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In this Issue

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Washington Focus: Bob Smith, editor and publisher of Privacy Journal and one of the most eloquent writers on informational privacy, died at his home in Providence, Rhode Island, July 25. After graduating from Harvard in 1962, followed by a stint in the Army, Bob started the Southern Courier in 1965, a publication aimed at covering events of the civil rights movement ignored by the mainstream media. While attending Georgetown Law School, Bob started Privacy Journal in 1974, the year the Privacy Act was passed. From its inception, Privacy Journal's reporting on privacy abuses and Bob's always thoughtful analysis, made him a leading expert and advocate on privacy issues. His book on privacy, "Ben Franklin's Website," which was published in 2000, is the best book on privacy I have ever read. Bob remained a close professional friend of mine since I met him in the late 1980s and was widely-respected by professionals in the privacy and open government communities. Bob's newsletter was an inspiration for me when I first started editing Access Reports in 1985 and I will miss him dearly.

D.C. Circuit Rejects Privacy Claim For Misconduct Allegations

A recent decision by the D.C. Circuit illustrates that even pro se plaintiffs can prevail on appeal on the appropriate balance for assessing whether the public interest in disclosure outweighs the privacy interest under Exemption 7(C) (invasion of privacy concerning law enforcement records). But the decision also shows how important a role the underlying circumstances may have on tipping that balance.

The case involved the appeal of Gregory Bartko, an Atlanta-based securities broker who created two private equity funds in the early 2000s and was accused of fleecing investors. The SEC began to investigate him, and charges were brought against him in the Eastern District of North Carolina where then-Chief of the Economic Crimes Section, Assistant U.S. Attorney Clay Wheeler prosecuted Bartko for mail fraud and selling unregistered securities. Bartko was convicted and sentenced to more than 20 years in prison. Months after his conviction, Bartko discovered that Wheeler had made multiple serious errors during the trial and asked for a new trial. The district court denied Bartko's request and the Fourth Circuit

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affirmed on the narrow grounds that Wheeler's misconduct was not enough to supersede the overwhelming evidence of Bartko's guilt. However, pointing to a slew of recent discovery errors by the U.S. Attorney's Office for the Eastern District of North Carolina, the Fourth Circuit indicated that the behavior "raised questions regarding whether the errors were fairly characterized as unintentional." Concerned the U.S. Attorney's Office for the Eastern District of North Carolina was unlikely to do anything, the Fourth Circuit sent a copy of its opinion to the Office of Professional Responsibility at the Justice Department. To ward off OPR involvement, the U.S. Attorney's Office for the Eastern District of North Carolina announced that it would more closely monitor its discovery practices.

With this backdrop, Bartko filed a series of FOIA requests to OPR, the U.S. Postal Inspection Service, the IRS, the FBI, the Executive Office for U.S. Attorneys, the Department of Treasury, and the SEC. From OPR, Bartko requested records about complaints of misconduct against Wheeler. OPR only released records pertaining to complaints filed by Bartko and issued a *Glomar* response neither confirming nor denying the existence of records for everything else. The district court ordered OPR to search for records pertaining to Wheeler's behavior in Bartko's prosecution but upheld the agency's *Glomar* response as to any other records concerning complaints against Wheeler.

Writing for the court, Circuit Court Judge Patricia Millett questioned whether OPR could show that the records had been compiled for law enforcement purposes, meaning it could only claim Exemption 6 (invasion of privacy) as the basis for a *Glomar* response. But because OPR had seriously underestimated the public interest in disclosure of Wheeler's records, its *Glomar* defense failed on that basis as well. Millett first noted that "the government has not come close to showing that all the records (if there are more) involving misconduct allegations against Wheeler would have been compiled for law enforcement purposes. Bartko's FOIA request was broadly worded to include a wide variety of actual or alleged violations by Wheeler of the U.S. Attorney's Manual, the North Carolina Code of Professional Conduct, and other ethical and legal obligations. While violations of some of these standards could conceivably result in civil or criminal sanctions, many of them would not, and would bear only on internal disciplinary matters." Referring to *Jefferson v. Dept of Justice*, 284 F.3d 172 (D.C. Cir. 2002), an earlier D.C. Circuit ruling in which the court had found OPR investigations were not conducted for law enforcement purposes, Millett added that "OPR's mission today (and during the time period covered by Bartko's FOIA requests) has narrowed to focus primarily on internal disciplinary matters."

