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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: Ruling Mar. 31 in a non-FOIA case involving press requests for access to a sealed videotape made of a prisoner at Guantanamo Bay, a splintered three-judge panel of the D.C. Circuit found the videotape was not subject to disclosure, but could not agree on why. Writing for the majority, Senior Circuit Court Judge A. Raymond Randolph pointed out that "images are more provocative than written or verbal descriptions. Extremists have used Guantanamo Bay imagery in their propaganda and in carrying out attacks on Americans." But Circuit Court Judge Judith Rogers disagreed, writing that "the qualified First Amendment right of access fits well with the privilege of habeas corpus. . .Because criminal trials and habeas proceedings are designed to protect against abuses of Executive power and guard individual liberty, why would the First Amendment right of access apply differently in the two proceedings?"

Court Examines Privilege Claims In Records Prepared for OIG Report

Judge Beryl Howell has provided a nuanced explanation of why the deliberative process privilege applies in some situations, but not in others, although the documents may seem closely related. Ruling in a case brought by David Hardy, an attorney and internet blogger who writes on information relating to firearms law issues, Howell found that a number of claims made by the Inspector General at the Justice Department for records relating to a 2007 report entitled "The Bureau of Alcohol, Tobacco, Firearms and Explosives' National Firearms Registration and Transfer Record, June 2007," exploring the effectiveness of the agency's database through interviews, data analyses and document reviews, as well as an electronic survey and an onsite visit, did not qualify under the privilege.

By the time she ruled, Howell had divided 511 pages processed by OIG into three categories: (1) records of interviews and notes of telephone interviews, (2) records related to surveys, and (3) miscellaneous work papers. Howell noted initially that "OIG appears to suggest a blanket rule covering all the documents, asserting that even if the documents contain purely factual information, they were

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produced in preparation for a final public report and thus are non-disclosable." But Howell indicated that "at issue, is whether for *each* contested document withheld in part or in full, the declarations establish (1) 'what deliberative process is involved,' (2) 'the role played by the document in issue in the course of that process,' and (3) 'the nature of the decisionmaking authority vested in the office or person issuing the disputed document, and the positions in the chain of command of the parties to the documents.'"

Turning to the interview notes, Howell pointed out that "to the extent information in the documents includes 'recommendations' or 'opinions on legal or policy matters,' they are clearly 'deliberative' in nature and non-disclosure is permissible under Exemption 5." She added that "even if the documents contain 'purely factual material,' that information is still covered by Exemption 5 because it would reveal the agency's deliberative process." She then observed that "for this reason, interview notes and summaries are routinely found to be subject to Exemption 5." She explained that "as the records of interviews and interview notes constitute information 'line-level inspectors believed were relevant' from the interviews they conducted, the inspectors would have had to 'extract pertinent material' from a larger universe of facts and thus the documents reflect an 'exercise of judgment as to what issues' seemed most 'relevant' to those inspectors to 'pre-decisional findings and recommendations.'"

Howell rejected the agency's claim that since a small number of individuals had been interviewed, disclosure would increase the chance of identification. Howell noted that "that argument is not persuasive." She pointed out that "in this case, OIG interviewed 72 individuals, far from a 'relatively small number' of employees, including over 50 ATF officials and staff members, whose titles and locations are fully disclosed in the report. Given the significant number of interviewees, and the availability of redacting identifying information from the documents, the possibility of linking any individual to a particular document is not a colorable risk that would warrant withholding. Thus, this rationale does not support the application of Exemption 5."

Addressing the records related to OIG's survey, Howell explained that "survey data is quintessentially factual information that reveals little about an agency's deliberative process." She indicated that OIG sent the electronic survey to 609 ATF Industry Operations Investigators, of which 334 responded. She pointed out that "OIG released portions of the survey results in the final report, including aggregate data from the multiple-choice questions as well as numerous direct quotations from the narrative responses." Howell noted that "given that OIG has already produced in the NFRTR Report the survey questions in their entirety, and the results and data in part, to withhold the remaining survey results and data, OIG must explain how the withheld information is 'different from those released in any relevant respect.'" She added that "further, the 'Survey Results' and 'Final Survey Data' are anonymized collections of information from 334 individuals and, thus, disclosure of the results and data could not be used to identify any particular respondent. Even quotes from narrative responses to questions from the survey cannot be tied to any particular survey respondent. Therefore, public disclosure is unlikely 'in the future to stifle honest and frank communication within the agency.'"

