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Washington Focus: Both GAO and openthegovernment.org have released reports surveying the current state of FOIA implementation. Of the 18 agencies surveyed by GAO, all of them had adopted best practices by updating response letters to inform requesters of their right to contact the agency's FOIA public liaison, implemented request tracking systems, and provided training to FOIA personnel. Fifteen agencies had updated online access to frequently requested records, while 12 agencies had identified Chief FOIA officers and updated their FOIA regulations. Steve Aftergood of Secrecy News noted that GAO had also identified 237 statutes claimed by agencies as qualifying under Exemption 3, but that since 2010 agencies had only used 75 of those statutes. Openthegovernment.org focused on intelligence agencies, noting that the CIA spent $2.5 million in litigation, more than the amount spent by NSA, the Defense Intelligence Agency, the Army, the Navy, and the Office of the Director of National Intelligence combined. Openthegovernment.org also pointed out that the number of requests denied by the CIA because of pending litigation had doubled since 2015.

Court Finds NIH Review Did Not Yield Policy Changes

Judge Reggie Walton's ruling that the National Institute of Health conducted an adequate search for records concerning a 2007 review of the operations of the Department of Spiritual Ministry and properly withheld records under Exemption 5 (privileges) provides an illustration that while individual employees may remember episodes in their government careers as terribly important, unless such episodes produce tangible change in an agency's policies, they may seem far less important than they did to their participants. Here, Henry Heffernan, who served as the Roman Catholic priest in NIH's Department Spiritual Ministry and participated in the 2007 review before retiring in 2013, requested records about the review and its implementation. The agency initially sent Heffernan an interim response of 35 pages, eventually providing 614 pages with redactions made under Exemption 5 and Exemption 6 (invasion of privacy). Heffernan then filed suit, insisting that there must be more.

For the most part, however, Walton found that the agency's search had been adequate and that Heffernan's personal belief that more records must exist did not count for much. Over the course of the litigation, the agency provided three separate *Vaughn* indices, and with only two exceptions, Walton found the agencies' affidavits provided a thorough description of how and why it conducted its searches. What primarily bothered Heffernan as a participant was the lack of any polices implemented as a result of the review. But Walton pointed out that "the issue the Court must resolve is whether the defendant's search for the requested policies was adequate, not whether those policies in fact exist. Consequently, contrary to the plaintiff's proposition that these policies must exist, the plaintiff's conjecture and speculative arguments that policies must have been adopted have not been produced has no bearing on the Court's determination of whether the defendant's search was adequate. In any event, John M. Pollack, the Chief of the Spiritual Care Department, affirmed that 'no new policies were put into practice as a result of the 2007 operational review.'"

The agency explained that the Spiritual Care Department's policies and guidelines were housed in a policy book within the department. Accepting the agency's explanation, Walton noted that "in fact, the defendant conducted multiple searches of the Spiritual Care Department's policy book, the only place likely to contain the Clinical Care policies sought by the plaintiff. And the defendant went beyond the policy book, searching electronic files using reasonably tailored search terms and paper files of employees likely to possess the policies sought by the plaintiff." Heffernan suggested that the agency had not used keyword searches most likely to find responsive records. Walton pointed out that agencies had wide discretion in crafting search terms and noted that "there is no indication that the plaintiff requested the defendant to employ [specific] search terms either in his FOIA request or subsequent negotiations regarding the defendant's searches for responsive records." Walton observed that "although the defendant does not explain why it selected the search terms it used, the Court nonetheless finds the search terms that were employed were reasonable."

Heffernan questioned why the agency had failed to locate a specific 2007 PowerPoint presentation. Instead, the agency located a two-page PowerPoint presentation and a 21-page PowerPoint presentation with redactions, neither of which were the PowerPoint presentation Heffernan was seeking. Although Walton found that the fact that the agency had not located the PowerPoint Heffernan remembered from 2007 in sufficient to undercut the agency's search, he indicated that "defendant's declarations, taken together, do not provide the Court the minimum information needed for the Court to conclude that the defendant conducted a search 'reasonably calculated to uncover all relevant documents.' Although the defendant's declarations sufficiently identify the search terms used and the locations searched, they do not provide the requisite 'averment that all locations likely to contain responsive records were searched.'" Walton also found the agency had failed to adequately explain its search for a 2007 email sent by Pollack. In both instances, he allowed the agency to provide a supplemental affidavit sufficient to meet its burden of proof on the searches.

