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In this Issue

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Washington Focus: An analysis of recently filed FOIA litigation by the Transactional Records Access Clearinghouse shows a substantial increase in suits filed since the Trump administration took office. A total of 651 FOIA suits were filed in FY 2017, compared to 515 in FY 2016 and 525 in FY 2015. TRAC found that the Department of Justice was sued most often with 197 FOIA suits – a jump of 33. The Department of Homeland Security remained in second place with 98 suits, while the Department of the Interior shot up to third place with 68 new suits, replacing the State Department, which dropped to fifth place with 55 new suits. The Defense Department remained in fourth place with 56 new suits. The EPA came in first place among independent agencies with 35 new suits, a 250 percent increase from the previous year.

First Circuit Rules Privacy Interest Outweighs Public Interest in Trial Exhibits

The First Circuit has reversed a district court ruling from Rhode Island ordering the Department of Justice to disclose redacted versions of the exhibits introduced by the government during its 2011 prosecution of Dr. Paul Volkman in the Southern District of Ohio for illegally prescribing pain medication that caused the deaths of at least 14 patients to journalist Philip Eil after finding the public interest in overseeing the operations of the judiciary outweighed any privacy interest after redacting identifying patient information. In a 2-1 decision, the First Circuit concluded that the district court should have used the balancing standard under Exemption 7(C) (invasion of privacy concerning law enforcement records) instead of the common law right of access to judicial records. While all three judges agreed that the district court had used the wrong standard, Circuit Court Judge Juan Torruella dissented on the issue of whether or not the DEA had shown that the redactions ordered by the district court were insufficient to protect the privacy interests of Volkman's patients. The decision also seems to put to rest any notion that public availability of court records ever constitutes a waiver of FOIA privacy exemptions.

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Eil requested the 220 exhibits introduced at Volkman's trial from the U.S. District Court for the Southern District of Ohio as well as the Sixth Circuit. They all denied his request but told him to file a FOIA request with the Executive Office for U.S. Attorneys. Eil did so and his request was transferred to the DEA for a response. DEA disclosed more than 19,500 pages, some of which were redacted to protect identifying and personally sensitive information, including medical records of approximately 27 living former patients named in the trial transcript and records relating to the 14 patients who died. Eil sued the DEA in the U.S. District Court for the District of Rhode Island. The district court ruled in favor of Eil and ordered the agency to disclose all the exhibits admitted into evidence at Volkman's trial but allowed the agency to redact personally identifying information of former patients. DEA appealed that ruling to the First Circuit.

Circuit Court Judge Sandra Lynch explained that Exemption 7(C) protected the privacy interests of compilations of information about private citizens unless the requester could show a significant public interest in disclosure that would likely be advanced by disclosure of the information at issue. Here, Lynch noted, the district court had used the wrong standard when it stated that "only the most compelling showing can justify post-trial restrictions on disclosure of testimony or documents actually introduced at trial." She pointed out that "to support its application of these standards, the district court cited cases that concern the public's right to access *judicial* records but not FOIA cases." Lynch indicated that "public access to judicial records is a 'common law presumption' rooted in a desire to" provide public oversight of the judicial process. But, here, she observed, "the only public interests recognized by FOIA are those 'guided by FOIA's basic purpose, which is 'to open *agency* action to the light of public scrutiny' and the judiciary is not an agency. Moreover, the question of whether Exemption 7(C) allows an agency to withhold documents is a statutory one, and the Supreme Court has expressly recognized that the privacy interests protected by FOIA 'go beyond the common law and the Constitution.' It was thus inappropriate for the district court, in conducting the requisite balancing of interests, to invoke a disclosure-favoring standard based on a common law presumption divorced from the FOIA statutory framework."

Lynch explained that "FOIA does not require agencies seeking to withhold documents under Exemption 7(C) to provide a 'most compelling' reason for doing so. Nor does the statute recognize a 'presumptively paramount' public right to know. Rather, it authorizes the DEA to withhold documents as long as their release 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.' Neither party disputes that there were legitimate privacy interests at stake. The burden was thus on Eil, as the FOIA requester, to show that disclosure would be likely to further a 'significant' public interest."

Lynch pointed out that to the extent the district court conflated "the public interest in disclosure under FOIA with a public interest in accessing judicial records, it [was] erroneous because FOIA does not recognize public interests unrelated to agency functions." She noted that Eil himself did not make such a claim, but instead emphasized that "the public has a significant interest in finding out how the DEA investigates – and the federal government prosecutes – doctors who illegally prescribe pain medication." Emphasizing that "the government has already released the medical records of deceased patients and of living patients who cannot be readily identified from the trial transcript," Lynch observed that "given the wealth of information that he already has access to, Eil fails to satisfy his burden of showing that the withheld medical and death-related records – which relate only to the subset of patients that the government believes can be identified using the trial testimony – would shed any additional light on either the DEA's investigatory conduct in Dr. Volkman's case or the DEA's execution of its statutory mandate more generally."

