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Washington Focus: A recent report entitled "A Snapshot of FOIA Administration," co-authored by American University assistant professor of public affairs Khaldoun AbouAssi and Tina Nabatchi, an associate professor of public administration at Syracuse University, notes that while FOIA staffs continue to grow throughout the government, the lack of consistent policies across the government leads to confusion for requesters. . .After reviewing EPA records disclosed to the Sierra Club, both CNN and POLITICO uncovered inconsistencies and inaccuracies in former Administrator Scott Pruitt's public calendars. Indeed, after firing senior scheduler Madeline Morris for complaining that Pruitt's meeting calendars were inaccurate, former deputy chief of staff Kevin Chmielewski, who was later fired, has now admitted that Pruitt's records were routinely scrubbed to remove meetings that might prove embarrassing.

Frequently-Requested Requirement Applies Only to Existing Records

Judge John Bates has made it clear that the frequently-requested records provision in Section (a)(2) of FOIA, requiring agencies to post documents that have been the subject of three or more requests, only applies to existing records and does not require agencies to commit to posting future meeting calendars. Frustrated by his inability to get current meeting calendars for then-EPA Administrator Scott Pruitt, *New York Times* reporter Eric Lipton filed a FOIA request with the agency not only for Pruitt's existing calendars, but also demanding that the agency routinely post such records because they qualified under the frequently-requested records provision in Section (a)(2).

In part because the request-driven provision in Section (a)(3) is still subject to constant delays, some FOIA litigators have begun to explore the frontiers of the affirmative disclosure provisions of Section (a)(2), hoping to force agencies to take those provisions more seriously by routinely posting more information. In overlapping litigation, CREW and the Campaign for Accountability has had a modicum of success, at least in getting the D.C. Circuit to recognize a cause of action under (a)(2), although that cause of action appears to

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be limited to situations in which the requester has made a FOIA request under (a)(3) as well. Although the reading room concept goes back to the original 1966 version of FOIA – a now-quaint reminder that agencies once maintained physical reading rooms that were supposed to be open to the public – the frequently-requested provision first appeared in the 1996 EFOIA Amendments as part of a legislative recognition that records subject to frequent requests should be made routinely available to the public and that making such records available electronically would help requesters as well as ease the burden on agencies. While the three-request threshold for determining whether records were considered frequently requested evolved shortly after the 1996 EFOIA Amendments became effective, Congress codified the rule in 2016.

Lipton argued that §552(a)(2)(D) applied to Pruitt's calendar because it was of continuing public interest, likely to be subject to future requests, and had already been the subject of more than three requests. The EPA argued that the provision's requirement that "a document be released under the reactive provision before the section is triggered dooms plaintiff's claim, as one cannot make a proper FOIA request for documents that do not yet exist." Bates noted that "to resolve plaintiffs' claims, then, the Court must determine whether the Administrator's detailed calendar – including both existing and future entries – constitutes a single 'agency record' which must be continuously published under the reading-room provision." Bates then went on to explain that "the reading-room provision does not enable plaintiffs to seek all future entries in the Administrator's detailed calendar on a rolling basis; it only requires an agency to make publicly available documents that have already been created, and released in the past."

Bates found that both the statutory language and the legislative history supported his conclusion. He started with what constituted a record under the frequently-requested provision, pointing out that "the law only specifies that 'record' and any other term used in [FOIA] in reference to information includes. . . any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.' This otherwise tautological statement merely clarifies that electronic, as well as paper, documents count as records. It does not define what a record *is*." He continued: "And the ordinary understanding has long been that a 'record' is an existing document or other permanent, preserved account of past events. This was equally true in 1966, when FOIA itself became law, and in 1996 and 2016, when FOIA was amended to include §552(a)(D). Common usage, and common sense, supports the government's interpretation of the term 'record.'"

He rejected Lipton's claim that Pruitt's calendar constituted a continuous record. Instead, he noted that "to qualify for publication under [the frequently-requested] provision, records must first 'have been released to any person' under the more familiar, reactive FOIA provision. If the other prerequisites in the reading-room provision are fulfilled, the agency must publish 'copies' of those same records. And one of the two ways in which those prerequisites can be met is if records are released under the reactive provision 'that have been requested 3 or more times.' Thus §552(a)(2)(D) equates the 'records' that must be published under the reading-room provision with the 'records' that have been successfully requested under the reactive provision. This language suggests that the particular information that must be published under the reading-room provision has to be the same information that has already been released in the past. One cannot previously have released information, or copies of information, that has not yet been created. Nor is nonexistent information likely to have been requested more than three times." Bates added that FOIA's search requirement also presumed the existence of records and he noted that "since a record must have been released under §552(a)(3) to qualify for publication under the reading-room provision, information not yet generated at the time of the search is not subject to the reading-room provision."