Heffernan challenged the agency's deliberative process privilege claims by arguing that he knew from his own experience while at NIH that the agency had fully intended to implement the policy recommendations that came out of the 2007 operational review. But Walton agreed with the agency that there was no evidence that any final decisions were ever made. He pointed out that "even though the SMD took initial steps regarding the potential implementation of changes based on these recommendations, those steps do not appear to have borne any fruit. Rather, the records suggest that those steps were nothing more than part of the SMD's deliberative process of determining whether changes to its policies and practices based on those recommendations were appropriate." He added that "there is no evidence that the SMD actually implemented actual changes to its policies or practices based on the Operational Review Team's final report or its recommendations."

The agency withheld a pre-final draft of a press release. Heffernan argued that the press release was not deliberative because it was not related to any policy change. Here, Walton agreed with Heffernan, noting that

"there is no indication as to what deliberative process the withheld pre-final draft press release concerned or the role in the formulation of policies or recommendations for policy change undertaken by the 2007 operational review." But as to a draft report, Walton found that "the Operational Review Team's pre-final draft reports are both pre-decisional and deliberative because they predate the preparation of the Operational Review Team's final report and they include recommendations and proposed changes to the SMD's existing policies." Finally, Walton found the agency had not sufficiently shown that it conducted an appropriate segregability analysis. (*Henry G. Heffernan v. Alex Azar*, Civil Action No. 15-2194 (RBW), U.S. District Court for the District of Columbia, June 27)

Views from the States…

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

Georgia

The supreme court has ruled that an appeals court erred when it found that the exemptions listed in the Open Records Act prohibited disclosure of all information that was not required to be disclosed. The Consumer Credit Research Foundation entered into a contract with the Kennesaw State University Research and Service Foundation under which Professor Jennifer Lewis Priestly would research the effects of payday loans on the health of their recipients. Priestly – but not KSU or the KSU foundation – entered into a confidentiality agreement with CCRF. Priestly published an article in December 2014. In June 2015, the Campaign for Accountability requested records of communications between Priestly and CCRF from Kennesaw State University. KSU indicated that it intended to disclose redacted records and CCRF filed suit to enjoin the disclosure. The trial court ruled in favor of CFA and the university, but the appeals court reversed, relying on *Bowers v. Shelton*, 453 S.E.2d 741 (1995), in which the supreme court noted in passing that once a record was found to fall within an exemption an agency was prohibited from disclosing it. However, the supreme court ruled that the appeals court had overread the passage in *Bowers*. Instead, the supreme court noted that "read naturally and reasonably, [the exemptions in the ORA] do not prohibit disclosure of records simply because those records are not required to be disclosed by a specific exemption from the ORA's general disclosure duty." CCRF argued that if the exemptions did not prohibit disclosure of records that fell within their parameters, then such an exemption as the one providing for confidentiality of records protected by federal statute or regulation could be legally disclosed. The court, however, observed that [the exemption] "does not prohibit disclosure of the records to which it applies, so an agency that decides to release documents that a federal statute or regulation requires to be kept confidential would not violate the *Open Records Act*. The agency would, however, violate the *federal statute or regulation*. The fact that the Georgia statute does not add an *extra* prohibition on top of the federal statute or regulation does not create any conflict or inconsistency with the federal law." The supreme court pointed out that the reference to "certain information" in *Bowers* referred only to those records that were actually exempt, not those that only fell within an exemption, noting that under this interpretation "*Bowers'* statement does not contradict the plain language of the current [ORA]." But the supreme court indicated that the part of *Bowers* allowing an affected party to sue to enjoin disclosure was still good law. As to this portion of *Bowers*, the supreme court explained that "some provisions of the ORA expressly prohibit disclosure, so an action to enjoin disclosure of information covered by those provisions would be an action to enforce compliance with the ORA, which is expressly authorized by [the statute]." (*Campaign for Accountability v. Consumer Credit Research Foundation*, No. S17G1676 and No. S17G1677, Georgia Supreme Court, June 18)