Lynch indicated that "Dr. Volkman's living former patients have significant privacy interest in their medical records." She observed that "it is undisputed that the prior disclosure of these records as trial exhibits does not diminish the privacy interests of the former patients in the records," explaining that trial exhibits normally were returned or destroyed after a case was over. She disagreed with Torruella's concern that the

redactions ordered by the district court were sufficient. Instead, she noted that "because the trial transcript contains the names of Dr. Volkman's former patients along with significant information about their medical histories and interactions with Dr. Volkman, any interested party could readily identify the individuals associated with the records by connecting the trial testimony to the exhibits." Torruella dissented, indicating that there remained a dispute of material fact as to whether the district court-ordered redactions protected the individuals' privacy interests. He observed that "it appears highly likely that the exhibits themselves would yield at least *some* new information not contained in the publicly available trial transcript. . .[I]n illustrating what the DEA found probative of Volkman's having engaged in criminal behavior, those exhibits necessarily pertain to the public interest in elucidating the DEA's discharge of its statutory duties." (*Philip Eil v. U.S. Drug Enforcement Administration*, No. 16-2359, U.S. Court of Appeals for the First Circuit, Dec. 22, 2017)

Views from the States…

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

Alaska

The supreme court has ruled that the Division of Alaska State Troopers may not invoke the exception requiring a party in litigation with a public agency to use discovery rather than the public records act because it is not involved in litigation pertaining to Kaleb Basey, a member of the military who was the subject of a joint criminal investigation conducted by AST and the Fort Wainwright Criminal Investigation Division. Basey was indicted on federal charges and he filed a federal civil rights lawsuit against more than a dozen individuals, including several AST officers. Basey filed several requests with the AST, which were denied because he was involved in litigation with an agency, and, alternatively because their disclosure would interfere with law enforcement proceedings. The trial court ruled in favor of the agency and Basey appealed to the supreme court. The supreme court reversed, noting that "the litigation exception applies only when the requestor is involved in litigation 'involving a public agency.' The State failed to establish Basey was involved in such litigation. Basey's complaint refers to his criminal case, but that case is being prosecuted by the federal government, not the State. The federal government is not a 'public agency' as defined in the Public Records Act." The supreme court added that "the State has not argued that Basey's civil or criminal case 'involves a public agency' in some way other than a public agency being a party to the case, and we do not address this possibility." The supreme court rejected the interference with law enforcement proceedings claim as well. The court pointed out that "it suffices to say the State cannot invoke the law-enforcement-interference exception merely by pointing to a pending criminal case involving the requestor. If the legislature had intended to create a per se exception that applies any time the requestor is being prosecuted – even if by the federal government and not the State – the legislature would not have required that the requested records be 'reasonably expected to interfere' with the prosecution." (*Kaleb Lee Basey v. State of Alaska, et al.*, Alaska Supreme Court, Dec. 29, 2017)

California

A court of appeals has ruled that Samuel Perroni, a retired attorney from Arkansas, is not entitled to attorney's fees for his suit under the California Public Records Act for records concerning the investigation of the 1981 drowning death of actress Natalie Wood. Parts of the original 1981 investigation of Wood's death conducted by the Los Angeles County Medical Examiner and the Los Angeles County Sheriff's Department,

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concluding that Wood's death was accidental, had previously been disclosed to two authors. In 2011, the sheriff's department reopened its investigation of Wood's death; no records from that investigation had been made public. Perroni decided to write a book on Wood's death and requested the investigation files under the CPRA. The coroner and the sheriff's department denied Perroni's request and he filed suit. The trial court ordered the coroner to disclose the investigation report on Wood's death and ordered the sheriff's department to disclose a map of Avalon, which is located on Santa Catalina Island. The trial court did not require the sheriff's department to disclose any records pertaining to the 2011 investigation. Perroni then filed a motion for $92,000 in attorney's fees. The trial court ruled that Perroni was not eligible for attorney's fees because he represented himself. The court of appeals agreed. The court pointed out that parties in California were expected to bear their own litigation costs unless provided for otherwise by contract, statute, or law. Although the CPRA allowed for recovery of attorney's fees by prevailing parties, the court observed that "nothing in the CPRA, nor relevant case law, indicates that the Legislature intended for a self-represented attorney, representing no clients, to recover attorney fees." The court noted, however, that the prohibition "does not apply when a self-represented attorney is also representing client," but pointed out that "no such attorney-client relationship exists here." (*Samuel A. Perroni v. Mark A. Fajardo, et al.*, No. B281167, California Court of Appeal, Second District, Division 5, Dec. 13, 2017)

Connecticut

Based on previous rulings by the Connecticut Supreme Court finding that the Freedom of Information Act applies only to administrative functions of the judiciary, a trial court has found that the term "personnel," as applied to administrative functions of the courts, pertains to court personnel and not other types of individuals – like guardian ad litem representatives – appointed as the result of court proceedings. The court pointed out that two prior decisions by the supreme court "provide the narrow construction of the term required. Applying the possessive pronoun 'its' to each of the nouns in the definition makes clear that the 'administrative functions' of the branch consist of activities relating to '*its personnel*,' i.e., the branch's employees. This restrictive reading of the formulation adopted by the Court excludes those persons appointed but not employed by the courts, like [Guardian Ad Litems] and attorneys for minor children. Thus, records having to do with the latter do not relate to the personnel of the branch and are not accessible via the act." (*Mark Sargent v. Freedom of Information Commission*, No. CV 16 5018092, Connecticut Superior Court, Judicial District of New Britain, Dec. 13, 2017)

Delaware

A trial court has ruled that Jonathan Rudenberg is not entitled to attorney's fees for his suit against the Attorney General's Office to force the agency to provide records in response to his multi-part request pertaining to cell tower stimulators. The Attorney General and the Department of Safety and Homeland Security claimed the records were exempt because of a non-disclosure agreement with the FBI. After Rudenberg appealed his denial, the Attorney General decided that the non-disclosure agreement was a public record and disclosed it along with a handful of other records. Rudenberg then filed for attorney's fees. The trial court found Rudenberg did not qualify as a successful plaintiff. The court noted that "appellant has not recovered the records he initially sought in his FOIA request. At best, he recovered only two records (redacted purchase orders and the FBI nondisclosure agreement) and explanations for the nondisclosure of everything else he requested. This Court is not convinced that recovery of two documents and explanations for why DSP cannot disclose the remaining requested records was what Appellant sought to accomplish when he originally brought his FOIA action. Thus, he is not a 'successful plaintiff' to warrant an award of attorney fees and costs [under the statute]." Rejecting Rudenberg's claim that he was entitled to attorney's fees, the court pointed out that "the award of attorney fees and costs in this case is not warranted in this administrative appeal of a FOIA action where Appellant voluntarily withdrew his appeal in exchange for a very small portion of the materials

comprising the original FOIA request." (*Jonathan Rudenberg v. Chief Deputy Attorney General of the Department of Justice, et al.*, No. N16A-02-006 RRC, Delaware Superior Court, Dec. 8, 2017)

