Volume 43, Number 9
May 10, 2017

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: Two House committees have recently instructed agencies they oversee that communications between the agencies and the committees should be considered congressional records and not agency records subject to disclosure under FOIA. In a letter from Rep. Jeb Hensarling (R-TX), chair of the House Financial Services Committee to Secretary of Treasury Steve Mnuchin, first reported by BuzzFeed News, Hensarling indicated that "all such documents and communications constitute congressional records not 'agency records' for purposes of the Freedom of Information Act, and remain subject to congressional control even when in the physical possession of the Agency." The letter observed that committee communications could contain "sensitive and confidential" information that should remain in congressional control. BuzzFeed uncovered a similar communication from a staffer at the House Ways and Means Committee to the Centers for Medicare and Medicaid Services. Decrying the apparent new policy, Adam Marshall of the Reporters Committee noted that "to the extent that individual committees within Congress are taking steps to interfere with the mandate of disclosure, that raises serious questions for the American public as to why these requests for secrecy are being made."

Court Accepts Exemption 4 Claims, But Questions Exemption 5 Claims

Judge Rudolph Contreras has ruled that the Justice Department properly withheld records pertaining to oversight of Siemens' corporate compliance by an independent monitor after the company pled guilty to paying bribes to foreign governments in violation of the Foreign Corrupt Practices Act under Exemption 4 (confidential business information). He accepted that some records were protected by the attorney work product privilege under Exemption 5 (privileges), but found that the agency had not justified its claims under the deliberative process privilege. He also questioned the categorical nature of the agency's claims under Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records). He ordered the agency to provide a representative sample of documents for *in camera*

ACCESS REPORTS

review. His decision provides a thoughtful discussion of the applicability of all three exemptions, including when they apply to third parties.

100Reporters, an organization specializing in investigative journalism, submitted a FOIA request to the Justice Department for copies of four annual reports prepared by Dr. Theodore Waigel, hired by Siemens to monitor its compliance with its plea agreement resulting from its FCPA violation. In a previous decision, Contreras had found that Siemens and Waigel could intervene to claim that their records were confidential. The agency initially denied the request entirely, citing Exemption 7(A) (ongoing investigation or proceeding). The agency disclosed more than 100 pages in full and 348 pages in part, but continued to withhold 4,293 pages. Although it dropped its Exemption 7(A) claim, the agency continued to assert Exemption 4, Exemption, 5, Exemption 6, and Exemption 7(C).

Contreras found the compliance materials contained commercial information. He noted that "information that is 'instrumental' to a commercial interest is sufficiently commercial for the purposes of Exemption 4. . . Because the compliance and training documents include information that is instrumental to Siemens' operations, the Court finds that the information is 'commercial' for the purposes of Exemption 4." 100Reporters argued that because the compliance materials were unique to Siemens' circumstances, their disclosure would not lead to competitive harm. Contreras disagreed. He pointed out that "of course no two companies are exactly alike, and [the plaintiff's suggestion that a company's customized compliance plan cannot be confidential] would effectively make identity a requirement before disclosure of compliance materials could constitute harm. That rule seems particularly problematic in a world of constantly changing regulatory environments and business climates, where companies must continue to invest in compliance and training to address emerging risks." Contreras observed that "the disclosure of a compliance plan constitutes a competitive harm because competitors are likely to take advantage of that plan without incurring the costs undertaken by the party who provided the documents to the government."

