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In this Issue

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Washington Focus: In a blog post for the Washington Monthly, web editor Martin Longman looks at the new realities of preserving records under the Presidential Records Act posed by the Trump administration. Commenting on the challenges, Longman notes that "unfortunately for these record-keepers, Donald Trump came into the presidency with a habit of tearing up any document that displeased him or that he considered no longer of any use. So, the job of collating presidential records quickly became more like a third-grade art class." Two records analysts at the White House, who were summarily fired, told Longman that they were required to piece together shredded documents using Scotch tape. Longman observes that "several decades from now, historians and ordinary citizens will be sifting through the Trump administration's records, just as they often look back today at the records of JFK, Johnson, and Nixon. What they'll see is a lot of documents that have been pieced back together with Scotch tape."

Court Accepts DOJ Exemption Claims, But Finds Them Overbroad

Judge Randolph Contreras has ruled that while the Justice Department properly invoked Exemption 4 (confidential business information), Exemption 5 (privileges), Exemption 6 (invasion of privacy), and Exemption 7(C) (invasion of privacy concerning law enforcement records) to protect records submitted by a third-party monitor overseeing a plea agreement with A.G. Siemens for violations of the Foreign Corrupt Practices Act, he found many of its claims had not been sufficiently supported. The case involved a request by 100Reporters, an investigative reporting organization, for records concerning the plea agreement and its implementation. Contreras previously ruled that Siemens and Theodore Waigel, the monitor hired by the company and approved by the agency to oversee the plea agreement, could intervene to make its own confidentiality claims. Having decided that Siemens and Waigel could intervene, Contreras now dealt with the agency's exemption claims, including an *in camera* review of one work plan and one annual report prepared by Waigel. Although Contreras had accepted the agency's Exemption 4 claims in

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principle in his previous decision, he found after his *in camera* review that may of its claims were overbroad because many of the records claimed to be confidential did not deal with commercial operations.

Except for a section entitled "Countries of Interest," Contreras found that the sample work plan did not contain commercial information. He pointed out that "unlike the types of information held to be commercial in this Circuit's more expansive reading of Exemption 4, for instance letters describing market conditions or 'documentation of the health and safety experience of [a company's products],' the descriptions of the Monitor's activities do not elaborate on Siemens' business or describe its competitive landscape. The Monitor's process and methodology are not 'instrumental' to Siemens' commercial interests, and therefore do not fall within the scope of Exemption 4." He told DOJ to review the Exemption 4 claims for those records not reviewed *in camera* and to redact them consistently with his guidance concerning the Exemption 4 claims for the records reviewed *in camera*.

Turning to the agency's Exemption 5 claims, Contreras found that although DOJ had sufficiently explained the deliberative nature of its claims, upon review he concluded that many records were neither pre-decisional nor deliberative. He rejected 100Reporters' claim that the agency had failed to show the decision-making authority of all DOJ recipients. He noted that "DOJ need only provide the Court 'enough information to determine whether the deliberative process privilege applies.' 100Reporters cites to no case holding that DOJ must go beyond this standard, which it has met by describing the decision-making authority of the documents' most senior recipients."

Contreras then found that while draft materials were predecisional, the final work plans were not. He pointed out that "under DOJ's characterization of the deliberative process at issue – evaluating whether each Work Plan was appropriate to carry out the plea agreement's mandate – each final Work Plan *was* the final agency document representing DOJ's sub-decision and laying out its information-gathering framework going forward. Such final agency documents are not predecisional." He added that "the final Work Plans dictated DOJ's steps to compile information that it would then use in its decision-making process. Accordingly, they were not deliberative with respect to DOJ's evaluation of Siemens."

Contreras agreed with the agency's claim that failure to protect Siemens' confidentiality might well lead to a diminution in the quality of information. He pointed out that "if monitored companies are not as forthcoming with information in the future, agency decision makers will be forced to rely on lower-quality information. Impairment of the quality of agency decision making weighs in favor of withholding material under FOIA Exemption 4, but courts in this district have also taken that consideration into account when evaluating deliberative process withholdings."

