Volume 43, Number 8
April 26, 2017

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: Billing its actions as following existing law, the Trump White House announced Apr. 14 that it will no longer make public names of visitors to the White House or any presidential or vice-presidential residence. Citing "grave national security risks and privacy concerns," White House Communications Director Mike Dubke indicated that the Trump administration has decided to no longer disclose such records with a three-month time lag, which was the policy during the Obama administration, but instead make the records available under the Presidential Records Act five years after Trump leaves office. Neither Obama nor the Bush administration ever retreated from their legal position that the records were not agency records subject to FOIA, a position that was upheld by the D.C. Circuit in 2013 in response to litigation brought by CREW and Judicial Watch. Although it was not obligated to do so, the Obama administration agreed to disclose many of the records after a three-month time delay. The new Trump administration policy will discontinue that policy altogether, meaning that visitors logs will not be publicly available until five years after Trump leaves office. CREW, the National Security Archive, and the Knight First Amendment Institute have filed a FOIA suit in New York, which is not bound by D.C. Circuit precedent, challenging the new policy.

Court Considers When Records Are Responsive to Request

In ruling in favor of the FBI on most of its exemption and search claims in a case brought by researcher Ryan Shapiro for all intelligence agencies' records pertaining to Nelson Mandela, Judge Christopher Cooper has made some interesting observations concerning the effect of the recent D.C. Circuit decision in *American Immigration Lawyers Association v. Executive Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016), in which the court ruled that agencies could not withhold records because they were considered non-responsive to the request, but only because they fell within an exemption. But while *AILA* seems to foreclose the use of non-responsiveness as a basis for agencies withholding records, Cooper discovered that *AILA* did not address the circumstances present here.

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While the claim that records do not have to be disclosed to a requester because they are not responsive to the request has been a hotly contested issue, it had not been considered on its merits by the D.C. Circuit until *AILA*. Although the D.C. Circuit ruled that agencies could not resort to a claim of non-responsiveness for records gathered during the processing of a request, the issue arose in *AILA* because the Executive Office for Immigration Review had done a line-by-line redaction of information concerning complaints against immigration judges where it decided that certain information did not respond to the plaintiff's request. As a result, the D.C. Circuit rejected such a detailed redaction based on non-responsiveness and told the agency that it could withhold information only under an exemption. But *AILA* never reached the issue of how an agency decided what records were responsive to a request in the first place.

Shapiro refused to limit the scope of his request. As a result, the FBI processed 1,519 responsive records, disclosing 1,244 in full or in part, and withholding 272 pages entirely. The FBI located references to Mandela in reports including unrelated topics. The agency isolated the sections containing references to Mandela, but told Shapiro that the rest of the record was not responsive. Shapiro contended that once the agency decided the report was responsive to his request, it was, under *AILA*, obligated to review the entire report and disclose it subject to exemption claims. Cooper pointed out that the Office of Information Policy at the Justice Department had issued interpretative guidance on *AILA*'s definition of record to help agencies determine whether or not to divide documents covering multiple topics into discrete records, including the requester's intent, maintaining the integrity of the released documents, the scope of the request, the agency's own knowledge regarding storage and maintenance of documents, efficiency, cost, resource allocation, and maintaining the public's trust in transparency.

Finding the FBI's practice was consistent with *AILA* and OIP's guidance interpreting it, Cooper noted that "the FBI's search returned responsive material and information, some of which was found in document compilations covering multiple, unrelated topics. It located the responsive pages related to Shapiro's FOIA request, and included additional pages, as necessary, to provide context. This set of documents (*i.e.*, pages) became the responsive record, which the FBI then reviewed for statutory exemptions." Cooper added that "the FBI's practice is also in keeping with practical considerations. If an agency was forced to turn over a full manual or entire report every time a single page contained a responsive term, the amount of time, labor, and cost that would be required to review this purportedly 'responsive' material for exemptions would be exponential, hindering the agency's ability to process multiple requests efficiently or allocate its resources effectively."

Many of the agency's exemption claims were made under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, **Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods and techniques)**. Shapiro challenged the Exemption 7(C) claims, arguing that the FBI had not done enough to determine whether individuals were dead or were publicly known. Shapiro faulted the FBI for not checking whether individuals were listed in the social security database. Cooper pointed out that "it is not apparent from the record that the FBI had the means to do so. And even if it did, it would still be unreasonable to require it to look at individuals' social security numbers considering the large volume of responsive records and names." But he agreed with Shapiro that the FBI had not justified redacting names of individuals who may have been publicly charged and convicted of crimes. He observed that "such a privacy interest differs in degree though when that individual was not merely suspected, but publicly charged and convicted of a crime. . .If Shapiro's supposition that the Bankston twins' surname was redacted is correct, the FBI would need to justify why revealing their surname in conjunction with the fact that they were convicted of crimes, implicates privacy concerns that outweigh the public's interest in transparency."

