure. But because the current record lacks sufficient information for the Court to conduct the

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required balancing, and because the SEC (which mistaken concluded that providing the complainants' names 'would not shed light on how the government operates) should conduct the relevant balancing in the first instance, the Court will deny summary judgement at this time." (*Richard Edelman v. Securities and Exchange Commission*, Civil Action No. 14-1140 (RDM), U.S. District Court for the District of Columbia, Mar. 6)

In a case that underlines the importance of FOIA in trying to defend one's reputation from charges of participation in extraordinary rendition in the aftermath of 9/11, Judge Beryl Howell has ruled that both the CIA and the State Department properly invoked *Glomar* responses neither confirming nor denying the existence of records in response to multi-part requests from Sabrina de Sousa, a former Foreign Service Officer stationed at the U.S. consulate in Milan in 2003 when an Islamic cleric known as Abu Omar was kidnapped and flown to Egypt for interrogation. Although she implored the U.S. government to invoke diplomatic immunity on her behalf, she and others were convicted in absentia by an Italian court for being involved in the rendition. She sued the CIA and the State Department for violating her constitutional rights. She also filed FOIA requests with the CIA, the State Department, and the Department of Defense for records concerning the alleged rendition. The CIA asserted a *Glomar* response in answer to all parts of her two requests. The State Department issued a partial *Glomar* response, but also disclosed 18 documents in full and 61 documents in part, withholding 17 documents in full. The Defense Department disclosed 286 pages withholding some records. While de Sousa admitted that underlying CIA records about the rendition were likely classified, she argued primarily that because her requests were couched in terms of allegations and used the disjunctive "whether or not," admitting to the existence of such records would not reveal classified information. Howell disagreed, pointing out that "plaintiff's emphasis on the disjunctive form of the request ignores the main thrust of the request regarding the agency's defense or protection of the plaintiff. If she had no affiliation with the CIA at all, the CIA would not be discussing whether or not to defend her, or not to defend her." De Sousa argued that records concerning an Italian defense attorney who was retained by the State Department were even further removed from implicating the CIA. But Howell pointed out that "the CIA's possession of records concerning the letter would suggest that the letter was forwarded to the CIA and potentially discussed more thoroughly within the CIA or with other agencies. This, in turn, would lead to the reasonable inference that the CIA had either a relationship with the plaintiff, an intelligence interest in Abu Omar, or some other involvement in the rendition." Howell also approved the State Department's *Glomar* response. She noted that "*every* request propounded to the State Department presumes that at least some individuals convicted in connection with the rendition—including the plaintiff—were affiliated with the CIA. Whether these individuals were affiliated with the CIA is properly classified." The Defense Department withheld a draft letter concerning whether or not to invoke the Status of Forces Agreement under **Exemption 5 (privileges)**. Howell agreed that the draft was predecisional, but was more uncertain as to whether it had been subsequently adopted when the SOFA was invoked. Sending the issue back to the agency for further explanation, she noted that "the Department of Defense must explain whether the official who ultimately invoked jurisdiction under the SOFA relied on the reasoning set out in the letter from the Secretary of Defense to the President." Howell dismissed de Sousa's challenge to the **segregability** claims made by State and Defense. Finding the agencies' claims appropriate, she observed that "it is by now firmly engrained that an agency may provide sufficient justification by describing the materials withheld, the exemption under which they were withheld, and an affidavit attesting that 'it released all segregable material.'" (*Sabrina de Sousa v. Central Intelligence Agency, et al.*, Civil Action No. 14-1951 (BAH), U.S. District Court for the District of Columbia, Mar. 9)