Since DOJ had not supplemented its affidavits on it Exemption 6 and 7(C) claims, Contreras assessed the privacy interests for Siemens' employees, finding that non-executive employees and third parties had a substantial privacy interest, but that the monitorship team and Siemens executives did not. He pointed out that "private sector FCPA attorneys actively solicit monitorship business, and they advertise their participation in FCPA cases." He added that "because DOJ has failed to delineate the specific harm faced by the monitorship team from disclosure of their personal information, and because it has released the personal information of similarly-situated individuals, the privacy interests for this group are *de minimis*." Contreras found there was no public interest in disclosure of lower-level employees or third parties. He pointed out that "it is unclear exactly how the names and job titles of Siemens non-executives and third-party witnesses would shed light on DOJ's performance about and beyond other available information." (*100Reporters, LLC v. United States Department of Justice*, Civil Action No. 14-1264 (RC), U.S. District Court for the District of Columbia, June 13)

Views from the States…

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

Pennsylvania

A court of appeals has ruled that the Office of Open Records properly upheld exemption claims made by the Department of Human Services finding that records concerning negotiations with a selected offeror for the Physical HealthChoices Program were protected until a contract had been awarded. UnitedHealthcare, an unsuccessful bidder for the contract, filed two multi-part requests with DHS for records the company wanted to use to support its bid protest. The agency disclosed some records, but withheld a number of records under the exemption for contract negotiations and another exemption covering procurement records. UnitedHealthcare filed a complaint with OOR, which upheld the agency's exemption claims. UnitedHealthcare argued that the contract award exemption did not apply after a bidder had been selected, and its bid protest would be futile if it could not access records pertaining to the bid award. Noting that this was an issue of first impression, the appeals court concluded that "the General Assembly intended the phrase 'award of the contract' for purposes of [the exemption] to mean the execution of the contract, not the selection of offerors. This interpretation is the most logical when read in conjunction with the relevant provisions of the Procurement Code. This interpretation also furthers the purpose of [the exemption] to foster competitive bidding until a contract is awarded." The court also agreed with OOR that the agency's affidavits sufficiently explained the nature of the withheld records. (*UnitedHealthcare of Pennsylvania, Inc. v. Pennsylvania Department of Human Services*, No. 348 C.D. 2017 and No. 534 C.D. 2017, Pennsylvania Commonwealth Court, May 31)

In an unpublished companion decision involving a challenge by UnitedHealthcare to the Office of Open Records' rejection of its complaint filed in relation to another request, the court of appeals has ruled that the Department of Human Services properly interpreted the request and properly applied the non-criminal investigation exemption to withhold nine emails from the Office of the Inspector General to DHS attorneys, but that more generalized exemption claims are currently too vague for the court to rule. UnitedHealthcare submitted a request to DHS for records concerning the evaluation of the proposals for a healthcare contract. After it was dissatisfied with the agency's response, UnitedHealthcare filed a complaint with OOR, which upheld the agency's response. The court of appeals found that the agency had properly interpreted the request for evaluation records. But the appeals court noted that the agency's description of records withheld was too vague. The appeals court pointed out that "although the [affidavits] refer to certain categories of documents, such as the offerors' proposals and scoring and evaluation sheets, which are clearly exempt, the affidavits do not sufficiently describe or identify other types of documents responsive to the Request. Without a description of the particular documents withheld, other than DHS's interpretation that the documents *related to* the proposals and evaluation records, this Court is unable to assess whether *all* documents responsive to the Request qualify for exemption and non-production." (*UnitedHealthcare of Pennsylvania, Inc. v. Pennsylvania Department of Human Services*, No. 824 C.D. 2017, Pennsylvania Commonwealth Court, May 31)

Washington

The supreme court has ruled that a trial court erred when it used the standard in the Uniform Trade Secrets Act rather than the standard contained in the Public Records Act when it enjoined the City of Seattle from disclosing non-identifying information from the ride-sharing companies Lyft and Raiser, which was collected by the City under an agreement promising the companies confidentiality consistent with the