Shapiro questioned whether a source in the South African government had been assured confidentiality. Cooper explained that "in examining the disclosed portions of the record, the Court can see that the source had provided information regarding Mandela's then-current whereabouts and had offered an opinion as to what the South African government intended to do with him." Cooper observed that "it would be reasonable for the FBI to infer that this type of information and analysis of the apartheid government's plans and intentions came from a source with a high-level political connection or 'ready access' to areas of national security. . .All of these inferences would support a finding that the Mandela-687 source would only provide information if the source believed his or her identity would remain confidential."

Shapiro argued that Exemption 7(E) did not apply because the techniques described in the records were too old to risk circumvention if disclosed. Cooper disagreed. He pointed out that "exposing the methods used to collect information, along with the focus of those investigations, would also purportedly 'reveal resource allocations to that particular area of crime.' These facially logical explanations of why disclosure of information regarding closed cases could reveal 'currently used' law enforcement techniques are sufficient to defeat Shapiro's obsolescence argument." (*Ryan Noah Shapiro v. Central Intelligence Agency, et al.*, Civil Action No. 14-00019 (CRC), U.S. District Court for the District of Columbia, Mar. 31)

Views from the States…

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

Kansas

A court of appeals has ruled that information about applicants for two newly-created Saline County commissioners' positions is protected by the personnel records exemption since the applicants, who had applied to the Governor's Office, were seeking employment with Saline County, a public agency. The Salina Journal and the Associated Press both requested records about applicants for the two positions which were created as the result of a decision to expand the number of districts in Saline County. After Gov. Sam Brownback's office denied access under the personnel records exemption, the two media organizations filed suit. Based primarily on its interpretation of *Southwest Anesthesia Service v. Southwest Medical Center*, 937 P.2d 1257 (Kan. 1997), where the court ruled that records concerning requests for privileges by physicians who were independent contractors and not employees of the hospital did not fall under the personnel records exemption, the trial court ruled that the personnel records exemption did not apply because the applicants were seeking appointment rather than employment, and the Governor's Office would not be the applicants' employer if they were selected. The appeals court found the trial court had read too much into *Southwest Anesthesia Service*, noting that "the trial court's ruling fails to take into account that *Southwest Anesthesia Service* did not involve records pertaining to applicants for employment with a public agency, which is at issue in this case. By failing to recognize this factual distinction, the trial court enlarged the decision of *Southwest Anesthesia Service* beyond its holding to find that the personnel records exception was inapplicable because the applicants were 'nonemployees.'" The court added that "indeed, the *Southwest Anesthesia Service* decision affords no basis for the trial court to rule that plaintiffs' disclosure requests—for information on applicants for employment—was disclosable despite the personnel records exception." One judge dissented, arguing that the commissioners' positions were for elective office and should be made public. The judge noted

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that "if the legislature wanted to exempt the identity of those seeking elected office from public view, it could have done so explicitly and did not." (*Salina Journal, et al. v. Sam Brownback, Governor of Kansas*, No. 115,194, Kansas Court of Appeals, Apr. 7)

New York

A court of appeals has ruled that records of complaints against New York City Police Officer Daniel Pantaleo, whose 2014 chokehold on Eric Garner was recorded and became widely publicly available as a result, which were substantiated by the Civilian Complaint Review Board are protected by the personnel records exemption. A trial court found disclosure would not harm Pantaleo and that the public interest in Garner's death was significant. The appellate court noted that "CCRB findings and recommendations are clearly of significance to superiors in evaluating police officers' performance. . .[A]ll complaints filed with the CCRB, regardless of their outcome, are filed with and remain in an officer's CCRB history, which is part of his or her personnel record maintained by the NYPD." The court explained that the records "fall squarely within a statutory exemption of the statute." The court observed that the exemption "makes no distinction between a summary of the records sought and the records themselves. Releasing a summary of protected records would serve to defeat the legislative intent of the statute in exempting those records from disclosure. It is hard to imagine that in a situation like this, where the legislative intent is so clear, the simple expedient of releasing a summary of protected records concerning substantiated complaints against an identified police officer can be used to circumvent the statute's prohibitions on disclosure." (*In re Justine Luongo, et al. v. Records Access Officer, Civilian Complaint Review Board, et al.*, No. 02523, New York Supreme Court, Appellate Division, First Department, Mar. 30)