Ohio

In a 4-3 split, the supreme court has ruled that the autopsy reports of eight members of the Rhoden or Gilley families, who were found murdered in Pike County in April 2016, are protected from disclosure because they qualify as confidential law enforcement investigatory records until the murders are solved. Although final autopsy reports are specifically classified as public records under the Ohio Public Records Act, there are several exceptions, including the CLEIR exception, which was added in 2009 by the state legislature. After the *Cincinnati Enquirer* and the *Columbus Dispatch* requested the final autopsy reports, the Pike County Coroner denied their requests, claiming the autopsy reports fell under the CLEIR exception to disclosure. Both the *Enquirer* and the *Dispatch* filed a petition with the supreme court, asking it to decide the case. The supreme court accepted the case for review. The majority found that the CLEIR exception applied and denied the newspapers' requests for attorney's fees as well. The newspapers argued that *Steckman v. Jackson*, 639 N.E.2d 83 (1994), limited the criminal investigatory exemption to law enforcement officials and the coroner did not qualify. The majority disagreed, noting that "there is no doubt that the nature of the coroner's work in a homicide-related autopsy is investigative and pertains to law enforcement. The General Assembly has recognized that a coroner plays an integral role in law-enforcement investigations." The majority recognized that the protection for the autopsy reports was usually temporary. The majority pointed out that "the exception is recognized for the information in autopsy reports that, for a time, constitutes CLEIR. Once the criminal investigation ends, CLEIR contained in autopsy reports may assume the status of public records and become available to the public. In order that justice may be delivered to all, patience may be required of some." The dissent emphasized that *Steckman* applied here to prohibit the use of the criminal investigatory exemption. (*State ex rel. Cincinnati Enquirer, et al. v. Pike County Coroner's Office*, No. 2016-1115 and No. 2016-1153, Ohio Supreme Court, Dec. 14, 2017)

The Federal Courts…

Judge Christopher Cooper has ruled that the Consumer Financial Protection Bureau properly responded to two FOIA requests from the law firm Frank LLP, which specialized in consumer class action suits, pertaining to an enforcement action against Encore Capital Group – one of the largest purchasers and collectors of consumer debt – by withholding records under **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods and techniques)** in response to Frank's first request and because Frank **failed to exhaust its administrative remedies** by not committing to pay fees for the second request. Cooper also found that Frank had standing to challenge CFPB's FOIA policies regarding its interpretation of **Exemption 4 (confidential business information)** and **Exemption 8 (bank examination reports)** and that while the agency's definition of a financial institution was appropriate under Exemption 8, its presumption that records were voluntarily submitted in response to a civil investigative demand issued by the agency was invalid because it was contrary to case law interpreting the meaning of what constituted a voluntary submission for purposes of Exemption 4. After CFPB filed a consent order finding that Encore Capital Group had filed misleading affidavits in hundreds of thousands of cases claiming ownership of debt without having substantiated those claims, citing 36,000 consumers who had paid debts after Encore filed such an affidavit, Frank submitted a FOIA request for records pertaining to the 36,000 identified consumers. The agency withheld the records entirely, claiming they were exempt under Exemption 4. Frank appealed. The agency upheld its decision to withhold the records entirely but claimed Exemption 7(E) instead of Exemption 4.

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Frank submitted a second FOIA request for records supporting the agency's finding in its consent order and compliance requirements imposed by that order. The agency again withheld all the records under Exemption 4 and Exemption 7(E) but added Exemption 8 as well. This time, the agency granted Frank's appeal, remanding for a better explanation of whether or not the records were **segregable**. Frank argued that the investigative techniques involved self-identifying the number of cases in which Encore filed an improper affidavit. Cooper noted, however, that the technique was "not so obvious," and pointed out that "if it were disclosed, targets of the Bureau's investigations might be able to complicate enforcement, if not outright evade it. The technique is admittedly not proprietary or especially complex. But, again, an agency is justified in withholding records based on a mere '*chance* of a reasonably expected risk' of circumvention." Frank challenged the agency's claim that attorney's notes were privileged because they did not reflect mental impressions and were prepared for settlement, not litigation. Cooper rejected both claims. He indicated that while there was a distinction in discovery between fact and opinion work product, "there is no such fact-opinion distinction for purpose of Exemption 5" because work product materials would not routinely or normally be disclosed during discovery. As to the settlement/litigation distinction, Cooper observed that "at the time the notes were taken, the Bureau was investigating Encore's alleged violations of several statutes. . .[H]ad settlement discussions been unproductive [the agency] may have challenged Encore's practices in court." Cooper agreed with the agency that Frank had not yet committed to paying fees for its second request after remand from its initial appeal. The agency had indicated the existence of 48,000 pages of potentially responsive records and told Frank it would need to pay half of the estimated $52,603 fee upfront. Frank argued that since the agency had upheld some of its exemption claims as a result of its appeal it should be entitled to pursue judicial relief. Cooper, however, noted that "but to the extent that aspects of the Bureau's appellate determinations are unfavorable, it is only because they might *foreshadow* a denial of Frank's request on remand. Nothing in the determination itself is adverse in the sense relevant to judicial review under FOIA." Frank also argued CFPB had waived its right to collect fees when it did not charge for the initial processing of the request. Cooper found the agency's decision not to charge fees initially had no effect on its ability to charge future fees. He pointed out that "as a practical matter, the fees associated with reviewing Frank's initial request were likely negligible compared with the potential costs of review on remand, given that the Bureau's initial review resulted in a blanket denial under three FOIA Exemptions and its review on remand must involve a document-by-document segregability analysis." Cooper concluded that Frank had **standing** to challenge the agency's Exemption 4 and Exemption 8 policies because it was likely to continue to request information from the agency that fell within those exemptions. Finding the case law contradicted the agency's position on voluntary submissions, Cooper noted that "the D.C. Circuit has held that voluntariness does not turn on the *recipient's perception* of whether it must comply with the demand – it instead turns on the *agency's power* to induce compliance." He added that "if an agency has statutory authority to get a court order, its ability to obtain the information is not in jeopardy regardless of whether a court order has yet issued its order." Frank also challenged the agency's Exemption 8 policy interpreting "financial institution" to cover entities that buy and collect on debts. Rejecting Frank's claim, Cooper observed that "debt collectors – as a link in the credit-management chain – fit comfortably within the scope [of Exemption 8]." (*Frank LLP v. Consumer Financial Protection Bureau*, Civil Action No. 16-00670 (CRC), U.S. District Court for the District of Columbia, Dec. 14, 2017)

