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## In this Issue



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*Washington Focus: Retiring Rep. Darrell Issa (R-CA) was honored recently at the Republican state convention in San Diego and told his audience that he hoped the 2016 FOIA Improvement Act would be remembered as his primary legacy. Issa told the audience that "after I am gone. . .we will still have some improvements in the fundamental structure of the federal government and may pass onto the states that will allow us to know more about what our government is doing for us and to us." Issa pointed out the important role FOIA played during his investigations as chair of the House Oversight Committee. "FOIA discovery got things in many of these cases faster than I did," Issa told reporters.*

## Court Faults GSA on Response to Request

Judge Beryl Howell has chided the General Services Administration for narrowing the scope of records responsive to a request by American Oversight concerning communications – particularly email attachments – between the agency and the Trump presidential transition team pertaining to its lease of the Old Post Office Building in Washington for use as a Trump International Hotel. She also found the agency's only explanation for its categorical Exemption 6 (invasion of privacy) claims was based on its policy for redacting third-party information rather than an actual review of the applicability of the exemption to the actual records withheld. While the agency also claimed a number of records were protected by Exemption 5 (privileges), Howell indicated that since the PPT did not qualify as a government agency, records shared with it lost any attorney-client privilege protection they may have had originally.

The agency searches of "emails, calendar logs, and shared drive files" identified 3,730 pages of responsive records. GSA disclosed the records with redactions on nearly every page, including 2,000 pages with redactions claiming the attorney-client privilege. The agency also redacted names and contact information of PPT members because they were non-federal employees under Exemption 6, even though their names were publicly available on a PPT website. Although its original response contained only a two- page *Vaughn* index,

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the agency provided a lengthier index after AO challenged the sufficiency of the index.

AO challenged the adequacy of GSA's search, and the breadth of its exemption claims under Exemption 5 and Exemption 6. Although its request was modified during negotiations with GSA, AO contended the agency had failed to search telephone call logs, calendar entries and stand-alone electronic records. By contrast, GSA admitted that it had not searched for telephone call logs, meeting agendas, or paper records, but argued that such a search "goes far beyond what is required by the FOIA" and that the search performed was "reasonably tailored" to the request "based on its knowledge of its [own] practices." To begin, Howell noted that "while records of emailed calendar invitations were produced, no actual calendar entries or logs were reflected in GSA's production." She ordered GSA to either search for the calendar entries or "to clarify the method and scope of such a search, as well as any withholdings of calendar entries." Howell faulted the agency for its narrow interpretation of AO's request. She pointed out that "when a request seeks 'communications,' the GSA reads no further and searches 'emails, calendar logs and shared drive files' as a default, irrespective of the specifics of a request. In this case, the plaintiff expressly sought 'telephone call logs' and 'all records reflecting communications,' which includes 'stand-alone electronic records' and 'paper records,' but GSA has not explained whether or not such records were searched for the requested communications." She added that "in other words, GSA performed a search using its default methodology for requests seeking 'communications,' but fails to take account of the specific aspects of the plaintiff's request that may warrant a broader search."

While it conducted a search for emails, GSA decided such a search did not encompass email attachments because the request did not specifically ask for attachments. Howell pointed out that "while the FOIA request does not explicitly refer to attachments, the scope of the request for 'all records reflecting communications' plainly covered parts of email communications that were in the form of an attachment. GSA's blinkered literalism, distinguishing emails from email attachments, is at odds with the agency's 'duty to construe a FOIA request liberally.'" She noted that a recent decision, *Coffey v. Bureau of Land Management*, 277 F. Supp. 3d 1 (D.D.C. 2017), had specifically found that email attachments were included in a request for emails, particularly where the attachments were referred to in the emails themselves. Howell agreed with AO that the "attachments themselves are independently responsive to [AO's] request because they were communicated between GSA and PTT."