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requirements of the PRA. Jeff Kirk, a Texas resident who collected data about the use of taxis from Seattle and other cities to determine whether such services were using discriminatory redlining practices, requested the Lyft and Raiser zip code data as well. Lyft and Raiser asked a trial court for an injunction, arguing that the information constituted a trade secret under the UTSA. After finding the data qualified as a trade secret under the UTSA, the trial court granted a permanent injunction. Seattle appealed the decision to the supreme court. The supreme court recognized that the data qualified as a trade secret under the UTSA, which protects companies from misappropriation by other companies, but that whether trade secret information was exempt from disclosure pursuant to a public records request was a separate issue that required analysis through the PRA. The supreme court noted that "PRA exemptions are recognized through operation of the PRA, not outside it. The UTSA may not be invoked to carve out trade secrets from application of PRA procedural provisions. As is clear from the fact that L/R initially sought injunctive relief under [the PRA], this is a PRA case and not a trade secrets case." The court explained that "the UTSA addresses misappropriation, threatened misappropriation, and related tort claims and contemplates unfair competition among private actors; it does not address public disclosure laws. Once records that comprise trade secrets are deemed important enough to warrant collection by agencies for public purposes, additional considerations of public interest pertain." The court pointed out that "while the [trial] court acknowledged the public interest in data that might evidence redlining, it erroneously concluded that the public could trust the City to adequately police redlining using zip code reports, obviating the need for public disclosure. This conclusion ignores the core policy underlying the PRA [that the people do not yield their sovereignty to the government]. Further consideration of the public interest element is required, and we remand to the trial court to evaluate all of the facts in light of the PRA's requirement that disclosure 'may be enjoined' only when 'clearly not. . .in the public interest.'" (*Lyft, Inc. and Rasier, LLC v. City of Seattle and Jeff Kirk*, No. 94026-6, Washington Supreme Court, May 31)

The Federal Courts…

Judge Christopher Cooper has ruled that the CIA must conduct a **search** of its operational records because they fall within an exception to the CIA Operations Act and that the Department of State's search for passport records issued to one of two CIA agents under two pseudonyms was too restricted. David Talbot, an investigative journalist researching the assassination of President John F. Kennedy, sent requests to the CIA and the State Department for records concerning passports and visas issued to two former CIA agents, William King Harvey, and F. Mark Wyatt from January 1950 to July 1, 1976, including any photographs of either agent. The CIA withheld some records under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. The agency also cited the CIA Operations Act for declining to search to its operational files. Both agencies also redacted information under **Exemption 6 (invasion of privacy)**. The State Department searched for passport records on Harvey and Wyatt using their names and birthdates, and for two pseudonyms used by Harvey that Talbot had provided the agency, along with Harvey's actual birthdate. The agency found ten documents pertaining to Wyatt, but none pertaining to Harvey. Talbot challenged the agency's search for not including employment or personnel records related to employees receiving "special passports." Cooper rejected the claim, noting that "but as the Department notes, Talbot's request was for *passport and visa records* pertaining to Wyatt and Harvey, not for any records or even for any employment or personnel records. The Department does not typically create or maintain records on visas that Americans receive from foreign countries – those are housed with the foreign country authorizing the visa. As to passport records, the Department has explained why the locations searched – the electronic and paper records of the office responsible for processing and issuing passports to U.S. citizens – were the logical places to find any responsive records." Talbot faulted the agency for limiting its search for passports issued under Harvey's two pseudonyms to Harvey's actual birthdate. Here, Cooper agreed with Talbot, noting that "it strikes the Court as unlikely that a CIA officer using a pseudonym would list his real birthdate with the false name rather than a