Howell questioned the agency's claim that a document entitled "Final Survey Data Analysis" was either predecisional or deliberative. She pointed out that "OIG does not describe with any specificity (1) the type of information contained in the documents—whether merely collative of survey results or actually evaluative; (2) the particular role the documents played in any agency deliberations prior to or during the drafting of the NFRTR Report; or (3) 'the nature of the decisionmaking authority vested in the office or person issuing the disputed documents, and the positions in the chain of command of the parties to the documents.' In short, OIG has not provided sufficient information for the Court to determine, one way or the other, whether these documents are protected by Exemption 5." The agency argued that disclosure could create confusion with the

public. Rejecting the claim, Howell noted that "OIG has raised no concern about the 'Final Survey Data Analysis' document being 'erroneous or incomplete.' Moreover, as the final report has already been released, the disclosure of this document now would not result in the 'premature exposure' of any agency decision or policy. Finally, the 'confusion' rationale 'has special force with respect to disclosure of agency positions or reasoning concerning proposed *policies*.' Here, OIG is not promulgating a 'policy,' it has merely released a report about the adequacy of another agency's record-keeping. Thus, if the 'Final Survey Data Analysis' document was released, there is no risk that the public would be confused about the grounds for an agency's *policy*."

Howell found that an "Interview Workpaper" was protected by Exemption 5, but that a "Workpaper Index and Assignments Worksheet" was not. As to the "Interview Workpaper," she observed that "even if the document contains purely factual material derived from interview notes, this document was prepared by 'culling' information 'from a much larger universe of facts,' namely the interviews, and thus 'reflects an exercise of judgement.' Indeed, the document is a 'spreadsheet' that analyzes the very interview responses this Court has already held to be deliberative." Finding the "Workpaper Index and Assignment Worksheet" was not protected, Howell indicated that "given that the NFRTR Report already divulges significant information about who was interviewed, how many interviews were conducted, and where they were conducted, along with information about how other data was collected, OIG has not explained why the disclosure of the 'log of all interviews and other data collected' must be withheld in full." She added that "at a minimum, OIG has failed to explain how the information in the 'Workpaper Index and Assignments Worksheet' differs so significantly from the publicly released information as to implicate adversely the interests to be protected by Exemption 5."

She also faulted the agency's claims that email and document summaries were privileged. She pointed out that "OIG does not explain who drafted the email summary, who the emails were from and to whom they were sent, or how they were used in drafting the report. OIG's declarant describes the 'Document Summary' as 'containing information the OIG reviewed in the course of preparing the NFRTR Report.' This description is patently inadequate, however, as it would apply to *every* document and piece of information reviewed by OIG for the NFRTR Report, including the portions of documents OIG already disclosed. If this rationale were sufficient to exempt material under Exemption 5, no information could ever be released." (*David T. Hardy v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.*, Civil Action No. 15-1649 (BAH), U.S. District Court for the District of Columbia, Mar. 22)

Views from the States…

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

Michigan

A court of appeals has ruled that an anti-fracking group failed to state a claim when it challenged a decision by the Department of Environmental Quality that records submitted in conjunction with a drilling permit were not confidential because the law under which the permit was granted covered drilling for minerals, not for natural gas. The records were withheld under the confidentiality provisions covering confidential business information. The trial court upheld the agency's decision and the plaintiffs appealed. Affirming the lower court's decision, the appellate court noted that "the confidentiality

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protections apply and plaintiff's assertion that its bare allegation that [the drilling project] is not a mineral well is sufficient to withstand summary disposition is without merit." (*Gary Cooley and Ban Michigan Fracking v. Department of Environmental Quality*, No. 334133, Michigan Court of Appeals, Mar. 16)

Missouri

A court of appeals has ruled that the motion of the Reporters Committee and the ACLU of Missouri to enforce a trial court ruling requiring identification of the pharmacists who supplied lethal drugs to the Department of Corrections to use in executions is moot because the appellate court reversed the trial court's decision in a companion case consolidated with the Reporters Committee appeal. The trial court had ruled in favor of the Reporters Committee and the ACLU of Missouri, finding the pharmacists' identities were not protected because they did not administer the drug. The trial court ordered the DOC to annotate its privilege log, but before they did so, the trial court ruled against the agency. The two cases were appealed and the appeals court reversed the trial court's decision. The Reporters Committee and the ACLU of Missouri asked the trial court to order the agency to disclose the annotated log. Finding the case was now moot, the appeals court indicated it had settled any outstanding issues with its ruling in the companion case. The court noted that "the records that Plaintiffs pursue here, if disclosed, would undoubtedly lead to the identification of [the identities of two participants] and, therefore, they fall within the scope of our [companion] ruling and are protected from disclosure." (*Reporters Committee for Freedom of the Press, et al., v. Missouri Department of Corrections*, No. WD 79961, Missouri Court of Appeals, Western District, Mar. 28)

