Volume 44, Number 19
October 3, 2018

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

## In this Issue



Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.
Copyright by Access Reports, Inc
1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
email: hhammitt@accessreports.com
website: www.accessreports.com

No portion of this publication may be reproduced without permission.
ISSN 0364-7625.

*Washington Focus: In a posting on his FOIA Blog, Scott Hodes notes that none of the sections in the Department of Justice Guide to the Freedom of Information Act, long considered the most definitive guide articulating the government's position on FOIA litigation, have been updated recent. At one time in the past the guide was updated every two years. Now, Hodes points out, "not one of the its sections has been updated since August of 2015 – some haven't been updated since 2009. If there had been no changes in FOIA that would be fine, however, there has been legislation and a number of important Court decisions on FOIA matters since then." Hodes observes that "while DOJ has given procedural advice on FOIA reporting consistently, it is unclear why there has been no changes in this important document."*

## Court Finds DOD Failed to Consider Statutory Foreseeable Harm Standard

Ruling in a case brought by *Miami Herald* reporter Carol Rosenberg for emails sent by then SOUTHCOM Commander Gen. John Kelly to Lisa Monaco, then Assistant to President Obama for Homeland Security and Counterterrorism, pertaining to issues concerning the Guantanamo Bay detention center, Judge Amit Mehta becomes the first district court judge in the D.C. Circuit to substantively consider the impact of the codification of the foreseeable harm standard in the FOIA Improvement Act of 2016. Chiding the Justice Department's Office of Information Policy for its failure to update its FOIA Guide to reflect the 2016 amendments, Mehta explained that he found only two cases – *Edelman v. SEC*, 239 F. Supp. 3d 45 (D.D.C. 2017), in which Judge Randolph Moss discussed the impact of the codification of the foreseeable harm standard in passing, and *Ecological Rights Foundation v. FEMA*, 2017 WL 5972702 (N.D. Cal. Nov. 30, 2017), which provided a more detailed examination of the agency's burden of proof in analyzing the applicability of the foreseeable harm standard – addressing the issue at all. Mehta rejected the Defense Department's claim that the statutory codification of the foreseeable harm standard had virtually no effect on an agency's burden of proof, but rather than deny the agency's deliberative process privilege claims, he sent the case back to the agency to give it a chance to supplement its affidavits.

ACCESS REPORTS

Rosenberg, who has covered SOUTHCOM and Guantanamo Bay for the *Miami Herald* for years, made the request for Kelly's emails after he became a potential candidate for a national security position in the Trump administration. As a result, she asked for expedited processing, which the agency denied. However, the agency eventually provided her with 256 email records and 92 attachments, totaling 548 pages. The agency redacted or withheld records under Exemption 1 (national security), Exemption 3 (other statutes), Exemption 5 (privileges), Exemption 6 (invasion of privacy), and Exemption 7(E) (investigative method or techniques). Rosenberg did not challenge the denial of expedited processing or the adequacy of the search but did question the agency's exemption claims.

Rosenberg argued that by citing nothing beyond the elements of the deliberative process privilege, the agency had failed to assess the impact of the 2016 codification of the foreseeable harm standard while DOD contended that the codification "does not require an agency to go through the superfluous exercise of showing how *each* disclosure would harm its deliberative process, especially where, as here, the agency's declaration explains that disclosing any of General Kelly's 'routine consultations with senior DOD and White House officials. . . about ongoing operational issues at [Guantanamo Bay]' would impede open discussion of these issues." Based on the statutory language, as well as the analysis from the court in *Ecological Rights Foundation v. FEMA*, Mehta pointed out that "to satisfy the 'foreseeable harm' standard, DOD must explain how a particular Exemption 5 withholding would harm the agency's deliberative process. DOD may take a categorical approach – that is, group together like records – but in that case, it must explain the foreseeable harm of disclosure of each category."

Mehta pointed out that he was "unmoved by Defendant's argument that a more specific foreseeable-harm analysis would be duplicative. . .In DOD's view, [a] general explanation is all that is required, 'particularly where the nature of these documents is explained in detail.' To be sure, the agency's declaration provides sufficiently detailed descriptions of the nature and substance of withheld communications about JTF-GTMO operations between General Kelly and senior DOD officials. Indeed, the declaration provides that these communications run the gamut [of] discussions. . ." However, Mehta observed that "pointing out the breadth and variety of these categories of deliberative discussions only serves to undermine Defendant's argument that it has satisfied its statutory obligation." Agreeing with the agency that discussions on sensitive topics were probably privileged, Mehta added that "absent more detail from the agency, the court can less readily agree with the notion that disclosure of other, seemingly more benign, categories of withheld deliberative information. . .would reasonably result in the same level of harm to the exemption-protected interest."