A court of appeals has ruled that the fact that disciplinary trials held by the New York City Police Department are public does not require the police to disclose the resulting decisions. The court noted that "whether the trials are public and whether the written disciplinary decisions arising therefrom are confidential are distinct questions governed by distinct statutes and regulations. Further, the disciplinary decisions include the disposition of the charges against the officer as well as the punishment imposed, neither of which is disclosed at the public trial." The court also rejected the contention of the New York Civil Liberties Union that the NYPD could disclose redacted versions of the disciplinary decisions, pointing out that "respondents' previous disclosure of other redacted records did not waive their objections to redacting the disciplinary decisions at issue here." Expressing sympathy with the New York Civil Liberties Union's policy arguments, the court nevertheless explained that "as an intermediate appellate court, we cannot overrule the [relevant] Court of Appeals' decisions and are obligated to reverse based on this controlling precedent. The remedy requested by petitioners must come not from this Court, but from the legislature or the Court of Appeals." (*In re New York Civil Liberties Union v. New York City Police Department*, No. 02506, New York Supreme Court, Appellate Division, First Department, Mar. 30)

Tennessee

A court of appeals has ruled that the Tennessee Bureau of Investigation properly declined to release 20-year-old records of a now-closed investigation into the murder of Kevin McConico to inmate George Campbell. Campbell, proceeding pro se, argued that the exemption protecting TBI investigative records only applied to active investigations. The court disagreed, finding the exemption applied to TBI investigative records regardless of whether or not the investigation was now closed. The court indicated that "here, the records requested by Appellant were, at all times, part of the TBI file created in the course of its investigation of the McConico case. Under the plain language of [the exemption], such 'investigative records' are not subject to the Tennessee Public Records Act and must be procured under subpoena or court order. In the

absence of such subpoena or court order, the trial court properly denied Appellant's motion for summary judgment and dismissed Appellant's TPRA petition for disclosure of TBI's investigative records." (*George Campbell, Jr. v. Tennessee Bureau of Investigation*, No. M2016-01683-COA-R3-CV, Tennessee Court of Appeals at Nashville, Mar. 29)

Texas

A court of appeals has ruled that the University of Texas provided sufficient support for its claim that records containing personally-identifying information about students who were participating in a social sciences research study pertaining to individuals' reactions to terrorism to show that disclosure of the records was protected under the common law right of privacy. The University declined to provide the information in response to a Public Information Act request. As required under the PIA, the University wrote to the Attorney General for support of its claim that the records were protected by the common law right to privacy. The AG found the University had not adequately supported its claim. The University then filed suit. The AG argued that once he concluded that the University had not supported its exemption claim the burden of proof shifted back to the University to provide more support. The court ruled in favor of the University, noting that "even if we assume for the sake of argument, however, that the Attorney General's broad reliance on [the relevant case law] sufficed to conclusively negate the 'highly intimate or embarrassing' element of the University's claim, the University's burden in response would not have been to conclusively establish that element of its claim but only to raise a fact issue." The court concluded that "the Attorney General did not establish as a matter of law that disclosure of the human research subjects' identities (and thus their participation in the study) is not highly intimate or embarrassing private information under the common-law privacy test." (*University of Texas System v. Ken Paxton*, No. 03-14-00801-CV, Texas Court of Appeals, Austin, Apr. 7)

The Federal Courts…

Judge Tanya Chutkan has ruled that the CIA cannot issue a ***Glomar* response** neither confirming nor denying the existence of records concerning whether or not it supplies intelligence support to Israel because former President Barack Obama said in a 2015 speech at American University that the U.S. provided unprecedented intelligence assistance to Israel. Grant Smith, head of the Institute for Research: Middle Eastern Policy, requested records from the CIA pertaining to its intelligence budget, specifically intelligence support for Israel from 1990 through 2015. The agency issued a *Glomar* response pursuant to **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Smith filed suit, arguing that in his 2015 speech at American University, Obama had specifically stated that the U.S. provided intelligence support to Israel. The CIA contended that Obama's statement was not equivalent because it did not specify any monetary support. But Chutkan agreed with Smith that Obama's statement undercut the CIA's ability to use a *Glomar* response. She observed that "the CIA must have a budget item line for expenses that it incurs; even if the budget is secret or classified or subject to FOIA's exemptions, it must exist in order for the CIA to operate. The court is not aware of, nor has the CIA pointed to, other agencies that might provide intelligence support abroad." Chutkan found that the D.C. Circuit's ruling in *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), in which the D.C. Circuit found that various public statements about targeted drone attacks meant the CIA could not deny an intelligence interest in the subject, was applicable here. She noted that "the court finds that in the *Glomar* context, President Obama's statement is sufficient to acknowledge the existence of the records sought. The match between Plaintiff's request and President Obama's statement, although the statement did not consist of