New York

A trial court has ruled that emails between New York City Mayor Bill de Blasio and senior members of his staff and Jonathan Rosen, a public relations executive informally advising de Blasio, are not privileged because Rosen was not working for the city. After receiving requests from two reporters, de Blasio's office disclosed 24 email chains, some of which were characterized as duplicative, withholding some records because they were privileged. After the reporters brought suit, the city disclosed another 1500 pages, but still withheld records based on its privilege claim. Finding there was no privilege, the court noted that "here, the Mayor is seeking to apply the inter-agency deliberative privilege to someone who is not part of the Mayor's office or that of any other city agency, and who has not been hired by the Mayor but is merely advising him on an informal basis. . .Rosen is a private citizen whose private interest may diverge from those of the City in connection with his representation of his private clients, some of whom conduct business which may be impacted by city policies, such as zoning matters. Although respondents claim that none of the withheld documents relate to Rosen's private clients, that does not mean that Rosen and his consulting firm are free from such divergent interests. Clothing informal relationships such as that of Rosen and the Mayor with the inter-agency or intra-agency privilege impermissibly broadens the exceptions to FOIL, counter to the public interest in transparency in government." The court rejected the City's claim that the common law public interest privilege served to protect the records because the parties meant for their discussions to be confidential. The court observed that "this statement merely asserts that respondents desired that the discussions be secret, and hardly constitutes the requisite specific support for the claim of privilege. It certainly does not indicate why, in balancing the governmental interest in confidential information with the public's interest in disclosure, as embodied in the presumption of openness embodied by FOIL, a common-law public interest privilege should bar disclosure here." (*Grace Rauh and Yoav Gonen v. Bill de Blasio*, No. 157525/2016, New York Supreme Court, New York County, Mar. 21)

Ohio

A court of appeals has ruled that preliminary autopsy records concerning the murder of eight members of a family in Pike County are not subject to the journalist exception because they are now investigative law enforcement records protected by the law enforcement exemption. A reporter for the *Cincinnati Enquirer* requested the records, citing the journalist exception, which is intended to ensure that routine autopsy information is made public. The Pike County coroner denied the reporter's request and the *Enquirer* filed suit. Finding that the records were protected, the court noted that "insofar as the requested preliminary autopsy reports contained records about the homicide victims that constitute confidential law enforcement investigatory records, they constitute non-public records under [the investigatory law enforcement records exemption] that are not subject to the journalist exception [contained in a separate statute]." (*State of Ohio, ex rel. Cincinnati Enquirer v. Pike County General Health District*, No. 16CA873, Ohio Court of Appeals, Fourth District, Pike County, Mar. 17)

The Federal Courts…

The Sixth Circuit has ruled that the inter- or intra-agency threshold in **Exemption 5 (privileges)** means that entities sending or receiving such memoranda must both qualify as agencies under the FOIA for the exemption to apply. The case involved two requests for assistance from the Justice Department's Office of International Affairs to Austria and another country for help in prosecuting Doda Lucaj, who was arrested in the United States for allegedly participating in an attack against facilities in Montenegro in an attempt to influence that country's elections. The FBI withheld the RFAs under Exemption 5, claiming that because the countries shared a common interest with the FBI the RFAs fell within the common interest doctrine and were privileged under Exemption 5. The Sixth Circuit noted that the Supreme Court's ruling in *Dept of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), that the source of a document must be an agency did "not rule out the corresponding requirement that the document's destination must also be an agency." The court added that "consistent with this rule [that the source of the document must be an agency] and in keeping with the plain meaning of the statute and legislative intent, the destination of the document must be a Government agency as well." The court explained that "however broad the term *agency* can be, FOIA offers, for our purposes, a more limited definition: "'agency' means each authority of the Government of the United States.' So to be inter-agency memorandums or letters, the RFAs must have been sent from an authority of the Government of the United States to an authority of the Government of the United States. The OIA, undoubtedly an authority of the Government of the United States, sent the RFAs to the Central Authority of Austria and an unnamed country, undoubtedly not authorities of the Government of the United States. The RFAs' recipients having failed to meet FOIA's definition of *agency*, we hold that the RFAs from the OIA to the Central Authority of Austria and the unnamed country are not inter-agency. And given that the RFAs are not intra-agency either, they may not be withheld under Exemption 5." The Sixth Circuit rejected the expansion of the coverage of Exemption 5 by the common interest doctrine, primarily developed by the Fourth Circuit in *Hunton & Williams v. Dept of Justice*, 590 F.3d 272 (4th Cir. 2010), and the consultant corollary, which had been approved by the D.C. Circuit in *National Institute of Military Justice v. Dept of Defense*, 512 F.3d 677 (D.C. Cir. 2008). Instead, it indicated that "however important it may be for the OIA to have frank communications with the Central Authority of Austria and an unnamed foreign government, however common the interest between the OIA and its international partners, the Central Authority of Austria and an unnamed foreign government are not, so far as Congress has defined the term, *agencies*." However, the court indicated that the RFAs might still be protected by **Exemption 3 (other statutes)**, **Exemption 6 (invasion of privacy)**