Contreras faced a threshold issue under Exemption 5 as to whether Waigel qualified as either inter- or intra-agency for purposes of the exemption. In *Dept of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), the Supreme Court ruled that a consultant could qualify for the deliberative process privilege if his or her interest was the same as that of the government, but where an adverse interest existed, such a consultant would not qualify for the privilege. Assessing whether Waigel and the government's interests were the same, Contreras pointed out that "the terms of the monitorship also explicitly required the Monitor to report to the government regarding Siemens' compliance. The Monitor was not representing his own interests or the interests of Siemens when communicating with the government. Instead, the plea and settlement agreement tasked the Monitor with the important job of exercising independent, fact-based judgment to evaluate Siemens' compliance and submit reports to the government detailing Siemens' compliance efforts." Contreras concluded that "because the Monitor was exercising independent judgment, not advocating on its behalf or on behalf of Siemens, the Court finds that the consultant corollary applies and the Monitor's documents are intra-agency documents within the meaning of Exemption 5."

Having found that Waigel qualified for inclusion under Exemption 5, Contreras agreed with 100Reporters that DOJ had not sufficiently described its deliberative process claims. Recognizing that an agency's deliberations did not have to end in a final decision in order to be privileged, he pointed out that "however, an agency must establish at least what deliberative *process* is involved and the role that withheld documents played in that process." He explained that "DOJ and the Monitor present evidence that purportedly shows that the withheld materials were created over four years of the monitorship, and the law enforcement agencies relied on them when making decisions regarding Siemens' compliance with the plea and settlement agreement and with anti-corruption laws generally." But he observed that "accepting DOJ and Defendant Intervenors' view of the deliberative process at issue would create a four-year umbrella effectively shielding

all agency action from review without accounting for any subsidiary agency decisions." He ordered the agency to provide supplemental affidavits if it intended to continue to claim the deliberative process privilege.

100Reporters argued that Waigel had waived the deliberative process privilege by sharing documents with Siemens. Contreras disagreed. He noted that "the monitorship imposed by the plea and settlement agreement called for the Monitor to carefully analyze Siemens' business practices and provide recommendations for improvements. That process would have been impossible if the Monitor could not communicate with Siemens." He added that "here, the plea and settlement agreement, which were approved by the court, required the Monitor to submit his work plans and reports to Siemens. Therefore, the Court finds that the disclosure was involuntary. Because the disclosure of information from the Monitor to Siemens was involuntary under the relevant court orders and was necessary for the purposes of the plea and settlement agreement and monitoring, the Court concludes that the disclosures did not waive the deliberative process privilege."

Contreras found the records had been created for law enforcement purposes. He pointed out that "here, there is no doubt that DOJ has a duty to enforce the FCPA and Siemens committed an actual violation of federal law. The more difficult question is whether documents compiled after the entry of a guilty plea constitute a part of the investigation. . .The Court finds that the post-plea compilation in this case is part of an ongoing investigation, because DOJ had an ongoing responsibility to enforce the terms of the plea agreement and could bring additional enforcement action if Siemens failed to comply." He concluded that DOJ had not shown that Exemption 7(C) could be applied categorically to withhold names and personally-identifying information. He pointed out that many of the Siemens board members were identified on the company's website. He added that "DOJ has not done enough to differentiate the interests of various government employees in the context of this case." Because he found the agency had not sufficiently justified its Exemption 5 and Exemption 7(C) claims, Contreras indicated that the agency had failed to justify its segregability claims as well. He ordered the agency to provide one work plan and one annual report for *in camera* review. (*100Reporters LLC v. United States Department of Justice*, Civil Action No. 14-1264 (RC), U.S. District Court for the District of Columbia, Mar. 31)

Court Finds Agency Decision Retains Deliberative Status

In a complex case involving the deliberative nature of discussions involving the EPA and the U.S. Corps of Engineers over whether an industrial site in Redwood City, CA fell within federal jurisdiction under the Clean Water Act or the Rivers and Harbors Act, Judge Rudolph Contreras has found that the agencies have not yet sufficiently supported their deliberative process privilege claims. In the course of his discussion, Contreras makes some interesting observations as to when deliberations ripen to a final decision, taking them outside the privilege.