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the specific words 'CIA' or "budget line items' is as close to the match in *ACLU v. CIA*." (*Grant F. Smith v. Central Intelligence Agency*, Civil Action No. 15-01431 (TSC), U.S. District Court for the District of Columbia, Mar. 30)

Judge Rudolph Contreras has ruled that FOIA's only remedy for a requester's dissatisfaction with an agency's processing of his or her request is to ask a court to review the agency's actions de novo, which does not include ordering the agency to "re-do" its initial response. Instead of appealing the agency's decision, Florent Bayala filed suit against the Department of Homeland Security after the agency withheld records related to an asylum officer's decision not to grant Bayala asylum. Bayala' primary contention was that the agency's bare bones description of its action was too vague for him to challenge properly. During the litigation, the agency disclosed most of its Assessment to Refer, which it had originally withheld under **Exemption 5 (privileges)**. Contreras found Bayala had **failed to exhaust his administrative remedies** and granted the agency summary judgment. Bayala appealed to the D.C. Circuit, which found that the agency's decision to disclose the Assessment to Refer had superseded its initial decision and that Bayala no longer was required to file an administrative appeal. Instead, the D.C. Circuit remanded the case to Contreras with instructions to resolve any remaining issues concerning the agency's search and exemption claims. But Bayala continued to argue that the agency was required to re-write its initial response and promise not to send such responses to requesters in the future. Contreras found that under the mandate rule, which restricts lower courts to the issues identified by an appellate court, he did not have authority to address Bayala's continued concerns about the agency's original response. Instead, he concluded that "the remedy of *de novo* review provided for by FOIA and currently available to Mr. Bayala renders immaterial the alleged imperfections of DHS's initial response and the administrative process." He then pointed out that Bayala did not have standing to ask for injunctive future relief. Contreras observed that "where plaintiffs do not allege any possibility that their injury could recur—such as through pending FOIA requests or concrete plans to file additional requests—they lack standing for perspective relief regarding an agency's FOIA practices." Contreras refused to dismiss the case, noting that "the briefing before the court does not discuss the adequacy of DHS's search or the withholdings claimed by DHS. It would therefore be premature for this Court to determine whether the Assessment to Refer contained segregable portions before determining if DHS was correct to withhold any portions of the document." He indicated that he would review the Assessment to Refer *in camera* and asked Bayala and the agency to provide further briefing on the adequacy of the search and the claimed exemptions. (*Florent Bayala v. United States Department of Homeland Security*, No. 14-0007 (RC), U.S. District Court for the District of Columbia, Mar. 30)

Judge Randolph Moss has ruled that Criminal Division of the Justice Department has not yet shown that it conducted an **adequate search** for records pertaining to grand jury proceedings and other records related to the conviction of Christian Borda on drug-trafficking charges. Further, while Moss found the agency had properly applied **Exemption 7(D) (confidential sources)** to withhold identifying information about four individuals who testified against Borda at trial, he concluded the agency had not yet justified why the exemption applied to the entire plea agreements. Borda submitted four FOIA requests to EOUSA, three of which asked for specific items, while the fourth requested records about the grand jury proceeding more broadly. The agency consolidated the requests and referred them to the Narcotics and Dangerous Drugs Section of the Criminal Division that had been responsible for prosecuting the case. The Criminal Division identified 70 boxes of materials, and searched the materials for responsive records. The agency withheld four plea agreements under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** as well as Exemption 7(D). Moss initially found that the agency's decision to consolidate the requests had improperly narrowed the scope of the search. He indicated that "the