Next, Millett turned to the privacy/public interest balance. She pointed out that "OPR just sweepingly asserted that disclosure of *any* record regarding *any* allegation of misconduct would be an unwarranted invasion of Wheeler's privacy. OPR ignores altogether its obligation to specifically identify the privacy interest at stake, which can vary based on many factors, including frequency, nature, and severity of the allegations." She noted that "OPR also made no apparent effort to weigh any privacy interest against the countervailing public interest in the disclosure of information concerning allegations of government attorneys' misconduct. OPR cannot issue a blanket proclamation that a loss of privacy would be 'unwarranted' without considering whether there is a public interest that might well warrant it." As to the potential public interest in disclosure, Millett explained that "the *Glomar* response fails for the additional reason that OPR was wholly unable to establish that there would be a single answer to every balancing of interests involving any of Wheeler's records. This is a yawning omission given the substantial public interest embedded in the Fourth Circuit's finding of a pattern of discovery abuses in the U.S. Attorney's Office for the Eastern District of North Carolina, and that Office's admission that a change in practices was needed and would promptly be made." She added that "the same reasoning dooms OPR's blanket invocation of Exemption 6 as an alternative ground for withholding responsive records. . .Because Exemption 6 requires an even stronger demonstration of privacy interest than Exemption 7(C), an agency's inability to justify withholding under the latter often precludes it from satisfying Exemption 6's heightened requirements."

Applying these standards to the records OPR processed because they pertained to Bartko's own complaints against Wheeler, Millett found the agency had failed to justify its withholdings under Exemption 7(C). She observed that "even though almost of [OPR's] complaints are closed without a full investigation, much less an adverse finding, OPR argues that all of its Wheeler records qualify as law-enforcement records just because of the slight chance that an inquiry could lead to an investigation that could lead to a misconduct finding that could result in a state bar referral that could lead to a bar sanctions hearing. That claim does not rise above the ephemeral." She pointed out that despite the referral from the Fourth Circuit, OPR decided not to pursue an investigation of Wheeler because it was unlikely to result in a finding of misconduct. Millett indicated that "so right out of the gate, OPR did not find that the Fourth Circuit's referral was substantial enough to inquire further. . .That is not an investigation with an eye towards law-enforcement proceedings." Instead, she found that "the public interest in knowing what OPR did weighs heavily. . .The public has an interest in knowing 'that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.'" After having dismissed OPR's privacy claims, Millett accepted similar claims from the FBI, the U.S. Postal Inspection Service, and the IRS, pointing to the law enforcement function of each agency and the more tailored claims.

Bartko also challenged a copying fee assessed by EOUSA, arguing that he qualified for a fee waiver. Millett found that Bartko was in a unique position to publicly disseminate information about his case and Wheeler's alleged misconduct. Although the district court had acknowledged Bartko's ability to disseminate the information, it ruled against his fee waiver request because it found that his personal interest in disclosure outweighed the minimal benefits to the public. Millett noted that conclusion "was legal error." She pointed out that "FOIA states that a fee waiver is available as long as disclosure 'is not primarily in the *commercial* interest of the requester.' No party contends that the release of records would be in Bartko's financial interest. Beyond that, it does 'not matter whether the information will also (or even *primarily*) benefit the requester.' 'Nor does it matter whether the requester made the request for the purpose of benefiting itself.' All that matters is whether these records are likely to significantly contribute to public understanding." (*Gregory Bartko v. United States Department of Justice, et al*, No. 16-5333, U.S. Court of Appeals for the District of Columbia Circuit, Aug 3)

Views from the States…

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

Florida

A court of appeals has upheld a trial court's decision ordering the State Attorney's Office and the Broward County School Board to disclose to a coalition of media plaintiffs the surveillance footage taken during the shootings at Marjory Stoneman Douglas High School in which 17 students and teachers were killed because the surveillance tapes did not qualify for the ongoing criminal investigation exemption in the public records act. The appellate court also rejected the school board's contention that disclosure was prohibited by the security or fire-safety system plan exemption because the public interest in disclosure far outweighed any risks to security plans. Rejecting the attorney general's claim that the criminal investigation exemption applied, the appeals court noted that "the videos were not 'criminal investigative information' within the meaning of the [exemption] because they were not compiled by a criminal justice agency in the course of