false birthdate. The Department's declarations offer nothing to support a contrary conclusion. The Court therefore concludes that the Department's search for only records reflecting Harvey's actual birthdate was too narrow." State redacted identifying information about Wyatt's minor children. The agency also redacted identifying information about agency employees who had processed Wyatt's passports, arguing that they could be subject to harassment and threats if identified. Cooper noted that "while these concerns strike the Court as somewhat attenuated, Talbot has pointed to little value that would be gained by knowing the specific civil servants involved in the processing of the passports beyond what was already disclosed by the released redacted records." The CIA searched its personnel files, finding records on Harvey, but not on Wyatt. The search indicated that Wyatt's archived file had been requested by the staff of the Office of Human Resources but was never returned. While Talbot challenged the adequacy of the agency's search, Cooper found the agency had sufficiently explained why it could not locate Wyatt's files. Talbot argued that an exception to the CIA Operations Act requiring the CIA to search for operational records pertaining to matters of congressional investigation applied since Harvey had testified before the Senate Select Committee on Intelligence, known as the Church Committee about CIA operations to overthrow Fidel Castro. Cooper observed that 'given the Church Committee's interest in Harvey, it seems clear that it would have considered records reflecting his TDY travel and station or base assignment (both subjects of Talbot's request) with respect to the specific operations at issue central to its investigation. . .The Court therefore concludes that a specific, narrow subset of the possible requested records in operational files – those that would relate to Operation Mongoose or the Castro assassination plot, during the time period of November 1961to June 1963 – fall within the exception to 50 U.S.C.§ 3141(c) and are not categorically exempt from FOIA." Talbot argued that the agency had not shown that the disclosure of records withheld under the National Security Act would be unauthorized. Cooper rejected the claim, pointing out that "the mere fact that information is not classified does not mean that disclosure of the information is automatically authorized. [Further,] if the disclosure of unclassified information pursuant to a valid FOIA request is necessarily authorized, then any protection accorded by the National Security Act under Exemption 3 would be co-extensive with Exemption 1's protection for classified information." He observed that "ultimately, the question the Court confronts here is whether the information at issue would disclose intelligence methods and sources. [The agency's] declarations adequately attest that it would." (*David Talbot v. U.S. Department of State, et al.*, Civil Action No. 17-0588 (CRC), U.S. District Court for the District of Columbia, June 7)

Judge Beryl Howell has ruled that PEER's two-part request for documents relied upon by EPA Administrator Scott Pruitt in stating that humans were not primarily responsible for climate change is **sufficiently descriptive for the agency to conduct a search**. After PEER filed suit against the EPA for failing to respond to its request for records Pruitt relied upon for making the statement during an interview with CNBC, the agency told Howell it was willing to search for briefing materials provided to Pruitt, but that it considered the second part of PEER's request for records supporting Pruitt's statements to "not be a proper request under FOIA." In response, PEER declined to modify its request, arguing that the request was appropriate. The agency argued that PEER was asking it to divine Pruitt's beliefs. Howell disagreed, noting that "nothing in the FOIA request seeks information 'about Administrator Pruitt's beliefs or how they were formed.' Instead, the FOIA request appropriately targets for disclosure agency records that EPA's Administrator relied on, whether or not those records reflect his personal beliefs or the conclusions he publicly articulated on March 9, 2017, about the cause of climate change." Howell sharply criticized the agency's current position that it would not search for briefing materials unless PEER dropped the other part of its request for records supporting Pruitt's statement. She pointed out that "the problem here is not the plaintiff's refusal to make additional modifications to the FOIA request, but EPA's demand for specific modifications as a condition for any response." She observed that 'EPA's obligation to respond to the request, which the agency concedes it could do, is not conditional." Howell acknowledged the provision in FOIA encouraging

agencies to negotiate with requesters to make requests more manageable but explained that the provision only went to the issue of delay, not the issue of whether or not the agency had to process the request. She pointed out that "EPA's efforts to confer with plaintiff to downsize the scope of the FOIA request at issue is statutorily sanctioned and even encouraged, but the plaintiff's refusal to drop the second part of the FOIA request does not excuse the agency from conducting a search and responding to the request in full." Howell was puzzled by the agency's reluctance to take a position on climate change since it had already argued before the Supreme Court that humans were primarily responsible for climate change. Instead, she noted that "the FOIA request at issue may be viewed as seeking agency records underpinning a potential change signaled by Administrator Pruitt's March 9, 2017, public statements." Howell indicated that the EPA was construing the second part of the request "far more broadly than the text supports in a thinly veiled effort to make the request more complex and burdensome than it is. The plaintiff is not seeking any agency records 'that broadly discusses the relationship between air pollution and climate change' . . .but only 'documents that explicitly draw a conclusion on that subject.' Howell rejected the agency's reliance on *Yagman v. Pompeo*, 868 F.3d 1075 (9th Cir. 2017), where the Ninth Circuit had found the CIA was not required to identify the "we" referred to by President Obama in a remark about U.S. responsibility for torture. Instead, she observed that "the *Yagman* Court specifically rejected the same argument asserted by EPA here – that a FOIA request for records serving as the basis for a public official's statement was an inappropriate FOIA request." She dismissed EPA's undue burden argument as well. She noted that "this assertion is predicated on an incorrect and overly broad construction of the second part of the FOIA request." (*Public Employees for Environmental Responsibility v. U.S. Environmental Protection Agency*, Civil Action No. 17-652 (BAH), U.S. District Court for the District of Columbia, June 1)