Department may be correct that its search for *some* grand jury documents would have uncovered *all* responsive grand jury documents, but at this point, it has not demonstrated as much 'beyond material doubt.'" Borda argued that the plea agreements were not subject to Exemption 7(D) because the government had waived confidentiality through the individuals' public testimony at his trial. Moss, however, disagreed, noting that in *Parker v. Dept of Justice*, 934 F.2d 375 (D.C. Cir. 1991), the D.C. Circuit had adopted the First Circuit's conclusion in *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989), that public testimony did not waive the agency's ability to claim Exemption 7(D). Applying the ruling here, Moss noted that "Borda offers no basis for the Court to stray from *Parker*'s holding. To the extent any of the individuals identified in the plea agreements provided public testimony, doing so did not waive the Department's ability to invoke Exemption 7(D) to shield disclosure of their identities." But Moss found the agency had failed to show why all four plea agreements could be entirely withheld under Exemption 7(D). Moss observed that "the Department makes no attempt to explain why the remaining paragraphs should be withheld, nor is an explanation evident to the Court. It is unlikely, for example, that an entire plea agreement—including the type of boilerplate terms commonly included in plea agreements—represents information identifying or furnished by a confidential source." He added that "the Department may be correct that none of the four plea agreements is reasonably segregable, but the Court needs more information before determining whether the Department has done all that it can." (*Christian Borda v. U.S. Department of Justice, Criminal Division*, Civil Action No. 14-229 (RDM), U.S. District Court for the District of Columbia, Mar. 28)

Judge Tanya Chutkan has ruled that the Department of Justice, the Department of Homeland Security, and the Department of State conducted **adequate searches** for records concerning the investigation and conviction of Carlos Arturo Patino-Restrepo on drug-trafficking charges and that the agencies properly invoked a variety of exemptions—primarily **Exemption 7 (law enforcement records)**—to withhold and redact information. Patino-Restrepo accused the government of mischaracterizing him as a leader of a drug cartel and suggested that the government had not provided all potentially exculpatory information. Chutkan rejected Patino-Restrepo's claim, noting that "plaintiff has provided no evidence, such as testimony or documentary evidence, which could lead a reasonable person to believe that the government committed *Brady* violations in Plaintiff's case." State had refused to search for records pertaining to interviews of a long list of individuals provided by Patino-Restrepo because any information would likely be withheld under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Chutkan agreed, noting that "it is unclear how State could redact the personaly identifying information of those individuals in a way that would allow meaningful disclosure while protecting the privacy interest of those individuals. It is one thing where an individual requests records that happen to contain personally identifying information, and the personal information can be redacted while still providing the requesting individual with the substantive information they seek; but another thing entirely where the object of the individual's request *is* the personal identifying information. In the latter case, redaction does not make sense." Patino-Restrepo claimed the FBI had not provided a sufficient description of records it withheld under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. But Chutkan, pointing out that "the records consisted of interview forms, which the FBI uses to 'memorialize interviews,' and computer database printouts of FBI and local law enforcement record checks," explained that "it is clear that the records withheld are law enforcement records as to which exemption 7 applies, and the court finds FBI's justification of its withholding pursuant to 7(A) adequate." She added that "FBI's assessment that the information could 'potentially jeopardize current or prospective investigative and/or prosecutions' is reasonable." (*Carlos Arturo Patino-Restrepo v. Department of Justice, et al.*, Civil Action No. 14-1866 (TSC), U.S. District Court for the District of Columbia, Mar. 30)

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Judge Amit Mehta has ruled that the Executive Office for U.S. Attorneys has not yet provided sufficient detail about its search for records concerning Ernest Thomas's criminal case in the superior court for the District of Columbia to allow Mehta to rule on the **adequacy of its search**. Mehta pointed out that "without more details, Defendant cannot satisfy its burden on summary judgment. To be clear, the USAO/DDC very well may have conducted an adequate search. After all, Plaintiff's FOIA request is straightforward: he seeks information about his own criminal case, which he identified by case number. Based on the current record, however, the court cannot find that the search conducted was reasonably designed to identify all responsive information." Remanding the case to the agency, Mehta suggested the agency review its *Vaughn* Index claims as well. He noted that "neither the declaration nor the *Vaughn* Index adequately explains why [certain] documents cannot be released in part by redacting identifying personal information. Additionally, it is unclear how Exemption 6 and 7(C) support the redaction of names appearing in a publicly filed grand jury indictment." (*Ernest W. Thomas v. U.S. Department of Justice*, Civil Action No. 15-01514 (APM), U.S. District Court for the District of Columbia, Mar. 28)

