Volume 44, Number 18
September 19, 2018

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: According to the National Law Journal, D.C. Circuit Court Judge Patricia Millett showed considerable skepticism at oral argument during an appeal filed by EPIC against the IRS to force it to disclose President Donald Trump's tax returns. In the district court, Judge James Boasberg accepted the agency's argument that EPIC had not perfected its request because it did have Trump's permission to release his tax returns. Ellis Kim of the National Law Journal wrote that "Millett bristled at what she described as the IRS' effort to shift the burden to EPIC in establishing its case for release of the tax returns. When DOJ attorney Michael Murray stated the IRS normally requires requesters to explain their right to certain kinds of information, Millett responded that FOIA was the very source of an individual's right to agency documents. The exception, she emphasized, was if there were an exemption that applied."

Court Finds Plaintiff Waived Claim, Agrees Talking Points Are Privileged

Judge Timothy Kelly has ruled that the American Center for Law and Justice waived its ability to challenge the adequacy of the Justice Department's search for records concerning a June 2016 meeting between Bill Clinton and then Attorney General Loretta Lynch at the Phoenix Airport. Kelly has also provided perhaps the most thorough explanation of why talking points created for senior officials in responding to press inquiries qualify for protection under the deliberative process privilege. Kelly's decision also is a rather graphic illustration of how disjointed the government's approach to FOIA litigation can be since Judge Amit Mehta issued a ruling less than two weeks later involving the same parties on a much narrower set of records concerning the privileged status of talking points prepared for Lynch for the same incident. While Mehta was surprised that neither party had mentioned Kelly's on point decision, the fact that he was not informed by the government shows a typical disregard by the government of any attempt to coordinate its litigation efforts.

ACLJ requested records concerning the Clinton-Lynch meeting in July 2016 and brought suit in November 2016 after DOJ failed to respond within the statutory time limit. In July and August 2017, the agency disclosed 413 pages to ACLJ

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with redactions made under Exemption 5 (privileges), Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records). The parties met and conferred to discuss the remaining issues. DOJ revised its redactions in two documents. ACLJ informed DOJ that it continued to contest DOJ's redactions under the deliberative process privilege and that it disputed the agency's segregability analysis. The parties signed and filed a September 27, 2017 Status Report. In its summary judgment motion, DOJ only addressed redactions to 11 documents, which it understood were the only documents still in dispute. However, ACLJ in its cross-motion sought to broaden the dispute, indicating that its opposition to the redactions in the 11 documents not only challenged the redactions, but also DOJ's alleged failure to actually segregate factual information from the redacted documents. It also challenged the adequacy of DOJ's search, explaining that since the September 27, 2017 status report ACLJ had received a document from another agency it believed should have been produced by DOJ. In its reply, DOJ provided additional information about its search and withholdings.

ACLJ argued that the search was inadequate because the agency had used search terms that were too limited and had improperly narrowed the time frame of certain searches. Kelly found that ACLJ had waived its right to challenge the adequacy of the agency's search by indicating in the September 2017 status report that the only remaining issue was the agency's exemption claims. Kelly explained that "where sophisticated parties to a FOIA case have agreed to narrow the issues in a written status report, they generally may be held to their agreement under traditional waiver principles. . .Just as a party may agree to narrow the case during a pretrial conference, a FOIA plaintiff may agree to do so in a written status report. Having voluntarily narrowed the case to a set of agreed-upon issues, the plaintiff may be said to have waived the others."

ACLJ claimed its agreement was void because of the document it had since received from another agency that DOJ had not produced. Kelly dismissed the claim, noting that "adequacy of the government's search is a potential issue in every FOIA case. ACLJ had every opportunity to discuss DOJ's search methodology with DOJ during the meet-and-confer process. And after meeting and conferring, ACLJ represented that it was not challenging DOJ's search."

ACLJ's argument that talking points prepared for and used by Lynch to respond to press inquiries constituted the agency's final position was met with a lengthy explanation by Kelly of the role of talking points in agency decision-making. He pointed out that "this argument fails to appreciate the nature of talking points generally and the particular context surrounding the June 28 talking points. Talking points are typically documents 'prepared by [government] employees for the consideration of [government] decision-makers.' There may be some circumstances where 'talking points' are intended by agency decisionmakers to be followed literally such that they, in and of themselves, represent the agency's decision about what to say. But the 'final' version of talking points prepared by more junior staffers for a more senior official is rarely the final decision about what the senior official will say. Rather, a senior official – especially one as high-ranking as the Attorney General – may elect to use all, some, or none of the talking points prepared for her. Perhaps to the chagrin of their junior staffers, senior officials have a tendency to improvise. And even when senior officials do follow their talking points, they often do not recite them word-for-word. The particular factual context surrounding the June 28 talking points, which were written for Attorney General Lynch but concerned events she had personally witnessed, strongly suggests that the talking points were no more than advice from subordinates. The final decision was what Attorney General Lynch actually said to the media, which is, of course, already a matter of public record."

Kelly further explained that "the talking points remain protected even though Attorney General Lynch followed them and even though they were repurposed for other press inquiries. A government employee drafting talking points to advise a senior official needs to know that her advice will remain privileged regardless of whether the official ultimately sticks to the script or decides to extemporize. It is accordingly of

no moment that Attorney General Lynch ultimately 'stuck to the talking points' – the point is that she might not have. And given that talking points are typically used on the fly, it would rarely be the case that an official formally 'adopts' talking points simply by relying on them. . ." Kelly found that DOJ had not sufficiently explained why the privilege applied to two emails but agreed that factual information contained in the talking points could not be segregated because they were inextricably intertwined with deliberative materials. (*American Center for Law and Justice v. United States Department of Justice*, Civil Action No. 16-2188 (TJK), U.S. District Court for the District of Columbia, Sept. 7)

Views from the States…

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

Alaska

The supreme court has ruled that the Homer city council properly withheld records concerning non-legal advice provided to the city council in relation to a case involving Frank Griswold and invoices for outside law firms who represented the city council in Griswold's litigation. The city council denied both of Griswold's requests. Griswold then sued, and the trial court upheld the city council's claims except for the hours billed and the names of clients on two invoices, finding that they were not protected by the attorney-client privilege. Griswold then appealed to the supreme court. Pointing out that this was the first time it had ever ruled on the applicability of the attorney-client privilege or attorney work product privilege in the context of the Public Records Act, the supreme court upheld the city council's claims as to the advice it had received, but noted that the trial court had ruled on only two of 22 pages of invoices and that the case should be remanded to the trial court to review the invoices and redact any information that qualifies as privileged and that "the court should then make its final decision, and the relevant, unprivileged information should be produced." The trial court had also awarded the city council 20 percent of its attorney's fees as the prevailing party. The supreme court explained that 'because we vacate part of the [trial] court's decision, we also vacate the prevailing party decision and its attorney's fees award." (*Frank Griswold v. Homer City Council*, No. S-16236, Alaska Supreme Court, Sept. 14)