The D.C. Circuit has ruled that the FBI did not conduct an **adequate search** in response to two requests from the Reporters Committee and the Associated Press for records concerning the agency's impersonation of a reporter when trying to flush out an individual who had made a series of bomb threats in 2007 to Timberline High School in Seattle. To lure the perpetrator of the bomb threats into the open, the FBI posted a message on social media pretending to be an AP publisher and requesting input on a draft article, which was available by clicking an emailed link. The suspect took the bait and clicked on the link, which contained malware, allowing the FBI to locate and arrest him. Although the incident received little attention at

the time, in 2014 an ACLU technologist stumbled across the incident in records released years earlier in response to a FOIA request. The ACLU technologist disclosed the incident on Twitter and in response to a media outcry, then FBI Director James Comey defended the incident in a letter to the *New York Times*. The Reporters Committee and the AP requested records about the Timberline incident, as well as about FBI policies for impersonating the press more generally. The agency searched its Tech Division for records concerning the use of news media sites or links to facilitate the installation of malware, and broadened its search for records on media impersonation policies to include the Seattle Division, the Office of General Counsel, the Behavioral Analysis Unit, the National Covert Operations Section, and the Training Division. The search for records about the use of media sites to install malware came up empty, while the FBI found records pertaining to its policies for impersonating media. While the FBI was able to find its records related to the Timberline incident, the agency claimed that it could not effectively search its database for records about other instances in which it used media links to install malware because it was too abstract, although it finally searched using the term "media impersonation," but found no records. The D.C. Circuit found the FBI's search failed to adequately explain the search parameters. Writing for the court, Circuit Court Judge David Tatel observed that the agency's declarations "are utterly silent as to which files or record systems were examined in connection with the targeted searches, and how any such searches were conducted, including, where relevant, which search terms were used to hunt within electronically stored materials." The FBI argued that under *Perry v. Block*, 684 F.2d 121 (D.C. Cir. 1982), an agency was not required to elaborate on a search. Tatel pointed out that the agency's interpretation of *Perry* was misleading and that the case actually required an agency to "explain in reasonable detail the scope and method of the search conducted." The agency further argued that D.C. Circuit case law required a more detailed explanation when specific information was known to exist within a larger set of records and did not apply in a case like this where the requests had sought "something nebulous and vague, not known to exist." Tatel noted that "this proposed distinction is both wrong and irrelevant. It is wrong because our cases have demanded greater specificity from the affidavit in connection with equally generic FOIA requests. And it is irrelevant because the specifics of a particular FOIA request have no logical bearing on an agency's ability to make a factual representation of what steps it has taken to honor the request. Here, for example the FBI could have explained that it was difficult to come up with search terms reasonably calculated to turn up the records the Reporters Committee sought and then gone on to describe how it attempted to work around that difficulty. Because the FBI failed to offer any such explanation, the Reporters Committee was left without 'information specific enough. . . to challenge the procedures utilized. . .'" Tatel also agreed with the Reporters Committee that the FBI had failed to explain why it limited its search for records about the Timberline incident to the Tech Division, while it searched several other offices for records about media impersonation more broadly. Tatel pointed out that "given the FBI's determination that certain divisions were 'reasonably likely' to hold records relating to a specific instance where media impersonation was used to deliver malware, its failure to search these very same divisions for records relating to other such instances leaves us unable to conclude, barring some explanation, that the FBI searched for the latter records in a manner 'reasonably expected to produce the information requested.'" Tatel found the agency should have also searched the Director's Office since Comey had been involved in publicly defending the policy. But he rejected the Reporters Committee's claim that the FBI Seattle Office should have been searched further. (*Reporters Committee for Freedom of the Press, et al. v. Federal Bureau of Investigation, et al.*, No. 17-5042, U.S. Court of Appeals for the District of Columbia Circuit, Dec. 15, 2017)

Judge Rudolph Contreras has ruled that public disclosure of a declassified version of the intelligence community's assessment that Russia tried to influence the outcome of the 2016 presidential election does not require disclosure of those declassified portions as they appear in a separate classified assessment and that the entire classified report is protected by **Exemption 1 (national security)** and **Exemption 3 (other statutes)**.