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or **Exemption 7 (law enforcement records)**. (*Doda Lucaj v. Federal Bureau of Investigation; United States Department of Justice*, No. 16-1381, U.S. Court of Appeals for the Sixth Circuit, Mar. 24)

A federal court in New York has ruled that questions asked of juveniles detained at the Mexican-U.S. border on suspicion of smuggling and their responses are not protected by **Exemption 7(E) (investigative methods and techniques)** because they are already known to the public through disclosure by U.S. Customs and Border Protection during the show "Border Wars." In response to a FOIA request from the ACLU concerning procedures for the detention of juveniles suspected of being involved in smuggling, CBP claimed the questions and answers, which had been developed during the now-terminated Juvenile Referral Program, were protected by Exemption 7(E) because disclosure would allow smugglers to learn about the kinds of questions used in interviewing such juveniles. The ACLU argued that the agency had already disclosed the existence of the interview questions during the show "Border Wars." The court agreed, noting that "here, CBP has not established that there is anything technical about the questions asked, that any special method or skills are being used, or that children who were subjected to questioning would not thereby learn the 'technique' that CBP wishes to keep secret. It offered nothing more than the fact that these records would reveal that CBP asks questions about these topics and may ask follow-up questions. Courts require the government to offer more than 'generic assertions' and boilerplate' to justify Exemption 7(E) withholding." The court added that "asking well-known law-enforcement arrest questions in a particular order does not amount to a 'technique.' Section 7(E) requires that the material being withheld truly embody a specialized, calculated technique or procedure and that it not be apparent to the public." The government urged the court to adopt an exception allowing an agency to withhold generally known techniques if disclosure would harm their effectiveness. The court indicated that "to the extent that CBP contends that disclosing the questions to Plaintiff would nullify their effectiveness because they may become known to smugglers, the damage [has already] been done, in large part on CBP's own initiative." (*American Civil Liberties Union Foundation v. Department of Homeland Security, et al.*, No. 15-9020, U.S. District Court for the Southern District of New York, Mar. 22)

Judge Amy Berman Jackson has ruled that the government misconduct exception does not apply in the FOIA context and does not overcome deliberative process privilege claims made by the State Department for records concerning the attack on the U.S. consulate in Benghazi, but that two other documents withheld by the agency under the deliberative process privilege were not deliberative. In responding to a request from Judicial Watch, the agency disclosed 459 documents in whole or in part. Judicial Watch did not contest the adequacy of the agency's search, but focused on the **Exemption 5 (privileges)** claims. Judicial Watch argued that since the agency had been deceptive concerning what happened at Benghazi, the government misconduct exception applied. After reviewing the documents *in camera*, Jackson rejected the application of the government misconduct exception in the FOIA context. She pointed out that the leading D.C. Circuit case related to the government misconduct exception was *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), which involved a criminal investigation. She observed that "some courts in this district have cited *In re Sealed Case* and discussed the possibility that the exception would apply in FOIA cases where the claimed governmental misconduct is 'severe enough to qualify as nefarious or extreme government wrongdoing. But plaintiff has not pointed the Court to any case in which a court in this district has ordered that deliberative materials be disclosed on those grounds." In contrast, however, Jackson noted that the court in *Wright v. Administration for Children & Families*, 2016 WL 5922293 (D.D.C. Oct. 11, 2016), had ruled that "Exemption 5's protection of privileged materials is not subject to the same exceptions to which the common law privilege is susceptible." Jackson indicated that "in this Court's view, the *Wright* decision flows directly from the ruling in *In re Sealed Case*, where the Court of Appeals specifically carved FOIA cases out of its general recognition that the deliberative process privilege could be overcome by a showing of need." She added that "the Court