The law firm of Hunton & Williams submitted FOIA requests to the EPA, the U.S. Army Corps of Engineers, and the Army, for records concerning the developer's request for an Approved Jurisdictional Determination, establishing the government's position on CWA and RHA jurisdiction. The Corps and the EPA share responsibility for issuing AJDs. The Corps prepared a draft AJD, which was reviewed by the Army. The Corps returned to work on the AJD, informing the EPA in December 2014 that it intended to finalize the AJD. However, the EPA exercised its special case authority to take over the CWA portion of the AJD. As of August 2016, the EPA had not issued the CWA portion of the AJD. In response to Hunton & Williams' request, the EPA disclosed 600 documents in full, withheld 12 documents in full, and withheld 320

ACCESS REPORTS

documents in part, primarily under Exemption 5 (privileges). The Corps disclosed 20,448 pages of documents, out of a total of 22,776 pages. The Army did not respond until the law firm filed suit. The Army identified 3,852 pages of responsive documents and released 2,422 pages.

Contreras found the agencies' searches were adequate. However, he turned to Hunton & Williams' claim that the Corps and the Army had failed to search personal accounts for responsive records. He pointed out that in *Competitive Enterprise Institute v. Office of Science & Technology Policy*, 827 F.3d 145 (D.C. Cir. 2016), the D.C. Circuit had ruled that when an agency was aware that employees had used personal accounts to conduct agency business it was obligated to search those records. But he observed that in *Wright v. Administration for Children & Families*, 2016 WL 5922293 (D.D.C. 2016), Judge Beryl Howell, interpreting *CEI*, found that agencies were not required to search personal accounts based on nothing more than the requester's speculation. Hunton & Williams found some emails in the records the Army disclosed sent from personal email accounts. As a result, the Army searched that particular account, but found no more records.

Agreeing that the Army's search was sufficient, Contreras noted that "Hunton identifies no other particular employees whose accounts it asserts should be searched, or other specific facts in the record indicating that personal email accounts—presumably those for all employees identified as having been involved with the issues—even in the absence of any indication that any such personal accounts were used for agency business. This goes too far. . .Here, as in *Wright*, the Court finds that Hunton's purely speculative claims are insufficient to overcome the presumption that the agency's search was adequate." Contreras rejected Hunton & Williams' claim that the agencies should also search for text messages. He pointed out that "unlike email messages, no evidence in the record suggests that any agency employees used text messages to conduct official business." The law firm also challenged the Corps' decision to limit its search to specific individuals. Contreras indicated that "while Hunton may not have consented to an unconditional limitation, it did agree that it would inform the Corps if it sought records from additional custodians. Hunton never exercised that right, and thus cannot object to the Corps proceeding with the original list."

Contreras found that all three agencies had not adequately justified their deliberative process privilege claims. Addressing the EPA's explanations, he noted that "mindful of the heightened requirement for specificity in the context of the deliberative process privilege, the Court cannot grant the EPA summary judgment because the EPA's disclosures, like other rejected in this jurisdiction, are insufficiently specific about the deliberative process at issue and the function and significance of each record in that process." To assist the agencies in addressing his concerns, Contreras turned to several specific issues, especially the status of the Corps' final draft AJD.

Hunton & Williams argued that the Corps had finalized it AJD, meaning it was no longer predecisional. But Contreras agreed with the EPA that regardless of whether the Corps might consider the draft AJD its final decision, it was still predecisional as to the EPA's final decision. He pointed out that "the EPA does not dispute that the 'final' draft AJD was a whisker's breadth from completion. Nonetheless, because the 'final' draft AJD was never finalized and has not—to this Court's knowledge—been adopted by any agency, the Court agrees with EPA that the deliberative process privilege could apply." The law firm asserted that the Corps' draft AJD was the agency's final decision and its failure to actually issue the AJD was "ministerial." However, Contreras explained that "the 'draft' AJD does not appear to have been given any effect, either informally or formally. It was never signed or finalized. . .Nor does Hunton claim that the draft has been applied to government CWA jurisdiction over the site. Instead, Hunton's repeated assertions that EPA has delayed and continues to delay CWA portions of the AJD makes it clear that the government is not giving the 'final' draft AJD, which Hunton asserts concluded against CWA jurisdiction, any legal effect."