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After the declassified version was made public, EPIC requested a copy of the classified version, arguing that those portions that had been disclosed could no longer be considered top secret. The Office of the Director of National Intelligence rejected EPIC's claim, indicating that even the disclosure of the declassified material would provide foreign intelligence agencies the ability to better understand the capabilities of U.S. intelligence. Contreras agreed with the agency, noting that "because the entire document is exempt, there is no non-exempt reasonably segregable portions of the report that must be disclosed. . .[E]ven though there are portions of the classified report that have already been released, to the public, those lines, when placed within the classified report itself, have not been 'officially acknowledged' in full. . ." Accepting the agency's Exemption 1 claims, Contreras pointed out that "it is true that this information, taken out of context and transplanted into a new document, has been determined to be releasable. But ODNI's release of this information in the declassified report does not undercut its claim that such information, when seen within the context of the redacted report, 'reveals an additional association or relationship that meets the standards for classification under the [Executive Order]." The agency cited Section 102A(i)(1) of the National Security Act of 1947, protecting sources and methods of intelligence, as the basis for its Exemption 3 claim. Contreras explained that the agency's representations "are sufficient to demonstrate that the portions of the classified report that have already been released in the declassified report were properly withheld in response to EPIC's FOIA request. The agency's concern about Russian intelligence capabilities to discern more information from a partially redacted version of the report than a member of the general public is logical, and the accuracy of those concerns appear plausible." He added that "although the amount of protected information foreign intelligence agencies would be able to obtain by reviewing a fully redacted version of the report as opposed to a partially redacted version of the report is far smaller, the agency still met its burden of demonstrating that it is plausible that even releasing a fully redacted version of the report would pose too great a risk to the collecting agencies' national security operations." Although ODNI admitted portions of the classified report had been made public in the declassified version, Contreras agreed that EPIC had not shown that "the agency has officially acknowledged such information as the length of the report, where the conclusions that have already been released are placed within the report, or what proportion of the report remains classified as compared to the portions that are unclassified or now declassified." Contreras also rejected EPIC's request that he review the classified report *in camera*. He pointed out that "even if the Court were to inspect the documents *in camera*, the Court would be no better situated to evaluate the agency's prediction that the release of such information would be harmful to national security." (*Electronic Privacy Information Center v. Office of the Director of National Intelligence*, Civil Action No. 17-163 (RC), U.S. District Court for the District of Columbia, Dec. 18, 2017)

Judge Trevor McFadden has ruled that Jeffrey Scudder, Ken Osgood, Hugh Wilford, and Mark Stout have **failed to state a claim** showing that the CIA has a **policy or practice** of denying requests for electronic records. Based on a 2014 ruling by Judge Beryl Howell in another suit brought by Scudder finding the agency had not shown that electronic records were not readily reproducible under FOIA, Scudder, Osgood, Wilford, and Stout filed suit after the agency refused to disclose 386 documents in electronic format. But this time, McFadden found Scudder and the others had no claim. He noted that "although it asserts, in conclusory fashion, that the CIA has a policy of refusing to release responsive records in electronic format, the complaint is devoid of facts sufficient to advance this allegation from being possible to plausible." He observed that Scudder's complaint indicated the CIA had disclosed electronic records on at least two occasions in recent years. He pointed out that "the reasonable factual inference to be drawn from these allegations is that the CIA has produced documents electronically on several occasions, and not, as Plaintiffs have asserted, that the CIA has categorically refused electronic production of responsive documents." McFadden added that "Plaintiffs do not allege any instance where a requestor did not receive the documents requested in electronic format; or, more significantly, any instance where a requester improperly did not receive the documents in electronic format as requested. By alleging that there have only been a few instances where the CIA has produced

responsive records electronically, Plaintiffs, at best, plead facts 'merely consistent with' liability, which is well-settled as insufficient." McFadden found Howell's previous comments irrelevant, noting that "I cannot reasonably impute Chief Judge Howell's summary of the Defendant's apparent litigating position in a case several years ago as fact of the Defendant's current policy or practice, which is the focus of this lawsuit." McFadden also found Scudder had failed to state a pattern or practice claim. He pointed out that "Plaintiffs in this matter have not alleged any instance where the Defendant was found to have violated FOIA – or even a specific instance where the Defendant violated FOIA – by failing to provide the requested information electronically where readily producible. Indeed, because this lawsuit and the First Amended Complaint were filed prior to the Defendant's response to Plaintiffs' FOIA claims, it is not even clear in this case that the Defendant will respond that the documents sought are not readily producible in electronic format, or not otherwise produce non-exempt records requested by the Plaintiffs in electronic format." (*Jeffrey Scudder, et al. v. Central Intelligence Agency*, Civil Action No. 16-01917 (TNM), U.S. District Court for the District of Columbia, Dec. 13, 2017)