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conducting a criminal investigation." The appeals court agreed that the security plans exemption applied but pointed out that its exception for disclosure for good cause applied under these circumstances. The court noted that "here, given the constitutional commitment to open government, the scales are weighted heavily in favor of disclosure." The court observed that "we conclude that the legislature intended the court to apply a common law approach to 'good cause,' where meaning emerges over time, on a case-by-case basis, and courts arrive at a desirable equilibrium between the competing needs of disclosure and secrecy of government records." The appeals court added that "parents have such a high stake in the ultimate decisions that they must have access to camera video footage here at issue and not blindly rely on school board experts to make decisions for them." (*State's Attorney's Office of the Seventeenth Judicial Circuit and School Board of Broward County v. Cable News Network, et al.*, No. 4D18-1335 and No. 4D18-1336, Florida District Court of Appeal, Fourth District, July 25)

The Federal Courts…

Judge Rudolph Contreras has ruled that the Department of the Treasury properly withheld under **Exemption 1 (national security)** a September 2014 two-page letter sent by Mark Carney, the Governor of the Bank of England, to then Treasury Secretary Jack Lew because it contained foreign government information. In April 2015, a series of online reports were published regarding why the reinsurance subsidiary of Berkshire Hathaway was not included on the United States Financial Stability Board's list of "systematicly important financial institutions" and there was speculation that the 2014 letter discussed Berkshire Hathaway's absence from the list. The letter was first requested in May 2015 by Elizabeth Festa. At that time, the agency told Festa the letter was a "foreign record" not subject to FOIA. In April 2017, the Competitive Enterprise Institute submitted a request for the letter, which had recently been classified by Treasury. CEI argued that the letter had been classified to avoid embarrassment. Contreras rejected the argument, noting that "Competitive Enterprise cites nothing in the record indicating that the Department of Treasury considered the information in the Letter an embarrassment, or that it was aware of any news reporting regarding the Letter's existence prior to classification. Moreover. . .the Department did not classify the Letter until *two years* after the allegedly embarrassing news reports were released. Either the Department's capacity for delayed embarrassment is unrivaled, or the classification decision was only remotely related to those stories." CEI also claimed that the letter did not fall within one of the categories for classification under EO 13,526. Contreras disagreed, pointing out that "EO 13,526 does not specifically define 'foreign relations,' as it is used in § 1.4(d), and courts have applied this category to a range of situations in which it is reasonable to believe that the disclosure of information may harm relations between the United States and a foreign country – whether or not that information is from or pertains to the foreign government itself." Contreras found the agency's affidavit provided a sufficient explanation for why the letter was classified. He observed that "courts have held that the disclosure of information that may impact future negotiations between the United States and foreign nations, or that may damage the United States' ability to speak candidly with or about foreign nations, poses sufficient potential harm to 'foreign relations' to justify classification under EO 13,526 and nondisclosure under Exemption 1." Although he noted that his finding that the letter was properly classified was all that was needed to approve the agency's withholding, Contreras went on to address when an *in camera* review was appropriate in such circumstances. Rejecting CEI's request for *in camera* review, he noted that "the Court's task is not to evaluate the objective validity of the Department of Treasury's assertions, but rather to evaluate whether [its affidavit] is specific enough to determine whether the agency plausibly asserted that the Letter's disclosure could 'reasonably be expected' to harm the foreign relations of the United States." CEI claimed that the agency's belated decision to classify the letter was evidence of bad faith, meriting *in camera* review. Once again, Contreras disagreed, pointing out that "Competitive Enterprise has offered little evidence other than its own speculation that the information in the Letter was, or would have been, an embarrassment to the

Department of Treasury. Absent tangible evidence of agency wrongdoing, the Court finds that the Department of Treasury's actions do not demonstrate the bad faith or egregious 'sloppiness' that Competitive Enterprise claims." (*Competitive Enterprise Institute v. Department of Treasury*, Civil Action No. 17-1600 (RC), U.S. District Court for the District of Columbia, Aug. 9)