California

A court of appeals has ruled that the extent of the data manipulation necessary to remove identifying information from the California bar admissions database would constitute creating a new record which is not required under the California Public Records Act. Richard Sanders and the First Amendment Coalition originally requested the database. The trial court found that the plaintiffs did not have a common law or constitutional right of access to the database. But the supreme court reversed, finding that under the common law right of public access, there was a sufficient public interest in disclosure of the database to consider whether or not the database could be disclosed without invading the privacy of individuals identified in the database. At a second trial, the parties argued over whether the data could be anonymized without the risk of re-identification. The plaintiffs offered four different de-identification protocols designed to allow disclosure while protecting privacy. The trial court found that the protocols would require the State Bar to create a new record. Further, the trial court ruled that the privacy exemption and the catch-all exemption also protected the records. Sanders and the First Amendment Coalition appealed. The appellate court upheld the trial court's finding that the protocols would require the State Bar to create a new record. The court pointed out that "there is no doubt that a government agency is required to produce non-exempt responsive computer records in the

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same manner as paper records and can be required to compile, redact, or omit information from an electronic record. But it cannot be required to create a new record by changing the substantive content of an existing record or replacing existing data with new data. The trial court's application of this distinction was entirely correct." (*Richard Sanders, et al. v. State Bar of California, et al.*, No. A150061, California Court of Appeal, First District, Aug. 23)

Georgia

The supreme court has ruled that the appellate court misapplied the Open Meetings Act when it found that the City of College Park had violated the statute because it was required to hold a public vote to appoint an interim city manager. The supreme court disagreed. The supreme court noted that "the phrase 'the vote. . .shall be taken in public' employs the use of a definite article ("the") and is therefore referential, presupposing the required action. Simply put, the language does not *mandate* a vote on a relevant employment decision, it simply *references* such a vote and requires that any such vote be taken in public." Instead, the supreme court observed that whether or not a public vote was required was dependent on the city's charter. Remanding the case to the trial court for a determination of that issue, the supreme court noted that "the mayor and city council are bound by the charter, and thus the resolution of this matter calls for a review and interpretation of the city charter." (*City of College Park v. Chawanda Martin*, No. S17G20008, Georgia Supreme Court, Aug. 27)

Kentucky

A court of appeals has ruled that an audit of billing practices at the Appalachian Heart Center, which had recently been purchased by the University of Kentucky, resulting in the University's decision to refund apparent overpayments, became part of the final decision and is not privileged under either the attorney-client privilege or the attorney work-product privilege. At a dinner meeting with the University's Board of Trustees, outside counsel presented a summary of the information contained in the audit report. The Lexington *Herald-Leader* then requested the audit report under the Open Records Act. The university withheld the report, claiming in was preliminary and that the content of its discussion at the board of trustees meeting was privileged. The *Herald-Leader* filed a complaint with the Attorney General's Office, which found that the audit report was not exempt and that the board of trustees' meeting had violated the Open Meetings Act as well. The *Herald-Leader* sued to enforce the AG's order and the trial court also found the report was not protected. The university appealed the trial court's ruling. The university argued that since the audit report was not referenced in its decision to refund the overpayments it was not incorporated as part of its final decision. The court of appeals disagreed, noting that "records which are of an internal, preliminary and investigatory nature lose their exempt status once they are adopted by the agency as part of its action. The Act does not require that an agency reference or incorporate specific documents in order for those records to be adopted into the final agency action. Rather, we agree with the Attorney General that preliminary records which form the basis for the agency's final action are subject to disclosure." The court dismissed the university's attorney-client privilege claim, pointing out that "the University does not suggest that the audits were prepared or conducted under the direction of either its inside or outside counsel." The appellate court also rejected the university's attorney work-product privilege claim. The appeals court observed that "here, the audit documents at issue were prepared in the course of the University's normal business oversight of the Clinic's operation, and only remotely in anticipation of potential litigation." (*University of Kentucky v. Lexington H-L Services, Inc.*, No. 2017-CA-001423-MR, Kentucky Court of Appeals, Sept. 14)

Oregon

A court of appeals has ruled that the City of Salem must disclose information about the arrest of an individual on allegations that he sexually abused a minor. After learning of the arrest, a reporter for the local newspaper asked the police department for the arrest record. The City refused to disclose any records, claiming they were protected by a variety of statutes pertaining to the investigation of reports of child abuse. The newspaper filed suit and the trial court sided with the City. The newspaper appealed, and the appellate court reversed. The appeals court began by noting that "assuming that 'report of child abuse' in [the child abuse statute] refers only to a report made in accordance with that procedure, then the statutory scheme operates sensibly, with the receipt of each report triggering a duty to investigate. If, on the other hand, the term 'report of child abuse' referred to *any* document containing information regarding child abuse, then the scheme would become unworkable. . .Thus, we reject the city's implicit reading that 'report of child abuse' in [the statute] includes every document containing any information about child abuse." The appeals court pointed out that "the city has admitted that it has a report, or reports, regarding [the] arrest, and the record on summary judgment does not demonstrate that the report or reports containing the requested information were 'compiled under the provisions of [the child abuse statute]." The appeals court observed that "the city chose to rely exclusively on its legal argument that all records related to a report of child abuse – and, thus any record of an arrest on allegations of child abuse – are exempt from disclosure under [the child abuse statute] . . .[B]ecause the city failed to show any facts about the reports or advance any argument as to why the reports might be exempt from disclosure, the city also failed to meet its burden on plaintiff's motion for summary judgment. . ." (*Pamplin Media Group, Inc. v. City of Salem*, No. A162248, Oregon Court of Appeals, Sept. 6)