A federal court in Vermont has ruled that the First Responder Network Authority, created by Congress in 2012 to develop a national wireless broadband network and operate the national network, is not subject to FOIA because its authorizing statute specifically exempts it from the Administrative Procedure Act, of which FOIA is a part. Stephen Whitaker and David Gram made a series of FOIA requests to FirstNet, which is run by AT&T by contract, and the National Telecommunications and Information Administration and the Department of Commerce, which oversees FirstNet, for records about public comments pertaining to its state-by-state operation. FirstNet responded by telling Whitaker and Gram that it was exempt from FOIA, while NTIA and Commerce referred the requests to FirstNet to respond. Under 47 U.S.C. § 1426(d)(2), FirstNet is exempt from "chapter 5 of title 5 (commonly referred to as the Administrative Procedures Act)." Whitaker and Gram argued that reference was not intended to include FOIA as well. The court disagreed, noting that "the location of FOIA within Title 5, Chapter 5 of the United States Code is undisputed. . .[T]he common usage of 'APA' to refer to the more familiar elements of the statute does not alter the fact that FOIA is codified in company with the more familiar provisions of the APA within Title 5." Whitaker and Gram argued that the Open FOIA Act of 2009, which amended Exemption 3 to require future exempting provisions to include a statutory reference to FOIA to qualify as an Exemption 3 statute and a vague reference to the APA was not specific enough. The court noted that § 1426(d)(2) was "not a specific exemption of matters from disclosure, but rather a general exemption of an entire administrative agency from all of the obligations of FOIA. A government entity utterly excused from FOIA obligations by statute need not comply with subsections of FOIA that define subclasses of specific information that can be shielded from disclosure. . . [Instead,] it rests on statutory authority located outside the APA which removes FirstNet entirely from the requirements of FOIA." Whitaker and Gram argued that NTIA and Commerce were required to search for records they might have responsive to their requests. But the court agreed with the government that "the unifying principle that emerges from [case law] is that when an agency reasonably determines, based on the nature of the request and the scope of the agency's operations, that it is unlikely to have responsive records and that a search is likely to be futile, it need not proceed with a search." Whitaker and Gram also contended that the government had not prepared privacy impact statements as required by the E-Government Act. The court found this was a separate issue that needed more briefing before reaching the merits. (*Stephen Whitaker and David Gram v. Department of Commerce*, Civil Action No. 17-192, U.S. District Court for the District of Vermont, Dec. 20, 2017)

In an exhaustive examination of the way in which **attorney's fees** are calculated, Judge Reggie Walton has ruled that Catholic Charities is entitled to attorney's fees for its litigation against U.S. Citizenship and

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Immigration Services, that the USAO Matrix is the most reliable method to calculate fees, that Catholic Charities in entitled to fees for litigating the attorney's fees issue, and that Catholic Charities' fee request should be reduced 55 percent to reflect its level of overall success, leaving Catholic Charities with an award of $5,255 in fees and $400 in costs. Catholic Charities filed a multi-part FOIA request with USCIS for records concerning its FOIA policies. Walton found Catholic Charities had clearly succeeded in forcing the agency to disclose its FOIA Processing Guide. Walton first rejected the agency's claims that Catholic Charities was not entitled to fees at all. He then pointed out that, although Catholic Charities' attorney did not normally charge fees for his services, the organization could still be compensated based on the prevailing market rates. Turning to an examination of those rates, Walton found, like several other district court judges in the D.C. Circuit recently, that the updated USAO Matrix represented the best method for calculating fees, rejecting the LSI *Laffey* Matrix. He recognized that "the rate survey underlying the USAO Matrix is not perfect and is perhaps over-inclusive as Catholic Charities argues; however, the Court finds it difficult to conclude that the rates underlying the LSI *Laffey* Matrix are superior." He dismissed Catholic Charities' claim that several attorney's fees rulings in recent years favoring plaintiffs had relied on the LSI *Laffey* Matrix, indicating that those decisions concluded that the litigation was complex, and pointing out that "the litigation for which Catholic Charities seeks fees involved a single FOIA request and one document responsive to that request, [and] did not implicate novel legal issues. . ." Turning to the hours claimed by Catholic Charities, Walton explained that Catholic Charities was claiming eight hours for its FOIA claim and 9.25 hours for its fee claim. He reduced the hours on the FOIA claim to 4.6 hours for lack of success. As to the fee award claim, he observed that "despite finding that Catholic Charities' requested fees on fee hours are reasonable, the Court nonetheless agrees with defendants that Catholic Charities' total fees on fees award should be reduced to account for its limited success on its fees motion." He added that "the proper course is to reduce Catholic Charities' fees on fees award by the same percentage that its underlying fees on the merits were reduced." (*Rica Gatore, et al. v. United States Department of Homeland Security*, Civil Action No. 15-459 (RBW), U.S. District Court for the District of Columbia, Dec. 21, 2017)

The D.C. Circuit has ruled that EPIC does not have **standing** to challenge the Presidential Advisory Commission on Election Integrity's failure to prepare a privacy impact statement under the E-Government Act because it cannot show that it suffered any harm protected by the PIA requirement. EPIC appealed Judge Colleen Kollar-Kotelly's previous ruling that while EPIC had shown it had suffered both an informational injury and an organizational injury, it was unlikely to succeed on the merits in obtaining an injunction to require the Commission to prepare a PIA. Writing for the D.C. Circuit, Circuit Court Judge Karen LeCraft Henderson noted that EPIC "has not suffered the type of harm that section 208 of the E-Government Act seeks to prevent. Indeed, EPIC is not even the type of plaintiff that can suffer such harm." She explained that "as we read it, [Section 208] is intended to protect *individuals* – in the present context, voters – by requiring an agency to fully consider their privacy before collecting their personal information. EPIC is not a voter and is therefore not the type of plaintiff the Congress had in mind." EPIC's organizational injury claim fared no better. Henderson rejected EPIC's claim that the Commission's failure to prepare a PIA prevented it from focusing public attention on such issues. Instead, she pointed out that "section 208 of the E-Government Act does not confer any such informational interest on EPIC. EPIC cannot ground organizational injury on a non-existent interest." She observed that "halting collection of voter data would not 'likely' redress any informational or organizational injury, even had EPIC suffered one. . . [Instead], ordering the defendants *not* to collect voter data only *negates* the need (if any) to prepare an assessment, making it *less* likely that EPIC will obtain the information it says is essential to its mission. . ." Concurring, Senior Circuit Court Judge Stephen Williams complained that informational and organizational injury were essentially the same thing. He pointed out that "if an organization's only claimed injury is informational, additional discussion of the same facts under the 'organizational' rubric will not clarify the court's reasoning." (*Electronic Privacy Information*