Judge Beryl Howell has ruled that the government has not shown that 18 FOIA requests filed by American Oversight to cabinet-level departments for information about Trump administration political appointees should be **severed** into individual suits. Howell pointed out that the 18 requests were follow-up requests to earlier requests to each of the agencies that had resulted in disclosure of some records for an earlier date range, and that the date ranges in the second round of requests varied depending on the date range produced as a result of the first round of requests. Instead of defending the consolidated agencies, the government asked Howell to sever the cases under Federal Rule of Procedure 21. The government claimed that it would be deprived of individual filing fees if the cases were not severed. Howell indicated that "the government's concern that, without severance, the 'U.S. court system' will be 'deprived. . .of thousands of dollars in filing fees' is simply not the measure of whether severance is warranted." She observed that "the Court is mindful that, if the government's view were adopted, the increased expense to the plaintiff of pursuing FOIA litigation against each federal agency to which the plaintiff submitted virtually identical record requests, could have the effect of suppressing the plaintiff's exercise of its statutory rights to enforce the FOIA against recalcitrant agencies." The government also argued that AO's claims did not arise from the same transaction or occurrence. Howell disagreed. She noted that "contrary to the defendants' view, any differences in the FOIA requests to each defendant agency are minor, and any timing differences in the responses by defendant agencies may be appropriately monitored by the Court in a single action." The government asserted that the cases should be severed because there was no commonality of facts. Again, Howell disagreed, observing that "plainly, in view of the fact that the plaintiff's FOIA requests to each agency seek the same types of records, each defendant agency is likely to invoke the same exemptions to justify any withholding, resolution of any challenge to which will raise common legal and factual questions. Indeed, to the extent differences exist in the justification offered by different agencies for withholdings, presentation of such differences in the same case will be helpful in clarifying the law in application of the exemptions." The government argued that the consolidated case could only proceed at the speed of the slowest agency. While Howell recognized that concern, she pointed out that "the speed with which some defendant agencies comply with their FOIA obligations may serve to spur their co-defendant agencies to perform at a faster pace, and, thereby, in the end, result in speedier resolution of all of the plaintiff's claims. More importantly, severance

makes little sense from a judicial efficiency perspective." (*American Oversight v. U.S. Department of Veterans Affairs, et al.*, Civil Action No. 18-656 (BAH), U.S. District Court for the District of Columbia, June 2)