A federal court in New York has ruled that the Department of Justice and the Department of Homeland Security conducted **adequate searches** for records concerning their "Countering Violent Extremism" programs and that both agencies properly withheld records under **Exemption 1 (national security), Exemption 3 (other statutes), Exemption 5 (privileges)**, and **Exemption 7 (law enforcement records)**. The Brennan Center for Justice made a series of FOIA requests to the FBI and DHS's Office of Intelligence and Analysis for records about their participation in the CVE program. By the time Judge Katherine Polk Failla ruled, the only issues remaining were the Brennan Center's challenge to the FBI's search and a handful of challenges to exemption claims made by both agencies. Although the FBI conducted a manual search of records in its Countering Violent Extremism Office, the Brennan Center challenged the agency's claim that an electronic records search would be too burdensome because of the agency's record-keeping system. Failla pointed out that "despite Plaintiff's contention that the FBI should have 'used Boolean operators' such as 'and,' or [and] 'not' in searching its databases, this was not the FBI's burden, which is only 'to show that its search efforts were reasonable and logically organized to uncover relevant documents; it need not knock down every search design advanced by every requester.'" She also rejected the Brennan Center's claim that the search was inadequate because the agency did not explain the structure of its filing systems within the offices that were searched. Failla agreed that both agencies had appropriately cited the National Security Act as (b)(3) statute. She approved of DHS's use of Section 201(d)(11) of the Homeland Security Act of 2002 as well, noting that "plaintiff does not appear to dispute that the Homeland Security Act qualifies as a withholding statute under Exemption 3, and with good reason – on its face, the Homeland Security Act specifically exempts 'intelligence sources and methods' from disclosure." The Brennan Center argued that neither agency had shown that records withheld under Exemption 3 actually pertained to sources and methods. But Failla dismissed that notion, pointing out that "it would be naivete to presume that such documents would not exist, given the focus on national security." Rejecting the Brennan Center's procedural challenges to the FBI's Exemption 1 claims, Failla also dismissed its claim that the records had been officially acknowledged by disclosure to members of the public who were CVE participants. She pointed out that "even if the record demonstrated comparable specificity, the disclosure would only be to a small segment of the public, insufficient to render the disclosure 'public in the sense relevant to the official disclosure doctrine.'" Failla approved the FBI's Exemption 5 claims except for its claim that a PowerPoint presentation was protected because it was a draft. She noted that "courts have 'made clear that simply designating a document as a "draft" does not automatically make it privileged under the deliberative process privilege.'" Having found that the agencies' records qualified under Exemption 7, Failla approved of the agencies' withholding claims under **Exemption 7(E) (investigative methods or techniques)**. She agreed with DHS that its analysis of travel trends qualified as a guideline. She observed that "by focusing on historical travel trends of suspected extremists, I&A is able to focus its future policies toward identifying criminal suspects in the future. This falls within the definition of law enforcement 'guidelines' for the purpose of Exemption 7(E)." (*Brennan Center for Justice at New York University School of Law v. Department of Homeland Security and Department of Justice*, Civil Action No. 16-672 (KPF), U.S. District Court for the Southern District of New York, Aug. 3)

A federal court in Idaho has ruled that while the Department of Justice properly withheld 12 Office of Legal Counsel opinions dealing with presidential authority under the Antiquities Act under the presidential communications privilege, they are protected by the attorney-client privilege and the deliberative process

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privilege as well. In response to a request from Advocates for the West for all OLC opinions concerning the Antiquities Act located in OLC's database of final legal advice, OLC located 38 opinions. It disclosed 26 of them in full, but withheld the remaining 12 under various privileges, particularly the presidential communications privilege. Advocates complained that the agency's *Vaughn* index was too vague and did not provide enough information about individual opinions for it to assess the agency's privilege claims. The court found the *Vaughn* index sufficient, pointing out that "while Advocates see the generic nature of the descriptions as vague and lacking, any more specificity could negate the whole reason for withholding the documents in the first instance. Specifics in a *Vaughn* index could just as easily lead to the dissemination of information to the public that was the impetus for the withholding in the first instance." Attempting to limit the breadth of the presidential communications privilege, Advocates argued that "the presidential communication privilege only extends to quintessential Article II powers and is not applicable in this case because DOJ did not produce these records to fulfill any of the President's Article II duties, but instead for the President's statutory duties under the Antiquities Act of 1906." Based on a number of cases from other federal courts accepting an expansive interpretation of the presidential communications privilege, Judge David Nye found that "the presidential communications privilege is not limited only to quintessential Article II powers and DOJ has properly invoked this privilege in this case. To be clear, there is no doubt that the presidential communications privilege applies to communications directly related to the President's Article II powers, but the privilege is not so restrictive – as Advocates asserts – that it cannot likewise apply properly to the records at issue in this case." Having found that the presidential communications privilege applied to all 12 documents, Nye addressed the applicability of the deliberative process privilege and the attorney-client privilege as well. Advocates argued that OLC opinions constituted the final legal position of DOJ. Nye disagreed, noting that "while the Form and Legality Memos may be a quasi-final *position* of OLC as it relates to its job in advising the President and other top officials, it is no means a final *policy* of DOJ or OLC. The F&L Memos are not policy, but rather opinions, recommendations, and advice." He added that "even if an F&L Memo could be considered OLC's position on a given matter, such a conclusion would be the result of the specifics of the proposal in question. It does not follow that a single F&L Memo becomes the position of OLC indefinitely." As to the attorney-client privilege, Nye observed that "OLC is the Executive Branch's legal counsel and it deserves the same protections a single client would expect from his or her attorney." (*Advocates for the West v. United States Department of Justice*, Civil Action No. 17-00423-DCN, U.S. District Court for the District of Idaho, Aug. 6)