Center v. Presidential Advisory Commission on Election Integrity, et al., No. 17-5171, U.S. Court of Appeals for the District of Columbia Circuit, Dec. 26, 2017)

In a separate lawsuit filed against the Presidential Advisory Commission on Election Integrity, Judge Rudolph Contreras has ruled that United to Protect Democracy and the Protect Democracy Project have **standing** to bring suit against the Commission for alleged violations of the information collection requirements of the Paperwork Reduction Act, but because the PRA only applies to agency action and the Commission is not an agency, they could not succeed on the merits of their claim. UPD and PDP filed suit against the Commission, claiming its requests to the states for voter registration data constituted an information collection under the PRA, requiring a notice and comment period. UPD and PDP argued that because they were deprived of the opportunity to comment about the information collection they had suffered an informational injury. Contreras noted that "Plaintiffs' right to information may be based on a statute tied to notice and comment procedures, but they have sufficiently alleged that the deprivation of that particular information has caused them particularized and concrete injury in fact. . .[T]he Court is satisfied that, at this stage in the proceedings, Plaintiffs have adequately alleged a concrete and particularized informational injury." Because the PRA only applied to agency action, UPD and PDP argued that the definition of agency in the PRA should be read more broadly and that the Commission qualified for inclusion in the definition of an agency because it was an establishment within the Executive branch. Because the Commission did not qualify as an agency under the definition of agency in FOIA, UPD and PDP attempted to distinguish the FOIA definition by noting it was based on the definition of agency in the Administrative Procedure Act and drew its defining characteristics from that definition. But Contreras pointed out that "unfortunately for Plaintiffs, this is simply not the case. While FOIA does reference the APA's definition of agency under § 551(1) and the language of that provision is the source of *the APA's limitation* on staff and units that advise the President, § 551(1) is *not* the source of FOIA's limited applicability. Indeed, the limitation on FOIA's definition of 'agency' comes from how Congress intended the term 'Executive Office of the President' to be interpreted under § 552(f) of FOIA." He observed that "because the sources of the 'advise and assist' limitation under FOIA is derived from the term 'Executive Office of the President,' a term that is shared by the PRA, Plaintiffs have failed to show why FOIA's reference to § 551(1) requires the Court to reject the normal presumption that common terms in parallel provisions should be construed consistently." Contreras explained that "based on the present record and the relevant case law, the Court cannot conclude that the Commission constitutes an 'agency' for purposes of the PRA. . .The Commission's request for information from state officials is not a command for information that state officials must obey and there is no evidence that the Commission has sought to compel compliance by any means." (*United to Protect Democracy, et al. v. Presidential Advisory Commission on Election Integrity, et al.*, Civil Action No. 17-2016 (RC), U.S. District Court for the District of Columbia, Dec. 29, 2017)

Judge Amit Mehta has ruled that OMB did not conduct an **adequate search** for records about the Paperwork Reduction Act and specific rules of the U.S. Patent and Trademark Office in response to three requests from the American Center for Equitable Treatment. The requests specified rules and Information Collection Requests to be searched. The agency initially withheld a number of records under **Exemption 5 (privileges)**, but ACET argued the claims were inappropriate because the Paperwork Reduction Act itself required disclosure of the information. OMB then disclosed that information, leaving only specific challenges to the search remaining. ACET contended OMB had used 2009 as its baseline date for searching all the requests, even though one of the requests asked for records as far back as 1995. OMB's explanation for why it did not search the earlier time frame was that such records should have been destroyed or transferred to the National Archives. Mehta pointed out that "to fulfill its FOIA obligations, OMB either must expand the

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temporal scope of its search to the time periods requested by Plaintiff. . .or supplement its declaration to explain why using Plaintiff's preferred dates is inconsistent with the standard of reasonableness." ACET argued that OMB used the entire CFR citation for the rules it had requested, but did not use terms like "Rule 111," which were commonly used references to such rules. Here, Mehta found that "where, as here, a FOIA requester suggests search terms that are common in practice, but the agency elects not to use them, the failure of the agency to explain its choices prevents the court from evaluating the reasonableness of the agency's search method." (*American Center for Equitable Treatment, Inc. v. Office of Management and Budget*, Civil Action No. 16-01820 (APM), U.S. District Court for the District of Columbia, Dec. 19, 2017)

After an *in camera* inspection of 19 remaining disputed documents, Judge Rudolph Contreras has ruled that the EPA properly withheld 13 documents entirely under **Exemption 5 (deliberative process privilege)**. PEER had requested documents on EPA's response to suspected toxic contamination at schools in Santa Monica Malibu Unified School District. The EPA disclosed some records, withholding others under Exemption 5 and **Exemption 6 (invasion of privacy)**. In a prior ruling, Contreras accepted some of the agency's claims, but found it had not provided sufficient substantiation for many of its Exemption 5 claims. Contreras allowed the EPA to supplement its affidavits and decided to review the remaining records *in camera*. By the time of his second ruling, the remaining disputed documents had been narrowed to 19. This time, Contreras found most of the agency's claims were justified, but found that four documents consisting of email chains were not deliberative. Rejecting the agency's claim as to an email discussion entitled "Emission Rates from Caulk," Contreras pointed out that "EPA's reference to a 'final position based on the test results' is untethered to any decisionmaking process and is insufficient by itself to demonstrate that these communications are predecisional. EPA's suggestion that this document played some role in decisions regarding dust samples at Malibu is also insufficient. A document is not predecisional under Exemption 5 unless it was 'generated as part of a definable decision-making process.' An agency's post hoc realization that past deliberations might bear on new questions does not satisfy this requirement." PEER also challenged the agency's claim that more information could not be **segregated** from the emails and disclosed. Contreras agreed with PEER that "EPA used boilerplate, conclusory language to describe its efforts to segregate nonexempt, factual material from exempt material." But he pointed out that, except for a few sentences in two documents, "this Court's inspection of the documents disputed in this case confirms that most of records do not feature reasonably segregable factual information." (*Public Employees for Environmental Responsibility v. Environmental Protection Agency*, Civil Action No. 14-2056 (RC), U.S. District Court for the District of Columbia, Dec. 11, 2017)