Howell questioned GSA's primary basis for its attorney-client privilege claims. She pointed out that "GSA concedes that, based on Justice Department guidance, 'transition teams are considered nonagencies for purposes of the FOIA,' meaning that Exemption 5 cannot apply to any communications between GSA and the PTT. Thus, to the extent that GSA relied on Exemption 5 to withhold any communications between GSA and the PTT. . .it must produce the withheld material to the plaintiff." AO challenged several instances in which the agency's claim of privilege seemed suspect. One was a request from the PPT for a list of relevant Executive Orders. GSA withheld its response as privileged. Howell observed that "information about the availability of a resource list, even if produced by an attorney, falls far afield of the provision of legal advice necessary for the attorney-client privilege to attach. Moreover, given the context, to the extent that the GSA attorney's response regarding the availability of any list of pertinent Executive Orders was then shared with the requesting PPT member, no privilege would apply." To justify further withholding, Howell told the agency if would need to "submit a fulsome explanation with sufficient information to assess whether *each* redaction under Exemption 5 is properly withheld under the attorney-client privilege."

GSA had redacted the names of PPT members because they were not federal employees. Howell observed that "contrary to GSA's construction of FOIA's Exemption 6, neither the text nor relevant case law, permits, let alone requires, the automatic withholding of non-federal employees' names." She found that the names and contact information for PPT members had been made publicly available on a PPT website and that

GSA had acknowledged that all PPT members were listed on the website. Howell noted that "GSA's Exemption 6 redactions obscure which of the publicly-named PPT members were referenced in, or included on, certain emails, even though those names are already 'out of the bag' and are no longer subject to a significant protectable privacy interest." Howell identified a strong public interest in learning more about "the actions of GSA and PTT members working with GSA in carrying out the agency's statutory duty during the presidential transition" and observed that "any privacy interest of PTT members in non-disclosure of their names on communications with GSA is outweighed by that public interest in disclosure." (*American Oversight v. U.S. General Services Administration*, Civil Action No. 17-1267 (BAH), U.S. District Court for the District of Columbia, May 3)

# Views from the States…

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

## California

A trial court has ruled that a temporary restraining order preventing the City of Milpitas from disclosing records about misconduct allegations concerning former City Manager Tom Williams should be dissolved and that the public interest in disclosure of records concerning the investigation into Williams' alleged misconduct with minor redactions to protect third-party privacy outweighs Williams' privacy interests. After mayoral candidate Richard Tran, a critic of Williams' performance as city manager, was elected mayor, a number of California Public Records Act requests were filed pertaining to Williams. Williams filed a reverse-CPRA action, asking for a temporary restraining order blocking disclosure of the records. That TRO was granted. In the meantime, the First Amendment Coalition made a request for records about Williams' performance. Milpitas released some records and FAC filed suit. After holding a number of hearings, the trial court judge suddenly recused himself and was replaced with a new judge. After reviewing the record, the new judge dissolved the TRO and ordered Milpitas to disclose the records with redactions. Williams argued that now that he was retired his privacy interests were enhanced. The trial court judge rejected this notion, noting that "even if Mr. Williams is no longer with the City, his claims against the City live on, and the public has a right to know information about those claims. The public also should know what steps, if any, the City and its elected officials have taken or are taking in response to the allegations made against Mr. Williams and made by Mr. Williams." Williams also argued that the allegations were baseless, but the court pointed out that "I believe that the allegations of misconduct against Mr. Williams (and others) are sufficiently reliable to find reasonable cause that the allegations of wrongdoing are well-founded." The trial court judge explained that information about third-parties, as well as data on Williams' home address, should be redacted. The trial court observed that "it is proper to redact the names, home addresses, phone numbers, and job titles of people who are *not* high-ranking public officials, but who are mentioned in the documents or who provided information to the City about the allegations of misconduct. The public interest in understanding the alleged misconduct and the City's response to that alleged misconduct is not enhanced by knowing the identities of these persons." (*Tom Williams v. City of Milpitas, et al. and First Amendment Coalition v. City of Milpitas*, No. 17CV309235, California Superior Court, Santa Clara County, Apr. 27)