Bates indicated that the legislative history of the 1996 and 2016 amendments supported his conclusion as well. He pointed out that while the 1996 amendments included a definition of "record" for the first time, it was intended only to clarify that FOIA applied to electronic records as well as paper records, noting that "the

definition did not create a new substantive definition of what a record is." Indeed, both the House and Senate reports on the 1996 amendments explained that the reason for the inclusion of the frequently-requested provision was to avoid duplicative requests for the same records. Bates observed that Lipton's interpretation would expand the provision dramatically, requiring "agencies to continue releasing an official's calendar in perpetuity, after only three requests for even a small number of calendar entries. This would only increase, not alleviate, agencies' workloads." Bates noted that "plaintiff's reading of §552(a)(2)(D) would create massive, ongoing duties to publish non-static records if any part or prior version of a record had met the provision's prerequisites." He observed that "nor does this duty have any natural stopping point," adding that "popular interest in a non-static document like a calendar at one time could saddle an agency with responsibility to publish every update even when there would otherwise be no interest in or request for those updates at a later time. This is not the sort of efficient access that Congress envisioned." (*Eric Lipton, et al. v. United States Environmental Protection Agency*, Civil Action No. 17-2588 (JDB), U.S. District Court for the District of Columbia, July 10)

D.C. Circuit Majority Conflates Attorney's Fees Award From Four Factors to One

In his parting gift to strict constructionism in the FOIA context, Circuit Court Judge Brett Kavanaugh has convinced new Trump-appointed Circuit Court Judge Gregory Katsas to join him in denying journalist Jefferson Morley attorney's fees even though the D.C. Circuit had twice remanded the case back to Judge Richard Leon practically ordering him to find in favor of Morley. Indeed, the previous time the case had been before the D.C. Circuit, Kavanaugh had issued a dissenting screed attacking the traditional four-factor test for awarding attorney's fees, which, while not in the text of FOIA, is referred to in detail in the 1974 Senate Report. This time, writing an unsigned per curiam opinion, Kavanaugh decided that Leon had properly exercised his discretion in finding that the CIA had a reasonable basis for originally refusing to search for records responsive to Morley's request for records concerning former CIA agent George Joannides, referring Morley to the JFK Assassination Records collection at the National Archives instead. Morley's suit ultimately forced the agency to disclose an additional 411 records not included in the JFK collection at NARA. Kavanaugh's disingenuous recasting of the facts of the case, led conservative Circuit Court Judge Karen LeCraft Henderson to issue a blistering dissent, accusing Kavanaugh of ignoring the severe limitations the two previous D.C. Circuit opinions had placed on Leon's discretion.

Kavanaugh's dissent in the previous ruling in *Morley v. CIA*, 810 F.3d 841 (D.C. Cir. 2016), was based largely on identical arguments put forth by Senior Circuit Court Judge A. Raymond Randolph in *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008), attacking the basis of the four-factor test rather than disagreeing with the majority's application of it. However, having lost that quixotic endeavor, this time Kavanaugh apparently decided to change tactics altogether, and rather than attempting to tear down the basis of 40 years of case interpretation of the attorney's fees, he concluded that, despite two previous D.C. Circuit admonitions, the substantial discretion granted to district court judges to award attorneys fees was sufficient to accommodate a finding that Leon was right all the time.

Kavanaugh began by noting that in its previous decision in *Morley*, the D.C. Circuit had referred to the public interest in the records disclosed as "marginally" supporting Morley's contention that disclosure of the records was in the public interest. He pointed out that "the District Court's assessment on remand that a public benefit existed, but was 'small,' was entirely consistent with our prior decision." As to the second and third factor, assessing whether the requester had a commercial or personal interest in the records, Kavanaugh pointed out that "we have upheld a district court's analysis of factors two and three when the district court

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stated (as the District Court did here) that those factors at least did not count against an award of attorney's fees."

The primary focus of both Randolph and Kavanaugh's objections to the traditional four-factor test is that it unnecessarily muddies what should be, in their minds, a straight-forward assessment of whether the government's position is reasonable. Here, Kavanaugh observed that "our standard of review of the District Court's conclusion on the fourth factor is deferential: We ask only whether the District Court's decision was reasonable. And in reviewing the District Court's conclusion on the fourth factor (which in turn asks whether the agency's position was reasonable), we end up applying what is essentially a double dose of deference. The question for us is whether the District Court *reasonably* (even if incorrectly) concluded that the agency *reasonably* (even if incorrectly) withheld documents." Kavanaugh acknowledged that the D.C. Circuit's earlier rulings in *Morley* had found the CIA's decision to refer Morley to NARA rather than processing his request itself was determined to be incorrect, but wondered "was the CIA's initial response at least reasonable?" Finding that the district court's discretion was subject to "deference piled on deference," Kavanaugh noted that "the District Court's conclusion – namely, that the CIA's response was reasonable – was at least within the zone of reasonableness."