Adopting the kind of functional categorical approach sometimes used under Exemption 7(A) (interference with ongoing investigation or proceeding), Mehta noted that "the court does not read the statutory 'foreseeable harm' requirement to go so far as to require the government to identify harm likely to result from disclosure of *each* of its Exemption 5 withholdings. A categorical approach will do. But the court agrees with Plaintiffs that the government must do more than perfunctorily state that disclosure of all the withheld information – regardless of category or substance – 'would jeopardize the free exchange of information between senior leaders within and outside of the [DOD].'" Based on his *in camera* review of a sampling of the withheld documents, Mehta ruled on Rosenberg's contention that some exemption claims were either based on bad faith efforts to conceal embarrassing information or that some withheld exchanges were neither predecisional nor deliberative. He rejected Rosenberg's claim of bad faith but agreed that an instance in which Kelly was expressing his opinion on the merits of a military commission about a female guard "is not directed towards decision-making as to law or policy, and that such material is not subject to the deliberative process privilege."

Rosenberg also challenged some of the agency's Exemption 1 claims. Rosenberg argued that information about detainee health could not be withheld because it had already entered the public domain. Rejecting her

claim that information about forced-feeding had already been officially acknowledged, Mehta observed that "rather than demonstrate that the 'information requested' is 'as specific as the information previously released,' Plaintiffs have merely identified facts relating to hunger strikes and enteral feeding from a variety of sources – some 'official' but most not – 'in the hopes that such information collectively is "as specific as" and "matches" the information that has been withheld.' But Plaintiffs' approach is unavailing." Mehta agreed with Rosenberg that information about a prisoner-release to Oman had been officially acknowledged and should be disclosed.

Mehta accepted the agency's claims of Exemption 6 and Exemption 7(E). Rosenberg argued that because policies of the Bureau of Prisons pertaining to hunger strikes and forced-feeding were publicly available, DOD's policies should be disclosed as well. Mehta disagreed. He pointed out that "the information withheld from the record details the differences between BOP policy and the policy employed at JTF-GTMO; the policies and procedures in force at JTF-GTMO for hunger strikes and enteral feeding thus are not publicly available. Plaintiffs cannot seek disclosure of JTF-GTMO's policies based on another agency's public disclosure of its policies." (*Carol Rosenberg, et al. v. U.S. Department of Defense*, Civil Action No. 17-00437 (APM), U.S. District Court for the District of Columbia, Sept. 27)

# 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 trial court erred when it awarded the Kodiak Public Broadcasting Corporation, referred to by its call letters KMXT, $24,657 in attorney's fees, including $315 in city sales taxes, for prevailing in what the trial court characterized as a constitutionally-based challenge to the City of Kodiak's refusal to disclose records concerning the use of pepper spray while detaining a suspect in an attempted theft from a vehicle. KMXT filed a request under the Public Records Act and the City denied request because it was a pending investigation. However, the City also told KMXT that the records would probably be publicly available after its internal investigation was completed. KXMT filed suit and the trial court ruled against the City, finding three chest-cam videos were not protected by any exemption and should be released. The City did so. KXMT then filed a motion for attorney's fees, asking for $24,627. Finding that the Alaska Supreme Court had characterized the right of access as a fundamental right, the trial court granted KXMT the entire amount, including $315 to cover city sales tax. The City appealed, arguing that the trial court had erred in finding KXMT was entitled to the full amount of its request because of the constitutional nature of its suit. The supreme court reversed, noting that "KXMT asserted a statutory right seeking injunctive relief under the Alaska Public Records Act, and it prevailed entirely on statutory grounds. . .Because KMXT's Public Records Act claim was statutory and because KMXT did not raise a constitutional claim in its complaint, we conclude that KMXT – although it was the prevailing party – did not prevail in asserting a constitutional right." Typically, a prevailing party under the PRA is entitled to 20 percent of its reasonable attorney's fees. The City contended the full award was inappropriate. The supreme court agreed, remanding the issue of fees back to the trial court for determination of an appropriate fee award. The court also agreed with the City that a fee award "may not include municipal sales tax on attorney's fees." (*City of Kodiak v. Kodiak Public Broadcasting Corporation*, No. S-16598, Alaska Supreme Court, Sept. 14)