A federal court in California has ruled that the FBI conducted an **adequate search** for records concerning procedures for issuing national security letters to obtain information from members of the media. In response to a request by the Freedom of the Press Foundation, the FBI located 302 pages and disclosed 156

pages. The request was also referred to the Office of the General Counsel, which located 134 pages and disclosed 72 pages. The Foundation challenged the adequacy of the search as well as various exemption claims. The FBI told the court that it could not search its Central Records System, which is organized by individuals, organizations, companies, and events, because the request focused more broadly on agency policy. As a result, the search was conducted by the Discovery Processing Unit, which referred it to OGC's three branches – the National Security Law Branch, the Litigation Branch, and the Investigative and General Law Branch. A keyword search of an unclassified version of the Domestic Investigations and Operation Guide was conducted using the term "national security letter." The court rejected the Foundation's contention that the search was insufficient because it did not identify Appendix G of the DIOG and did not find any records dated before 2014, noting that the omission of Appendix G "standing alone, is insufficient to render the FBI's search inadequate." In challenging the agency's **Exemption 3 (other statutes)** claim, the Foundation argued that the agency's explanation fell short of the level of detail required in *Weiner v. FBI*, 943 F.2d 972 (9th Cir. 1991). But the court indicated that the Ninth Circuit, in *Hamdan v. Dept of Justice*, 797 F.3d 759 (9th Cir. 2015), had deferred to an agency's decision to provide less detailed affidavits in cases involving national security investigations. Here, the court found the level of detail met the *Hamdan* standard. The Foundation argued the agency was required to show more detail in explaining why certain records were protected by **Exemption 5 (privileges)**. But the court observed that "Defendant has already explained the nature of the withheld information. It need not disclose the specific comments or how the final policies ultimately changed in light of such feedback because that would create an end-run around the exemption." The Foundation challenged the agency's **segregability analysis**, focusing primarily on the fact that so much information was withheld under the deliberative process privilege. The court indicated, however, that "the question is not whether Defendant withheld numerous pages, but rather whether they were properly withheld and segregated. Plaintiff's speculative suggestion is not enough to overcome the presumption of good faith." (*Freedom of the Press Foundation v. United States Department of Justice*, Civil Action No. 15-03503-HSG, U.S. District Court for the Northern District of California, Mar. 13)

Judge Beryl Howell has ruled that the Bureau of Alcohol, Tobacco, and Firearms properly withheld records about training provided to hearing officers to assess whether a Federal Firearms Licensee had violated the Gun Control Act to the extent that it might result in loss of the license under **Exemption 7(E) (investigative methods and techniques)**. David Codrea, Len Savage, and the FFL Defense Research Center filed a FOIA request for a variety of records, including policies or guidance for hearing officers. The agency processed 6,875 pages, disclosing them in four rolling productions. By the time Howell ruled, however, the only remaining issue was the application of Exemption 7(E) to four pages. Howell found the information qualified as law enforcement records. She noted that "records created in connection with hearings carried out by the ATF under the GCA in order to determine whether an applicant for a firearm license was properly denied a license or an FFL's license was properly revoked, are plainly compiled to further the law enforcement purposes of the GCA by ensuring that firearm licenses are awarded consistent with statutory and regulatory requirements." Howell explained that "the withheld information relays information about the types of evidence sought in law enforcement investigations and thereby 'necessarily would disclose information about the underlying techniques and procedures themselves.'" The plaintiff argued that the records did not provide examples of the kinds of behavior that would result in loss of a license. Howell rejected the claim, pointing out that "this argument is short-sighted. While examples of the types of evidence probative of willful violations might be helpful as guideposts for law-abiding people, the plaintiffs ignore the obvious risk that descriptions of inculpatory evidence invite non-law-abiding people to prioritize making that evidence disappear." (*David Corea, et al. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, Civil Action No. 15-0988 (BAH), U.S. District Court for the District of Columbia, Mar. 7)