The Federal Courts…

Judge Amy Berman Jackson has ruled that the FBI properly issued a ***Glomar* response** neither confirming nor denying the existence of records in response to a request from the James Madison Project and Politico reporter Josh Gerstein for records concerning whether President Donald Trump is or was ever a target of, subject of, or material witness to any investigation. In response to the request, the FBI issued a *Glomar* response based on **Exemption 7(A) (interference with ongoing investigation or proceeding)** and **Exemption 7(E) (investigative methods or techniques)**. JMP and Gerstein argued that a series of public statements made by Trump constituted official acknowledgment of the records and waived the government's ability to claim the *Glomar* defense. They initially pointed to Trump's letter firing then FBI Director James Comey in which Trump wrote that "I greatly appreciate you informing me, on three separate occasions, that I am not under investigation. . ." Jackson found Trump's statement contained "no mention of any 'agency record' or written memorandum, that was shared with the President or was referenced in the conversation. Moreover, the general phrase 'not under investigation' does not mirror the specificity of the request, which seeks records on whether the President 'is or ever was a target of, subject of, or material witness.' These terms have specific meaning that is not captured by the President's language. Plaintiffs contend that this is an 'overly-literal' interpretation, but the 'insistence on exactitude' is what the official acknowledgment doctrine demands." JMP and Gerstein argued that the D.C. Circuit's ruling in *ACLU v. Dept of Defense*, 628 F.3d 612 (D.C. Cir. 2011) had modified the burden of proof under the official acknowledgment doctrine to the extent that an overwhelming inference that records existed was sufficient. Jackson indicated that the unique circumstances present in *ACLU v. Dept of Defense* were not present here. She pointed out that "while a President may be included among the executive branch officials who can waive the confidentiality needed to sustain an agency's *Glomar* response, it is still necessary that any statement proffered meet the matching and

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specificity requirements. When a plaintiff asks a court to take the extraordinary step of looking past the fact that an official statement does not on its face reveal whether responsive records exist, then it is imperative that both the context and substance of the official disclosures 'leave no doubt' as to that fact." JMP and Gerstein also pointed to Trump's interview with Lester Holt of NBC in which he discussed his reasons for firing Comey as evidence that Trump had acknowledged the existence of records. Jackson disagreed, noting that "again, none of these statements summarizing conversations with the FBI official explicitly refer to the existence of any record within the agency, or necessarily imply the existence of such records." Jackson rejected claims by JMP and Gerstein that a number of other statements made by Trump confirmed the existence of records concerning investigations. She also rejected two opposing memos by the House Intelligence Committee as providing public acknowledgment. Here, she pointed out "a memorandum issued by members of a House Committee cannot constitute an official disclosure on behalf of the FBI and DOJ." She observed that "even if the President's decision to de-classify and release the memorandum somehow transforms the statement into on of his own for purposes of this analysis. . .it does not pertain to whether DOJ has records memorializing internal discussions or disclosures to the President about the President's status as a subject, target, or material witness to any investigation." (*James Madison Project, et al. v. Department of Justice*, Civil Action No. 17-1392 (ABJ), U.S. District Court for the District of Columbia, Sept 7)

A federal court in Massachusetts has ruled that the CIA failed to conduct an **adequate search** for records concerning the agency's use of Twitter and that while the agency properly invoked **Exemption 3 (other statutes)**, it failed to support its **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)** claims. Amanda Johnson, a Ph. D student at MIT, submitted a three-part request for records pertaining to the agency's use of Twitter. The agency searched its Office of Public Affairs and disclosed 18 records with redactions. Johnson argued that searching only OPA was too limited because the disclosed documents indicated that other components, such as the Office of General Counsel, the Chief Information Officer, the Web Council, and the Publications Review Board, were involved as well. Agreeing with Johnson, the court noted that "Dr. Johnson is not merely speculating about the existence of responsive documents outside of OPA, she has reliable evidence that their existence is likely. In light of these references, it was unreasonable for the Agency to draw the conclusion, without providing more of an explanation, that OPA would be 'the only Agency office reasonably likely to possess records responsive to Plaintiff's request.'" The court added that "the mention of PRB and other offices in the produced documents are leads sufficient to require the Agency to expand the scope of its search." The agency had refused to search for a list of user applications associated with the agency's public Twitter account because to do so would require the agency to create a record. Again, the court disagreed. The court pointed out that "the list sought by Dr. Johnson in the third request already exists and must be produced. She is not asking the Agency to create a list of user applications, but rather seeks the currently existing list of user applications available on Twitter's website. As evidenced by [the agency declaration], the record sought is a list, accessible to the Agency, already maintained on the Agency's Twitter account. The record exists with regard to all Twitter accounts and would not be created specifically for purposes of the Agency's FOIA response." The court found although the list was on Twitter's website the agency had sufficient control over the document. The court indicated that "the Agency can manipulate its applications list by revoking access to certain applications and connecting to others. The makeup of this list is controlled by the Agency's own decisions with regard to its Twitter account. This shows that Twitter significantly relinquished control over this page to the Agency. Even if not hosted within the Agency's records system, the Agency has enough ability to manipulate and use the record so that the list constitutes an Agency-controlled record for FOIA purposes." The court found that the agency's redactions under the National Security Act and the CIA Act were appropriate under Exemption 3. As to its claim that certain information was protected under the deliberative process privilege, the court pointed out that "the Agency misapplies the privilege. As the Agency describes, the information withheld is part of an Agency document used to aid employees in making decisions related to the Twitter account. Although it may aid the

deliberative process, the document itself is not deliberative." The court concluded that names and addresses of CIA and Twitter employees contained in emails did not qualify for Exemption 6. The court observed that "the 'emails can in no way be construed as similar to personnel or medical files' so the Exemption cannot be invoked. Rather, the emails are 'mundane interoffice communications [and] do not contain any detailed personal information.'" (*Amanda Johnson v. Central Intelligence Agency*, Civil Action No. 17-10789-JGD, U.S. District Court for the District of Massachusetts, Sept. 17)