## Kentucky

A trial court has ruled that the Kentucky House of Representatives violated the Open Meetings Act when it held a closed meeting that included a quorum of both the majority and minority caucuses to discuss pension

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reform. After the meeting took place, the Bluegrass Institute for Public Policy Solutions filed a complaint with the Attorney General's Office arguing that the closed meeting violated the Open Meetings Act. The Attorney General agreed and the House filed suit. The House argued that the meeting fell within an exception for caucus meetings because although a quorum of the minority caucus attended as well, the meeting was sponsored by the majority caucus. The trial court noted that "the August 29, 2017 meeting consisted of a public agency with a quorum of members of both majority and minority parties present and public business was discussed. Therefore, no statutory exception exists to find the meeting was not in violation of the Open Meetings Act, and the House's failure to open the meeting to the public violated the Act." (*Kentucky House of Representatives v. Bluegrass Institute for Public Policy Solutions*, No. 17-CI-01246, Franklin County Circuit Court, May 9)

## New Jersey

A court of appeals has ruled that the use of the phrase "citizens of this State" in the prefatory provisions of the Open Public Records Act was not intended to limit the use of OPRA to New Jersey residents only. Several states have citizenship restrictions and the U.S. Supreme Court ruled several years ago in *McBurney v. Young*, a case challenging Virginia's citizenship requirement that the Privileges and Immunities clause in the U.S. Constitution did not prohibit states from limiting use of their access laws to state citizens. However, in an appeal consolidating three cases – one of which found citizenship was not a requirement while the other two ruled OPRA was limited to New Jersey residents – the appeals court has ruled that because all other statutory references that describe who can use OPRA speak in terms of requesters or individuals, rather than citizens, no citizenship limitation should be presumed. The court noted that "reading [the prefatory language] sensibly, bearing in mind the context in which the phrase 'citizens of this State' is used, the terms the Legislature used in the rest of OPRA, and considering the statute's history and purposes, we cannot conclude that the Legislature intended to preclude out-of-state residents from making OPRA requests." The court pointed out that "although OPRA has an extensive definitions section, 'citizen' is not defined. Other than in [the prefatory section], the term does not appear anywhere else in the statute. Rather, the remaining sections of OPRA use the term 'person' or 'requestor.'" The court explained that OPRA had replaced the previous Right to Know Law where "the term 'citizen' was used throughout, including the specific provisions defining who could request and obtain records and who could enforce the statute. We conclude that in replacing the term 'citizen' with 'person' in the analogous sections of OPRA, the Legislature signaled its intent to broaden rather than limit the right of public access." The court added that "any doubts about the meaning of the phrase should be resolve in favor of public access, and hence in favor of construing the phrase as a generality rather than an intentional limit on standing." (*Harry Scheeler v. Atlantic County Municipal Joint Insurance Fund, et al.*, No. A-2092-15T2, New Jersey Superior Court, Appellate Division, May 16)

## New York

A court of appeals has ruled that emails sent or received between New York City Mayor Bill de Blasio and Jonathan Rosen, whose public relations firm BerlinRosen was retained by the Campaign for One New York to work on de Blasio's reelection campaign do not qualify as inter- or intra-agency records and are therefore not privileged. The emails were requested by Grace Rauh, a reporter at NY1 News, and Yoav Gonen, a reporter for the *New York Post*. De Blasio's office disclosed some of the emails but withheld others as privileged. After Rauh and Gonen filed suit, the trial court ruled that the records were not privileged and awarded the reporters attorney's fees. On appeal, the trial court's ruling was upheld. The appeals court noted that "it is well settled that for communications between a governmental agency and an outside consultant to fall under the agency exemption, the outside consultant must be retained by a governmental agency." The court observed that "respondents seek to broaden the agency exemption to shield communications between a governmental agency and an outside consultant retained by a private organization and not the agency. This