finds that the only applicable Circuit authority militates against recognizing a government misconduct exception in a FOIA case, and it will follow the analysis set out in *Wright*." The State Department had withheld paragraphs containing summaries of calls from President Obama to the Presidents of Libya and Egypt in the aftermath of the Benghazi attack, arguing that the summaries were to help inform the agency's deliberations. Jackson explained that "the two records, even if just barely predecisional, are not deliberative." She observed that "while the Court recognizes that the information was transmitted to inform State Department officials of facts that could be relevant to the ongoing performance of their duties, the deliberative process privilege has not been interpreted to extend that broadly. The agency has not articulated any principle that would justify withholding here that would not also justify the withholding of all factual summaries prepared in the ordinary course of agency business." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 14-1511 (ABJ), U.S. District Court for the District of Columbia, Mar. 20)

A federal court in New York has ruled that various intelligence agencies have failed to sufficiently explain the **searches** they conducted in response to FOIA requests from the ACLU for records concerning their authority under the Reagan administration's E.O. 12,333, minimization procedures used, and standards that must be satisfied for collecting, acquiring, or intercepting communications. Questioning the adequacy of searches conducted by the FBI, the CIA, and the National Security Division of the Justice Department, Judge Kimba Wood observed, as to the CIA, that "however, like FBI and NSD, CIA has failed to provide sufficient information for Plaintiffs or the Court to reasonably assess the search efforts undertaken. Neither the Court nor Plaintiffs are able to evaluate or confirm whether the duplicative and non-responsive results were attributable to the search's comprehensiveness, or, for example, human error. Given the lack of information about the search methods used, the Court can only speculate about whether CIA's efforts were reasonably expected to produce the information requested." However, the agencies withheld 109 documents in full and redacted 4 documents under **Exemption 5 (privileges)**. Wood found that Office of Legal Counsel memos were protected by the deliberative process privilege and that there was no indication that any of them had been adopted as the working law of the agency. She found that NSD memos that contained classified legal advice from OLC were exempt, but NSD's assertion that the majority of certain memoranda were pre-decisional and deliberative was not adequately supported. She questioned a CIA memo that contained talking points, noting that "given this description, the Court cannot conclude that Exemption 5 applies: for the exemption to apply, an agency must 'be able to demonstrate that the document for which executive privilege is claimed *related to a specific decision facing the agency*,' which these training materials do not do." She found that the CIA had properly withheld legal memoranda under **Exemption 3 (other statutes)**. She noted that "giving the appropriate deference to the assessments of the agencies, the Court finds that it is logical and plausible that there is no segregable non-exemption content contained in the legal memoranda withheld in full." She also approved various claims under **Exemption 7 (law enforcement)**. (*American Civil Liberties Union v. National Security Agency, et al.*, Civil Action No. 13-09198 (KMW) (JCF), U.S. District Court for the Southern District of New York, Mar. 27)

Judge Tanya Chutkan has ruled that the U.S. Army Corps of Engineers has not shown that disclosure of the names of property owners listed in a public notice pertaining to the California Water Fix project would invade their privacy under **Exemption 6 (invasion of privacy).** AquAlliance requested application records regarding the public notice and the agency redacted identifying information of property owners. Ruling against the agency, Chutkan pointed out that "it appears that the only information revealed about the individuals on the list is that their properties are adjacent to the proposed project, which is information any individual could discern from simply looking at property records or a map of the area." She added that "while the threat of an 'unwanted barrage of mailings and personal solicitations' may establish a privacy interest, the

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Army Corps has failed to allege with any specificity what unwanted contact these individuals would face simply by being identified as living near the proposed project." She noted that "AquAlliance states that it requested the names and addresses on the Army Corps' distribution list to determine who was and was not notified by the Army Corps of the project proposal and whether they had an opportunity to participate in a public comment process. The withheld information reflects on the actions taken by the government in conducting its official business and reveals at least some information about what the government is up to. Therefore, the court finds that there is an identifiable public interest in the disclosure of the withheld records, and given the lack of a significant privacy interest, the court further finds that this public interest weighs in favor of disclosure." (*AquAlliance v. U.S. Army Corps of Engineers*, Civil Action No. 16-0717 (TSC), U.S. District Court for the District of Columbia, Mar. 22)