Judge Tanya Chutkan has ruled that researcher Grant Smith failed to show that records he requested from the CIA on the diversion of uranium from the Nuclear Materials and Equipment Corporation to Israel fell within exceptions to the **CIA Information Act**. After the agency told Smith that it was not required to search its operational files under the CIA Information Act, it disclosed a handful of records that it had previously released. Smith appealed to ISCAP, which overturned some of the CIA's classification claims and the agency ultimately disclosed 16 redacted pages. Smith cited three documents from the Department of Justice, the General Accounting Office, and Carter administration National Security Advisor Zbigniew Brzezinski suggesting investigations of diversions. Rejecting Smith's claim that the documents confirmed that an investigation existed, Chutkan indicated that "it is not the court's role to make inference upon inference. Where it is not clear from the materials submitted that there was an investigation that meets the statutory language, the court will not require the CIA to search its operational files." Smith also argued that under the CIA Information Act the CIA was required to conduct decennial reviews to determine if records remained exempt under the CIA Information Act and that there was no evidence the agency had reviewed these records. Chutkan pointed out that "the CIA is not required to demonstrate that it conducted an appropriate decennial review of the specific records that Plaintiff seeks, because the CIA is not required to search its operational files for records responsive to Plaintiff's request." Chutkan found the CIA, the FBI, and the State Department had all properly invoked **Exemption 1 (national security)**, and approved the FBI's claims under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)** as well. Smith asked to amend his complaint to include a claim against the Justice Department for its response to a similar request. Pointing out that the two requests were not identical, Chutkan explained that "that his FOIA requests were related to the same general topic does not make the two agencies jointly or alternatively liable." (*Grant F. Smith v. Central Intelligence Agency*, Civil Action No. 15-224 (TSC), U.S. District Court for the District of Columbia, Mar. 31)

Judge Richard Leon has once again rejected researcher Jefferson Morley's request for **attorney's fees** for his litigation against the CIA for records that might reveal a connection between former CIA agent George Joannides and the assassination of President Kennedy. The agency initially told Morley that any records it had would be in the Kennedy Assassination collection at the National Archives. After Morley sued the agency, the CIA conducted a search and ultimately disclosed 524 records, 113 of which were already at NARA. Leon then denied Morley's request for attorney's fees. Morley appealed the decision to the D.C. Circuit, which found Leon was using the wrong standard and remanded the case back for further consideration. Leon once again rejected Morley's fee request and, once again, Morley appealed to the D.C. Circuit, which, once again,

sent the case back to Leon because it was still not satisfied that he was using the correct standard. Nevertheless, Leon ruled again that Morley was not entitled to fees. Noting that Joannides had worked as the CIA's liaison to the House Select Committee on Assassinations, Leon pointed out that "Morley's request thus had at least a decent chance of turning up information that would clarify the worth of the congressional investigation into the JFK assassination. But I see little basis to support the *ex ante* likelihood that Joannides would himself be connected to Lee Harvey Oswald or the JFK assassination. Morley's request was more like searching for a needle in a haystack than a targeted query with 'decent chance' of turning up 'useful new information' about the JFK assassination." Leon then found Morley had a private incentive to pursue his litigation because he was paid for writing some news articles and did not have to spend money researching the JFK collection at NARA. He indicated that the CIA had a reasonable basis for its resistance, pointing out that "an award of attorney's fees and costs is not necessary in this case to ensure that the agency refrains from needlessly frustrating efforts to obtain information." (*Jefferson Morley v. Central Intelligence Agency*, Civil Action No. 03-2545 (RJL), U.S. District Court for the District of Columbia, Mar. 29)

A federal court in California has refused William Pickard's request that it amend its decision finding that the name, informant number, and the information publicly disclosed at trial by a confidential informant is protected under **Exemption 7(D) (confidential sources)** and allow Pickard to challenge other aspects of the withheld records as well. Pickard argued the court had improperly shifted the burden of proof to the plaintiff to show that there were still unsettled issues. But Judge Charles Breyer noted that "the Court sent the whole case to [a magistrate judge], and Pickard asked the judge to adjudicate just three categories of materials. Had Pickard failed entirely to appear before [the judge], the case would have been dismissed without an order requiring the government to disclose the materials to Pickard. That, too, would not have been burden shifting, but a reflection of the fact that it is a plaintiff's burden to litigate his case." Breyer observed that "while Pickard might not have explicitly, or even intentionally, withdrawn his request for the remaining materials, the Court continues to conclude that Pickard withdrew his request when he pursued the litigation strategy that he did." (*William Leonard Pickard v. Department of Justice*, Civil Action No. 06-00185 CRB, U.S. District Court for the Northern District of California, Mar. 31)