A federal court in Kansas has resolved the remaining disputes over whether a handful of documents qualified for protection under **Exemption 5 (privileges)** in a case involving the State of Kansas's FOIA litigation over the Obama administration's attempt to close the detention facility at Guantanamo Bay and relocate any remaining detainees to federal prisons in the United States. When the Obama administration first announced its plans to relocate the detainees, Fort Leavenworth in particular was one of the sites discussed as a possible destination. The Attorney General of Kansas submitted a FOIA request to the Department of Defense and after Kansas filed suit, DOD eventually disclosed redacted documents. In an earlier ruling, the court dealt with the majority of issues, but found that it did not have sufficient information to decide whether four unclassified documents and one classified document contained cost estimates protected by Exemption 5. After conducting an *in camera* review, the court found most of the records did not qualify, while the remainder did. The court started its analysis by indicating that the Tenth Circuit, in *Trentadue v. Integrity Committee* 501 F.3d 15 (10th Cir. 2007), had disapproved of agencies withholding "factual material simply because it reflects a choice as to which facts to include in a document." With this standard in mind, the court explained that three documents pertaining to the costs of operations of Guantanamo Bay, federal prisons, and Colorado state prisons were not deliberative. The court noted that the three documents "contain data – not projections – the agency considered while making its decision." The court added that "defendant argues that Exemption 5 protects this data because it was integral to its decision-making. But 'integral' information is not what

Exemption 5 protects. Instead, Exemption 5 only protects factual information that allows 'the public to easily infer' deliberative information from factual content or is 'inextricably intertwined with deliberative material.'" But the court found another document containing cost estimates was protected, pointing out that "many of the columns in [the] document contain assumptions made by defendants' personnel." The agency had redacted the name of another agency from the classified document. Here, the court observed that "defendant didn't redact the names of other agencies involved in GTMO's closure – for example, the Department of Justice. Defendant provides no explanation why revealing the Department of Justice involvement does not reveal defendant's deliberative process but revealing the unnamed agency's name would." (*State of Kansas v. United States Department of Defense*, Civil Action No. 16-4127-DDC-KGS, U.S. District Court for the District of Kansas, July 23)

A federal court in Michigan has ruled that the Occupational Safety and Health Administration properly withheld business email addresses for Compliance Safety and Health Officers, who are agency employees and performing workplace inspections, under **Exemption 6 (invasion of privacy)** and that the agency did not have a similar list of state CSHOs. Jon Milbrand submitted a request for the number of state plans. The agency found a list of state plans from 1977 to 2015 and disclosed the list but withheld the business email addresses of the CSHOs. Milbrand challenged the agency's **search** because it had failed to locate the email addresses of state CSHOs. Although the agency contended that it did not maintain a list of state CSHO email addresses, Milbrand indicated that he believed the agency must maintain such records. The court sided with the agency, noting that "plaintiff's speculation that records should exist is not sufficient to rebut Defendant's showing that it conducted a reasonable search." The agency withheld all 817 emails addresses for its employees. The court found that the email addresses constituted "similar" files for purposes of Exemption 6 and pointed out that "here, the federal CSHOs are responsible for inspecting work sites, investigating complaints about workplace health and safety, and issuing citations to employers who fail to meet OSHA standards. In light of their work in an investigative capacity, the release of their business email addresses exposes them to the risk of harassment and implicates a substantial privacy interest." The court noted that Milbrand had shown no countervailing public interest in disclosure, observing that "a list of business email addresses does not, however, reveal to the public 'what their government is up to,' which is the only relevant public interest under FOIA." (*Jon K. Milbrand v. United States Department of Labor*, Civil Action No. 17-13237, U.S. District Court for the Eastern District of Michigan, Aug. 9)