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New Jersey

The supreme court has ruled that public bodies are not required to provide notification to employees who will be discussed at meetings, known as *Rice* notifications, to provide an opportunity for them to request an open or closed hearing unless the public body intends to consider adverse action against them. Further, the supreme court ruled that the requirement for public bodies to promptly issue minutes of meetings is not satisfied by waiting until the public body's next scheduled meeting. In a consolidated case against Kean University, the teachers' union and several faculty members sued the University, challenging its failure to provide *Rice* notices whenever employees were discussed and the board's policy of not publishing meeting minutes until they were approved at the next board meeting. The supreme court noted that *Rice*'s application was being stretched too far, pointing out that "the statute does not provide employees with a right to 'select the forum of the discussion,' as has been argued to us. Rather, it provides employees with the right to move a private discussion into the sunshine of a public discussion. The personnel exception's language is not applicable when a public entity already intends to take public action on a personnel matter implicating employees whose rights could be adversely affected by that action. Requiring *Rice* notices to employees when a public discussion is already planned so that the employees, if all agreed, could, in turn, insist that the discussion be public, at once defies logic and. . .imposes a greater burden on public entities than the Legislature envisioned under [the Open Public Meetings Act]." The supreme court rejected the plaintiffs' contention that routine discussion of action against employees was inadequate. The supreme court noted that "the OPMA does not contain a requirement about the robustness of the discussion that must take place on a topic. . . [T]he robustness of a debate on a particular item discussed in public session is not a topic addressed in the OPMA. It is beyond the existing requirements of the OPMA. If a discussion of a certain length or quality is to be mandated, the OPMA requires amendment by the Legislature, not by the courts." The supreme court rejected the University's claim that it could not disclose minute meetings until they were approved. Instead, the supreme court noted that "the delay that occurred here – the release of minutes for the September 2014 meeting in February 2015 – is unreasonable no matter the individual or combinations of excuses advanced by the Board." Without providing specific guidance, the supreme court indicated that public bodies needed to use technological advances that allowed publication shortly after a meeting took place. (*Kean Federation of Teachers v. Ada Morell*, No. 078926, New Jersey Supreme Court, June 21)

Washington

A court of appeals has ruled that emails sent by a faculty member at the University of Washington concerning his union activities are not public records subject to disclosure under the Public Records Act. The Freedom Foundation, an anti-union organization, requested communications sent by four faculty members to the Service Employees International Union Local 925. Robert Wood, one of the faculty members identified in the Freedom Foundation's request, located 3913 pages of emails, the vast majority of which consisted of emails sent to or from a listserv operated by the American Association of University Professors. The University told the Freedom Foundation that it was unable to determine whether or not the emails were public records. SEIU filed suit to block disclosure. The trial court allowed the union to review the records, which identified 102 pages as public records; the University then disclosed the 102 pages to the Freedom Foundation. The union then filed for a permanent injunction. The Freedom Foundation argued that the records were public because they were created by Wood at his workplace. Indicating that the supreme court's ruling in *Nissen v. Pierce County*, 357 P.3d 45 (2015), recognizing that records created on personal devices could qualify as agency records if they dealt with agency business, was relevant. Here, however, the appeals court noted that *Nissen* did not apply. The court pointed out that "the employees' communications do not fall within the scope of their employment, even if in the future, these efforts affect appointment, promotion, evaluation, tenure, or state budgets, as the Foundation proposes. Documents relating to faculty organizing and addressing

faculty concerns are not within the scope of employment, do not relate to UW's conduct of government or the performance of government functions, and thus are not 'public records' subject to disclosure." (*Service Employees International Union Local 925 v. University of Washington*, No. 76630-9-I, Washington Court of Appeals, Division 1, June 11)

Wisconsin

A court of appeals has ruled that Willis Hagen, a professor at the University of Wisconsin-Oshkosh, has not shown that disclosure of redacted records of closed investigations pertaining to him would constitute an invasion of privacy. The records were requested by reporter Alexander Nemec. The university concluded that no exemption applied to records of closed investigations and told Hagen that it planned to disclose the redacted records. Hagen then filed suit to block the disclosure. The trial court ruled against Hagen, who then appealed. The court of appeals agreed with the trial court. The appeals court noted that "this court has made clear, however, that once the investigation into possible misconduct by a public employee is completed, [the exemption for non-criminal investigations] does not exempt records of the investigation from disclosure." The court then rejected Hagen's public interest argument, pointing out that "Hagen's concern that release would have a chilling effect on attracting qualified candidates for future employment is 'remote – too remote to overcome the policy favoring disclosure of public records.'" The court observed that "releasing records relating to misconduct investigations is unlikely to discourage recruitment of good teachers. Indeed, it is as likely that current or prospective employees would view the release as appropriately transparent and favoring accessibility." (*Willis W. Hagen v. Board of Regents of the University of Wisconsin System, et al*, No. 2017-AP-2058-AC, Wisconsin Court of Appeals, June 20)