# #

ACCESS REPORTS

## California

A court of appeals has ruled that a provision in the California Public Records Act pertaining to who should bear the costs of redacting videos for disclosure requires the National Lawyers Guild to pay costs incurred by the City of Hayward in redacting police body cam videos taken at a December 2015 demonstration at Berkeley to protest police violence. In response to a request from the Guild, the City's IT staff extracted disclosable footage from 90 hours of videos. It charged the Guild $2,939 to cover the costs of the redaction. The Guild paid the fee in protest. The Guild filed another request from 232 minutes of body-cam video, which the City provided for $308. The Guild paid the second fee under protest as well. The Guild then filed suit, arguing that section 6253.9(a)(2) did not allow an agency to charge a CPRA requester for redacting existing records. The trial court agreed, and the City appealed. Section 6253.9 was added in 2000 to deal with agencies' increasing use of electronic records. Section 6253.9 provides that, subject to applicable exemptions, a public agency must disclose a reasonably described record "upon payment of fees covering direct costs of duplications, or a statutory fee if applicable." The trial court accepted the Guild's argument that Section 6253.9 was limited to situations where the request "would require data compilation, extraction, or programming *to produce the record* and that "nothing in the statutory language indicates that the term 'extract' means to reduce a record by taking out information that is exempt from public disclosure." The trial court concluded that the cost of redacting electronic records could not be passed on to the requester any more than could redaction of paper records using a black felt marker. The court of appeals was not so sure. It noted that "it is unclear from the statutory language whether 'extraction' was intended by the Legislature to include any act of removing or taking out 'data' for the purpose of constructing or generating a previously nonexistent record." After reviewing the legislative history, the court of appeals pointed out that "lawmakers were in fact aware of the cost of redacting exempt information from electronic records would in many cases exceed the cost of redacting such information from paper records. For this reason (and perhaps others), lawmakers drafted section 6253.9(b) to expand the circumstances under which a public agency could be reimbursed by a CPRA requester to include, among others, the circumstance present here wherein the agency must incur costs to acquire and utilize special computer programming to extract exempt material from otherwise disclosable electronic public records." (*National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al.*, No. A149328, California Court of Appeal, First District, Division 3, Aug. 28)

## Ohio

The supreme court has ruled that a court of appeals erred in finding that since a preliminary autopsy report prepared by the Pike County medical examiner pertaining to the murders of eight related family members was exempt under the coroner's-records statute it did not have to be disclosed to *Cincinnati Enquirer* reporter Kevin Grasha under a separate providing a journalist's privilege to obtain autopsy reports. The appeals court found that the autopsy report was protected by both the coroner's-records statute and the Public Records Act. The supreme court disagreed, noting that the journalist privilege statute provides that "if a journalist submits a proper request to review preliminary autopsy and investigative notes and findings, suicide notes, or photographs of the decedent made by the coroner, the coroner 'shall' grant the request. The language of [the statute] does not condition that right of access in any way, and the right of access certainly does not depend on whether the records in question are confidential law-enforcement records. Indeed, the statute accounts for the possibility that the materials might be sensitive by denying journalists the ability to copy the materials." The coroner argued that the records could be withheld because they were exempt under both the coroner's statute *and* the Public Records Act. Rejecting this argument, the supreme court pointed out that "the coroner's argument would swallow the journalist privilege altogether; the function of [the statute] is to give journalists limited access to records that *are not public records*. If a journalist could review only autopsy reports that *are* public records, then he would have no greater access than the general public, and [the statutory

provision] would be a dead letter." (*State ex rel. Cincinnati Enquirer v. Pike County General Health District, et al.*, No. 2017-0431, Ohio Supreme Court, Sept. 19)

### Pennsylvania

A court of appeals has ruled that the Office of Open Records properly concluded that records containing identifying information about panelists reviewing applications for grower/processor and dispensary permits under the medical marijuana program are not exempt under a Department of Health regulation implementing the Medical Marijuana Act prohibiting disclosure to an applicant because reporter Walter McKelvey is not an applicant for purposes of the regulation. The regulation was designed to protect panelists from being harassed by unsuccessful applicants. The Department denied McKelvey's request and he filed a complaint with OOR. Noting the conundrum created by opening the door to requests from applicants by allowing disclosure to non-applicants, OOR nevertheless found McKelvey did not fall within the exemption. The appeals court pointed out that "to adopt the interpretation that the Department advocates here would require this Court to insert additional language into the regulation or otherwise rewrite the regulation. We may not do that. Further, because the Department's interpretation is inconsistent with the plain language of the regulation, we reject the Department's argument that its interpretation is entitled to deference." (*Pennsylvania Department of Health v. Walter McKelvey and PennLive*, No. 1372 C.D. 2017, Pennsylvania Commonwealth Court, Sept. 27)