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Judge Rudolph Contreras has ruled that U.S. Immigration and Customs Enforcement properly withheld records concerning its criminal investigation of Lonnie Parker under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)**, but that it has not yet shown that in conducted an **adequate search**. The agency initially disclosed 60 pages and then, after Parker complained about the search, the agent in Little Rock who was primarily involved with Parker's investigation conducted a manual search of his files and located an additional 129 pages. ICE argued that since Parker had not objected to the agency's withholding or segregability claims, Contreras should accept them. But he pointed out that "this matter is no longer so simple. The D.C. Circuit has held [in *Winston & Strawn v. McLean*, 843 F.3d 503 (D.C. Cir. 2016)] that—even if the nonmovant does not respond to the motion for summary judgment—the court cannot grant the motion simply because it was conceded. This requires the Court to conduct an independent evaluation to determine whether the record and any undisputed materials facts justify granting summary judgment." Finding the agency's exemption claims appropriate, Contreras upheld the claims. Turning to the search, Contreras agreed with Parker's contention that the agency had not explained why a former agent's emails could no longer be searched. He pointed out that "Mr. Parker argues that ICE provides 'no meaningful details' such as the 'computer programs' the backup system uses or descriptions of any attempts by ICE to search the backup system. The D.C. Circuit has required that an agency 'inform the court and plaintiffs whether backup tapes of any potential relevance exist' and 'whether there is any practical obstacle to searching them.' As the mention of obstacles suggests, not every backup system is amenable to search. The D.C. Circuit noted that searching a backup system could be 'impossible, impractical, or futile' if the system was configured only to restore data after a disaster and did not include the ability to locate a specific file." Ordering the agency to provide a more detailed explanation, Contreras noted that "ICE [should] provide an affidavit from an information-technology professional that describes the email backup system potentially containing [the former agent's] emails with greater specificity and describes any practical obstacles to searching that system." (*Lonnie J. Parker v. U.S. Immigration and Customs Enforcement*, Civil Action No. 15-1253, U.S. District Court for the District of Columbia, Mar. 2)

Judge Emmet Sullivan has ruled that the Department of Defense has not shown that it conducted an **adequate search** for records concerning Linda Walston's request for records concerning whether or not the Defense Information Systems Agency had hacked her computer. Walston discovered her personal computer had been hacked several times between 2010 and 2014. A computer forensics specialist Walston hired to fix her computer suggested to her that DISA might have been responsible for the hacking. As a result, Walston filed a complaint with the Defense Department's Inspector General, alleging that DISA had hacked her computer. She then filed a FOIA request for records concerning the investigation of her complaint. DISA responded with a redacted memo from DISA OIG to DOD OIG concluding Walston's allegations were unfounded and a report providing analysis for that determination. After filing an administrative appeal, Walston filed suit. DISA then disclosed 13 pages of emails among DISA analysts discussing their analyses of her complaint and another 32 pages of administrative documents and documents that Walston had submitted to DISA. Walston claimed the agency had failed to conduct an adequate search. Sullivan indicated that the agency's two affidavits went some way to explain the agency's search, but found they still fell short of what was legally required. He noted that "nowhere does [the agency's affidavit] state that the electronic database, the shared drive, and the investigators' email files constitute the entire universe of files likely to contain responsive materials. The omission of the 'necessary' statement is all the more troubling because it appears that investigative materials in the DISA OIG database might be located in the 'primary location' in Maryland or in the 'decentralized location' in Illinois. . .Without the 'necessary' statement that the entire universe of files likely to contain responsive records was searched, the Court is foreclosed from granting summary judgment as to the adequacy of DISA OIG's search." He also faulted the agency for failing to identify the keywords used in its searches. He noted that "without a complete list of the search terms in response to Ms.

Walston's FOIA request, the Court is unable to conclude that DISA OIG's search was adequate." Sullivan agreed with the agency's redactions under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. Agreeing that an email was protected by the attorney-client privilege, Sullivan pointed out that "in the email exchange, the analyst asks the attorney a legal question and the attorney responds, in turn, with his legal opinion. The analyst and the attorney intended to communicate in confidence." (*Linda P. Walston v. United States Department of Defense*, Civil Action No. 15-2202 (EGS), U.S. District Court for the District of Columbia, Feb. 28)