Henderson's dissent started by putting the *Morley* litigation in context. Noting that this ruling was the sixth D.C. Circuit opinion in the case, she explained that "I share the majority's displeasure with the resulting waste of judicial resources." But she added that "Jefferson Morley, however, is not to blame for this 'staggering' saga. But for the district court's repeated misapplication of FOIA precedent, this case could have ended as early as 2006. . .Unfortunately, the district court got it wrong again. The majority, it appears to me, overlooks the district court's latest errors in order to 'bring the case to an end.' In the process, it distorts our settled four-factor test for awarding attorney's fees under FOIA and replaces it with a single-factor reasonableness inquiry of its own design." She accused the majority of ignoring precedent by retreating behind its expansive view of the deference owed to the district court. She pointed out that "here, the district court's discretion was constrained by our earlier opinion in this very case and by our closely related decision in *Davy v. CIA*." Henderson observed that "the district court's discretion has two important limits. First, it is constrained by precedent. Second, the district court's discretion is limited by the mandate rule, which provides that 'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'"

Henderson faulted the majority for largely ignoring the four-factor test. She pointed out that the majority "acknowledge[s] our four-factor test but [does] not apply it. In a telling footnote, they 'doubt' that the first three factors have any role to play in 'a proper interpretation of the statute.' They suggest instead that 'the fourth factor alone should constitute the test under FOIA for attorney's fees.' There may be good reason to question our FOIA precedent but, as a three-judge panel, we are bound to apply it." She noted that "the majority accepts that the first three factors favor Morley, but does not review the district court's reasoning and, worse, does not adequately evaluate the weight of the first three factors in light of [our prior decisions in] *Morley* and *Davy*." Underscoring the public interest in records pertaining to the Kennedy assassination, Henderson explained that in its earlier decision "we held that Morley satisfied the public-benefit factor *in this case*. . .The point is that we have twice remanded the case based on the district court's failure to assess properly the public benefit of Morley's FOIA request. Thus, the district court's description of the public value of the information sought by Morley as 'small' ignores our [earlier] decisions in *Davy* and *Morley*." Henderson indicated that it was unclear how Leon had assessed the personal or commercial interest factors. She pointed out that "the district court stated that 'the first three factors do not clearly indicate whether the Court should award attorney's fees – it is a very close call.'. . .If it believed the first three factors indeed favored Morley, the balance at that stage would have undoubtedly tipped in his favor and there would have been no 'tie' to break."

Finding that Morley's claim was nearly identical to one the D.C. Circuit upheld in favor of the plaintiff in *Davy v. CIA*, she added that "factors two and three cannot be 'close calls,' at least not after *Davy*. *Davy* makes clear that factors two and three unquestionably weigh in Morley's favor and the district court erred in concluding otherwise." She criticized the majority for accepting the district court's finding that the JFK Act provided Morley with adequate access. She observed that "the majority reasons that '*Congress itself* has provided "an alternative form of access."' But the Congress is not the CIA and congressionally-mandated access to documents is not the same as agency access under FOIA. Simply put, without statutory authorization, the CIA is not excused from its FOIA obligations." (*Jefferson Morley v. Central Intelligence Agency*, No. 17-5114, U.S. Court of Appeals for the District of Columbia Circuit, July 9)

Views from the States…

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

Illinois

A court of appeals has ruled that property tax valuations calculated by the Cook County Assessor's Office are final decisions and are not protected by the deliberative process privilege. The *Chicago Tribune* requested the final valuations for both commercial and residential properties. The Assessor's Office denied the request, claiming the valuations constituted opinions rather than decisions. The *Tribune* sued, and the trial court ruled in favor of the newspaper and awarded the newspaper attorney's fees. The Assessor's Office appealed. The appeals court agreed with the trial court, noting that "in this case, the requested records are final – not preliminary. The requested records are not ones in which opinions are expressed or in which policies or actions are formulated – they are factual. They are the results of the assessment process." The Assessor's Office argued that the valuations were subject to change as they were being calculated. But the appeals court pointed out that "just because adjustments are made to the property value assessments along the way does not mean that the information must fall within the exemption. Even if analysts make adjustments as the process continues, the data is the data. There is nothing in the record here that discloses the Assessor's Office's internal evaluations. The Tribune is not seeking the regression analyst's algorithmic code nor is it seeking the divulgement of how and why the analysts make the *predecisions* that they make – it just seeks the *results* of that process." Dismissing the Assessor's Office's exemption claim, the appeals court added that disclosure of the valuation data was in the public interest. The appeals court observed that "the public has a strong right to know about how they are being taxed by their government as opposed to the government's fairly meek interest in secrecy." (*Chicago Tribune Company v. Cook County Assessor's Office*, No. 1-17-0455, Illinois Appellate Court, June 29)