Judge Dabney Friedrich has ruled that a second affidavit from the Office of Information Policy provides a sufficient explanation of how former DOJ attorney Peter Kadzik searched his personal email account for emails he may have sent to John Podesta or others at Hillary Clinton's campaign to show that he conducted an **adequate search** for such emails. Based on a report from CNN that Wikileaks had disclosed an email Kadzik sent from his personal email account to John Podesta's personal email account, Judicial Watch submitted two FOIA requests for emails sent by Kadzik to anyone at the Clinton campaign. OIP conducted a search of Kadzik's DOJ account and asked Kadzik to conduct a search of his personal account and to turn over any business-related emails. Kadzik searched his email account and found no responsive records. Judicial Watch claimed that OIP's explanation of Kadzik's search did not provide sufficient detail to meet its burden of proof. As a consequence, OIP provided a second more detailed affidavit, indicating that Kadzik had searched for the terms mentioned in OIP's first affidavit "to the best of his recollection." This time Friedrich found the affidavit sufficient. Judicial Watch argued that the phrase "to the best of his recollection," was too imprecise to resolve the matter of the search. Friedrich noted that "to the extent that this qualifying phrase calls into doubt the completeness of Kadzik's electronic term searches, any deficiency is negated by the comprehensive manual searches Kadzik conducted. As described, Kadzik reviewed 'the subject lines and to/from fields of all

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emails from the inbox, trash, and sent folders' and opened and read 'any emails that, *based on either their subject line, author, or recipient, could have been potentially DOJ-related*.' He also 'opened and read *every single email* in any of his archived folders that *could have contained DOJ-related emails*.' Kadzik's belt-and-suspenders approach provides more than adequate support for the conclusion that the Department of Justice's search was reasonably calculated to discover the records that Judicial Watch seeks here." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 17-00029 (DLF), U.S. District Court for the District of Columbia, Aug. 9)

Judge Christopher Cooper has ruled that the U.S. Patent & Trademark Office conducted an **adequate search** for records concerning Chick-fil-A's unsuccessful challenge to Vermont-based T-shirt designer Bo Muller-Moore's application to trademark the phrase "Eat More Kale," which the company contended would cause consumer confusion with its "Eat Mor Chikin" advertisements. As part of his research for a documentary on the consumer trend towards eating more green vegetables, filmmaker James Lantz filed a FOIA request with USPTO for records about Chick-fil-A's unsuccessful challenge to Muller-Moore's trademark application. The agency located 45 pages and withheld three pages under **Exemption 5 (privileges)**. Lantz filed an administrative appeal, arguing that the agency's search was inadequate, and the agency had two more employees conduct searches, yielding an additional 52 pages. Lantz filed suit and the agency conducted another search to recover emails from a failed hard drive, producing another 70 pages. In total, the agency found 164 pages, released 116 pages in full, and withheld the remainder under Exemption 5. Lantz argued that the search was insufficient because the agency failed to locate some emails he knew existed independently, that the majority of the emails were dated from 2011 and 2013 while Chick-fil-A's challenge occurred from 2014 to 2015, that the agency did not use all the search terms, and that only 11 employees conducted searches while Lantz believed at least 39 employees were involved in the Chick-fil-A challenge. Cooper rejected all the claims. He noted that the agency's affidavit "explains that emails related to trademark applications – to the extent there are any – typically spike when the application is first received. And with 'Eat More Kale' in particular, the public's interest seemed to peak shortly after Chick-fil-A sent its 2011 cease-and-desist letter." As to the number of employees involved, Cooper pointed out that "the fact that a name appears on an email chain – *i.e.*, the mere fact that the individual received the email – does not suggest that the person is likely to hold additional responsive records." Cooper agreed that the withheld emails were protected by the deliberative process privilege. He observed that "as the government's declaration explains, the material includes 'draft work product and internal emails in which Agency representative are evaluating courses of action.' Disclosing that information would 'reveal internal deliberations among government personnel, namely, discussions of internal recommendations and opinions.' This sort of information is in the heartland of the deliberative process privilege and, therefore, at the core of Exemption 5." (*James Lantz v. U.S. Department of Commerce and U.S. Patent & Trademark Office*, Civil No. 17-940 (CRC), U.S. District Court for the District of Columbia, July 31)