attempt expands the agency exemption and closes the door on government transparency. Requiring an agency to retain an outside consultant to protect its communications comports with the fundamental principle that FOIL exemptions should be 'narrowly interpreted so that the public is granted maximum access' to public records." The court pointed out that during the pendency of the litigation, the Freedom of Information Law's attorney's fees provision was amended to make an award mandatory for a prevailing party. Approving the award of attorney's fees, the court observed that "based on the substantial body of law, respondents had no reasonable basis to withhold the documents. Indeed, after the proceeding had commenced and more than a year after the FOIL requests were made, respondents produced approximately 1500 pages of previously withheld documents." (*In re Grace Rauh, et al. v. Bill de Blasio, et al.*, No. 03115, New York Supreme Court, Appellate Division, First Department, May 1)

A court of appeals has ruled that the Competitive Enterprise Institute substantially prevailed in its suit against the Office of the New York Attorney General for records concerning Common Interest Agreements pertaining to climate change between various state attorney generals, but that the trial court erred in finding that the Attorney General stonewalled CEI's request when it initially said it had no responsive records. The Attorney General initially told CEI that it was withholding responsive records under the attorney work product privilege. After CEI filed suit, the Attorney General disclosed the Common Interest Agreement, which had already been made public and confirmed that it had no other responsive records. The trial court judge then awarded CEI $20,377 in attorney's fees. The Attorney General appealed, arguing that CEI had not substantially prevailed and that the fee award was excessive. The appeals court noted that "the [Common Interest Agreement] is very specific about preserving the confidentiality of any such shared information, but not to the existence of the agreement itself. . .Given this public announcement and the language of the Common Interest Agreement, we agree with [the trial court] that respondent did not establish a reasonable basis for denying this FOIL request." Reducing the fee award, the appeals court observed that "we do not agree with the [trial] court's assessment that respondent 'stonewalled' petitioner during the three-step FOIL process. We therefore conclude the counsel fee award should be reduced to $16,312, a sum acknowledged by respondent as reasonable." (*In the Matter of Competitive Enterprise Institute v. Attorney General of New York*, No. 525579, New York Supreme Court, Appellate Division, Third Department, May 3)

# The Federal Courts…

Judge Trevor McFadden has ruled that the Department of State failed to show that it denial of Zead Khalaf Ibrahim's application for resettlement in the United States as part of the Iraqi Resettlement Program qualifies as the denial of a permit under **Exemption 3 (other statutes)**. Ibrahim, an American sympathizer during the invasion of Iraq, ran a grocery store in Iraq. Because of death threats, he was forced to relocate to Jordan, where he applied for the Iraqi resettlement program. His application was denied, although he was recognized as refugee by the UN High Commissioner for Refugees. He asked the State Department to reconsider his application, arguing that his diagnosis of post-traumatic stress disorder explained his inability to recall details consistently. State denied his request for reconsideration as well. Ibrahim then submitted FOIA requests for records concerning the agency's denial of his resettlement application. State claimed many of the records were protected under 8 U.S.C. § 1222(f) of the Immigration and Nationality Act, a recognized Exemption 3 statute pertaining to denials and revocations of visas. McFadden reviewed the disputed documents *in camera* and by the time he ruled in the case, the agency had abandoned its claim that Ibrahim had applied for a visa, but insisted that 222(f) also covered permits to enter the U.S. Finding that the agency had cited no statutory authority for its claim, McFadden noted that "a declaration by an interested party cannot establish legal conclusions and does not adequately prove that Exemption 3 applies to records related to