Judge Reggie Walton has ruled that five memos written for President Barack Obama on various issues pertaining to a potential operation to kill Osama bin Laden are protected by **Exemption 5 (privileges)** as well as **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. After the existence of the memos became public, Judicial Watch requested them. The intelligence agencies that had written the memos claimed they were protected by the Presidential communications privilege, the attorney-client privilege and, alternatively, various Exemption 3 statutes protecting intelligence information. Judicial Watch argued that the memos were not written by close presidential advisors and were did not qualify for the privilege. Walton, rejected the claim, noting that "the defendants' burden is not limited to demonstrating that the authors are senior presidential advisors; rather, the defendants may satisfy their burden if they are able to show that the five requested memoranda were documents 'solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the [documents] relate.'" Judicial Watch contended that the presidential communications privilege only applied to the fact of communication and not to the content of the documents themselves. Walton pointed out that "this Circuit has made clear, however, that the presidential communications privilege applies to documents reviewed, solicited, or received by the President or his immediate senior advisors tasked with 'broad and significant responsibility for investigating and formulating advice.'" Walton explained that since he had found the memos were protected by the presidential communications privilege he did not need to consider whether they were protected by the deliberative process privilege as well. However, he went on to indicate that the memos qualified under the attorney-client privilege. He observed that "because the defendants have provided more than conclusory statements regarding the legal advice requested, the nature of the confidential information provided in response, and the need to preserve the confidentiality of that information in the five memoranda, the Court concludes that the defendants have sufficiently demonstrated the applicability of the attorney-client privilege to the five requested memoranda." Walton found the agencies had shown that the memos were protected by Exemption 1 and Exemption 3 as well. (*Judicial Watch, Inc. v. United States Department of Defense, et al.*, Civil Action No. 16-360 (RBW), U.S. District Court for the District of Columbia, Mar. 28)

After conducting an *in camera* review of ten sample trip reports, a federal court in New York has ruled that the U.S. Refugee Admission Program, part of U.S. Citizenship and Immigration Services, properly redacted the trip reports under **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods and techniques)**. Because the Iraqi Refugee Assistance Project challenged the agency's heavy redactions, Judge P. Kevin Castel decided to review a sample of ten trip reports *in camera*. Although the agency argued *in camera* review was unnecessary, Castel noted initially that "the *in camera* review of the disputed material has been essential to deciding this motion. Although the *Vaughn* Index provides accurate and good-faith descriptions of the redacted contents, it discusses them in broad terms, as is warranted given the potentially

sensitive nature of some of the subject matter. Absent *in camera* review, the Court would be unable to make adequate findings as to the DHS's claimed FOIA exemptions and whether the discussions contain segregable factual content." Ruling in favor of the agency, Castel observed that "the Court comfortably concludes that the redactions are narrowly applied to contents that include the internal formulation of policy, techniques and procedures for law enforcement, and/or law enforcement guidelines. If disclosed, many of the redacted discussions, and specifically the discussions of law enforcement guidelines, would facilitate applicant fraud and undermine USCIS fraud-detection practices." Describing redactions made to applicant interviews under Exemption 7(E), Castel pointed out that they "raised suspicion of fraudulent accounts, including certain applicant common themes suspected of being a product of potentially fraudulent applications. The discussions are detailed and specific, and give guidance for scrutinizing potentially fraudulent applications. Under Exemption 7(E), the enforcement guidelines include information that, if disclosed, could help applicants evade investigator techniques and thus circumvent the law." (*Iraqi Refugee Assistance Project v. United States Department of Homeland Security*, Civil Action No. 12-3461 (PKC), U.S. District Court for the Southern District of New York, Mar. 27)

After previously finding that Customs and Border Protection had not sufficiently justified its application of **Exemption 7(E) (investigative methods and techniques)** to protect records concerning its Analytical Framework for Intelligence System, Judge Reggie Walton has ruled that the agency has now provided an adequate explanation. EPIC argued that 7(E) did not apply because the records did not pertain to a criminal investigation. But Walton indicated that "nothing in the FOIA's language suggests that Exemption 7(E)'s scope is limited to records compiled in connection with *criminal* investigations." EPIC also argued that disclosure would not risk circumvention of the law. Walton noted that "the Court agrees that the disclosure of records detailing the function, access, navigation, and capabilities of the AFI system. . .presents a risk that could facilitate circumvention of the law that is logically connected to the content of the withheld documents." The agency had also withheld statements of work. Walton pointed out that "disclosure of details regarding products or services utilized by the defendant to search, organize, or report information in the AFI system presents a risk of circumvention of the law when those records could reasonably be used by potential bad actors to thwart the defendant's law enforcement efforts." (*Electronic Privacy Information Center v. Customs and Border Protection*, Civil Action No. 14-1217 (RBW), U.S. District Court for the District of Columbia, Mar. 24)