In a case brought by Cause of Action Institute to uncover the effects of a letter sent to agencies by Rep. Jeb Hensarling, chair of the House Committee on Financial Services, instructing agencies to treat communications with the committee as congressional records rather than agency records, Judge James Boasberg has ruled that while some of the **Exemption 5 (privileges)** claims made by the Department of Justice are appropriate, others are not protected by either the attorney-client privilege or the deliberative process privilege. DOJ initially disclosed five pages and later discovered another 11 responsive pages. The agency disclosed the records with redactions under Exemption 5. Cause of Action did not challenge the adequacy of the search but did contest the breadth of the agency's privilege claims. DOJ withheld the bulk of two emails from the White House Counsel's Office to the Director of the Office of Information Policy. The email began with "FYI – the administration has received several letters like the attached." DOJ redacted the following sentence and the entire attached letter, claiming it was covered by the attorney-client privilege. After reviewing the records *in camera*, Boasberg disagreed. He noted that "nowhere does the White House directly ask for legal advice in the email, nor is there any other statement that can even be fairly construed as a solicitation of legal counsel. Rather, the body of the email begins with the acronym 'FYI,' which the Court, like the parties, takes to mean 'for your information.' This statement gives the email the appearance of a simple alert to another government employee and not a communication whose 'primary purpose' is securing legal advice." DOJ argued that OIP routinely provided legal advice to agencies on FOIA-related issues. Boasberg, however, explained that "the fact that OIP is in the business of sometimes – or even 'routinely' – providing legal advice is insufficient when, as here, the provision of legal services is not the office's sole duty. It is Justice's burden to show that this *particular* communication involved a request for legal advice." He pointed out that "the 'context of the email' to which the Government refers only reveals coordination between the White House and OIP on a response to the congressional instruction. It does not establish that the purpose of this communication was legal in nature." He added that "even if the Court were to assume that obtaining legal advice was one of the White House's objectives in reaching out to OIP, DOJ might nevertheless still fail to carry its burden. That a conversation has some legal nexus is insufficient: the party seeking the protection of the attorney-client privilege must show that securing legal advice was a 'primary objective.' [T]he email's language cuts against any inference that the communication primarily concerned a request for legal counsel, rather than mere coordination on a strategy or policy amongst government agencies." An email chain from an agency seeking legal advice from the Office of Legal Counsel fared better. Here, Boasberg pointed out that "the sending of the document to legal counsel for the purpose of review, accordingly, means that the draft falls within the scope of the privilege and is entitled to protection." Cause of Action challenged whether confidentiality was appropriate where the agencies' motive for seeking legal advice was public. But Boasberg noted that "the Institute has learned the identity of the twelve agencies that received the letter. It remains in the dark only as to which of these twelve actually sought OLC's counsel in these communications. That Plaintiff has some pieces of the puzzle, however, does not justify revealing the complete picture. Divulging the client's identity would still disclose that the agency acted on a particular 'motive. . .in seeking representation.'" Cause of Action argued that including

the Office of Legislative Affairs on the email waived the privilege. Boasberg indicated that "OLA is an organization within the executive branch, and the matter at issue concerned an agency's response to congressional correspondence, which is directly in OLA's wheelhouse. The disclosure of communications to OLA thus did not waive the privilege." Boasberg found that the email from the White House counsel to OIP was predecisional, but that it was not deliberative. He pointed out that "as the Court's review makes clear, the communications here reveal no 'deliberative process' that could 'expose the agency's policy deliberations to unwarranted scrutiny.' Absent more, the privilege cannot apply. A record is not protected merely by virtue of being a relevant predecisional communication." (*Cause of Action Institute v. United States Department of Justice*, Civil Action No. 17-1423 (JEB), U.S. District Court for the District of Columbia, Sept. 13)

Judge Christopher Cooper has ruled that the FCC must disclose email addresses used to submit comma-separated value (.CSV) files pertaining to public comments made to the agency in response to its decision to repeal the net-neutrality provisions put in place during the Obama administration to journalist Jason Prechtel, but has held Prechtel's challenge to application programing interface (API) keys in abeyance until the General Services Administration can weigh in on who owns them. Cooper also found that redactions the agency made under **Exemption 5 (privileges)** were appropriate. Prechtel filed a FOIA request with the FCC and GSA for public API keys used to submit online comments, including associated registration names and email addresses, as well as copies of data files submitted through those API keys, and logs of dates and times that those API keys were used to submit comments. Prechtel's request to the FCC also asked for email addresses associated with .CSV comment uploads, along with the .CSV files uploaded, logs of dates and times the email addresses submitted comments, and email inquiries to ECFSHelp@fcc.gov regarding .CSV comment submissions. GSA told Prechtel that the FCC has control of the API keys. After the FCC failed to respond, Prechtel filed suit. The FCC then disclosed 15 pages responsive to Prechtel's query about the help desk, redacted several emails, and told Prechtel that it did not maintain records on the API keys, asserting that GSA maintained those records. Because Prechtel did not add GSA as a defendant until after he and the FCC had filed summary judgment motions, GSA had not yet addressed the issue of who owned the API keys. Cooper approved the FCC's redactions based on the deliberative process privilege. Turning to the email addresses used for submitting .CSV comments, Cooper pointed out that the FCC misunderstood Prechtel's request by assuming that he wanted to public comments that were available on its website. Cooper noted that Prechtel was requesting the .CSV files themselves, not their content. He observed that "the .CSV files have independent value – principally, they reflect which comments were submitted together and, assuming disclosure of the bulk file submitters' email addresses, by whom. Whether or not the Commission properly withheld the email addresses of bulk submitters, it still must justify independently the withholding of the files themselves." Although email addresses of individual submitters were public, the FCC argued that bulk submitters only transmitted files and did not necessarily comment. Cooper disagreed, noting that "the individuals here sought to influence agency decision-making by submitting scores of public comments into the administrative record. This makes them more akin to individual commenters who provide their email addresses when petitioning the government. . .Any difference between public commenters' and bulk submitters' privacy interests is one of degree, not kind. . .In other words, when someone submits multiple comments to influence public policy and is told that her email address will become part of the public record, her privacy interest in that email address is not as strong as the Commission now suggests." Cooper agreed that there was a public interest in knowing more about the number of potentially fraudulent email addresses used in submitted comments. He pointed out that "the public-commenting process appears to have been corrupted by endemic fraud and the Commission hopes to take action to ensure that

this problem will not recur. Disclosure of the email addresses and .CSV files will enable interested observers to scrutinize that action (or its absence) by defining the scope of the problem." Explaining why disclosure of more information would benefit the public interest, Cooper observed that "the already public information paints only part of the picture. The .CSV files will reveal which public comments were submitted together and – with disclosure of the bulk submitter email addresses – by whom. The public might better understand the agency's responsiveness to various constituencies if it knows which stakeholders solicited and facilitated bulk public comments and which comments they submitted." (*Jason Prechtel v. Federal Communications Commission*, Civil Action No. 17-01835 (CRC), U.S. District Court for the District of Columbia, Sept. 13)