Indeed, Hunton & Williams argued that the draft AJD was the Corps' final decision. But Contreras observed that "this argument confuses the temporal sense of 'final' with the sense required by FOIA. Hunton

presents no evidence that the Corps, or any other agency, has ever relied on, referred to, or treated as precedential the 'final' draft AJD." He indicated that the draft AJD could still be considered deliberative as well, pointing out that "the deliberative process can—as it did here—span between two different agencies. This set-up is particularly common when one agency serves a secondary function to a supervising agency." Under the circumstances, he noted that "here, the EPA has the ultimate authority to decide questions of CWA jurisdiction. The agreement between the Corps and the EPA describing the special case authority begins from this premise. The Corps' submissions to the EPA thus are part of the deliberative process because the EPA retained the authority to disagree and exercise its special case power—as it did here. Given that neither the Corps nor the EPA has—to the best of this Court's knowledge—issued a final decision, the deliberative process is ongoing."

Contreras rejected the Corps' claims that its draft AJD was protected by the attorney work-product privilege or the attorney-client privilege. He explained that to qualify for the attorney work-product privilege, records had to be created because of the prospect of litigation. He noted that "the 'because of' test demonstrates the flaw in the Corps' reasoning. Drafts of the AJD were not prepared *because of* possible litigation. The Corps was required to prepare the AJD, and thus drafts of the AJD, even if it knew that no litigation would ever result." He found the agency's attorney-client privilege claims insufficient. He observed that "this general statement cannot overcome the otherwise inadequate *Vaughn* index because it fails to provide necessary document-specific information such as the identities of the client and lawyer and whether legal advice was sought." (*Hunton & Williams LLP v. U.S. Environmental Protection Agency, et al.*, Civil Action No. 15-1203 (RC), No. 15-1207 (RC), and No. 15-1208 (RC), 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.

Georgia

The supreme court has ruled that a plaintiff may not use a writ of mandamus to force a public body to disclose records under the Open Records Act because the statute has its own enforcement mechanism allowing a requester to sue a public body directly. Oscar Blalock submitted a request to Bobby Cartwright, the Mayor of the City of Lovejoy, for records. When the City did not respond to his request, Blalock filed for a writ of mandamus requiring the City to comply. The City then released some records and the trial court ruled that since the Open Records Act provided for civil penalties it contained an adequate judicial remedy and that, as a result, mandamus was improper. The supreme court agreed with the result, but not the basis for the trial court's decision. Rejecting the trial court's conclusion that the possibility of civil penalties provided an adequate remedy, the supreme court observed that "a monetary award is simply no substitute for access to information found in government records. Were we to hold otherwise, agencies and officials could shirk their obligations under the Act whenever they determined that maintaining the secrecy of requested records was worth the cost of paying civil penalties." But the court noted that the right of requesters to sue the agency directly had been inserted into the ORA in 1982. The court explained that "but now that a private right of action exists under the Act, mandamus relief is not only unnecessary but improper." (*Oscar Blalock v. Bobby Cartwright*, No. S17A0065, Georgia Supreme Court, Apr. 17)