The Federal Courts…

The Seventh Circuit has ruled that the FDA conducted an **adequate search** and properly withheld records under **Exemption 4 (confidential business information), Exemption 5 (privileges)**, and **Exemption 6 (invasion of privacy)** in response to Donald Henson's multiple requests for records concerning a glucose monitoring system. The agency provided Henson with more than 8,000 pages of records concerning a specific glucose monitoring device. Henson was dissatisfied with the agency's response and filed suit. The district court ruled in favor of the agency and Henson appealed. Finding the search adequate, the Seventh Circuit noted that "the undisputed facts show here that the agency's search for responsive documents was reasonable." The court added that "Henson has no basis for suggesting that these [multiple searches] were not reasonable efforts to locate responsive documents to his many (and often repetitive) requests." Although neither the agency nor Henson filed the agency's *Vaughn* index with the district court, Henson argued it was improper for the district court to uphold the agency's exemption claims without actually reviewing the *Vaughn* index. But the Seventh Circuit observed that "this is an adversary process. Henson was in the better position to focus the judge on the contested issues. He had the ability to identify which redactions he believed were unsupported, rather than objecting generally, as though every entry in the *Vaughn* indices gave insufficient grounds for redaction. Rather than ask a busy district judge to examine documents or to parse the *Vaughn* indices as an original matter, it is better to put the burden on the plaintiff to identify with particularity the claims of exemption he was challenging, at least where the *Vaughn* indices appear facially adequate, as they do here." The Seventh Circuit explained that in the future *Vaughn* indices should be filed with the district court either by the agency or the requester. The appeals court observed that "if the plaintiff wishes to claim that the government has claimed inapplicable exemptions to disclosure, the plaintiff should identify specifically which ones are disputed." The appeals court upheld all of the agency's exemption claims. The agency withheld

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records on the materials used to manufacture the glucose monitor and its battery film under Exemption 4. The appeals court noted that "there is no evidence that the manufacturer of the glucose monitor disclosed the information that the agency redacted, nor is there evidence that the raw materials do not have economic value by virtue of remaining confidential. Because there is no evidence that the materials used to make the monitor and the battery film have been made public, there is no reason to doubt that substantial competitive harm could befall the manufacturer if that information were released to the public." (*J. Donald Henson, Sr. v. Department of Health and Human Services, et al.*, No. 17-1750, U.S. Court of Appeals for the Seventh Circuit, June 15)

A federal court in Indiana has ruled that the National Park Service Police have not shown that records of a 22-year-old triple murder are protected by **Exemption 7(A) (interference with ongoing investigation or proceeding), Exemption 7(C) (invasion of privacy concerning law enforcement records),** or **Exemption 7(E) (investigative methods and techniques)**, but upheld the FBI's claim that some records were protected by **Exemption 7(D) (confidential sources)**. Dustin Higgs, who was sentenced to death for the murders and is currently incarcerated at the federal penitentiary at Terre Haute, requested the records with the help of the Federal Community Defender's Office. The Park Police initially withheld the records entirely under Exemption 7(A), contending that Higgs' post-conviction appeal was still pending. After Higgs told the Park Police that his appeal has ended in 2004 when the Supreme Court denied certiorari, the agency processed his request. The agency located nine boxes of responsive records and disclosed 330 pages to Higgs, telling him it would continue to process the records. The Park Police referred records to the FBI, which withheld 806 pages. The Park Police identified 45 categories of documents in its *Vaughn* index, but Higgs only challenged 23 categories. Higgs argued that he already knew the identities of the confidential sources. The court found this irrelevant, noting that "Exemption 7(D) affords the government a broad law enforcement exception and [the FBI's affidavit] supports the application of this exception in this case." Turning to Exemption 7(C), the court agreed that "Mr. Higgs' allegations of government misconduct. . .implicate a broader public interest than government negligence or misconduct – his allegations concern the manner in which the Department of Justice carries out substantive law enforcement policy." But the court explained that "despite the passage of over two decades since the crime at issue was committed, [the FBI's affidavit] contains no analysis of whether the individuals whose privacy interests the Park Police now asserts are dead or alive." The court added that "it does not appear that the number of individuals is sufficiently high such that it would be unduly onerous to require the Park Police to demonstrate that those individuals are alive. Without such a demonstration, the Court cannot conduct the necessary balancing test required under Exemption 7(C). The Court therefore concludes that the Park Police has not met its burden under Exemption 7(C) through either the [FBI's affidavit] or the *Vaughn* Index. Given the prolonged history of this case, the Court will not give the Park Police a further opportunity to support its claim." The court ordered the government to produce unredacted versions of any records that were withheld only on the basis of Exemption 7(C). The court found the FBI had similarly failed to show why records in the NCIC database that were more than 20 years old continued to merit protection under Exemption 7(E). The court recognized that the D.C. Circuit in *Mayer Brown v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009), had set a low bar for claiming Exemption 7(E) but distinguished the case as applying specifically to tax evasion. The court found the Third Circuit's ruling in *Davin v. Dept of Justice*, 60 F.3d 1043 (3d Cir. 1995), much more persuasive, noting that "*Davin* recognizes that the passage of time rendered certain law enforcement techniques well-known or out of date. Indeed, given the significant technological strides that have occurred in law enforcement techniques over the last two decades, the Court is skeptical that an FBI file from the late 1990s contains information that would shape the conduct of murderers operating in 2018." The court observed that ballistics tests were a commonly known technique not covered by Exemption 7(E) and added that "there no indication that the 1986 Amendments to FOIA [which amended Exemption 7(E)] or any subsequent amendments justify withholding ballistics tests." The court also ordered the government to produce unredacted versions of those records withheld under Exemption 7(E). (*Dustin*