Judge Amit Mehta has ruled that the Department of Justice failed to show that an unidentified anonymous source is protected by **Exemption 7(D) (confidential sources)** and although the name of the attorney who represented the anonymous source is protected under **Exemption 7(C) (invasion of privacy concerning law enforcement files)**, the agency has not yet shown that disclosure of the name of his law firm would be enough to identify him. The case involved a series of requests filed by the law firm of King & Spalding with the Department of Health and Human Services and the Department of Justice for records about a 2012 investigation of Abiomed, a medical device manufacturer, for off-labeling marketing practices that was started because of an anonymous tip provided by a private attorney to the U.S. Attorney's Office in Washington, D.C. The investigation ended three years later without any enforcement action. On behalf of Abiomed, King & Spalding submitted several FOIA requests and subsequently filed suit. All the requests involving HHS were resolved, but the requests to EOUSA and the Criminal Division remained unresolved. EOUSA, which handled the Abiomed investigation, withheld a total of 67 pages under Exemption 7(D) and redacted personally identifying information under Exemption 7(C) as well as Exemption 6 (invasion of privacy). King & Spalding challenged EOUSA's claim that information supplied by the anonymous source was protected under Exemption 7(D) because it was provided under an implied assurance of confidentiality. Mehta first pointed out that a four-factor test articulated by the D.C. Circuit in *Roth v Dept of Justice*, 642 F.3d 1161 (D.C. Cir. 2011) had fleshed out the Supreme Court's implied confidentiality test from *Dept of Justice v. Landano*, 508 U.S. 165 (1993), focusing on the character of the crime, the source's relationship to the crime, whether the source received payment, and whether the source had an ongoing relationship with law enforcement. Turning to the four factors from *Roth*, Mehta observed that the character of the crime related primarily to whether it was violent or serious in nature. DOJ tried to compare the circumstances here with Judge Colleen Kollar-Kotelly's ruling upholding a claim of implied confidentiality in *Rosenberg v. Dept of Immigration & Customs Enforcement*, 13 F. Supp. 3d 92 (D.D.C. 2014), which involved the raid of a meatpacking plant for use of illegal workers. Mehta rejected the comparison, noting that "suffice it to say, in terms of severity, the character of the alleged crimes at issue here – involving violations of laws relating to the promotion of off-label uses of a medical device – pales in comparison to the character of the crimes at issue in *Rosenberg*, which involved 'long terms incarceration and financial fraud.'" As to the source's relationship to the crime, Mehta explained that "most obviously, the court cannot make the assessment because Defendants do not know the character of the source. If for instance, the source is an Abiomed competitor, then that fact might weigh against an inference of confidentiality. The opposite would hold true if the source is an Abiomed insider." Mehta found scant evidence of any ongoing relationship with the agency. He pointed out that "these limited communications, seemingly occurring over a short period of time at the start of the investigation, do not support an 'ongoing relationship' with the law enforcement agency." Mehta rejected DOJ's reference to two non-D.C. Circuit appellate decisions upholding the

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confidentiality of anonymous sources. He pointed out that both cases involved unsophisticated sources who had communicated by letter. By contrast, the source here had used an attorney, suggesting that "the source is likely more sophisticated than the letter writers in [the two appellate decisions] and thus less likely to believe that mere anonymity equates to confidentiality." Finding that none of the *Roth* factors supported the government's implied confidentiality claim, Mehta concluded that Exemption 7(D) did not apply. Because there was no evidence of wrongdoing on the part of the government, Mehta pointed out that the lawyer's name was categorically protected by Exemption 7(C). He pointed out that DOJ had not addressed whether or not disclosure of the name of the attorney's law firm would disclose his or her identity. He sent that issue back to DOJ to address to supplement its affidavits. (*King & Spalding LLP v. U.S. Department of Health and Human Services, et al.*, Civil Action No. 16-01616 (APM), U.S. District Court for the District of Columbia, Sept. 7)

Judge Amit Mehta has ruled that the Department of Energy's National Energy Technology Laboratory properly withheld records from the Climate Investigations Center pertaining to its funding and development of a clean-coal technology plant in Mississippi known as the Kemper Project under **Exemption 4 (confidential business information)** and that some but not all of its **Exemption 5 (privileges)** appropriate. In an earlier opinion, Mehta found that the agency had not provided sufficient support for its Exemption 4 and Exemption 5 claims and told the agency to either disclose the records or to supplement its affidavits. He also found that the agency's claim that **Exemption 6 (invasion of privacy)** protected personally identifying information of senior officials from the Southern Company was moot because the information was publicly available in the company's SEC filing. Mehta first rejected the Center's challenge to the agency's **search**, finding that the agency had shown that its searches were adequate. Turning to Exemption 4, Mehta found that the agency's supplemental affidavits provided ample support for him to conclude that disclosure would not only impair the government's ability to get quality data but would also cause substantial competitive harm. He pointed out that "defendant, through [its] Supplemental Declaration, has set forth why disclosing Southern Company's information, in this instance, would threaten Defendant's ongoing ability to gather information from companies seeking federal funding. As [the affidavit] explains, these applicants may stop applying for federal funding altogether or scale back the information they voluntarily include in their applications – information that goes above and beyond that required but is nevertheless useful to NETL when evaluating proposals." Mehta agreed that by providing an affidavit from Southern Company the agency had also shown the existence of substantial competitive harm. The Center tried to undercut the affidavit's credibility by arguing that Southern Company was an interested party. Mehta pointed out that "frequently in Exemption 4 cases the declarant is an official of the private enterprise whose information is at stake. . .[S]uch officials are often in the best position to explain the competitive harm that would arise from disclosure. Exemption 4 does not demand testimony from an uninterested observer to justify the withholding." Both NETL and DOE had claimed that the attorney-client privilege applied to a series of communications. Rejecting the NETL claims, Mehta noted that "the privilege does not apply to communications involving agency personnel, the agency's attorneys, *and* a third party – Southern Company's counsel." By contrast, he accepted DOE's attorney-client privilege claims because they had not been shared with a third party. Mehta rejected NETL's deliberative process privilege claims as well, pointing out that its assertion of privilege was primarily focused on when a record was created. He noted that "Defendant's organization of records centered on the timing of the production, not on any identifiable criteria that would situate a defined group of records within the overall decision-making process. This approach does not give the court the information it needs to evaluate the privilege claim." He added that since the deliberative process privilege protected "inter- or intra-agency" communications, records shared with Southern Company were not eligible for the privilege. He also rejected the agency's claim that Exemption 6 protected any identifiable third-party information. Instead, he observed that "Defendant has not, for example, shown why 'key officials' for Southern Company, a publicly-traded energy corporation, have the same or

similar 'substantial' privacy interest as, say, lower-level Southern Company employees and Kemper Project subcontractors. A categorical approach can be appropriate. But Defendant must explain the privacy interests at stake as to each appropriately categorized group of individuals whose names and identifying information it has withheld." (*Climate Investigations Center v. United States Department of Energy*, Civil Action No. 16-00124 (APM), U.S. District Court for the District of Columbia, Sept. 19)