# #

ACCESS REPORTS

Illinois

In two nearly identical cases, a court of appeals has ruled that amendments to several statutes regulating professional licenses that went into effect after the Department of Financial and Professional Regulation denied requests from the Institute for Justice and Christopher Perry for complaints filed against cosmetologists and hair braiders in the case of the Institute for Justice, and against Perry as a structural engineer, were applicable retroactively. Since the Department originally rejected the Institute's request, citing six different exemptions. After waiting a year for the Public Access Counselor to respond to its complaint, the Institute filed suit. While the case was pending, an amendment to the Barber Act exempting complaints made against licensees from disclosure but making public all formal complaints filed against licensees by the Department became effective. The Department had abandoned all its claims except for the exemption in the amended Barber Act, the trial court ruled that the exemption could not be applied retroactively. In Perry's case, he was informed by the Department that a complaint had been filed against him, but that the Department could not tell him anything more specific. Perry then filed a FOIA request to obtain a copy of the complaint. After the Department denied his request, Perry complained to the Public Access Counselor. The PAC concluded the complaint was protected by the exemption for confidential sources. As a result of the PAC's opinion, Perry amended his request, asking instead for a redacted version of the complaint that did not include personally-identifying information. After his amended request was denied, Perry filed suit again. This time the trial court found the complaint was still protected by the confidential source exemption, but that two exhibits could be disclosed. Basing its ruling on a handful of state and federal cases finding that disclosure prohibitions could be applied retroactively, a majority of the appellate court upheld the Department's decisions. The majority noted that "as the Barber Act only exempts the requested records from disclosure, and does not otherwise impair the Institute's rights with respect to any completed transaction made in reliance on any prior law, its application has no impermissible effect." The dissent disagreed, noting that "the Institute's right to the subject records, having vested when it made its FOIA request, did not abate when section 4-24 of the Barber Act became effective." (*Institute for Justice v. Department of Financial and Professional Regulation*, No. 1-16-2141 and No. 1-16-2294; *Christopher J. Perry v. Department of Financial and Professional Regulation*, No. 1-16-1780, Illinois Appellate Court, First District, Apr. 14)

Michigan

A court of appeals has ruled that the Township of Raisin Board of Trustees failed to respond to Paul Smoke's FOIA requests in a reasonable amount of time, but that Smoke did not show that the Township had violated the Open Meetings Act when it called an improperly noticed meeting to discuss the purchase of a fire truck. Although the Township eventually provided Smoke with all the records responsive to his requests, it did not locate a memo and 672 pages of records about a military surplus program until much later. The Township pointed to a recent court of appeals decision, *Cramer v. Village of Oakley*, to support its action here. In *Cramer* the court pointed out that a public body was required to make a decision as to whether to grant a request within five business days, but could then fulfill the request within a reasonable time. The court, however, found the circumstances here considerably more egregious. The court noted that "there is no such statute to support defendants' claims that they should be permitted to only provide documents responsive to a FOIA request that they are reasonably able to find. . .Defendants do not cite any exception under FOIA permitting a response of only those documents that were reasonably discoverable." Having found the Township violated FOIA the court indicated Smoke was entitled to attorney's fees. The court dismissed Smoke's claim that the Township had violated the Open Meetings Act by holding an improperly noticed meeting. The court pointed out that the OMA only provided a remedy for instances in which there was a pattern of violations and since Smoke had alleged only a single violation there was no evidence of a continued

violation of the statute. (*Paul J. Smoke v. Charter Township of Raisin*, No. 332434, Michigan Court of Appeals, Apr. 20)

Mississippi

The supreme court has ruled that an amendment prohibiting disclosure of information about individuals participating in lethal injection executions, passed after the Roderick & Solange MacArthur Justice Center had requested and received from the Mississippi Department of Corrections redacted records about lethal injection executions, became applicable when passed in 2016 and prohibited the agency from disclosing any more records. The trial court had found that the 2016 amendment did not apply retroactively to the Justice Center's 2014 request. Reversing the trial court's ruling, the full supreme court noted that "while the Justice Center's request was filed pursuant to the Mississippi Public Records Act, [the prohibitory amendment] specifically amended MDOC's duty to disclose documents requested under MPRA." The Justice Center argued that it had a vested right to the records once the agency processed its request and disclosed some records. The supreme court rejected the claim, pointing out that "the MPRA establishes a general public right but does not establish any type of private, vested right that can withstand the application of a specific exemption provided by the Legislature." (*Mississippi Department of Corrections v. Roderick & Solange MacArthur Justice Center*, No. 2015-CA-00431-SCT, Mississippi Supreme Court, Apr. 13)