After conservative groups expressed concern over the influence of the Craig memorandum issued by then White House Counsel Greg Craig at the beginning of the Obama administration – encouraging agencies to consult with the White House when records requested under FOIA pertained to White House equities as well – Judge Emmet Sullivan has ruled that the IRS conducted an **adequate search** when its search yielded no records documenting White House influence over the agency's FOIA operations. The agency interpreted Cause of Action's request as "seeking records reflecting communications between the IRS FOIA staff, or Chief Counsel, and the White House Counsel's office, relating to records forwarded by the IRS FOIA staff, or Chief Counsel, to the White House Counsel's office to review before such records are provided to Congress, GAO or FOIA requesters." Based on its interpretation, the agency searched the Office of the Chief Counsel, the Executive Secretariat Correspondence Office, and the Office of Disclosure using relevant keywords. Nearly two years after Cause of Action had submitted its request, the agency provided its final response, indicating that it had found no responsive records. Cause of Action's FOIA requests to 11 other agencies for similar records all yielded some responsive records. Cause of Action challenged the adequacy of the agency's search, arguing that the agency improperly limited the time frame of its search to the date mentioned in Cause of Action's request rather than searching from the time when the search was conducted. Sullivan sided with the agency, noting that "given that the IRS's cut-off date was communicated to Cause of Action during the agency's negotiations with plaintiff, and given Cause of Action's failure to object to the IRS's temporal limitation, there is no indication that the IRS improperly limited the scope of its searches under these circumstances." Cause of Action contended that the agency should have searched is correspondence files more broadly. However, Sullivan observed that "Cause of Action only requested communications between the White House and 'IRS FOIA staff or IRS Chief Counsel's office' – and not the Commissioner or others whose correspondence is handled by ESCO." Cause of Action also claimed the agency should have searched the email accounts of all employees in its Office of Disclosure. Sullivan disagreed, pointing out that "whether the IRS was required to search the individual email accounts of each employee in the Office of Disclosure depends on whether such a search was reasonably necessary to discover documents requested by Cause of Action's FOIA request. As the IRS's declarations make clear, the agency determined that searching employee emails was unnecessary in light of Deputy Associate Director Davis's representation that he was not aware of any consultations between the Office of Disclosure and the White House Counsel's Office with respect to FOIA requests. By insisting that the IRS was required to search each employee's individual email account, Cause of Action misunderstands the standard for adequacy of an agency's search under FOIA. An agency is only required to show that 'it has conducted a search *reasonably* calculated to uncover all relevant documents.'" Sullivan also rejected Cause of Action's assertion that the agency should have included acronyms for the White House Counsel's Office in its search. He observed that "the IRS notes that the acronyms 'OHWC' and "WHO' do not appear anywhere in plaintiff's FOIA request, and plaintiff does not explain why these acronyms were 'obvious' search terms whose omission made the agency's search deficient." (*Cause of Action Institute v. Internal Revenue Service*, Civil Action No 14-1407 (EGS), U.S. District Court for the District of Columbia, June 12)

Judge Amit Mehta has ruled that Andritz, Inc. may not intervene in a **reverse-FOIA** suit brought by Poet Design & Construction, Inc. to block disclosure of a contract awarded to Poet by the Department of Energy since because Andritz did not request the records itself it does not have **standing** to intervene. Instead, the law firm of Kilpatrick Townsend & Stockton made the FOIA request without identifying Andritz as its client. Andritz argued that Poet was aware that Andritz was the real requester because Poet identified Andritz as the actual requester when it filed its reverse-FOIA suit. Mehta pointed out that was irrelevant, noting that

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"Plaintiff cannot confer standing upon Andritz when it otherwise does not exist. So, the fact that Plaintiff repeatedly states that Andritz is the true FOIA requester does not open the door to Andritz entering this litigation. Andritz did not submit the FOIA request, and its counsel did not identify Andritz as his client. Therefore, Andritz lacks standing to intervene." Andritz attempted to distinguish its suit from other cases in which courts have ruled that the named requester was the only party that had the right to sue, pointing out that those cases had been brought against the agency and that here DOE had not taken any position. Mehta noted that "this is a distinction without a difference. . .Like Plaintiff, DOE is a party to this action. Thus, DOE's silence in this litigation cannot create standing where none exists. Once more, the question is whether Andritz's counsel identified Andritz as his client when making the FOIA request. The undisputed fact is that he did not. Therefore, Andritz has no standing to intervene in this matter." (*Poet Design & Construction, Inc. v. U.S. Department of Energy*, Civil No. 18-00857 (APM), U.S. District Court for the District of Columbia, June 5)