Judge Timothy Kelly has ruled that the Department of State properly invoked **Exemption 5 (privileges)** to redact documents concerning the alleged deletion or manipulation of video footage of a 2013 State Department press briefing at which then State Department spokesperson Jennifer Psaki implied to Fox News Reporter James Rosen that her predecessor had lied to Rosen about whether or not the Obama administration had secret bilateral talks with Iran in 2011. In 2016, Obama Deputy National Security Advisor reportedly admitted that the talks with Iran took place in 2011. Within weeks of that report, Rosen claimed the State Department had removed eight minutes of the 2013 press briefing including his exchange with Psaki. The American Center for Law and Justice asked for records concerning the deleted tape. The State Department disclosed 34 unredacted documents and 35 documents with redactions under Exemption 5, claiming the redactions were justified by the attorney-client privilege and the deliberative process privilege. Kelly found that emails concerning preparation for the press briefing were both predecisional and deliberative. Kelly pointed out that "State's assertion that these are recommendations, and not final decisions, is further confirmed by the fact that neither [Deputy Spokesperson Marie Harf] or Rhodes was clearly 'senior' to Psaki – Harf was Psaki's subordinate in the [the Bureau of Public Affairs] and Rhodes worked in a separate executive branch entity." Several of State's redactions involved draft talking points for the press briefing. Finding they qualified for protection under the deliberative process privilege, Kelly noted that "the 'decision' in this instance is not a press briefing, or how to respond to a particular press inquiry, but rather the development of a set of talking points to address future press inquiries." He added that "the unredacted portions of the documents support this claim – they show a back-and-forth discussion about how to revise these talking points. Also, the withheld material is predecisional in that there is no indication that the talking points were ultimately finalized, or even used." Kelly found that the State Department had failed to provide sufficient information to justify its claims on two emails – one withheld under the deliberative process privilege and the other under the presidential communications privilege. He ordered State to supplement its affidavits to justify the two claims. (*American Center for Law and Justice v. United States Department of State*, Civil Action No. 16-1355 (TJK), U.S. District Court for the District of Columbia, Sept 10)

Judge Rudolph Contreras has ruled that OMB has not shown that **Exemption 5 (privileges)** applies to calendar entries requested by Property of the People and researcher Ryan Shapiro. Property of the People and Shapiro requested visitor, phone logs, and calendar entries for OMB Director Mick Mulvaney. OMB told Property of the People and Shapiro that it did not maintain visitor or phone logs but would respond to his request for calendar entries. OMB withheld some entries, citing both the presidential communications privilege and the deliberative process privilege. Property of the People did not challenge OMB's application of the deliberative process privilege to withhold the subject matter of meetings, but argued that the names of attendees, the location of meetings, and the inviter were not privileged. OMB agreed to disclose the information in some instances but continued to withhold it for other meetings. Under the presidential communications privilege, OMB withheld calendar entries that related to meetings involving the President, Vice President or senior advisors. Contreras found that details about who attended meetings did not qualify under the deliberative process privilege. He noted that "though Plaintiffs might infer the general topic of a

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meeting from a list of meeting participants – the most potentially revelatory information in dispute – release of this information would expose no suggestions, no recommendations, no proposals, and no other aspect of the agency communications, and it is not apparent how disclosure of this information might in any way discourage candid discussion within the agency." He added that "with respect to the locations of the meeting and the name of the 'inviter' who scheduled the meetings, the Court struggles to imagine anything one could possibly glean about the agency's deliberations from this information." Contreras then found that OMB had applied the presidential communications privilege far too broadly. He pointed out that OMB "may have asserted the privilege with respect to meetings between individuals who are decidedly not immediate White House advisers under Circuit precedent," observing that "OMB appears to misapprehend the reach of the privilege, as the heads of agencies that are subject to FOIA are not immediate White House advisers for purposes of the application of the privilege." He rejected OMB's claim that preparation for meetings was privileged. Instead, he noted that "OMB cannot rely on the notion that preparatory meetings served some Executive Branch function to claim that a privilege specially related to the unique role of the President applies." Contreras observed that "OMB is not solely an advisor to the president. And the mere fact of communications between the OMB Director and White House staff or agency staff on matters of policy is insufficient to show that calendar entries concern matters of presidential decisionmaking." (*Property of the People, et. al v. Office of Management and Budget*, Civil Action No. 17-1677 (RC), U.S. District Court for the District of Columbia, Sept. 14)

Judge Amit Mehta has ruled that the FBI properly redacted two records under **Exemption 5 (privileges)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to the American Center for Law and Justice's FOIA request for records pertaining to the June 2016 meeting between Bill Clinton and then-Attorney General Loretta Lynch at the Phoenix Airport. The FBI initially told ACLJ that it found no records, but subsequently indicated that it had found two records totaling 29 pages, which it disclosed with redactions. Mehta found that Exemption 7(C) did not apply to the single email the FBI sought to withhold because the email was not created for law enforcement purposes. Mehta noted that "the email references a conference call; in context, it appears that the purpose of the call is related to a media inquiry regarding the Clinton-Lynch meeting. In short, Defendant has not carried its burden of making a connection between the email and an enforcement proceeding." But he agreed that the redactions of FBI employees were protected by Exemption 6 since ACLJ had shown no public interest in the identifying information sufficient to overcome the individual privacy interests. ACLJ argued that the deliberative process privilege did not apply to talking point memos because they were final. Mehta pointed out that although Judge Timothy Kelly had recently ruled in another case brought by ACLJ against the Justice Department involving similar memos prepared to address press inquiries that they were both predecisional and deliberative, neither party had brought the case to Mehta's attention. Applying Kelly's holding, Mehta observed that "these talking points are no more than 'advice from subordinates' to senior officials, who may or may not rely upon them if asked to comment to the press." He rejected ACLJ's claim that the agency had failed to **segregate** facts from recommendations, noting that "the process of sifting the facts in this case cannot be separated from the facts themselves." (*American Center for Law and Justice v. U.S. Department of Justice*, Civil Action No. 17-01866 (APM), U.S. District Court for the District of Columbia, Sept. 19)