A federal court in Illinois has ruled that the FDA properly responded to multiple requests from retired FDA employee Donald Henson for records concerning a premarketing application for a specific medical device. Henson alleged that he had submitted 46 FOIA requests and that the FDA had only fully responded to one. However, the FDA considered only 18 of Henson's letters to be FOIA requests and that many of his multiple communications overlapped with existing his requests and were consolidated. The agency concluded that other communications asking supplemental questions did not qualify as FOIA requests. Reviewing the record, the court agreed with the FDA that it had accounted for all the records in a *Vaughn* index and had properly redacted information under **Exemption 4 (confidential business information)**, **Exemption 5 (privileges)**, and **Exemption 6 (invasion of privacy)**. The court noted that "it is important to note that no documents were fully withheld from Plaintiff Henson; all redactions were accounted for in the *Vaughn* indices and included an explanation for said redactions. Thus, the Court finds that FDA reasonably conducted a search based upon Henson's FOIA requests and the agency produced all relevant documents. As to the necessary redactions, the Court finds that FDA had a legitimate reason for withholding certain information based on the FOIA exemptions." (*J. Donald Henson, Sr. v. Department of Health and Human Services*, Civil Action No. 14-908-DRH-DGW, U.S. District Court for the Southern District of Illinois, Mar. 23)

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Judge John Bates has ruled that the Bureau of Prisons conducted an **adequate search** for records concerning agency policies prohibiting inmates from conducting a business from their cell. Darrell DeBrew has written and published several novels while in prison. He was the subject of several disciplinary actions because such activities were prohibited. After he got out of jail, DeBrew sued the government for violating his constitutional rights and for failure to fully respond to his FOIA request. The agency interpreted DeBrew's request as being for records concerning the agency's policy regarding the Prohibited Act of Conducting a Business, Code 408. As a result, the agency provided various Federal Register notices that it had published dealing with the issue. DeBrew argued that the agency must have records prior to the publication of the Federal Register notices. Finding the agency's search appropriate, Bates noted that "the decisions to forward plaintiff's request to the Correctional Services Division and to LCI were reasonable: the former is responsible for making and enforcing BOP regulations and disciplinary codes at the institution level, and the latter is responsible for developing and modifying the BOP regulations. As the declarant explains, these locations are the most likely places to have found responsive records." He observed that "BOP's failure to produce specific documents does not undermine the adequacy of its searches. Nor does the adequacy of BOP's searches turn on the level of plaintiff's satisfaction with the results." (*Darrell James DeBrew v. Michael Atwood, et al.*, Civil Action No. 10-0650 (JDB), U.S. District Court for the District of Columbia, Mar. 27)

A federal court in California has ruled that the Financial Crimes Enforcement Network, part of the Department of Treasury, conducted an **adequate search** for most aspects of records concerning Bruce Turner's bank account, but that the agency has not justified its decision not to search for one item because it claimed the records were exempt under the Bank Secrecy Act. Ruling on the non-BSA search, the court noted that "defendant has satisfied its burden of establishing the adequacy of its search of non-BSA FinCEN Enforcement Division files made in connection with plaintiff's FOIA request." Rejecting the blanket claim of exemption under the BSA, the court observed that "Defendant's position that it was under no obligation to search BSA records in its possession because the requested [item] is exempt from disclosure under FOIA, finds no support in the cases addressing similar FOIA requests. In each of those cases it appears that although the agency was found to have properly withheld the documents in question, that determination was based upon the agency's search of the records followed by a reasonably detailed description of the documents being withheld as well as facts sufficient to establish the applicability of the claimed exemption." (*Bruce Evin Turner v. United States Department of the Treasury*, Civil Action No. 15-00007-DAD-SKO, U.S. District Court for the Eastern District of California, Mar. 23)