Virginia

A trial court has ruled that the George Mason University Foundation is not a public agency subject to the Virginia Freedom of Information Act, although programs at the university funded by the Foundation would be subject to the statute. Ruling in a case brought by Transparent GMU, the trial court noted that the Foundation's level of public funding was not sufficient to conclude that it was a public body under VFOIA. The trial court observed that "advancing a statutory objective is not equivalent to transacting public business. Although the Court considered the rationale found in other jurisdictions that fundraising is an essential function of a public university that depends on the strength of its endowment, the adoption of those rationales

is not provided for in VFOIA, and it would constitute a judicial declaration beyond a statutory grant." But the trial court pointed out that "any such independence or exclusion from VFOIA does not extend to the Gift Acceptance Committee. The Work of the Gift Acceptance Committee cannot be conducted in secrecy, and the acceptance of every gift or endowment, with terms that are approved by the Committee and the President of the University, or otherwise signed off by the appropriate University official, produces public records. Here, the University through its personnel dictates the operations of the Gift Acceptance Committee. The University's acceptance of any condition or restriction on the use of donated funds necessarily produces a record that is subject to VFOIA." (*Transparent GMU v. George Mason University, et al.*, No. CL 2017-7484, Nineteenth Judicial Circuit, Fairfax County, Virginia, July 5)

The Federal Courts…

A federal court in New York has ruled that several responses from then-White House Press Secretary Sean Spicer explaining a January 2017 U.S. intelligence-gathering raid in Yemen in which one service member was killed as well as an unspecified number of civilians – including the fact that the Director of the CIA was at the White House discussing the raid – constituted a **public acknowledgement** of CIA involvement with the raid prohibiting the agency from issuing a *Glomar* response neither confirming nor denying the existence of records in response to a request from the ACLU. The CIA argued that disclosing the existence of records would reveal that it had an interest in the operation. Judge Paul Engelmayer noted that "were it not for the White House's public statements about the Raid, the interest that the CIA articulates with respect to the Raid – that it is entitled not to disclose the existence or not of an intelligence interest as to a particular subject – would likely justify its *Glomar* response." But he pointed out that "the White House's statements about the Raid, however, change the analysis, because the assembled statements by Spicer clearly disclosed the CIA's intelligence interest in the Raid. . . In particular, Spicer explicitly acknowledged that the U.S. participated in the Yemen Raid, that the Raid was an 'intelligence-gathering raid;' and that the Director of the Central *Intelligence* Agency (explicitly referred to by his official title) was in the room when the Raid was 'laid out in great extent' and at a time when 'the indication. . .was to go ahead.' Under any reasonable reading, these statements revealed the CIA's intelligence interest in the Raid, a point further underscored by the CIA's prior acknowledgment of its intelligence interest in Yemen." The CIA argued that a non-*Glomar* response would confirm that the agency had records about the raid. Englemayer pointed out that "the Court is unprepared to accept that the CIA Director attended the meeting with the President in which that Raid was discussed and appears to have been approved, but that neither he nor his staff ever generated or received any documentation whatsoever. . .related to that meeting of the Raid before, during, or after these occurred." The agency also claimed that the existence of records had never been officially acknowledged. Englemayer observed that "where agency statements have exposed as fallacious the basis for claiming that revealing the existence of records would cause harm underlying a FOIA exemption – the agency's *Glomar* response may be rejected in toto." Although the Departments of Justice, Defense and State had all admitted to having records and prepared *Vaughn* indices, Englemayer gave the CIA the opportunity to assess "whether a more targeted *Glomar* submission may be viably made." (*American Civil Liberties Union v. Department of Defense, Central Intelligence Agency, Department of Justice and Department of State*, Civil Action No. 17-3391 (PAE), U.S. District Court for the Southern District of New York, June 27)

A federal court in New York has ruled that a tweet by President Donald Trump criticizing a *Washington Post* article reporting that Trump had decided to end the CIA's covert program to arm and train Syrian rebels battling the government of Bashar al-Assad, and an interview the next day with the *Wall Street Journal* in which Trump referred to his criticism of the *Post* article, did not constitute a **public**