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Resettlement Applications. Ultimately, legal conclusions about the scope of a statute are the province of the courts, not bureaucrats." He indicated that the cases cited by State "do not establish a preference for broad interpretations of the statute's coverage or of the term 'permit.'" He explained that "to interpret the word 'permits' as expansively as the Department suggests would render the word 'visas' superfluous: Since a visa conveys a permission to enter the United States, the Department's reading would make a visa a type of permit. The statute's reference to visas would therefore add nothing to its protection of records pertaining to the issuance or refusal of permits." He added that "the simple fact that a Resettlement Application seeks 'permission to travel to the United States through a letter issued by the Department of State' is not enough to establish that it is a permit. And the Department has not identified any specific type of permit created by a statute or regulation that issues upon approval of a Resettlement Application or that is denied upon rejection of a Resettlement Application." Ibrahim argued that asylum assessment notes made by a U.S. Citizenship and Immigration Service asylum officer were not protected by **Exemption 5 (privileges)** because they were primarily factual and not deliberative. McFadden found the majority of the notes were protected because factual material was intertwined with deliberative material. But he pointed out that the agency's assessment of Ibrahim's request for reconsideration was not protected because it constituted the agency's final decision. State also withheld some records under **Exemption 7(E) (investigative methods and techniques)**. Here, McFadden found that a document prepared by the UN High Commissioner for Refugees did not qualify for the exemption. He pointed out that the agency "ignores Mr. Ibrahim's observation that a document prepared by a non-governmental, non-law-enforcement organization to analyze whether a person meets that organization's definition of a refugee is not a document prepared 'for law enforcement purposes.'" However, McFadden indicated that 7(E) applied to USCIS's Refugee Application Assessment, noting that "unlike the UNHCR, the USCIS is a law enforcement agency." McFadden found that 7(E) did not apply to USCIS's assessment of Ibrahim's request for reconsideration. McFadden pointed out that "rather than disclosing sensitive law enforcement techniques, the assessment provides a high-level view of the case. . .Disclosure of this information would not risk circumvention of the law, and Exemption 7(E) therefore does not apply." (*Zead Khalaf Ibrahim v. United States Department of State*, Civil Action No. 16-01330 (TNM), U.S. District Court for the District of Columbia, May 7)

Judge James Boasberg has ruled that Kevin Kearns failed to show he had **exhausted administrative remedies** under both FOIA and the **Privacy Act** and that records concerning the agency's investigation of complaints against Kearns were not required to be disclosed under the Privacy Act because they were not in a system of records retrieved by name or unique identifier. Kearns first requested a copy of Accountability Board case number 2012-0155, which related to the investigation of complaints filed against him. The agency disclosed the case file, but redacted identifying information about third parties. Kearns filed an administrative appeal of the redactions, which was upheld by the agency. He then requested the entire file under both FOIA and the Privacy Act. The agency told Kearns there were no additional records beyond those provided to him in response to his first FOIA request. Kearns did not appeal the agency's decision. A year later, Kearns filed another request under FOIA and the Privacy Act for two identified internal security investigation files. In response to this request, the agency located 1,537 pages, disclosed 333 pages with redactions and withheld 797 pages under **Exemption 6 (invasion of privacy)**. Kearns appealed the decision, arguing the agency could not withhold information under Exemption 6 in response to his Privacy Act request. Before the agency responded to his appeal, Kearns filed suit, alleging the agency had improperly responded to all three of his requests. Kearns argued that he had constructively exhausted his administrative remedies as to his first FOIA/PA request because he filed the request based on the agency's advice contained in its response to Kearns' appeal of his original FOIA request. Boasberg found that did not absolve Kearns from filing an appeal of the second request. He pointed out that "here, Kearns is attempting to leapfrog those administrative checks by claiming exhaustion of his [second] request on the coattails of his [prior] appeal." Boasberg indicated that "indeed, exhaustion under the Privacy Act, unlike FOIA, is a jurisdictional threshold to challenging an agency