The Federal Courts…

Judge Christopher Cooper has ruled that U.S. Immigration and Customs Enforcement has not shown that it conducted an **adequate search** for records concerning Harvard Law Professor Rebecca Tushnet's request for records concerning agency seizures of counterfeit clothing from 2012-2015 and guidance as to how to distinguish trademark infringement from items that were parodies of a product. As a result of a press conference shortly before the 2015 Super Bowl publicizing the agency's efforts to seize counterfeit sports-related items in which the agency spokesperson explained that any item that disparaged a team would qualify for seizure, Tushnet wrote to the agency indicating that items that were parodies would not legally qualify as trademark infringement. She then followed up with a FOIA request for records on seizures of counterfeit clothing. The agency conducted a multi-office search, including its 26 field offices, and produced 1,475 pages of text documents and 3,197 photos. The agency redacted approximately 300 pages from industry guides under **Exemption 7(E) (investigative methods and techniques)**. Tushnet argued that the search was inadequate because it contained a number of inconsistencies. Cooper, however, indicated that "ICE is a complex organization and this particular request involved multiple parts, rolling productions, and coordinated searches across approximately 30 offices. A handful of inconsistencies is, therefore, unsurprising." Tushnet claimed the agency must have guidance of its own rather than relying on industry guides. But Cooper pointed out that "it seems entirely logical that ICE would rely on apparel licensers and manufacturers to point out the unique features of their branded clothing, rather than to expend the resources necessary to develop those guidelines internally." He found that the agency's failure to search its TECS database because it was too burdensome unconvincing, noting Tushnet had offered to significantly narrow her request before the agency's search began. Finding search terms used by field offices varied wildly, he observed that "ICE's claim of 'subject matter expertise' alone cannot resolve these questions. While FOIA might not require complete uniformity, it does require reasonable explanations for the scope of agency-wide searches. The wide and unexplained variances in the field offices' search parameters fall short of this standard." Tushnet contended that images of counterfeit clothing were publicly available and did not qualify under Exemption 7 (E). Cooper pointed out that "one could imagine ICE reasoning, for instance, that revealing a publicly available image

ACCESS REPORTS

along with a discussion of the features that distinguish authentic apparel from counterfeits would specifically highlight information to a black market manufacturer that an ordinary consumer might not notice. And given ICE's law enforcement expertise, its judgment on this issue is entitled to deference." Cooper agreed with Tushnet that the guidance did not distinguish between counterfeits and parody items. He noted that "given the evidence Tushnet has produced and the agency's apparent exclusive reliance on industry guidance to discern trademark infringement, the Court finds that ICE has not sufficiently justified its 7(E) redactions and that a material factual dispute remains regarding the applicability of this exemption." (*Rebecca Tushnet v United States Immigration and Customs Enforcement*, Civil Acton No. 15-00907 (CRC), U.S. District Court for the District of Columbia, Mar. 31)