Judge Christopher Cooper has ruled that the Federal Election Commission properly redacted emails concerning the "@altFEC" Twitter account and emails from EOP.gov under **Exemption 5 (privileges)**. The Center for Public Integrity made a FOIA request to the agency for records referencing the Twitter account. The agency located 21 pages and withheld 14 pages under Exemption 5. CPI made a second FOIA request for emails from the domain EOP.gov sent to the commissioners or senior managers at the agency. The agency

located 14 pages and referred them to OMB. OMB suggested redactions under Exemption 5 and Exemption 6 (invasion of privacy), which were adopted by the FEC. CPI argued that the redactions made under Exemption 5 did not qualify for the deliberative process privilege. The agency explained that the emails "consisted of communications among attorneys at different levels in the FEC's Office of General Counsel working to identify and analyze potential legal issues that the 'altFEC' Twitter account might raise.' In other words, agency lawyers were engaged in a back-and-forth discussion on a specific legal question. 'There can be no doubt that such legal advice, given in the form of intra-agency memoranda prior to any agency decision on the issues involved, fits exactly within the deliberative process rationale for Exemption 5.'" CPI argued that there must be some **segregable** information in the emails. Cooper noted that "to the extent the Center counters that there must be *some* non-exempt information that can be released like the names of senders and recipients, the FEC has disclosed that very information in the *Vaughn* index attached to its reply. . .Requiring the agency to release additional factual information beyond that in the *Vaughn* index would risk revealing the underlying deliberations themselves." The records withheld by OMB included a meeting agenda. Cooper pointed out that "a meeting agenda prepared before the meeting is necessarily predecisional and inherently deliberative in that staff are suggesting the topics to be discussed in the meeting." Cooper found another email sent by OMB to agency chief information security officers was properly redacted. He observed that "relevant agency experts engaged in a back-and-forth consultation about possibilities for evaluating the manner by which agencies handle data and other forms of information. As such, this email reflects 'recommendations and deliberations comprising part of the process by which government decisions and policies' – such as how to evaluate information resource management – 'are formulated.'" (*Center for Public Integrity v. Federal Election Commission*, Civil Action No. 17-1162 (CRC), U.S. District Court for the District of Columbia, Sept. 18)

Judge James Boasberg has ruled that the Department of Energy failed to **conduct an adequate search** for records concerning the National Coal Council, a federal advisory committee, and that **Exemption 4 (confidential business information)** does not protect the records the agency withheld. The Niskanen Center submitted a FOIA request concerning the National Coal Council, which was established in 1984 by the Secretary of Energy, and NCC, Inc. The agency located 11 documents and one Windows Media Player file and disclosed them with redactions under **Exemption 6 (invasion of privacy)**. After the Center reviewed the records, it told DOE that its search was deficient because it had not located any records concerning the Council's relation with NCC, Inc. The agency conducted a second search and located an additional 21 documents and one additional Video Object file. The agency withheld in full or in part certain of these documents under Exemption 4 and Exemption 6. The Center challenged the adequacy of the agency's search, arguing that it should have searched other offices beside the Office of Fossil Energy and that the agency had failed to use the search term "NCC, Inc." Boasberg agreed on both counts. He noted that "standing on its own, DOE's assertion that responsive records would be 'limited' to OFE is inadequate because the Court cannot evaluate that claim absent 'reasonable detail.'" He added that "nowhere does DOE indicate that it searched physical and electronic documents for the term 'NCC, Inc.,' ass well as 'NCC,' nor does it maintain that a search for the latter term would necessarily uncover uses of the former. Defendant's contention that its search was still adequate because it did in fact locate *some* documents concerning NCC, Inc. is unpersuasive." Turning to the Exemption 4 withholdings, Boasberg concluded that the *National Parks* test, requiring a showing that disclosure would likely cause competitive harm, resolved the issue. He pointed out that "this is because the Government never really argues that its withholdings satisfy that standard. It does not contend, for example, that disclosure of the withheld information would impair its ability to obtain such information in the future" or cause substantive competitive harm. Instead, Boasberg noted that "the documents include a strategic plan, meeting notes, and a statement of activities. There is no colorable argument that disclosure of any of this information would impair DOE's ability to obtain it in the future, and it is difficult to see how

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disclosure would harm NCC, Inc.'s competitive position." Boasberg also rejected DOE's claims that the records were otherwise privileged. (*Niskanen Center, Inc. v. United States Department of Energy*, Civil Action No. 17-676 (JEB), U.S. District Court for the District of Columbia, Sept. 13)

Judge Tanya Chutkan has ruled that the Justice Department properly withheld records from Nancy Crisman under the **Privacy Act** but rejected the FBI's **Exemption 5 (privileges)** claim. Crisman worked as a nurse at the Federal Reserve building in Miami. In March 2004, the Financial Institution Security Association sent a financial inquiry known as an FISA Alert concerning whether or not various entities or individuals had accounts at certain banks to the FBI field office in Miami. The FBI erroneously mischaracterized the alert as being under the Foreign Intelligence Surveillance Act, which led to Crisman's termination as well as having her information continually appear on national security and homeland security watchlists. Crisman originally filed a FOIA request in 2005 but the FBI withheld records under **Exemption 1 (national security)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7 (C) (invasion of privacy concerning law enforcement records)**, as well as subsection (j)(2) of the Privacy Act. Crisman filed suit in 2011 which ended in a stipulated dismissal in which Crisman agreed not to challenge the FBI's search or its invocation of the privacy exemptions. She filed another series of FOIA and Privacy Act requests in 2012, which formed the basis of her current suit. Crisman claimed the FBI had improperly redacted information in three pages under the deliberative process privilege. Chutkan agreed that the agency had not substantiated its claim. She noted that "the Declaration does nothing more than recite the legal standards of the deliberative process privilege and therefore cannot justify summary judgment with respect to the FBI's withholdings under Exemption (b)(5)." Crisman asked for damages under the Privacy Act, arguing that the FBI had failed to follow its own procedures for classifying the FISA Alert. The agency contended that Crisman's claim was time-barred. Chutkan disagreed, pointing out that "given that Plaintiff filed her Complaint on November 19, 2012 – less than six months after Crisman learned of the FBI's allegedly improper conduct – the court finds that Crisman's claim for damages under the Privacy Act is not time-barred." But she found that since the FBI's Privacy Act regulations exempted its Central Records System, Crisman's claim for damages was prohibited. (*Nancy Crisman, et al. v. Department of Justice, et al.*, Civil Action No. 12-1871 (TSC), U.S. District Court for the District of Columbia, Sept. 18)