Judge Colleen Kollar-Kotelly has ruled that the U.S. Forest Service did not violate the procedural requirements of the **Federal Advisory Committee Act** when it removed four non-federal scientists from its strategy team created to address a conservation strategy for the California spotted owl, but that the Center for Biological Diversity may continue with its claim under the Administrative Procedure Act that the agency violated FACA's document disclosure requirements. The Forest Service set up the strategy team with four non-scientists and met only once before the Center filed suit, alleging that the make-up of the strategy team did not comply with the fairly balanced requirements in FACA. In response, the agency removed the four non-federal scientists, leaving the strategy team made up solely of federal employees. However, the agency indicated that it would solicit the input of the four non-federal scientists on an individual basis and would not include them in any group discussions. Since the strategy team was no longer subject to FACA, the agency claimed the Center no longer had standing to bring suit. Kollar-Kotelly noted initially that the Supreme Court and the D.C. Circuit had previously assumed that courts had jurisdiction under FACA to hear a challenge to a violation of the statute. But she pointed out that those cases predated *Alexander v. Sandoval*, 532 U.S. 275 (2001), where the Supreme Court held that a private cause of action to challenge statutory violations existed only if Congress had explicitly created such a remedy. As a result, Kollar-Kotelly observed that "FACA does not provide a private cause of action in this case. Accordingly, Plaintiff's claims must be dismissed to the extent they are premised on the existence of one." She agreed the Center could proceed with its challenge under the APA, but noted that its challenge to the membership of the strategy team was **moot**. She pointed out that "by December 2015, the Strategy Team no longer formally included any non-federal employees. As such, the Strategy Team falls within the exemption in [FACA]" for committees made up solely of federal employees. She added that "in other words, by operation of law, the FACA advisory committee at issue in this matter. . .no longer exists." The Center argued the agency's admission that it planned to consult the four non-federal scientists made them de facto members of the strategy team. Kollar-Kotelly rejected the claim, noting that "on the present record there is no reasonable expectation that the wrongful conduct at issue—the formation of a FACA advisory committee and subsequent failure to comply with FACA—will reoccur. This, of course, is a prediction; but if Defendants do violate FACA in the future in connect with the Strategy Team, Plaintiff may renew its non-document FACA claims, and any subsequent voluntary cessation shall be viewed with considerable skepticism by the Court." The Center argued that the agency's actions displayed a pattern or practice of violating FACA. But Kollar-Kotelly observed that "there is only one FACA violation before the Court—that is, the one allegedly stemming from the creation of the Strategy in September 2015—and that does not suffice to make a 'pattern or practice' of FACA violations. . ." Kollar-Kotelly agreed with the Center that the agency had not yet shown that it had disclosed records created by the strategy team when it was still subject to FACA. As a result, she allowed the Center's challenge to the agency's failure to disclose documents under FACA to continue. (*Center for Biological Diversity v. Thomas Tidwell, et al.*, Civil Action No. 15-2176 (CKK), U.S. District Court for the District of Columbia, Mar. 9)

Judge Randolph Moss has ruled that the Department of Justice has satisfactorily explained its response to Erin House's request for records about wiretaps that involved his phone. House was one of several

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individuals convicted in the Western District of Pennsylvania as part of a drug investigation who then filed a number of FOIA requests with DOJ for records concerning the authorization of the wiretaps. Moss upheld most of the agency's response to House, but found the agency still had not provided a sufficient explanation of several items. House had complained of a reference to a single phone number when the agency had stated that it requested wiretap authorizations for several phone numbers. Moss noted that "House is correct that the *Vaughn* index indicates that the July 9, 2009, memorandum references only a single telephone number, but it is evident that the reference is simply a ministerial error. The Court sees no reason—and House does not provide one—why this minor error should call into question the adequacy of the Department's search and response to House's FOIA request." House also complained that his name did not appear in a tracking database of wiretaps. Again, Moss found the agency had adequately addressed House's concern by explaining that House was not the primary target and, as a result, was not listed in the database. He pointed out that "the fact that references to House appear in documents maintained by the Office of Enforcement Operations, but not in the subject field of the tracking system, does not discredit the Department's search, nor has House identified any reason to conclude that the Department has failed to locate all potentially responsive records." (*Erin D. House v. U.S. Department of Justice*, Civil Action No. 14-20 (RDM), U.S. District Court for the District of Columbia, Mar. 5)