### Vermont

The supreme court has ruled that a financial feasibility study provided by a private developer to a contractor hired by the City of Burlington to assess the viability of the developer's plans is protected by the trade secrets exemption in the Public Records Act. The Burlington city council took the first steps in redeveloping the Burlington Town Center Mall by approving a process to create a public-private partnership with the property's owners. The City contracted with an economic consulting firm called ECONorthwest to help the City analyze the project and structure a public-private partnership. The developer provided ECONorthwest with a copy of a feasibility study prepared by one of its consultants. After analyzing the feasibility study, ECONorthwest agreed with its results. A redacted version of the feasibility study was made public. Lynn Martin, on behalf of Coalition for a Livable City, filed a request for an unredacted copy of the feasibility study. The City told CLC that it did not have custody of the study and that even if it was a public record it would be protected by the trade secrets exemption. CLC sued and the trial court ruled in favor of the City. The supreme court affirmed. The supreme court noted that "the redacted information in this case is exempt from disclosure. In particular, it is the type of information that 'gives its user or owner an opportunity to obtain a business advantage over competitors who do not know it or use it' and [the developer] has made reasonable efforts to keep the information secret." CLC argued that the City did not have a binding non-disclosure agreement with the developer. The supreme court observed that this made no difference. The supreme court pointed out that "there is no requirement an entity enter into a binding NDA with a government agency before disclosing trade-secret information to invoke the PRA exemption [on trade secrets]." (*Michael Long, Lynn Martin, Steven Goodkind and the Coalition for a Livable City v. City of Burlington*, No. 2017-434, Vermont Supreme Court, Sept. 21)

## The Federal Courts...

Judge Amy Berman Jackson has ruled that the FBI, the CIA, and the NSA properly invoked a ***Glomar* response** neither confirming nor denying the existence of records in response to a request from the James Madison Project and Noah Shachtman and Spencer Ackerman, an editor and reporter for the Daily Beast, for

ACCESS REPORTS

records memorializing President Donald Trump's decision to share classified information with Russian government officials during a May 10, 2017 meeting in the Oval Office based on **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. The request was also sent to the Defense Intelligence Agency and the Department of State. DIA told the requesters that it did not have any records and the State Department told them that it had not yet finished its search. As a result, Jackson addressed only the *Glomar* claims of the CIA, FBI, and NSA. All three agencies explained that acknowledging whether or not they had an interest in such a diplomatic meeting and, further, collected information about such meetings, would reveal intelligence interests that were properly classified. Jackson approved of the agencies' use of a *Glomar* response, noting that she was "satisfied that they have put forth a 'plausible' and 'logical' argument in support of their *Glomar* responses under Exemption 1." JMP, Shachtman, and Ackerman argued that public statements by Trump, then National Security Advisor H.R. McMaster, and then Secretary of State Rex Tillerson revealed that classified information had been disclosed during the meeting. Although Trump frequently confirms things publicly that no former president would ever formally acknowledge, as has happened a number of times during the Trump administration, Jackson found that the public admissions did not specifically match the records sought. She noted that "none of the statements made by President Trump, McMaster, or Tillerson explicitly acknowledges that either the CIA, NSA, or FBI has records 'memorializing the contents' of the May 10 meeting. Indeed, not a single public statement mentions *any* records related to the May 10 meeting, much less the 'transcripts or notes' plaintiffs specifically requested." Jackson found that a statement by McMaster alluded to communications between the CIA and NSA and Homeland Security Advisor Tom Bossert. But she pointed out that "this vague acknowledgment of some type of post-meeting communications between Bossert and the CIA and NSA does not expressly mention any particular record, nor does it reveal – explicitly or implicitly – that either of the agencies retains records memorializing the May 10 meeting." JMP, Shachtman and Ackerman argued that the government writ large had acknowledged an interest in the meeting. Finding this insufficient, Jackson indicated that "the Court cannot speculate that specific documents exist within individual agencies based on general pronouncements in the public domain, or the fact that 'the U.S. Government' has an 'interest' in a matter that came up at meeting. To do so would violate the strict requirements of the official acknowledgment doctrine which demands 'exactitude,' particularly in cases like this one where national security and foreign affairs are involved." She rejected the plaintiffs' reliance on *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), in which the D.C. Circuit held that the CIA could not plausibly claim that it had no interests in drones to sustain a *Glomar* response. Here, Jackson pointed out that "the FBI, NSA, and CIA have not issued public statements related to the May 10 meeting. Nor do any of the public statements listed by plaintiffs reveal their involvement in the meeting, or in preparing for the meeting." (*James Madison Project, et al. v. Central Intelligence Agency, et al.*, Civil Action No. 17-1231 (ABJ), U.S District Court for the District of Columbia, Sept. 26)