Judge James Boasberg has ruled that the IRS properly invoked a *Glomar* response neither confirming nor denying the existence of records based on **Exemption 7(D) (confidential sources)** in response to FOIA requests filed by Thomas and Beth Montgomery for information about how their tax fraud scheme came to the attention of the agency. After an investigation, the IRS disallowed the Montgomerys from taking losses from several sham partnerships they had created. The Montgomerys entered into a global settlement agreement, but later submitted several FOIA requests aimed at uncovering who had tipped off the IRS. The Montgomerys argued that the agency had waived its ability to use *Glomar* because the agency had originally claimed that any materials were protected by Exemption 7(D). Boasberg pointed out that "although the Court finds the Service's error unfortunate, it does not amount to an official acknowledgement. It would be draconian to penalize the Government in a sensitive matter concerning a potential informant by refusing to permit some leeway for an honest mistake. . .Even if the Court were to find that the [agency] letter acknowledged the existence of *some* records, its reference to 'withheld' or 'exempted' material does not specify which of the five requests it refers to and thus does not rise to the level of an official acknowledgment." Boasberg admitted that Exemption 7(D)'s requirement that the agency show that the information was provided in confidence posed some problems here "because a *Glomar* response is meant to *obscure* the very existence of the source (or attempted source), the Government cannot offer any public statement concerning the confidentiality assurances given to that source (or a statement that no source exists). As the Service persuasively argues, even though the identity of an informant may not be at risk in *every* case, to protect whistleblowers in cases where

disclosure of the existence of records could lead to their identification, it must assert *Glomar* whenever an informant is involved." After reviewing the records *in camera*, Boasberg found the agency's *Glomar* response was appropriate. The Montgomerys also challenged the **adequacy of the search**, arguing that the agency should not have limited its search to two databases. Boasberg agreed that the agency had not adequately explained why it did not search other files. He noted that "it is entirely plausible that previous litigation files might contain information unrelated to a confidential informant but responsive to Plaintiffs' requests. And even if the Whistleblower Office was not a likely place to search for records, the Government must 'at the very least. . .explain in its affidavit that no other record system was likely to produce responsive documents.'" (*Thomas and Beth Montgomery v. Internal Revenue Service*, Civil Action No. 17-918 (JEB), U.S. District Court for the District of Columbia, Sept. 6)

Judge Trevor McFadden has ruled that the Executive Office for U.S. Attorneys properly responded to prisoner David Linder's request for exhibits used during his criminal trial by providing him 502 pages after he indicated that he would accept the 100 free pages to which he was entitled. McFadden noted that "Mr. Linder's reply [to the agency's fee letter] thus not only 'limited the number of pages he would receive from EOUSA pursuant to this FOIA request,' but ended EOUSA's obligation to continue searching for response records. So EOUSA's full release of the pages Mr. Linder opted to receive by statutory right ends this matter. For 'once all the [requisite] documents are released to the requesting party, there no longer is any case or controversy.'" (*David W. Linder v. Executive Office for United States Attorneys*, Civil Action No. 16-02039 (TNM), U.S. District Court for the District of Columbia, Sept. 19)

A federal court in Kansas has ruled that the Bureau of Prisons properly **aggregated** three FOIA requests from Manetirony Clervrain for the same categories of records pertaining to 57 penal institutions and denied him a **fee waiver**. After receiving the three requests, BOP consolidated the requests and told Clervrain he would need to pay the estimated $308 fee before the agency would process his requests. Clervrain filed an administrative appeal with the Office of Information Policy, which upheld BOP's decision to aggregate the requests, but remanded the fee waiver issue to the agency to make a determination. After BOP denied Clervrain's request for a fee waiver, he filed suit. Characterizing himself as a prison activist, Clervrain claimed that because the requests were for specific regions it was necessary to separate them. The court rejected that explanation, noting that "whether or not Plaintiff's primary purpose was to avoid fees, the effect would have been a fee reduction, and aggregation was reasonable." In defense of his fee waiver request, Clervrain indicated that his requests went to the issue of prison conditions and were not about him as an individual prisoner. The court, however, pointed out that "he specifies no public interest, he does not identify with any clarity the governmental activity on which he wants to shed light, he does not explain how the requested information would help the public better understand that vague activity, and he gives no indication he could effectively disseminate the information to the public." (*Manetirony Clervrain v. United States of America, et al.*, Civil Action No. 17-3194-SAC, U.S. District Court for the District of Kansas, Sept. 19)

Judge Dabney Friedrich has ruled that the CIA, the Department of Homeland Security, and the Department of State for the most part **conducted adequate searches** for records concerning Wynship Hillier, who claimed he was the "target of a sophisticated campaign" by the agencies to have him committed as an "involuntary psychiatric outpatient." Starting in 2012, Hillier submitted FOIA and Privacy Act requests to the three agencies for records about himself. The agencies found no records under FOIA and declined to search exempt Privacy Act systems of records. Hillier then filed suit in 2016. Although Hillier only invoked the Privacy Act, the agencies processed his requests under both FOIA and the Privacy Act. The CIA issued a

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Glomar response neither confirming nor denying the existence of records. Hillier argued that a *Glomar* response was inapplicable because he was only requesting *notice* of records, not the records themselves. Friedrich indicated the alleged distinction made no difference, pointing out that "even assuming Hillier is right, [the agency's declaration] demonstrates how confirming the existence of records about Hillier could jeopardize intelligence sources and methods. . ." Although she largely approved of DHS's searches, Friedrich found that its affidavit was not sufficient to grant summary judgment. She pointed out that "because the [agency] declaration fails to state whether DHS determined that the Office of Intelligence and Analysis was the *only* component with a record system that was reasonably likely to contain records responsive to Hillier's request, the declaration lacks sufficient detail for the Court to determine whether DHS's search was adequate." The Department of State searched its Bureau of Counterterrorism and Countering Violent Extremism. Hillier argued the agency should have searched other offices, but Friedrich approved of the scope of the search, noting that "Hillier identified himself as someone believed to be involved in terrorist incidents. Thus, it was reasonable for the agency to conduct searches in systems used by the components through which all records referencing Americans involved with terrorism would pass." (*Wynship W. Hillier v. Central Intelligence Agency, et al.*, Civil Action No. 16-1836 (DLF), U.S. District Court for the District of Columbia, Sept. 12)