determination." Kearns argued the agency erred by failing to process his first FOIA request under the Privacy Act as well. Boasberg rejected the claim, pointing out that "the Accountability Board files requested by Kearns were not retrieved from a 'system of records' under the criteria of the Privacy Act. Indeed, Plaintiff has provided no evidence that the documents he requested in [his first FOIA request] were *actually* retrieved by his name or other personal identifier. Rather, the FAA makes clear that the files provided to Kearns were instead retrieved by reference to the Accountability Board *case number*. Because the documents released pursuant to Plaintiff's [second] request were not retrieved by the name or identifier of an individual, they do not exist within a system of records for purposes of the Privacy Act. As that statute does not provide an independent basis for disclosing records withheld from the FAA's response to the [first FOIA] request, the Court finds that the agency was under no obligation to process Kearns' request in accordance with the Privacy Act." Boasberg indicated that the lack of retrieval from a system of records also doomed any Privacy Act claim Kearns had pertaining to his third request in which he cited both FOIA and the Privacy Act. Boasberg upheld the agency's Exemption 6 claims, noting that "while Plaintiff may have his *own* interest in identifying his accusers, FOIA is not concerned with the desires of the individual requester. Rather, the only valid public interest under the statute is one that serves FOIA's core purpose of shedding light on an *agency's* performance of its statutory duties. . .Here, Kearns is entirely unable to explain how disclosing the third-party information at issue in the ROIs would shed light on the FAA's performance of its statutory duties. The Court also cannot identify any such public interest in disclosure, and it therefore concludes that the privacy interests at stake are sufficient to justify withholding." (*Kevin Kearns v. Federal Aviation Administration*, Civil Action No. 17-434 (JEB), U.S. District Court for the District of Columbia, May 15)

Judge Trevor McFadden has ruled that the Agricultural Marketing Service conducted an **adequate search** for records concerning five investigative files of companies targeted for enforcement actions requested by the Cornucopia Institute. The agency searched its Compliance and Enforcement Division and located 881 responsive pages. It disclosed 420 pages in full, 225 pages in part, and withheld 236 pages under a number of exemptions, particularly **Exemption 4 (confidential business information)**, and **Exemption 5 (privileges).** The Cornucopia Institute challenged the adequacy of the search, claiming that the agency's decision to search only in the Compliance and Enforcement Division was insufficient. McFadden explained that "Cornucopia specifically requested 'the entire *investigative files* for five operations targeted for enforcement actions by the NOP.' The Government knows that it 'stores. . .investigative and other files. . .on [NOP's] shared network drive,' and 'hard copy paper investigative records. . .in storage cabinets within NOP office space in Washington.' By searching these locations, the Government conducted a search 'reasonably calculated to uncover the investigative files at issue. Cornucopia offers only speculation that the Government would have been better served using search terms (even though investigative files are organized by complaint number), or looking on other databases or offices, and speculation cannot rebut the presumption of good faith given to agency declarations." The agency withheld labels that companies had used to describe products as organic without agency approval under Exemption 4. McFadden noted that "the Government seems to have obtained this information voluntarily, using product labels that were being customarily (and illegally) displayed to the public. The labels were therefore not confidential." The agency argued that the Cornucopia Institute bore the burden of proving the labels had been made public. But McFadden disagreed, pointing out that "under customary disclosure analysis (and any Exemption 4 claim), it is the Government that bears the burden. The Government invoked Exemption 4 for these product labels, and the Government has failed to carry its burden of showing that they were confidential." McFadden rejected Cornucopia's argument that the agency had inconsistently applied Exemption 4 by redacting what Cornucopia believed, based on the position of the redactions, was the name of the company Aloha Medicinals, which had been publicly disclosed. McFadden observed that "emails regarding [another company] Serenigy may well mention other confidentially-relevant products or phrases. In other words, Cornucopia has not shown that the hidden phrase they want to see has