John Higgs v. United States Park Police, Civil Action No. 16-96-JMS-MJD, U.S. District Court for the Southern District of Indiana, June 25)

The D.C. Circuit has ruled that the FBI conducted an **adequate search** for records concerning deceased Internet activist Aaron Swartz and properly withheld records about its use of a commercial database under **Exemption 7(E) (investigative methods and techniques)**. Researcher Ryan Shapiro requested the FBI's records on Swartz, who committed suicide while awaiting a criminal trial for alleged unauthorized computer intrusions. After three opinions resulting in several searches and multiple exemption claims by the FBI, the district court ruled in favor of the agency. Shapiro appealed, challenging the adequacy of the agency's search and its use of Exemption 7(E). Shapiro argued the agency failed to disclose records in Serial 91, a file pertaining to Swartz's personal website. During oral arguments, the government said it would disclose Serial 91 to Shapiro. The FBI subsequently disclosed the file and the D.C. Circuit remanded that portion of the case back to the district court for any further proceedings. The agency had identified Accurint, a commercially-available database that provides public information from court records, as an investigative tool. Shapiro argued that the acknowledged use of the commercial database by the agency did not qualify as an investigative method or technique for purpose of Exemption 7(E). But the D.C. Circuit noted that "even if a database is available and its search terms are available to the public, the methods that the FBI uses to search the database and what results it considers meaningful from Accurint's large dataset can reveal law enforcement techniques and procedures." The court added that "though the capabilities of Accurint might be known to the public, the FBI's methods of managing the database are generally not known." Shapiro contended that the district court had erred in allowing the agency to withhold two records because they were duplicates. The D.C. Circuit disagreed, pointing out that 'even if the district court mistakenly assumed that [the two disputed records] were duplicates, that does not alter the outcome of the analysis. The district court determined that the FBI's redactions under Exemptions 6 and 7(C) were personal information associated with a law enforcement investigation and that disclosing the personal information 'would constitute an unwarranted invasion of privacy.' The district court's analysis is as applicable to [the duplicates] as it is to the other redacted or withheld documents under these FOIA exemptions." (*Ryan Noah Shapiro v. United States Department of Justice*, No. 17-5122, U.S. Court of Appeals for the District of Columbia Circuit, June 26)

A federal court in New York has ruled that The Century Foundation is not entitled to **attorney's fees** because its FOIA suit did not cause the Department of Education to disclose documents TCF needed to provide public comments concerning the performance of accrediting agencies. Although the agency had told commenters that their comments were required to be based on compliance reports, it failed to make the compliance reports publicly available. After TCF realized that it could not comment without first reviewing the compliance reports, it filed suit under the APA to force the agency to extend the comment period. It also requested the compliance reports under FOIA. Judge Paul Crotty granted TCF a temporary restraining order to allow it time to provide comments, but denied TCF's motion for a preliminary injunction since the organization had been able to comment. TCF then filed for attorney's fees, arguing that its suit was a catalyst for disclosure of the records. The agency argued that TCF's FOIA litigation did not cause it to disclose the records and that, further, TCF's claim was insubstantial in the context of FOIA's attorney's fees provision. Crotty agreed, pointing out that "while TCF obtained the relief it sought under its FOIA claims, the Department's accelerated production of documents was not substantially caused by FOIA claims. Rather, the Department accelerated its production in response to the TRO opinion, which was exclusively based on Plaintiff's APA claim. Indeed, the holding of the TRO Opinion would have been identical even if TCF had brought only its APA claim and had not asserted FOIA claims at all." TCF argued that its lawsuit had been responsible for disclosure of the records it had requested under FOIA. But Crotty noted that "TCF conflates

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its FOIA claims with its FOIA requests. . .The fact that the Department produced documents by means of a response to TCF's previous FOIA requests, however, is not relevant to whether TCF's FOIA causes of action asserted in this litigation substantially caused the production." Crotty also agreed with the agency that TCF's FOIA claims were insubstantial, which was defined by the D.C. Circuit in *Brayton v. Office of the Trade Representative*, 641 F.3d 521 (D.C. Cir. 2011), to mean "the government was correct as a matter of law to refuse a FOIA request." Crotty observed that TCF's FOIA claims consisted of the agency's failure to produce the documents within 20 days, and two denials of requests for expedited processing. He found TCF's claim that the agency failed to meet the statutory deadline premature, noting that "during that time, the Department never communicated to TCF that it planned to withhold any of the requested documents. Thus, TCF did not exhaust its administrative remedies, and it could not prevail on its claim for failure to produce documents." However, if the agency had missed the 20-day time limit, TCF had constructively exhausted its administrative remedies and its claim was ripe for adjudication for that reason alone. Turning to the expedited processing claims, Crotty pointed out that TCF had cited a compelling need under the circumstances, but had failed to provide any more support for its claim. Although TCF's failure to support its expedited processing claim was sufficient grounds for Crotty to dismiss the claim, he instead went on to explore whether TCF qualified for a fee waiver. He faulted TCF for not showing that it was primarily involved in disseminating information, a test that may factor into eligibility for a public interest fee waiver, but that is more relevant to inclusion in the news media fee category. (*The Century Foundation v. Betsey DeVos, and the United States Department of Education*, Civil Action No. 18-1128 (PAC), U.S. District Court for the Southern District of New York, June 22)