acknowledgement of the program to overcome the CIA's *Glomar* response neither confirming nor denying the existence of records about CIA involvement. The covert program was also referred to by General Raymond "Tony" Thomas, U.S. Special Operations Commander, during a talk at the 2017 Aspen Security Forum in response to a reporter's question. *New York Times* reporter Matthew Rosenberg filed a FOIA request with the CIA for all records pertaining to the program Trump had identified in his tweet criticizing the *Post* article. After the *Times* filed suit, the CIA issued a *Glomar* response, citing **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. The *Times* argued that Trump's tweet and Thomas's reference constituted public acknowledgment of the program, arguing that "there is no clear requirement that the President must follow the procedures outlined in E.O. 13526 [on classification] when declassifying information, and that a President may in fact not be bound by her own Executive Orders." Judge Andrew Carter noted that "it does not follow, however, that the courts are in a position to decide whether a President's statements, absent an unequivocal declaration that she is declassifying information, have the effect of declassifying secret information. Doing so would fly in the face of [the Supreme Court's decision in *Dept of Navy v. Egan*, 484 U.S. 518 (1988)] holding that the power to classify and declassify information bearing on national security rests with the Executive. Put another way, permitting courts to infer whether a President declassified information would transfer the President's constitutional authority to declassify to the Judiciary, undermining the basic tenets of the separation of powers." The *Times* argued that Trump's tweet and subsequent interview with the *Journal* revealed the existence of the program. Carter disagreed. He pointed out that "President Trump's comments to the Journal do not make any reference to classifying or declassifying information. In fact, his comments to the Journal were made in the context of his concern with intelligence leaks, which warrants the opposite inference than the inference drawn by the Times – that President Trump did not intend to declassify any intelligence." Turning to the issue of public acknowledgment, Carter noted that the Second Circuit's ruling in *New York Times v. Dept of Justice*, 756 F.3d 100 (2d Cir. 2014), held that publicly-available information need not be identical to the information being withheld to qualify as a public acknowledgement. But Carter concluded that "President Trump's tweet does not confirm the existence of records being requested let alone the program." Carter pointed out that the Second Circuit's earlier decision in *Wilner v. National Security Agency*, 592 F.3d 60 (2d Cir. 2009), held that "a general acknowledgment of the existence of a program alone does not wholesale waive an agency's ability to invoke *Glomar* where certain aspects of the program remain undisclosed." He explained that here "Plaintiffs would need to point to more than President Trump's general statements regarding a program to arm and train Syrian rebels; there would need to be official acknowledgment that the CIA operated said program for the Times' request for records from the CIA to be viable under Second Circuit law." (*New York Times Company and Matthew Rosenberg v. Central Intelligence Agency*, Civil Action No. 17-06354 (ALC), U.S. District Court for the Southern District of New York, June 29)

Judge John Bates has ruled that the IRS must conduct a **search** for non-tax return-related records concerning Islamic Relief USA. The Middle East Forum requested communications between the IRS Office of Criminal Investigation and other agencies concerning Islamic Relief USA. The agency declined to search without third-party authorization because it concluded the records constituted protected tax return information. MEF appealed, arguing that some of the responsive records did not constitute tax return information. The IRS refused once again to search and MEF filed suit. Bates sided with MEF. He noted that "even if the IRS was justified in rejecting MEF's initial FOIA request as imperfect, MEF's response (whether it constituted an appeal or a renewed request) clarified that the request was for any information *not* protected by statute. A 'liberal interpretation' of MEF's request indicates that MEF was seeking only non-'return information' and that no third-party authorization was therefore required." Bates faulted the agency for providing a single affidavit supporting its position. He pointed out that "without a more detailed explanation of the IRS's process in determining that all information responsive to MEF's request would be protected information, this affidavit

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is insufficient to support the IRS's motion. This is all the more true because the IRS seeks not to withhold information on a summary judgment motion after a search, but rather to dismiss MEF's claim without conducting a search in the first place. It is difficult to take the IRS at its word that all information responsive to MEF's request would fall within the return information exception when the IRS has not run a search to see if that is, indeed, the case." The IRS argued that MEF's request did not sufficiently describe the records sought. Bates observed that "the IRS claims that MEF's request was not reasonably specific because it did not include Islamic Relief USA's taxpayer identification number or location, or the system of records to be searched. However, MEF's request included the name of the group, subject matter, IRS office where responsive files would be found, date range, and the types of records sought." He added that "here, the IRS never requested additional information beyond the authorization form, and its immediate identification of 'all of the information. . .requested' as 'return information' indicates that the request sufficiently identified the records MEF sought." The agency contended that denying MEF's request because it did not provide a third-party authorization was not appealable. Bates disagreed, noting that "because MEF disputes that the information it sought in the request was protected return information, it had 'no choice but to refuse to provide the consent and appeal the IRS's determination.' Given that MEF has filed a perfected FOIA request, and has not failed to exhaust the administrative process, the IRS must conduct the request search." (*Middle East Forum v. United States Department of Treasury, et al.*, Civil Action No. 17-2010 (JDB), U.S. District Court for the District of Columbia, July 3)