A federal court in Ohio has ruled that Orlando Carter **failed to exhaust his administrative remedies** by sending his FOIA request for records concerning his conviction on fraud to the Office of the U.S. Attorney in Cincinnati rather than to the Executive Office for U.S. Attorneys in Washington as required by the agency's FOIA regulations. Carter sent his request by certified mail and after the agency failed to respond, he filed suit, arguing that the return receipt for his letter indicated the Cincinnati office had received his request and failed to respond. The agency contended that Carter had failed to exhaust his administrative remedies by not sending his request to its Washington headquarters. The court rejected the magistrate judge's finding that the burden to prove receipt was on Carter, but dismissed his suit regardless after finding he had sent the request to the wrong office. The court rejected Carter's claim that the agency was required to forward misdirected requests, noting that "the plain language of the regulation only applies to Department of Justice *components* (*e.g.*, the Executive Office for United States Attorneys), and the Cincinnati USAO has not been designated as a component. Similarly, inter-component 'referrals' are premised on the notion that a designated component

receives the FOIA request in the first place." The court pointed out that "because the face of Plaintiff's Verified Complaint shows that his February 8, 2016 request was sent to the Cincinnati USAO—not the Department of Justice component in Washington, D.C.—the time limits within which the government must respond have not yet been triggered." (*Orlando Carter v. United States of America*, Civil Action No. 16-530, U.S. District Court for the Southern District of Ohio, Western Division, Mar. 20)

A federal court in California has ruled that the FBI properly withheld two pages of a printout from its Automated Case Support System under **Exemption 7(E) (investigative methods and techniques)**. In response to a request from Tania McCash for records about herself, the FBI located 44 pages. The agency withheld two pages. It released 10 pages in full and 32 pages with redactions. After previously ordering the FBI to explain why it withheld the two pages of printouts, this time the court agreed that the agency's exemption claim was appropriate. McCash argued the FBI could not withhold the records because the use of databases by the FBI was already publicly known. But the court observed that "under Exemption 7(E), an agency can withhold details about how it uses a tool, even if the existence of that tool is publicly known." The court also rejected McCash's claim that the agency failed to consider segregating non-exempt information from the record and disclosing it. The court indicated that "the FBI has explained that these documents cannot be segregated because even partial disclosure would reveal the investigative techniques that it seeks to keep secret." (*Tania McCash v. Central Intelligence Agency, et al.*, Civil Action No. 15-02308-EJD, U.S. District Court for the Northern District of California, San Jose Division, Mar. 20)

A federal court in New York has ruled that the New York Corn & Soybean Growers Association is not an **agency** subject to FOIA, even though it is partially funded under the federal Soybean Promotion, Research, and Consumer Information Act. Ronald Robbins had served as vice president of the board of NYCSGA until he was terminated for a conflict of interest with his daughter, who was executive director. After submitting several requests for information, he sued the Association under a number of statutes, including FOIA. Rejecting Robbins' claims of federal jurisdiction, the court noted that under the Supreme Court's ruling in *Forsham v. Harris*, there must be substantial federal supervision of a private entity for it to qualify as an agency under FOIA. Robbins argued that *Forsham* was inapplicable because it applied only to grant recipients. The court disagreed, noting that "here, NYCSGA lacks sufficient federal supervision and control to be subject to FOIA disclosure. Robbins's sole allegation of federal involvement is that NYCSGA receives funding from the assessment program. . .[F]ederal funding alone is insufficient to attach federal agency status." (*Ronald Robbins, et al. v. New York Corn & Soybean Growers Association, Inc.*, Civil Action No. 15-973, U.S. District Court for the Northern District of New York, Mar. 21)

Wrapping up a suit brought by Mauricio Rojas Soto for records concerning the State Department's decision to deny him and his family a visa to come to the United States, as well as revocation of his daughter's student visa, Judge Randolph Moss has ruled that Soto does not have an action under the **Privacy Act** because he is not a U.S. citizen or resident alien. After Moss ruled against him on his FOIA claim, Soto filed a Privacy Act claim to force the agency to correct its records. Dismissing the claim, Moss noted that "here, however, it is clear that Plaintiffs are neither U.S. citizens nor lawful permanent residents. Instead, the premise of this litigation is that the Department *denied* the applications of three of the plaintiffs for non-immigrant visas to enter the United States and that it *revoked* the fourth plaintiff's student visa. Accordingly, the Plaintiffs are not entitled to bring suit under the Privacy Act." (*Mauricio Rojas Soto, et al. v. United States Department of State*, Civil Action No. 14-604 (RDM), U.S. District for the District of Columbia, Mar. 25)

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Editor's Note: Because the newsletter receives almost no FAX transmissions any longer, *Access Reports* has discontinued its FAX number. As a result, (434) 384-8272 is no longer in service.

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