A federal court in Colorado has ruled that immigration attorney Jennifer Smith may take **discovery** from U.S. Immigration and Customs Enforcement pertaining to its changes in its use of the fugitive disentitlement doctrine, which the agency routinely invoked to refuse to process FOIA requests for aliens it considered fugitives, even if they were represented by attorneys. Smith sued the agency, claiming the policy constituted an illegal **policy or practice** in violation of FOIA. Smith asked for discovery to better explore her claim. The agency produced a revised Standard Operating Procedure explaining its new policy on the use of the fugitive disentitlement doctrine. The SOP indicated that it applied only to FOIA requests submitted directly to ICE and that requests referred from other agencies or components of Homeland Security would be "processed in the ordinary course and categorical withholding based on the alien's fugitive status does not apply." As to the doctrine's application to FOIA requests submitted directly to ICE, the SOP indicated that the agency "may categorically withhold the fugitive's law enforcement records or information pursuant to FOIA Exemption (b)(7)(A). . .and the fugitive disentitlement doctrine." Noting that Smith was asking for discovery to explore a factual issue about the extent to which ICE relied on the fugitive disentitlement doctrine to deny requests, the court pointed out that ICE's accompanying affidavit focused on a legal issue – whether law enforcement records pertaining to fugitives were properly exempt. The court observed that "it appears that the agency applies *both* the (b)(7)(A) exception *and* the fugitive alien doctrine to justify withholding certain documents. This is a clear answer to Plaintiff's question regarding whether Defendant applies the (b)(7)(A) exception 'versus' the fugitive alien doctrine." Smith also claimed that the definition of "ordinary course" was unclear. But the court pointed out that the agency's affidavit explains that "the 'ordinary course' means that the agency looks to the FOIA regulations to determine whether requested records should be released, or whether they are exempt from release. This is a reasonable explanation of the phrase 'ordinary course.'" But the court allowed Smith to take discovery because it found two other aspects of the ICE policy confusing. The court observed that the use of "categorical" was unclear, noting that "'Categorical' means 'absolute' or 'unqualified.' Saying that documents will not be withheld 'categorically' leaves open the possibility that *some* documents *could* be withheld based on an alien's fugitive status even when the FOIA request has been referred from another agency. On the other hand, [the agency's] affidavit states that 'there is no special policy or practice that applies to such [referred] requests,' implying that the fugitive alien doctrine is *never* applied to

referred requests." Further, the court pointed out that "it seems that Defendant applies the fugitive alien doctrine to direct requests, which may or may not apply it to referrals. Thus, the heart of Plaintiff's remaining inquiry related to referred FOIA requests is the following: 'how can a statutory FOIA exception. . . be applied to reach opposite results as to the same document held by the same agency, depending on which agency received the original request?'. . .The Court concludes that Plaintiff should be entitled to inquire in a Rule 30(b)(6) deposition of the Defendant regarding the circumstances under which such a request could be treated differently from an identical request submitted directly to ICE." (*Jennifer M. Smith v. U.S. Immigration and Customs Enforcement*, Civil Action No.16-02137-WJM-KLM, U.S. District Court for the District of Colorado, June 21)