Judge Timothy Kelly has ruled that the Department of Energy has not yet shown that it conducted an **adequate search** for records discussing climate change and personnel changes at the agency as the result of inquiries from the presidential transition team in response to a two-part request from the Protect Democracy Project. Further, Kelly found that neither the agency nor PDP addressed the issue of whether the presidential transition team qualified as an agency for purposes of **Exemption 5 (privileges)** and that records pertaining to Secretary Rick Perry's security clearance were not protected under the deliberative process privilege. The agency searched the email account of Ingrid Kolb, the director of the Office of Management, since all transition-related communications would have passed through her. Kolb conducted a manual search based on her personal knowledge. This search yielded 45 documents, which were disclosed with redactions under Exemption 5 and **Exemption 6 (invasion of privacy)**. An additional electronic search of Kolb's files was done using keywords, which located an additional seven documents. The search for records responsive to the request for personnel changes was conducted by the Chief Human Capital Officer. That search located 24 responsive documents. PDP challenged the adequacy of the agency's search. Kelly agreed with PDP that the

agency had not explained why it limited it search for climate change-related records to Kolb, since the disclosed records showed that Kolb had been in contact with other agency employees to coordinate her efforts. Kelly noted that "such employees would be a logical starting place for DOE in identifying a bounded universe of additional custodians" and ordered the agency to expand it search to those employees. Kelly rejected PDP's claim that the agency should have searched for records using the terms "climate change" and "global warming." He pointed out that Protect Democracy is not looking for all documents about climate change, but for documents about a questionnaire that was, only in part, about climate change." But because he had ordered the agency to expand the number of custodians whose records would be searched, Kelly indicated that he would not rule on the sufficiency of search terms yet "because it may well be that the work of identifying an appropriate list of custodians will also lead to additional search terms." Turning to the Exemption 5 issues, Kelly observed that "assuming that the transition team is not an 'agency' under FOIA, this Court is not certain it necessarily follows that documents shared between DOE and the transition team fall outside Exemption 5. The D.C Circuit has held that agency communications with the White House are 'inter-agency' communications even though the President and his immediate staff are not an 'agency' within the meaning of FOIA." He pointed out that if PDP continued to dispute whether the questionnaire was privileged, it would have to address the issue of the transition team's agency status. As to whether records concerning Perry's security clearance were protected by the deliberative process privilege, Kelly observed that "it is not clear to the Court how these discussions involved any kind of policy judgment, as opposed to purely logistical considerations." (*The Protect Democracy Project, Inc. v. U.S. Department of Energy*, Civil Action No. 17-779 (TJK), U.S. District Court for the District of Columbia, Sept. 20)

Judge Amy Berman Jackson has ruled that the FBI properly invoked a ***Glomar* response** neither confirming nor denying the existence of records based on **Exemption 7(A) (interference with ongoing investigation or proceeding)** and **Exemption 7(E) (investigative method or techniques)** in response to a request from BuzzFeed reporters Peter Aldhous and Charles Seife for flight logs and evidence logs for 27 aerial surveillance aircraft identified by their unique tail numbers and locations. Aldhous and Seife citing *CREW v. Dept of Justice*, 746 F.3d 1082 (D.C. Cir. 2014), argued that Exemption 7(A) did not apply because the FBI had failed to identify a specific investigation that could be compromised by disclosure. Jackson pointed out that Aldhous and Seife had taken that part of *CREW*, which dealt with the government's implicit claim that Exemption 7(A) applied to closed investigations as well, out of context. Jackson observed that "here, the [agency's declaration] has plainly stated that merely revealing whether these records exist could compromise 'pending' or 'current' law enforcement investigations." Aldous and Seife contended that Exemption 7(E) did not apply either because disclosure would not reveal any techniques that were not already publicly known. Jackson disagreed, noting that "public awareness that the FBI uses airplanes, or even, press speculation that certain planes are FBI planes, is not the same as, and does not give rise to the same risk as, the FBI's own confirmation of its use of specific aircraft, and that admission would be inherent in confirming the existence of records responsive to plaintiffs' request." Jackson rejected Aldous and Seife's argument that the aircraft had been identified in disclosures made to the ACLU. After reviewing the information disclosed to the ACLU, Jackson found no waiver based on official acknowledgment. She pointed out that "it is simply not enough to point to 'similar' flight logs or evidence logs; to overcome the government's *Glomar* response, plaintiffs must point to records that acknowledge the existence of flight logs and evidence logs tied to the '*specific*' aircraft identified in plaintiffs' request." (*BuzzFeed, Inc., et al. v. Department of Justice*, Civil Action No. 17-0900 (ABJ), U.S. District Court for the District of Columbia, Sept. 26)