A federal court in California has ruled that the Bureau of Alcohol, Tobacco and Firearms is not required to provide non-statistical aggregate data from its Firearms Trace System because to do so would require the agency to create a record in response to a multi-part request from the Center for Investigative Reporting concerning the database, including gun traces showing the number of times guns originating at law enforcement agencies were later used in crimes. CIR challenged the agency's decision not to search for aggregate data because it would require creation of a new record. Magistrate Judge Jacqueline Corley Scott found that the agency had not shown that it conducted an **adequate search** for records that were not contained in the FTS database. But she indicated that the 2003 Tiahrt Amendment memorializing the provisions of the Consolidated Appropriations Resolution prohibiting the agency from using funds to respond to FOIA requests for FTS gun trace data served as an **Exemption 3 (other statutes)** statute. CIR argued that the Tiahrt Amendment did not qualify because it provided agency discretion to disclose data and did not cite Exemption 3 as required by the 2009 OPEN FOIA Act. Corley rejected CIR's claims, noting that exceptions to non-disclosure in the Tiahrt Amendment did not expand the agency's ability to disclose the data. She pointed out that "the exceptions instead provide specific criteria allowing for the release of certain categories of information; if the information does not fall into one of those categories, it cannot be released. In other words, the exceptions do not give ATF discretion to choose the type of information it can release from the database." She then rejected CIR's contention that ATF had disclosed aggregate statistical data in another suit involving a challenge made under the Administrative Procedure Act. Corley distinguished that case, noting that "the former did not require the creation of new records, but instead, represented existing records that were part of the administrative record underlying the ATF action challenged by the plaintiffs." By contrast, here, Corley observed that "Plaintiff's request for statistical aggregate data derived from the FTS database requires a compilation of data points – all firearms traced to former law enforcement ownership since 2006 – and seeks information that does not currently exist." CIR argued that it was not asking ATF to tally the number of gun traces related to guns originating with law enforcement agencies, but to merely print and redact the data and then CIR could do the statistical analysis itself. Corley pointed out that "Exemption 3 through the Tiahrt Amendment bars production of data from the FTS database, and the Tiahrt Amendment necessarily extends to a collection of individual records. And [the exception for disclosure of statistical aggregate data in the Tiahrt Amendment] does not apply to Plaintiff's request: although what Plaintiff now seeks may loosely be described as 'aggregate data,' it does not constitute '*statistical* aggregate data.'" (*Center for Investigative Reporting v.*

United States Department of Justice, Civil Action No. 17-06557-JSC, U.S. District Court for the Northern District of California, July 10)

A federal court in Pennsylvania has ruled that hard drives provided to the Department of Justice by Educational Management Corporation during litigation brought under the False Claims Act by whistleblower employees at EDMC, and later joined by DOJ, are not **agency records** under FOIA and, further, even assuming they qualified as agency records, searching the estimated 145 million records would be **unduly burdensome**. The case was litigated in the Western District of Pennsylvania and EDMC settled with the government for $95.5 million. Many of the records provided by EDMC were subject to several protective orders covering confidential business information and student-identifying information. The Project on Predatory Lending at Harvard Law School filed a request with DOJ for records pertaining to the litigation. DOJ denied the request, claiming the records were still subject to the protective orders. The Project argued that the records on the hard drives that had been obtained by DOJ were still in its custody. The court concluded that custody itself did not mean the agency exercised control over the records. Judge Nora Barry Fischer noted that "the DOJ did not maintain the materials for reference purposes or as a research tool, the DOJ's possession was less than that. Once the litigation had settled and [the outside law firm representing the whistleblowers] had transferred the hard drives to the DOJ, the DOJ maintained the hard drives in storage awaiting return to EDMC." She observed that DOJ "came into possession of the materials in the legitimate conduct of other official business, but [it] neither read or relied on the documents in the course of [its] official duties, [it] just held the materials. Under these circumstances, the Court concludes that at the time of the Project's FOIA request the EDMC Hard Drive materials were not 'agency records' subject to the FOIA." Calling her conclusion that the EDMC Hard Drives were not agency records "a close call," Fischer pointed out that "the reason why the DOJ sought to obtain the records in the first place was presumably to discover the logistics of how EDMC implemented its fraudulent student recruitment program. The DOJ was involved in discovery requests, received the discovery, and delivered the discovery to its litigation partner." But she explained that "at no time though did the DOJ read or rely on the discovery materials, and significantly, at the time of the FOIA request the litigation had ceased and the DOJ was acting as a mere warehouse storing the EDMC Hard Drives, never having read or reviewed the materials." Fischer also agreed that processing an estimated 145 million records was unduly burdensome. She pointed out that "even if the DOJ could successfully employ the methods suggested by the Project and reduce the amount of material by 99%, the task would still be unduly burdensome." Fischer found a much smaller cache of documents related to the Art Institute of Dallas had been used by DOJ and were subject to disclosure. She indicated that the agency's **search** for records was adequate, although she rejected several privilege claims. Turning to the issue of whether the protective orders prohibited disclosure of the records, she relied on *Morgan v. Dept of Justice*, 923 F.2d 195 (D.C. Cir. 1991), in which the D.C. Circuit ruled that agencies must determine the continuing status of protective orders before claiming they prevented disclosure. Here, Fischer observed that both the confidential business information protective order and the protective order for student-identifying information did not prohibit disclosure entirely but covered only those categories and that the agency could redact such information and disclose the other records. (*Project on Predatory Lending of the Legal Services Center of Harvard Law School v. United States Department of Justice*, Civil Action No. 17-210, U.S. District Court for the Western District of Pennsylvania, July 9)