A federal court in Colorado has ruled that immigration attorney Jennifer Smith's **pattern or practice** suit against U.S. Immigration and Customs Enforcement may go forward because Smith has indicated that she is a sufficiently frequent FOIA requester to show that she will be adversely affected if the alleged pattern or practice continues. Smith represented Maria Alicia del Carmen Orellana Sanchez, a non-citizen who was facing deportation. Smith requested Sanchez's alien file from U.S. Citizenship and Immigration Services. The agency told her that it was referring 18 pages to ICE for review. Two years later, ICE told Smith that Sanchez was considered a fugitive under the Immigration and Nationality Act and that the agency had a practice of denying FOIA access to records that could be used to help an individual evade immigration enforcement efforts. After exhausting her administrative remedies, Smith filed suit to force the agency to disclose Sanchez's alien file and asked the court for an injunction prohibiting the agency from continuing its Fugitive Practice. A month later, the agency disclosed Sanchez's alien file and moved to dismiss Smith's suit as moot. Smith argued that her pattern or practice claim was not moot because she had received other identical responses, that she regularly used FOIA to request records for her clients, and that, as a result, she would continue to be affected by the practice. ICE argued that Smith had not provided sufficient evidence that she was a regular FOIA requester who could be adversely affected by the practice. But the court noted that "there is no predetermined number of prior denials, combined with future intentions, that distinguishes a plaintiff with standing and one without. On this record at the pleading phase, the Court finds Smith has presented a sufficiently 'concrete' allegation of likely future harm based on the Fugitive Practice—sufficient, at least, to meaningfully, 'reduce the possibility of deciding a case in which no injury would have occurred at all.'" (*Jennifer M. Smith v. U.S. Immigration and Customs Enforcement*, Civil Action No. 16-2137-WJM-KLM, U.S. District Court for the District of Colorado, Apr. 4)

The D.C. Circuit has ruled that Prisology, Inc., an organization advocating for criminal justice reform, does not have **standing** to bring suit under either FOIA or the APA to force the Bureau of Prisons to affirmatively disclose administrative records required to be published under Section (a)(2) of FOIA. Prisology brought its complaint under the APA, which, at the time, was thought to be the only judicial remedy for non-compliance with the affirmative disclosure requirements of FOIA. However, while Prisology's case was pending, the D.C. Circuit ruled in *Citizens for Responsibility and Ethics in Washington v. Dept of Justice*, 846 F.3d 1235 (D.C. Cir. 2017), that a limited right existed under FOIA itself rather than the APA. The D.C. Circuit found CREW had standing in that case because it had requested specific records be posted online and the agency had declined. The D.C. Circuit found that such a denial could provide a claim under FOIA. Unfortunately for Prisology, it did not request records, but only filed suit under the APA to force the agency to post all relevant records since the 1996 EFOIA amendments. Writing for the court, Senior Circuit Court Judge A. Raymond Randolph noted that "we do not understand how the FOIA § 552(a)(3) decisions apply to this case. Prisology made no request to the Bureau of Prisons before bringing suit and therefore received no denial from that agency. As to FOIA § 552(a)(2), our decisions dealing with the enforcement of this subsection have not discussed standing. But in each such case the plaintiff made a request of the agency and the agency denied

the request." Prisology argued that it had standing because its court complaint constituted a request for information. But Randolph observed that "the argument goes nowhere. To the extent that a complaint may be seen as a request, it is a request for relief from a court. If the court denies the request, the plaintiff may appeal But a court's refusal to grant relief cannot confer Article III standing that otherwise does not exist." (*Prisology, Inc. v. Federal Bureau of Prisons*, No. 15-5003, U.S. Court of Appeals for the District of Columbia Circuit, Apr. 4)

A federal court in West Virginia has ruled that while Marshall Justice is eligible for **attorney's fees** as a result of his FOIA litigation against the Mine Safety and Health Administration he is not entitled to them. Justice, a union representative under the Mine Act, requested records about a complaint he had filed with the agency. He ultimately received 51 pages in full and 31 pages in part. Some records were disclosed in redacted form after the court ordered the agency to consider whether they could be disclosed with redactions. The court found Justice had prevailed as to two of the three disclosures made by the agency. Pointing to a letter from the Assistant U.S. Attorney to Justice's counsel explaining the agency's decision to provide more information originally withheld on privacy grounds about conversations that took place before third parties, the court observed that "it can be inferred that Justice's claims helped in part to catalyze the policy change." Finding that the agency had changed its position on some disclosures because of a court order, the court noted that "MSHA patently and 'voluntarily' changed its position on the two MOIs at issue in [the court order]. This court directed MSHA to consider partial disclosure, MSHA did so, and MSHA subsequently volunteered disclosure. Furthermore, the MOIs clearly bore some relevance to plaintiff's case, making them not insubstantial." But the court concluded that Justice was not entitled to fees. The court pointed out that "plaintiff simply neglects to provide any reasons for entitlement to fees, seeming to assume that if he is eligible for fees, he is also entitled to them." Although the court's order had resulted in the agency disclosing more information from the MOIs, the court observed that "without showing a public or even some significant private benefit, plaintiff cannot demonstrate that he is entitled to attorney's fees by virtue of his litigation over the two inspector MOIs." (*Marshall Justice v. Mine Safety and Health Administration*, Civil Action No. 14-14438, U.S. District Court for the Southern District of West Virginia, Mar. 31)