The Ninth Circuit has resolved William Pickard's lengthy litigation to force the government to officially acknowledge that Gordon Skinner was a confidential source at Pickard's trial on drug charges by finding that Skinner's identity was protected by **Exemption 7(D) (confidential sources)**. Although the Ninth Circuit had previously ruled that Pickard's contention that Skinner's identity had been publicly acknowledged required further explanation by the government, once the case returned to district court Judge Charles Breyer ruled that Exemption 7(D) applied to protect Skinner's identity. This time, the Ninth Circuit agreed, noting that "here, a senior lawyer from the DEA swore in a declaration that the DEA gives express assurances of confidentiality to its informants in Skinner's position, and his written agreement confirms that the assurance was given to him. The fact that the government stated that it could not 'guarantee' that Skinner's identity would never be divulged merely describes the reality that the future cannot be known, but does not undermine the assurance of confidentiality at the time Skinner gave information to the DEA." However, the Ninth Circuit also criticized Breyer for ruling that Pickard had given up all his other claims. Here, the court observed that "the mere failure to seek summary judgment on all claims does not mean that a party abandons the remaining claims. Rather, it means (in the absence of some other indicator of failure to prosecute) simply that the party

intends to go to trial on those claims because issues of fact remain." The Ninth Circuit also faulted Breyer for failing to conduct a **segregability** analysis. Finding the failure harmless, the court noted that "but no such findings were necessary as to the two categories of information that are at issue on appeal, because Plaintiff is not legally entitled to any of the information. Thus, there is nothing to segregate." (*William Leonard Pickard v. U.S. Department of Justice*, No. 17-15945, U.S. Court of Appeals for the Ninth Circuit, Dec. 13, 2017)

A federal court in Maryland has ruled that the Social Security Administration conducted an **adequate search** for a list of attorneys and non-attorneys eligible to represent claimants in social security disability claims and then properly redacted personal information under **Exemption 6 (invasion of privacy)**. Based on the parameters of Ed Goldner's request, the agency searched its Modernized Claims System database. That database search yielded 1,221 pages, but because the database could not differentiate whether contact information related to businesses or individuals, it redacted emails and phone numbers. Goldner challenged the adequacy of the search because the agency had indicated that there were other databases. But the court pointed out that "the reason that Defendant was unable to provide this information was not because it did not *find* it, but rather because it believed that information was exempt from FOIA." The court also rejected Goldner's claim that the information was not protected by Exemption 6 because he was only requesting business information. The court explained that "Defendant nowhere argues that business information is personal and should not be disclosed. Rather, it argues that, after conducting a reasonable search, it was unable to parse certain fields to determine if they contained business or personal information, and the default assumption that these fields contained personal information." Goldner contended that representatives fill out forms that distinguish between business and personal information. The court pointed out that "Defendant has put forth non-conclusory declarations that explain why, even though the forms may have such fields, the database that Defendant chose to search (based on Plaintiff's request) cannot distinguish that information. To the extent that Plaintiff believes there is a *better* way to search for this data, he is free to submit further FOIA requests. That belief, however, goes to the reasonableness of the search, and does not address the question of whether the information Defendant withheld was properly considered exempt from FOIA." (*Ed Goldner v. Social Security Administration*, Civil Action No. JKB-17-1243, U.S. District Court for the District of Maryland, Dec. 14, 2017)

Judge Rudolph Contreras has ruled that supplemental affidavits filed by U.S. Immigration and Customs Enforcement explaining its **search** for records concerning Lonnie Parker have put it several steps further towards completely explaining its search, but that it still has failed to provide sufficient justification as to some elements of its search. Parker requested records concerning himself from the agency's Little Rock office. In an earlier opinion, Contreras had found ICE had not sufficiently explained its search of the email of several agents. This time, Contreras found that the individual agent was best-suited to search his own email account. Contreras agreed with Parker that the agency was required to disclose the search terms the individual agent used in searching his emails, as well as which folders he searched for his archived emails. But he rejected Parker's contention that the agent need to provide more detail about the version of Microsoft Outlook the agent used. Contreras pointed out that "Mr. Parker has produced no evidence that the results of [the agent's] search, using the methods he has described, would have been different based on which version of Microsoft Outlook he used or based on whether he used ordinary or advanced searching." Contreras also faulted the agency's explanation of how it searched for the agent's older files. He noted that "ICE should address where [the agent's] files from the relevant time period are most likely to be stored, whether on his current computer, an older computer, or a backup system." Contreras rejected Parker's contention that the agency should try to reconstruct the agent's files where missing. He observed that "regardless of whether the files were transferred or not, in a routine case such as this one, the lack of results from [the agent's] original

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search does not necessitate that the agency conduct any sort of data recovery procedure on his computer or email account, absent evidence that the agency deleted files responsive to Mr. Parker's FOIA request after he submitted it." Contreras agreed with the agency that it was not required to retrieve older emails created on now obsolete software. He pointed out that "if pre-2006 emails from the Little Rock office were sent using cc:Mail and were stored in tapes that still exist, they would not be retrievable nor searchable, and ICE would not be required to obtain new equipment to retrieve and search them." (*Lonnie J. Parker v. U.S. Immigration and Customs Enforcement*, Civil Action No. 15-1253 (RC), U.S. District Court for the District of Columbia, Dec. 29, 2017)