A federal court in Illinois has ruled that LAF, a non-profit organization providing free legal services to persons living in poverty, may take **discovery** from the Department of Veterans Affairs to help it challenge the agency's policy of processing veterans' requests for their claims files solely under the Privacy Act rather than under both FOIA and the Privacy Act. When LAF made FOIA requests on behalf of veterans, the agency

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insisted on processing the requests as Privacy Act requests, although LAF cited both statutes. LAF filed suit challenging the agency's policy. The agency argued that LAF's request on behalf of a specific individual was moot once that individual received her records. The court agreed that the named veteran's claim was now moot, but that LAF had standing to bring a **pattern or practice** challenge because it "has pending FOIA requests with Defendant that will likely be subjected to the same practice, and that this practice of delaying information or not responding to FOIA requests by failing to abide by FOIA's procedures harms Plaintiff's ability to represent its clients." The court pointed out that "even if Defendant's records are covered by the Privacy Act, an agency presented with a FOIA request must also comply with FOIA unless the requested records fall within one of FOIA's nine exemptions. Indeed, the Privacy Act itself requires disclosure of any information than an agency must disclose pursuant to FOIA." Allowing LAF to take discovery, the court indicated that the agency had not yet carried its burden of showing that Exemption 3 (other statutes) or Exemption 6 (invasion of privacy) covered any records subject to FOIA. (*LAF v. Department of Veterans Affairs*, Civil Action No. 17-5035, U.S. District Court for the Northern District of Illinois, June 27)

A federal court in New York has ruled that eight draft versions of a never-finalized intelligence assessment entitled "Growing Frequency of Race-Related Domestic Terrorist Violence" and an email related to them are protected by **Exemption 5 (privileges)**. Color of Change and the Center for Constitutional Rights requested proposed intelligence assessments created in 2017 by an analyst at the Department of Homeland Security's Intelligence & Analysis Office concerning domestic terrorism. In response to the organizations' 2016 request, DHS initially indicated that it had found no responsive records. But in April 2017 after filing suit, the agency agreed to produce 500 pages per month. As a result, I&A made six rounds of disclosures. After reviewing the documents *in camera*, the court found they were protected by the deliberative process privilege. The court noted that "these papers, prepared by an analyst and intern, reflect the preliminary processes through which DHS policy is created. Release would reveal the give-and-take through which agencies ultimately reach their positions. It would display I&A's internal considerations on whether to issue the assessment and what form it should take." Color of Change argued that the final draft of the assessment constituted the agency's final decision on the issue. But the court observed that "Plaintiffs' conflation of a 'final' draft with a final agency assessment poses the very risk that the deliberative process privilege is meant to protect against – public confusion over agency official policy, which may chill frank and candid discussion among government employees." Color of Change challenged the agency's claim that factual and deliberative materials were inextricably intertwined. The court pointed out that "the factual materials do not exist in a vacuum. Rather, they are interwoven with the papers' policy judgments. Therefore, release would reveal the process by which 'factual material was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action.'" (*Color of Change, et al. v. United States Department of Homeland Security*, Civil Action No. 16-8215, U.S. District Court for the Southern District of New York, July 9)

James Boasberg has ruled that the IRS conducted an **adequate search** for records concerning William E. Powell, Powell Printing, Powell's grandfather, Andrew Powell, and his father, William A. Powell and that Powell has a material interest in some of the trusts set up by his grandfather, allowing him to have access to some of the tax return information related to those trusts, but that he does not have a material interest in several other trusts his grandfather set up. Powell inherited Powell Printing, originally founded by his grandfather, when his father died. Powell filed a number of FOIA requests with the IRS because he believed the trustees of his grandfather's estate might have breached their fiduciary duties. Boasberg dismissed most of Powell's **Privacy Act** requests, noting that "even accepting all of Plaintiff's allegations as true, he has not actually pled that he submitted requests for most of the information that he seeks. Although he is *pro se*, Powell is on notice of the Privacy Act's exhaustion requirements as the Court has previously dismissed a case

of his for the same reason. Here, he cursorily alleges in [his complaint] that he 'mailed a FOIA and PA Request with supporting documents' and Defendant never responded, yet such a conclusory allegation is not enough to avoid dismissal." Boasberg found that Powell had not shown a material interest in his grandfather's estate, observing that "trusts and estates are different legal entities, and Powell's rights under the trust do not automatically make him a beneficiary of the estate *under the will*, as required by statute." He rejected Powell's contention that he was entitled to access tax records for his grandfather's business, noting that "to the extent, moreover, that he attempts to argue that as a shareholder of Powell Printing Company he is also a shareholder of the Andrew Powell Printing Company and thus entitled to access, Plaintiff has not established that these two companies are the same legal entities such that beings a shareholder of one would mean he was a shareholder of the other." Finding that the agency's search was adequate, Boasberg agreed with the agency that K-1 records before 2006 would have destroyed in 2016 before Powell made his request. (*William E. Powell v. Internal Revenue Service*, Civil Action No. 17-278 (JEB), U.S. District Court for the District of Columbia, July 5)