A federal court in Connecticut has ruled that the National Geospatial Intelligence Agency went beyond its FOIA obligations in searching for images of Christine Wu's home in Stamford. Wu requested any images of the area around her home that were available on the agency's system, including an authorized account from the Army. The agency found no images generated by the government, but located eight images in a database containing commercial images that had been requested by the Coast Guard for purposes related to that agency. The court noted that the agency's search "went beyond the specifics of Wu's request. . .That extended search revealed the existence of eight commercial images that were not NGA images and, to the best of the Director's knowledge, has not been accessed by NGA." Wu argued that the agency's failure to respond to her request until she filed suit suggested the agency tried to discourage her from pursuing her request. The court disagreed, pointing out that "so long as [NGA] arrived at its belated determination after an adequate search, and did not act in bad faith, it is entitled to summary judgement under FOIA." (*Christine M. Wu v. National Geospatial Intelligence Agency*, Civil Action No. 14-1603 (DJS), U.S. District Court for the District of Connecticut, Mar. 8)

A federal court in Louisiana has declined to reconsider its ruling finding U.S. Citizenship and Immigration Services had not conducted an **adequate search** for a form requested by immigration attorney Michael Gahagan. The court observed that "it was USCIS's own sloppy approach and failure to describe its alleged search, and the confusion created by its own personnel, that undermined its ability to carry its burden to show that it had conducted an adequate search." The agency argued that "the apparent discrepancy has been explained and, now, it should be understood that the agency never kept the record and, thus, could only recreate it, as it has done." Rejecting the claim, the court pointed out that "too little, too late. At the time the Court issued its December 14, 2016 Order and Reasons, USCIS had failed to carry its burden to show that it had conducted an adequate search. Clearly, it had not done so; the Court ordered that a search must be conducted and an explanation clarifying the inconsistency in the record must be filed. The Court will not reconsider its prior ruling based on any clarity finally achieved only after a Court-ordered search and submission that was prompted by the agency's own inadequate presentation." (*Michael W. Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 16-15438, U.S. District Court for the Eastern District of Louisiana, Mar. 8)

Judge Tanya Chutkan has ruled that the Equal Employment Opportunity Commission properly responded to David Johnson's request for IRS MD-715 reports, which contains guidance to agencies for establishing effective equal employment opportunity programs, from 2003-2013. The agency initially

disclosed all the reports except for 2013, which had not yet been filed. Johnson claimed he had also submitted a request to OPM for that agency's EEO reports. Noting that EEOC had released its 2014 and 2015 reports as well based on Johnson's claim that he had requested them, Chutkan pointed out that "EEOC did not release the IRS MD-715 Report for the fiscal year ending December 31, 2013, because IRS had not yet submitted its report. EEOC did not violate the FOIA by failing to disclose a record it did not have in its possession when it received Plaintiff's April 1, 2014 FOIA request. Even if EEOC were to have received an MD-715 Report from IRS for 2013 at some point after it responded to Plaintiff's April 1, 2014 FOIA request, EEOC would not have been obligated to release it." She added that "now that EEOC has released all of the records Plaintiff requested, this FOIA claim is moot." Dismissing Johnson's claim against OPM, Chutkan observed that "the Court concludes that Plaintiff had not submitted a FOIA request to OPM prior to filing this civil action." (*David M. Johnson v. United States of America*, Civil Action No. 16-0072 (TSC), U.S. District Court for the District of Columbia, Mar. 6)

Judge Reggie Walton has ruled that the Department of the Interior properly concluded that it did not generate a hard-copy of a Within Grade Increase denial for Barry Ahuruonye, but instead provided him with a copy of a screen shot showing the electronic version. Ahuruonye claimed the agency had admitted to the existence of the form in its response to a discovery request in a separate action he filed with the Merit Systems Protection Board. But Walton observed that "the discovery response the plaintiff cites does not indicate that the defendant has such a document in its possession; rather, the defendant's response simply indicated that the defendant considered the document requested to be 'irrelevant' to his appeal." Walton added that "the defendant has shown that other than the memorandum already provided to the plaintiff, a separate Acceptable Level of Competence determination record for the fiscal year of 2014 sought by plaintiff does not exist." (*Barry Ahuruonye v. United States Department of the Interior*, Civil Action No. 15-1215 (RBW), U.S. District Court for the District of Columbia, Mar. 8)