Judge Amit Mehta has ruled that BuzzFeed News' need to know when the government officially received the Steele Dossier in order to defend itself against defamation charges brought against it by Aleksej Gubarev and his company Webzilla outweighs the government's claim that the information is protected by the law enforcement privilege. While courts so far have been reluctant to find that President Trump's tweets and off-the-cuff public statements constitute official acknowledgement on a range of issues, Mehta made clear that Trump's recent decision to declassify information pertaining to the Steele Dossier on behalf of Republicans on the House Intelligence Committee undercut the government claims here by revealing far more about the Steele Dossier than when the government received it. After Gubarev and Webzilla were identified in BuzzFeed's original story disclosing the contents of the Steele Dossier, they sued BuzzFeed for defamation in Florida state court. BuzzFeed claimed it was protected by the fair report privilege, which provides a defense for defamation

if the information came from a government record. To establish that the government was in possession of the Steele Dossier at the time of BuzzFeed's story, BuzzFeed filed subpoenas to force the government to provide records confirming when it received the Dossier. The government ignored BuzzFeed's subpoenas and the company filed suit to enforce them. By the time Mehta ruled, BuzzFeed had narrowed the scope of information it needed to providing authenticated answers to several questions. Mehta found that BuzzFeed's request for authentication was relevant to the Florida litigation. He noted that "although the [Florida] court presumed as true for purposes of the motion that the 'official actions. . .actually occurred,' BuzzFeed still must support the occurrences of these official actions *with proof*." Mehta pointed out that "it is evident that the testimony that BuzzFeed seeks to compel in *this* litigation – i.e., testimony regarding whether and when the FBI or any other Government Respondent acquired the Dossier, and whether senior intelligence officials briefed President Obama on its contents prior to the Article's publication – is directly relevant to BuzzFeed's fair-report-privilege defense in the Florida litigation." Mehta rejected the government's claim that responding to BuzzFeed would open a floodgate of other similar requests, noting that only three defamation cases involving the Dossier had actually been filed. He found that BuzzFeed's need for the information outweighed the government's invocation of the law enforcement privilege. He pointed out that "ordinarily, this court would be disinclined to compel even most factual disclosures about an ongoing law enforcement investigation. The risk attendant to such judicial intervention is obvious. But this is no ordinary investigation. Caution and discretion – typically hallmarks of federal criminal and national security investigations – have given way to unprecedented public disclosures." He added that "these disclosures show, an unprecedented amount of information about the Dossier's origin and its use in an ongoing investigation is already in the public domain. What BuzzFeed seeks to confirm through its subpoenas would add to this information only at the margins. . . The disclosures already authorized by President Trump, by comparison, are of a far greater magnitude. The court can only assume that the information declassified and released, at the President's direction, was determined to be of a kind whose disclosure would not discourage citizens from coming forward with information and would not compromise a source's identity." (*BuzzFeed, Inc., et al. v. U.S. Department of Justice, et al.*, Miscellaneous No. 17-02429 (APM), U.S. District Court for the District of Columbia, Aug. 3)

Dismissing prisoner William White's motions to vacate various procedural rulings in his case against the Department of Justice, a federal court in Illinois has ruled that White's request to take **discovery** is premature at best. Noting the recent Seventh Circuit ruling in *Henson v. Dept of Health and Human Services* 892 F.3d 868 (7th Cir. 2018), the court pointed out that "before allowing discovery, the Court should consider whether a defendant's affidavits in support of summary judgment show the agency has conducted a thorough search and given a reasonably detailed explanation of why exemptions apply. Because such affidavits are presumed to be in good faith, discovery is not necessary unless the plaintiff makes a showing of bad faith or points to tangible evidence that a claimed exemption should not apply, or if summary judgment is inappropriate for some other reason. Simply showing that a responsive document exists that the agency did not produce or that the agency did not give a detailed explanation of its entire records storage is not enough to justify discovery." The court observed that "should the Court find the defendants' affidavits insufficient to justify the agency's response to White's FOIA request, the Court will consider allowing discovery at that time." (*William A. White v. Department of Justice, et al.*, Civil Action No. 16-948-JPG-DGW, U.S. District Court for the Southern District of Illinois, Aug. 2)

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Editor's Note: *Access Reports* will take a summer break. The next newsletter, v. 44, n. 17, will be dated September 5, 2018.