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already been disclosed, and so fails to rebut the Government's contention that the information is commercial and confidential." Dismissing Cornucopia's broad contention that records the agency had claimed as protected under Exemption 5 were not privileged, McFadden agreed with Cornucopia that the agency had provided no substantive justification for privilege claims for two pages. (*The Cornucopia Institute v. Agricultural Marketing Service*, Civil Action No. 16-00866-TNM, U.S. District Court for the District of Columbia, May 14)

The Eighth Circuit has ruled that the district court did not err in finding after a trial that redemption data on Supplemental Nutrition Assistance Program beneficiaries was not protected by **Exemption 4 (confidential business information)** because its disclosure would not cause substantial competitive harm to small grocery stores. More than five years ago, the *Argus Leader* requested the redemption data. After the Department of Agriculture refused its request, claiming that **Exemption 3 (other statutes)** applied to the data, the newspaper sued in the U.S. District Court for the District of South Dakota. The trial court ruled in favor of the agency, but the Eighth Circuit reversed, finding that by its terms the cited statute did not apply to the redemption data. The case was remanded back to the district court, where the agency then argued that the data was protected by Exemption 4. After holding a rare FOIA trial, the district court concluded that the agency had not shown that disclosure of the redemption data would cause grocers substantial competitive harm and ordered the agency to disclose the data. The agency chose not to appeal that decision, but the Food Marketing Institute, a trade association, intervened to challenge the district court's ruling on appeal. This time, the Eighth Circuit found no reason to reverse the district court's decision. The appeals court observed that "the evidence shows that releasing the contested data is likely to make these statistical models marginally more accurate. But the evidence does not support a finding that this marginal improvement in accuracy is likely to cause *substantial* competitive harm. The USDA's evidence showed only that more accurate information would allow grocery retailers to make better business decisions. If that were enough to invoke Exemption 4, commercial data would be exempt from disclosure any time it might prove useful in a competitive marketplace. A likelihood of commercial usefulness – without more – is not the same as the likelihood of substantial competitive harm." FMI argued that *Madel v. Dept of Justice*, 784 F. 3d 448 (8th Cir. 2015), in which the appeals court found that disclosure of data on pharmacies supplying oxycodone could reveal individual pharmacies' market share, applied here as well. But the appeals court noted that "in *Madel*, the data in question were sufficiently specific that their release was likely to provide a tangible competitive advantage. The contested data in this case, by contrast, are more general and add little to the information already available to retailers." (*Argus Leader Media v. United States Department Agriculture, et al*, No. 17-1346, U.S. Court of Appeals for the Eighth Circuit, May 8)

A federal court in Michigan has ruled that Jodi Hohman is not entitled to **attorney's fees** for her suit against the IRS because she did not substantially prevail. Hohman requested her tax records and the agency told her that it was unable to respond within 20 days. After Hohman sued, the IRS told the court it could disclose Hohman's records by January 6, 2017, which it did. Hohman then claimed she was entitled to attorney's fees. The court disagreed, noting that "Hohman did not substantially prevail because the filing of the complaint was not reasonably necessary to obtain the requested records." The court explained that "a disclosure specialist began processing Hohman's request within a week of receipt. The IRS notified Hohman that it needed more time to locate responsive records and process her request. Moreover, contrary to Hohman's argument, the letter clearly indicated that the IRS was not denying the request. Rather, the IRS said it needed additional time because of the size of Hohman's request. This

does not justify an award of attorney's fees." The court rejected Hohman's claim that its order memorializing the IRS's intention to disclose Hohman's records by January 6, 2017 was a change in the agency's position. Instead, the court observed that "that order simply memorialized a representation made by the IRS's counsel that it could produce the documents by January 6, 2017. That order was not a decision on the merits. If the IRS had declined to produce documents by January 6, 2017, the Court would have required the parties to brief the merits of the case before requiring the IRS to disclose all responsive documents." (*Jodi C. Hohman v. Internal Revenue Service, et al.*, Civil Action No. 16-13282, U.S. District Court for the Eastern District of Michigan, May 16)