A federal court in Kentucky has ruled that the Bureau of Prisons conducted an **adequate search** for records concerning the use of inmate trust funds for improving the dining facilities at the Federal Correctional Institution in Lexington in response to requests filed by inmates Clifton Davidson and Alfred Jennings. Both Davidson and Jennings filed grievances about the alleged misuse of prison trust funds and their FOIA requests related to those allegations. The court found that Davidson had **failed to exhaust his administrative remedies** in regard to his request for records specifically asking for records on the use of funds for the dining hall improvements. The agency told Davidson it had located 33 pages of responsive documents, but because they were not at the facility where they were supposed to be maintained, the agency told Davidson it found no records. He told the court that he appealed the decision to the Office of Information Policy in May 2015, but OIP found no record of an appeal until September 2015, far beyond the 60-day filing date requirement. Finding no reason to disbelieve OIP, the court pointed out that "the plaintiff does not demonstrate actual receipt merely by providing the Court with a copy of an appeal letter he claims to have mailed. Instead, more specific and detailed information is required, such as a certified mail receipt showing delivery, tracking information, and the recipient's signature. Without such evidence of actual receipt by the agency, a FOIA plaintiff fails to rebut presumptively-accurate government records indicating that no such documents were received, and the agency has satisfied its burden to demonstrate that the requester failed to exhaust administrative remedies." Davidson claimed the search was inadequate because the agency had not searched for records in the Lexington facility. The court disagreed, noting that "the question in a FOIA action is not

whether the responding agency could have done more, but whether the search it did conduct was reasonable. . . At bottom, Davidson simply disagrees with the BOP staff charged with maintaining these documents about where they were likely to be found. Given the strong presumption of good faith to be afforded to an agency's search for records under FOIA, Davidson has failed to demonstrate the BOP's bad faith in responding to his FOIA request." (*Clifton B. Davidson and Alfred L. Jennings v. Federal Bureau of Prisons*, Civil Action No. 15-351-JMH, U.S. District Court for the Eastern District of Kentucky, Mar. 31)

A federal court in Idaho has adopted that portion of the magistrate judge's recommendation finding that individual USPS employees in Idaho were not proper defendants in a FOIA suit, but has rejected the magistrate judge's conclusion that Martin Bettweiser had provided sufficient evidence that he made a valid FOIA request by hand-delivering his request to Billy Gans, one of the local USPS employees. Finding that Bettweiser had **failed to exhaust his administrative remedies**, the court noted that "even if some Station Managers choose to accept FOIA requests outside the regulatory framework and either respond to them or volunteer to forward them to the appropriate FOIA Requester Service Center, the Court cannot conclude, in light of the regulations, that doing so is required or otherwise in accordance with published administrative procedures. Instead, the USPS regulations are clear and provide a process to follow that calls for delivery to a Requester Service Center. Only when Plaintiff follows that process can he argue that he submitted a valid FOIA request and is entitled to a response." (*Martin Bettweiser v. Billy Gans, et al.*, Civil Action No. 15-00493-EJL, U.S. District Court for the District of Idaho, Mar. 31)