Judge Rosemary Collyer has ruled that the FBI properly redacted portion of six records under **Exemption 3 (other statutes), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)** in response to a FOIA request submitted by David Marck, an attorney representing Mark and Anne Cocchiola, for records on Mark Cocchiola and 12 other individuals, as well as 18 companies. The FBI processed 6,674 responsive pages and disclosed 2,278 pages. By the time Collyer ruled, Marck was only contesting the exemption claims for the six records. The FBI withheld information about a third-party individual who was subpoenaed to appear before a grand jury. Marck argued that he already knew the individual's identity. Collyer explained that was irrelevant, noting that "the fact that Mr. Marck believes he already knows the name of the third-party individual whose identity is being protected does not remove the mandatory protections provided to grand jury information." Collyer agreed that an individual whose identity had been withheld under Exemption 7(D) had received an implicit grant of confidentiality. She observed that the agency's affidavit "specifically describes the close relationship between the source and the target, explaining that the source was 'in a position to have ready access to and/or knowledge about targets and others involved in fraudulent activities.'" She added that "the source was subpoenaed to testify before the grand jury, which supports a finding of implied confidentiality to the pre-subpoena information he gave to the FBI." (*David J. Marck v. Department of Health and Human Services, et al.*, Civil Action No. 15-10 (RMC), U.S. District Court for the District of Columbia, June 5)

Clarifying which of David Linder's multiple FOIA requests to EOUSA were actually before the court, Judge Trevor McFadden has ruled the agency has so far failed to show that it conducted an **adequate search** as to one of Linder's broader requests pertaining to Linder's conviction on drug charges or that it properly applied **Exemption 6 (invasion of privacy)** or **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The agency located 1,500 responsive pages and told Linder that duplication costs would be $70. Instead, Linder requested that the search be discontinued and that the agency disclose the first 100 pages without cost. Ultimately, the agency disclosed 453 pages in full and 49 pages in part. Linder argued that the agency had improperly charged him $70 to cover the duplication costs. McFadden noted, however, that "it does not appear that EOUSA charged him for duplication of the 502 pages released to him through request 2015-02765. While it is undisputed that Mr. Linder previously paid a $70 fee, it was not for request 2015-02765." McFadden faulted the agency's search, noting that the U.S. Attorney's Office in Norfolk explained that it had "conducted a search and identified approximately 1,500 pages potentially responsive to Mr. Linder's request, after which the office provided the EOUSA with 502 pages of responsive records. . .The declaration does not specify why the district's initial estimate of 1,500 pages potentially responsive to Mr. Linder's request resulted in providing 502 pages – a third of the initial estimate – to the EOUSA (which were subsequently provided to Mr. Linder). The declaration's lack of 'specificity' is insufficient to merit summary judgment." McFadden also found the agency's exemption claims wanting. He pointed out that "although EOUSA dedicates several pages to describing the exemptions generally, it does not

justify why the exemptions are relevant and warranted as to the 49 pages released with redactions." (*David W. Linder v. Executive Office for United States Attorneys*, Civil Action No. 16-02039 (TNM), U.S. District Court for the District of Columbia, June 8)

Judge James Boasberg has ruled that the Department of Housing and Urban Development conducted an **adequate search** for records concerning the cancellation of Keith Laverpool's Federal Housing Administration insurance policy, which led to the foreclosure of his house. The agency located and disclosed 144 pages but was unable to find any records dealing with the cancellation of Laverpool's insurance policy. Although the agency disclosed the contents of Laverpool's FHA file, he challenged the adequacy of the agency's search because it did not turn up information about the cancellation of his policy. Boasberg observed that "the central point Laverpool appears to be urging here – and the motivator for his FOIA requests in the first place – is that he himself never canceled his FHA insurance. He seems to wish to obtain a document showing who canceled it, and how, which, the Court assumes, he believes may be helpful in demonstrating that there may have been an error in his foreclosure proceedings. [The agency], however, took the extra step – not required by FOIA, which mandates only the release of documents, not the answers to requesters' questions – of elucidating this issue. . .To the extent that 'information' does not include signed paperwork, the Government explains that this is because in 2013 'there was no HUD policy requiring that the cancellation be in writing.'" Boasberg added that 'while it is understandable that Plaintiff may be dissatisfied that he cannot locate the document he seeks, the Government has sufficiently articulated why it likely does not exist. Agencies, in any event are judged not on the specific documents that they produce but on whether the search was 'reasonably calculated to uncover all relevant documents.'" (*Keith Laverpool v. Department of Housing and Urban Development*, No. 18-284 (JEB), U.S. District Court for the District of Columbia, June 8)

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