Judge Rosemary Collyer has ruled that the Treasury Department conducted an **adequate search** for email communications to or from the Office of Foreign Assets Control, the Committee on Foreign Investment, and the Office of the Secretary, and former Secretary of State Hillary Clinton's private email account. The agency explained that only senior officials in those offices would have communicated with Clinton so it limited its search to those individuals. The search found no records. Judicial Watch complained that the agency should have conducted a global search. Rejecting the claim, Collyer noted that "the operative question is not whether a global search of all employees is technically possible, but whether Treasury's searches were 'reasonably calculated to uncover all relevant documents.' Treasury has proffered, through its supporting affidavits, that senior agency officials were 'the only people in each office who could reasonably have communicated with Ms. Clinton or one of her senior aides, while Ms. Clinton was serving as Secretary of State.' Treasury asserts that, because of this fact, only a search of those officials' emails would be reasonably likely to uncover any relevant records." She pointed out that "Judicial Watch has given the Court no reason to doubt Treasury's commonsensical explanation. While it may be the case that Treasury could perform a global search of all its employees' emails, there is no indication that such a search of non-senior employees would be reasonably calculated to uncover relevant documents." (*Judicial Watch, Inc. v. United States Department of the Treasury*, Civil Action No. 15-1776 (RMC), U.S. District Court for the District of Columbia, Mar. 31)

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In another of his opinions resolving multiple requests from inmate Jeremy Pinson to the Justice Department Judge Rudolph Contreras has ruled that the FBI has now shown that it conducted **adequate searches** for the majority of Pinson's requests to the agency that had not been resolved and that it properly withheld some records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(D) (confidential sources)**. In response to several of Pinson's requests the FBI told him that responsive records were available online. Contreras found the FBI reference to online records was insufficient as to one request, but adequate as to the other. He noted that "although directing a requester to a public set of documents that would otherwise be responsive to the request is acceptable under FOIA, the FBI has done nothing more than assert, in conclusory terms, that the documents available on its vault are responsive. The FBI never explains whether there are other responsive documents not on the vault, how those documents were chosen, or whether the vault was up-to-date at the time of Pinson's request." As to the other online reference, Contreras indicated that "the FBI re-mailed correspondence related to this request to Pinson, once again informing her that the requested documents could be accessed for fee on the FBI's public website. Going even further, the FBI also re-reviewed the already publicly-available documents and determined that it could release further reasonably segregable material that was previously redacted." Pinson argued that because the agency had heavily redacted many of the disclosed records, she could not assess whether the agency had conducted an adequate **segregability** analysis. But Contreras noted that "the conclusory statement that a document is heavily redacted does not suffice to refute an agency's detailed showing that all reasonably segregable material has been released." (*Jeremy Pinson v. United States Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, Mar. 29)

Judge Emmet Sullivan has ruled that the FBI properly responded to a request by prisoner John Passmore for copies of emails and other computer-generated legal materials Passmore once possessed while in prison but apparently had been lost as a result of a move. The FBI originally told Passmore that it had located 16,039 potentially responsive pages which would cost $1,593 in hard copy or $485 if disclosed on a CD. Passmore indicated that he wanted to receive certain records up to the limit of 100 free pages. The FBI released those records and later released another 10 pages. Passmore complained that the agency had not reviewed the 16,039 pages of potentially responsive records and did not consider his request for a fee waiver. But Sullivan pointed out that "absent plaintiff's agreement to pay fees or, alternatively, a waiver of fees, the FBI need not have searched and released more than 100 pages of records. Similarly, upon plaintiff's clarification that he wanted email messages first, the FBI need not have searched any other documents in addition to the 103 pages of records it was obliged to process without plaintiff incurring fees." Sullivan upheld a variety of exemption claims under **Exemption 7 (law enforcement records)**. (*John Passmore v. Department of Justice*, Civil Action No. 14-1742 (EGS), U.S. District Court for the District of Columbia, Mar. 28)

A federal court in California has ruled that EOUSA failed to show that it conducted an **adequate search** for records indicating whether Assistant U.S Attorney Michael Wheat of the Southern District of California referred an exchange of letters he had with prisoner David Harrison for further action. Responding to a letter Harrison wrote to Judge Larry Burns contending that his federal conviction was invalid, Wheat responded to Harrison that his letter served "no legitimate purpose" and that Wheat was going to refer the letter to various agencies to monitor Harrison's activities. Harrison then submitted a FOIA request for records indicating the offices to which Wheat had referred the letter. Assistant U.S. Attorney Katherine Parker contacted Wheat and asked him to identify the offices to which he had referred the letter. Wheat told Parker that he had taken no action so there were no offices to which the letter had been referred. The agency then told Harrison that the agency had no records. The court found that was insufficient, noting that "calling Mr.