A federal court in California has reduced an **attorney's fees** request from the Ecological Rights Foundation by 55 percent to reflect excessive billing totaling in the hundreds of hours for motions that should have taken less than half that time to prepare. As part of a series of suits against several different agencies pertaining to a water project involving Stanford University, the Ecological Rights Foundation sued the Federal Emergency Management Agency for failure to respond to its FOIA requests. Dealing with the Foundation's request for $702,000 in attorney's fees, Magistrate Judge Maria-Elena James agreed with the agency that the organization's fee request was excessive. She found that EcoRights' request was in the public interest, noting that "even though EcoRights may have pursued the FOIA requests *in part* to help its [other] litigation against FEMA, the fact remains that EcoRights, an environmental, non-profit, used the documents to carry out its mission and educate its constituents and the public." FEMA argued that its inability to respond to the request on time was due to confusion and bureaucratic difficulties, but James pointed out that "the Court does not impute bad faith to the government, but cannot find that the repeated missed deadlines, incomplete productions, and failures to obey Court orders had a colorable basis in law. FEMA cannot now complain that EcoRights' attorneys request to be compensated for the time they spent attempting, frequently in vain, to have FEMA comply with its statutory and Court-ordered obligations." While James agreed with the agency that EcoRights' failure to challenge the agency's search cut-off date prevented it from litigating the issue, she disagreed with the agency' broader claim that EcoRights should not be entitled to fees for issues on which it lost. She observed that "those claims also were based on the same factual underpinnings: FEMA's failure to timely and adequately produce documents regarding the [Endangered Species Act] pursuant to FOIA. EcoRights squarely prevailed on its core claims and achieved compelling results in this action: rejection of FEMA's exemption claims and production of an additional 2,000 pages." EcoRights requested $120,000 for two summary judgment motions it prepared during the litigation. James found this was plainly excessive. She noted that "given the $30,000 counsel already had incurred in drafting the substantially identical First Motion, the Court finds a reasonable client would not have paid for even half of the hours that counsel charged at the rates charged." For its fees motion, EcoRights asked for more than $200,000, claiming more than 390 hours. James blamed this excessive charge partially on the fact that EcoRights, as a non-profit, had failed to exercise any constraints on the number of hours its attorneys charged. She observed that "in deciding to forge ahead and incur these significant fees, EcoRights increased the amount of attorneys' fees at issue, which made settlement more difficult to reach. The Court cannot find a reasonable paying, private client would have authorized this approach, but instead would have requested counsel stand down and stop accruing fees until the Court and the parties determined whether the matter would proceed to mediation or by motion." Reducing the fee request, James noted that "extrapolating counsel's billing on [the motions] and based on the Court's overall experience with the case and its review of the billing records, the Court finds the claimed hours are excessive and that a 55% across-the-board reduction is appropriate. The resulting $316,000 in fees is a considerable award, which reflects the fact that FEMA's ability or willingness to timely comply with its obligations under FOIA significantly increased EcoRights' fees in this matter." (*Ecological Rights*

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Foundation v. Federal Emergency Management Agency, Civil Action No. 16-05254-MEJ, U.S. District Court for the District of Northern California, June 16)

Judge James Boasberg has ruled that although Debbie Coffey is entitled to **attorney's fees** for her suit against the Bureau of Land Management he found that because the number of hours claimed was both insufficiently detailed and excessive her fee request should be reduced by 50 percent from $125,541 to $69, 019. Boasberg previously ordered the agency to conduct a second search and after Coffey reviewed the records released as a result of the second search, the only remaining issue was the question of fees. The agency questioned whether Coffey's timekeeping was accurate. Boasberg agreed that some aspects of her timekeeping were sloppy, noting that Coffey's attorney had already recalculated his rates to reduce the fee request by $9,000. Boasberg pointed out that "the Court does not infer from these isolated mistakes that counsel's timekeeping was generally not contemporaneous." But he agreed with the agency that Coffey "cannot recover fees for tasks related to timekeeping itself." He also deducted $2,000 Coffey paid to an expert witness to review her fee request. Boasberg noted that "paying another attorney to review Plaintiff's attorneys' records for reasonableness is an unnecessary use of funds and one the Court will not recompense." He also agreed with the agency that the time reviewing documents released by BLM was not compensable. More broadly, Boasberg sided with the agency's claim that the number of hours claimed for Coffey's various motions was excessive. He pointed out that "a general discount on fees sought for the motions of 50% is appropriate. The Court arrives at this figure because it determines that the preparation of the motions could have been accomplished in approximately half the time listed." (*Debbie Coffey v. Bureau of Land Management*, Civil Action No. 16-508 (JEB), U.S. District Court for the District of Columbia, June 14)