Judge Randolph Moss has ruled that pro se litigant Sai may not amend his multi-count FOIA suit against the Transportation Security Administration to add new FOIA counts as well as counts under the Rehabilitation Act. Moss noted that "as the Court understands Sai's proposed amendment, Sai seeks to challenge the TSA's purported failure to maintain an electronic, FOIA-reading room containing among other things, all 'statements of policy and interpretation which have been adopted by the agency, and that have not been 'published in the Federal Register.'" Characterizing Sai's original complaint as "comprehensive," Moss pointed out that "it may be that Sai now regrets not bringing a challenge to the adequacy of TSA's electronic FOIA-reading room but regret and clarification are not the same thing." Rejecting Sai's attempt to "clarify" his complaint, Moss observed that "in the present context, granting leave to amend would cause undue delay and unfairly prejudice the defendant. This case has been pending for well over four years. . .Most recently, the Court issued a 70-page opinion addressing Sai's challenges to 'virtually every aspect of the TSA's multiple searched and productions' in response to six separate FOIA requests. That decision narrowed the case, but leaves roughly a dozen questions for further briefing and development. Rather than narrowing and focusing the litigation, however, Sai treats the Court's opinion as a jumping-off point. In Sai's view, the opinion identifies ways in which the complaint might be improved or invites the parties to develop new theories to replace those the Court has considered and rejected." Moss pointed out that "that approach to litigation offers no end and is unfair to the opposing party." He indicated that "granting Sai's motion for leave to amend would inevitably extend [the] schedule by many months, and perhaps longer. Adding entirely new claims to the already lengthy set of issues for resolution as this date would not serve the interests of justice." (*Sai v. Transportation Security Administration*, Civil Action No. 14-403 (RDM), U.S. District Court for the District of Columbia, July 11)

After reviewing 35 documents *in camera*, a federal magistrate judge in California has ruled that most of the documents are protected by **Exemption 7(E) (investigative methods and techniques)**. The 35 documents were 259 pages of email attachments that constituted the remaining issues from litigation brought by EFF against the Justice Department for records about its Hemisphere program. For those documents that Magistrate Judge Maria-Elena James found were covered by Exemption 7(E), she noted that "these documents not only identified Hemisphere as an investigative technique, but also described information such as the circumstances under which the techniques should be used, how to analyze the information gathered through these techniques, and the current focus of Hemisphere investigations." (*Electronic Frontier Foundation v. United States Department of Justice*, Civil Action No. 15-03186-MEJ, U.S. District Court for the District of Northern California, July 2)

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Judge James Boasberg has ruled that the Office of Foreign Assets Control conducted an **adequate search** for records concerning applications and license OFAC granted to William Powell, his family printing business and an array of other related individuals. William Powell has filed and litigated a number of requests concerning his family business. Boasberg was puzzled as to why Powell requested records from OFAC in the first place, but he observed in comments at the end of his ruling that "although this winds up the current litigation, it is unlikely to dissuade Powell from continuing his course of making FOIA requests and then following up with suits – at least six in front of this Court alone – particularly given that he qualifies for *in forma pauperis* status and thus pays nothing. Perhaps he could articulate at some point to the Government or this Court what he hopes to ultimately accomplish, as there may be a more direct and less exhausting route to relief." (*William E. Powell v. United States Department of Treasury Office of Foreign Assets Control, et al.*, Civil Action No. 17-2435 (JEB), U.S. District Court for the District of Columbia, July 3)

A federal court in North Dakota has ruled that Riley Kuntz's FOIA litigation is **moot** because he had already received a copy of a Memorandum of Understanding between the Department of Justice and the State of North Dakota from the state before requesting it from the agency. But the court rejected DOJ's alternate argument that the MOU was already publicly available on the Internet. Rejecting that claim, the court noted that "there is no indication that Kuntz knew for sure there was an agreement at the time he made his request, much less that he knew its name so that he could have conducted the precise internet search DOJ now suggests could have been conducted." (*Riley S. Kuntz v. U.S. Department of Justice*, Civil Action No. 17-223, U.S. District Court for the District of North Dakota, July 11)