Wheat to discuss the matter is certainly part of an adequate search. But the Court is not convinced that it alone is sufficient, especially where, as here, Mr. Wheat and his conduct are the subject of Plaintiff's FOIA request. Nor has Defendant identified a single case where a phone call or conversation has been held sufficient under FOIA, much less a case where the conversation included the subject of the FOIA inquiry. This Court declines the opportunity to be the first." The court indicated that it did not doubt the good faith of Parker or Wheat, but observed that "but this is not the issue here. The issue is the adequacy of the search conducted by Defendant, and the Court finds that Defendant's declaration fails to meet that mark." After talking to Wheat, Parker had concluded that no further search would be useful. The court, however, pointed out that "but Ms. Parker does not explain *why* she concluded that an additional search would be fruitless. The Court will not credit this conclusion without further explanation." (*David Scott Harrison v. Executive Office for United States Attorneys*, Civil Action No. 16-1310 JLS (BGS), U.S. District Court for the Southern District of California, Mar. 30)

A federal court in Nevada has ruled that the Treasury Inspector General for Tax Administration properly invoked a *Glomar* response neither confirming nor denying the existence of records in response to Peter Janangelo's request for records concerning the report of an investigation initiated after Janangelo contacted Rep. Joseph Heck (R-NV) to complain about alleged misconduct by an IRS employee. Janangelo argued that a *Glomar* response was inappropriate because the report had already been publicly acknowledged. The court rejected Janangelo's assertion that an email from special IRS agent Ronald Moller responding to Janangelo's request for the results of the investigation, informing Janangelo that he could not provide him the "information," was an implicit acknowledgement by the agency of the existence of the report. The court "disagrees with Janangelo's interpretation that the phrase, 'the information,' is an acknowledgment of an existing report. Rather, as is the case here, 'the information' is that a privacy interest is at issue and cannot be disclosed barring an outweighing public interest." Upholding the agency's final decision to withhold the records under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, court noted that "approving Janangelo's FOIA request based on the stated public interests, which seem pretextual, would bypass the function of internal criminal investigations that allow for protections from unwarranted allegations. Moreover, the privacy interest at stake here is great as the allegations are of a single individual and regard intimate topics which, if disclosed, could cause severe professional and personal embarrassment." (*Peter Janangelo, Jr. v. Treasury Inspector General for Tax Administration*, Civil Action No. 16-906 JCM (GWF), U.S. District Court for the District of Nevada, Mar. 29)

A federal court in Michigan has ruled that a FOIA suit filed by Jenny Theresa Roman and her husband, Benito Roman Lugo, for records concerning why the Department of State rejected Roman's application for a visa for her husband became **moot** once she decided not to challenge the agency's exemption claims, but that to the extent Roman may be eligible for **attorney's fees**, that part of the litigation may continue, but would require Roman to provide a motion supporting her claim for fees. Roman filed suit after the agency failed to respond within the statutory time limit. The agency ultimately processed the request and indicated that Benito Roman Lugo had been found by the U.S. Consulate General in Mexico to be a member of an organized criminal entity and was ineligible for a visa. The magistrate judge noted that "while plaintiffs may seek attorney fees, their lawsuit is moot. Once the State Department turned over everything in its possession related to plaintiff's FOIA request, 'the merits of plaintiff's claim for relief in the form of production of information, became moot.'" However, the magistrate judge pointed out that although the issue of attorney's fees was still unsettled Roman had not provided any support for her general claim in her complaint that she had substantially prevailed. The magistrate judge observed that "while plaintiffs' response to the pending motion for summary judgment talks about attorney fees and their status as prevailing parties, a response brief

is not a motion." The magistrate judge indicated that Roman could file a motion for attorney's fees if she so chose. (*Jenny Theresa Roman and Benito Roman Lugo v. United States Department of State*, Civil Action No. 15-887, U.S. District Court for the Western District of Michigan, Mar. 27)