Judge Amit Mehta has declined to reconsider two rulings he made in FOIA cases brought by Richard Goldstein against the IRS and the Treasury Inspector General for Tax Administration concerning whistleblower allegations Goldstein made against the mismanagement of his father's estate and whether Goldstein had a material interest in the records of the estate that would allow him access to tax return information that would normally be confidential under Section 6103. In his motion asking Mehta to reconsider his case against the IRS, Goldstein argued that Publication 5251 explaining the whistleblower claim process supported his request for reconsideration. Mehta disagreed, pointing out that "if anything, [Publication 5251] confirms the breadth of Section 6103 and the limited information available to a whistleblower. . . In light of this broad restriction on disclosure, it is mystifying why Plaintiff would think that Publication 5251 demonstrates clear error [on the part of the court]. This court held that unless perfected, Plaintiff is not entitled to information regarding the whistleblower investigation, including the dates, times, and locations of meetings, because it qualifies as protected 'return information' under Section 6103. Publication 5251 does not compel a different result." Goldstein also argued that in *Crestek v. IRS*, a pending suit against the agency, the IRS had changed its position on the applicability of Exemption 6. Mehta was puzzled by the claim, noting that "Plaintiff argues that the IRS's alleged inconsistent position in *Crestek* bears on the public interest in the whistleblower records at issue in this case. But Section 6103 operates through FOIA Exemption 3 and Exemption 3 requires no public-private balancing. *Crestek* is thus irrelevant to this case." The IRS also asked Mehta to clarify his ruling in his previous decision in the Goldstein litigation finding that Goldstein had a material interest in certain records and ordering the agency to assess whether it had such records. Explaining the implications of his decision, Mehta observed that "Plaintiff is entitled to records responsive to Item 8 if he can demonstrate a 'material interest' in those records per the IRS Code and attendant regulations. The court understands Plaintiff to have perfected his request as to the records of certain taxpayers, such as the Samuel R. Goldstein Estate, and the Samuel R. Goldstein Living Trust. On the other hand, Plaintiff has not demonstrated a material interest as to certain other taxpayer records, such as those of the SRG Investment Limited Partnership. Only the IRS knows, however, whether the investigative records responsive to Item 8 relate to a

taxpayer as to whom Plaintiff has demonstrated a material interest. The agency, therefore, should determine whether any Item 8 records concern a taxpayer as to whom Plaintiff has made a perfected request. If they do, such records should be released to Plaintiff unless their disclosure would reveal an examination or other inquiry of a taxpayer as to whom Plaintiff does not have a perfected interest." Mehta found even less reason to reconsider his decision in Goldstein's suit against the Inspector General for Tax Administration. Goldstein pointed to the IRS changes in *Crestek*, but Mehta observed that "the decision of the IRS – which is not a party in this case – to withdraw its assertion of Exemption 6 in another case about unrelated records does not constitute an intervening change in controlling law or the kind of new, material evidence that merits altering the court's decision." (*Richard H. Goldstein v. Internal Revenue Service*, Civil Action No. 14-02186 (APM), and *Richard H. Goldstein v. Treasury Inspector General for Tax Administration*, Civil Action No. 14-02189 (APM), U.S. District Court for the District of Columbia, June 25)

Judge Trevor McFadden has ruled that the FBI properly issued a Glomar response neither confirming nor denying the existence of records as to whether or not prisoner Anthony Rhodes was listed on the terrorist watchlist. Rhodes requested records about himself from the FBI. The agency told Rhodes it located no records about him, but indicated that it would neither confirm nor deny whether or not Rhodes was on the terrorist watchlist. Rhodes filed suit alleging "illegal acts" against him and asking for $250 million in punitive damages. The agency filed for summary judgment and Rhodes failed to respond. Ruling on whether the agency was entitled to summary judgment, McFadden approved of the agency's use of a *Glomar* response, noting that in *Kalu v. IRS*, 2015 WL 4077756 (D.D.C., July 1, 2015), Judge James Boasberg had approved the use of a *Glomar* response under the same circumstances. McFadden observed that in *Kalu* "Judge Boasberg concluded that the FBI 'is entitled to keep mum on the issue' because 'the agency's supplemental declaration provides reasonable and sufficiently specific reasons to justify its *Glomar* response in this case – namely, that anything other than a "neither confirm nor deny" response would tend to disclose at the very least "guidelines for law enforcement investigations or prosecutions" and that such disclosure "could reasonably be expected to risk circumvention of the law.'" Other courts have ruled similarly. Nothing supports a departure in this case." (*Anthony Rhodes v. Federal Bureau of Investigation*, Civil Action No. 16-1111 (TNM), U.S. District Court for the District of Columbia, June 14)

A federal court in Louisiana has indicated that it will review a supplemental *ex parte in camera* affidavit submitted by the U.S. Army Corps of Engineers to assess whether the agency properly claimed that withheld records concerning a project near Livingston, Louisiana were protected under **Exemption 5 (privileges)**. The court had previously found that the agency's *Vaughn* index was insufficient and ordered the agency to provide a supplemental index. The agency requested permission to submit it supplementary index *in camera*. This time, the court noted that "after reviewing the supplemental *Vaughn* index, the comparison of the *Vaughn* indices and the parties' arguments, the court finds that an *ex parte in camera* inspection of the withheld documents is warranted to ensure that they are indeed subject to the FOIA exemptions claimed." (*Robert Beard, et al. v. U.S. Army Corps of Engineers*, Civil Action No. 17-2668, U.S. District Court for the Eastern District of Louisiana, June 14)

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