Judge Rudolph Contreras has ruled that Kay Khine **failed to exhaust her administrative remedies** by not filing an administrative appeal to the response by U.S. Citizenship and Immigration Services to her FOIA

ACCESS REPORTS

request, but that Catholic Charities, which represented Khine and other individuals seeking their asylum assessment reports from the agency has **standing** to continue its **policy or practice claim** against the agency. Khine, a Burmese national seeking asylum, submitted a FOIA request to USCIS for her records. The agency disclosed 860 pages and included a letter of response explaining its exemption claims, indicating that records had been referred to U.S. Immigration and Customs Enforcement for further review, and informed Khine of her right to appeal. She opted not to appeal, arguing that to do so would be futile. Instead, Catholic Charities asked Contreras to add Khine as another party to its policy or practice claim against USCIS's failure to process asylum assessment reports and disclose factual portions of those reports. Contreras addressed the matter of standing first. He found that Catholic Charities had standing to continue its policy or practice suit, noting that "plaintiffs allege that DHS has a policy of sending 'computer-generated,' 'template' letters in response to FOIA requests from asylum applicants seeking disclosure of their assessments. They further allege that DHS has sent over 100 such letters during the past six years. Plaintiffs argue that these template letters violate FOIA in a variety of ways. The D.C. Circuit recently [in *Judicial Watch v. Dept of Homeland Security*, 895 F.3d 770 (D.C. Cir. 2018)] held that similar allegations of a 'pattern' of informal agency conduct violating FOIA with respect to several identical document requests were sufficient to raise a policy-or-practice claim at the pleading stage." Finding that Catholic Charities had standing to continue its suit, Contreras pointed out that Catholic Charities was "likely to be subjected to the [alleged] policy again" because Catholic Charities' "'primary institutional activities' include representing asylum applicants and 'monitor[ing] and examin[ing] the work of asylum officers,' and it 'relies heavily and frequently on FOIA to conduct work that is essential to the performance of' these institutional activities." But Contreras found that by failing to file an administrative appeal Khine had failed to exhaust her administrative remedies and could not continue litigating the agency's response to her request. Citing *CREW v. FEC*, 711 F.3d 160 (D.C. Cir. 2013), Contreras observed that the agency had provided Khine with a sufficiently detailed initial determination to trigger her obligation to file an administrative appeal. He noted that "plaintiffs have not explained how in this action they have managed to challenge several aspects of DHS's decision making, but somehow could not 'meaningfully' raise these same challenges in an administrative appeal." Catholic Charities argued that if Khine had filed an administrative appeal of her request, and then filed a lawsuit, she would no longer have standing to challenge the initial response. Contreras agreed that "it is true that this Court's *de novo* review would moot Plaintiffs' challenge to DHS's particular initial response here, regardless of whether that challenge was raised in an administrative appeal." But he pointed out that "to the extent Plaintiffs contend that DHS's alleged policy of sending boilerplate, inadequate initial responses will result in future FOIA violations, the administrative appeal and the filing of a lawsuit would not moot that contention." (*Kay Khine and Catholic Charities v. United States Department of Homeland Security*, Civil Action No. 17-1924 (RC), U.S. District Court for the District of Columbia, Sept. 24)

Judge Randolph Moss has ruled that EOUSA conducted an **adequate search** for records concerning communications between three Assistant U.S. Attorneys in the Northern District of Mississippi and their legal secretaries that refer to Peter Bernegger or others involved in his prosecution and conviction for mail and bank fraud. Moss also found that, with one exception, the agency had properly redacted identifying information under **Exemption 6 (invasion of privacy)** and **Exemption (C) (invasion of privacy concerning law enforcement records)**. Moss also rejected Bernegger's claim that the misconduct exception applied to waive the agency's claims under **Exemption 5 (privileges)** and that the **Privacy Act** did not provide a right of access to the emails. In response to Bernegger's requests, the agency disclosed 72 pages in full and 88 pages in part and withheld 130 pages in full. Bernegger challenged the search by EOUSA, claiming that a large number of pages were missing. Moss found that Bernegger's claim of missing pages was based solely on the fact that the agency had initially indicated that it had uncovered 1,375 potentially responsive records but failed to account for 540 records in its final response. Noting that the 1,375-page figure was an estimate, Moss dismissed the claim, noting that "an estimate does not create an entitlement to that number of pages of records. EOUSA was

required to release or lawfully withhold only those records within the scope of Bernegger's request." Bernegger complained that the agency had improperly narrowed the scope of its search to records pertaining to his criminal case. However, Moss pointed out that "it is clear from the [agency's] declaration that the U.S. Attorney's Office did not narrow its search, as Bernegger contends, to emails between the specified AUSAs and their secretaries or to emails pertaining to Bernegger's criminal case. Rather, as requested, the office searched for any emails that referenced Bernegger's name *or* the specified criminal case numbers, as well as emails sent to or received by the specified AUSAs and their legal secretaries." Moss found the agency had properly redacted names and identifying information about third parties from the records, questioning only a single instance in which the agency had redacted identifying information from emails exchanged between U.S. Attorney's Office and the U.S. District Court for the Northern District of Mississippi. He told the agency that it either could disclose that information or provide supplemental affidavits supporting its reason for the redactions. Moss rejected Bernegger's claim that the misconduct exception applied to waive the deliberative process privilege. Bernegger also claimed the Privacy Act provided him with a right of access to the emails, arguing that the (j)(2) exception did not apply. Moss found he did not need to address that issue, pointing out instead that "an email database, like that at issue here, does not constitute a 'system of records' and, thus, is not subject to the Privacy Act's disclosure requirement in the first place." (*Peter Bernegger v. Executive Office for United States Attorneys*, Civil Action No. 17-563 (RDM), U.S. District Court for the District of Columbia, Sept. 20)

Judge Ellen Segal Huvelle has ruled that Stephen Aguiar is not entitled to GPS software or new mapping images from the DEA, but that the agency has not yet shown that it conducted an **adequate search** for records concerning administrative subpoenas requested by Aguiar. Aguiar was convicted in 2011 of federal drug charges in Vermont and is serving a 30-month sentence. Starting in 2013, Aguiar submitted multiple FOIA requests to the DEA for records concerning his prosecution and conviction, focusing on four administrative subpoenas and GPS tracking software used as part of the agency's investigation. The agency told Huvelle that it had conducted a search for the subpoenas but did not find them and that the GPS tracking software was developed by a private vendor and was not an agency record. In her earlier decision in the case, Huvelle accepted the agency's assertions. Aguiar appealed to the D.C. Circuit and the appeals court remanded the case, finding the agency had not met its burden of proof on either issue and noting that since the agency admitted the subpoenas had existed at one time the agency needed to provide a more detailed explanation of why it believed the subpoenas no longer existed. This time, on remand, the agency provided more detailed affidavits to support its original position. Huvelle accepted the agency's supplemental affidavit, noting that "there is no DEA system that tracks all administrative subpoenas; rather, those subpoenas are stored as paper copies in the hard-copy case file. . .Two relevant files were identified based on Aguiar's identifying information and the date range he specified in his request. Burlington Office staff then manually searched those files. Although the subpoenas, whose existence is not in dispute, were not found, the Court is persuaded that the search was diligent and reasonably likely to turn up any relevant records." Aguiar had previously argued before the D.C. Circuit that the search for the subpoenas was inadequate because the agency had failed to contact the DEA agent who signed the subpoenas. The D.C. Circuit had rejected that argument because Aguiar had not made it during his administrative appeal or before Huvelle. Agreeing that at this point this was a lead that the agency was required to explore, she rejected DEA's claim that such an inquiry would be "futile." She pointed out that "this assessment is insufficient. Success need not be guaranteed to warrant follow-up. . .It is not merely speculative, and indeed seems reasonable, to suppose that [the agent] may recall that the subpoenas were stored in a different type of file or some other location, and the DEA should make a good-faith effort to reach him to pursue this lead." Turning to the issue of whether or not the GPS tracking software was an agency record, Huvelle observed that "the documents and explanations describe significant limitations on the DEA's use of the software, most notably that the contract prohibits its distribution. The

ACCESS REPORTS

Court is satisfied that the DEA did not 'obtain' and 'control' the software because the limited terms of the license established no 'intent' to retain control over it. . ." Aguiar nevertheless argued that he was entitled to images of the GPS maps used during his investigation. Huvelle agreed with the agency that providing the images would require the agency to create a record. She observed that "the multiple steps between the spreadsheets and the requested images. . .strongly suggests that the output would not be a straightforward reproduction of the spreadsheets, but a new record with significant added meaning." (*Stephen Aguiar v. Drug Enforcement Administration*, Civil Action No. 14-240 (ESH), U.S. District Court for the District of Columbia, Sept. 24)

Wrapping up three of the remaining suits brought against EOUSA by pro se litigator Gregory Bartko, Judge James Boasberg has ruled primarily in favor of the agency but has found that one of Bartko's claims may continue. Bartko was convicted of securities fraud in the Eastern District of North Carolina. Bartko subsequently filed a number of FOIA requests with the Department of Justice for records related to his conviction, including disciplinary actions taken against AUSA Clay Wheeler, who supervised Bartko's prosecution. The three remaining requests included one for all the records from his prosecution. EOUSA concluded that a search of 21 boxes of potentially responsive records would take over 93 hours of search and demanded Bartko pay an advance fee of $2,618. Bartko filed suit challenging the fee estimate and Boasberg previously dismissed his claim because he had not filed an administrative appeal. Bartko then filed an administrative appeal with the Office of Information Policy contending the fee estimate was improper. However, OIP refused to hear the appeal on the ground that his request remained subject to litigation. Several years later, Bartko filed suit challenging the agency's refusal to process his request without an advance payment. The second request involved Bartko's request to DOJ's Office of Professional Responsibility about Bartko's prosecution. OPR referred 619 pages to EOUSA for processing but EOUSA refused to process 519 pages until Bartko paid $51.90 in fees. Boasberg ruled in favor of EOUSA, but on appeal, the D.C. Circuit ruled that Bartko was entitled to a public interest fee waiver. While his appeal was pending, Bartko filed another suit against EOUSA for its failure to disclose the 619 pages. EOUSA argued this suit violated the ruled against "claim-splitting' – a corollary of sorts to *res judicata*. Bartko's third request was to OPR for records of misconduct by Wheeler. OPR once again referred records to EOUSA, which withheld them entirely under several exemptions. Boasberg dealt with the third request first. Pointed out the longstanding confusion over whether there were 642 pages or 320 pages in dispute, Boasberg explained that at long last, DOJ had resolved the issue. He observed that "OPR technically referred to EOUSA 642 pages of responsive records, as Bartko suspects. Those 642 pages, however, consist of the following: 320 pages that OPR had marked with preliminary FOIA determinations; a *duplicate* set of 320 pages that OPR had not marked, and two cover pages" and indicated that "this explanation resolves Bartko's concerns." EOUSA withheld most of the 320 pages under **Exemption 5 (privileges)**, claiming the attorney-client privilege, the deliberative process privilege, and the attorney work-product privilege. Boasberg agreed with EOUSA on the applicability of the attorney-client privilege as to a handful of pages. While upholding some of the agency's deliberative process privilege claims, he rejected the agency's claim that judicial opinions or court filings risked revealing what OPR attorneys considered relevant. He noted that "if all factual material an agency considers during a decisionmaking process were exempt, an agency would *never* need to disclose factual matter raised during its policy-making deliberations. That is wrong and the cases say so." Rejecting the agency's attorney work product claims, Boasberg pointed out that "EOUSA's justifications for withholding records on attorney-work-product-privilege grounds all fall short for one obvious reason: none of them explains in what manner the records were 'prepared or obtained because of the prospect of litigation.'" In light of the D.C. Circuit's ruling in Bartko's appeal, Boasberg found EOUSA's attempt to withhold all the records under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** fell short. He pointed out that "in *Bartko* [*v. Dept of Justice*, 898 F.3d 51 (D.C. Cir. 2018)], the Court of Appeals concluded that the records Plaintiff sought of AUSA Wheeler's misconduct were not, on the record before it,

law-enforcement records. These conclusions apply with equal force to Bartko's request here for records of Wheeler's misconduct – the same records request at issue in the previous matter, merely directed to EOUSA rather than OPR. Perhaps EOUSA can make a particularized showing as to why the responsive records are law-enforcement records, but it has not come close to making that showing so far." Boasberg agreed with EOUSA that Bartko's second request implicated issues that had already been addressed by the court and as a result, was barred. But he found that Bartko was not required at this point to administratively appeal his first request challenging the agency's fee estimate. Boasberg explained that EOUSA "seems to think that if a plaintiff's failure to properly exhaust her claim initially forever precludes her from getting a FOIA determination in the agency or in court, that is the plaintiff's fault for not getting it right the first time. That kind of one-strike-and-you're-out approach is inconsistent with FOIA's goal of opening agency action to the light of public scrutiny." (*Gregory Bartko v. United States Department of Justice, et al.*, Civil Action No. 17-781 (JEB), U.S. District Court for the District of Columbia, Sept. 25)

After reviewing the legislative history of 1996 amendments to the Tariff Act, a federal court in New York has ruled that U.S. Customs and Border Protection properly withheld aircraft cargo manifest data from Panjiva and ImportGenius, two companies providing services to the global trade community because aircraft cargo manifests are not subject to the public disclosure provisions contained in the Tariff Act. Judge Paul Oetken explained that the Tariff Act's provisions requiring disclosure of cargo manifests applied to vessels, which has always been consistently defined to encompass anything "capable of being used, as a means of transportation in water" and that the term expressly "does not include aircraft." However, in July 1996, Congress enacted the Anticounterfeiting Consumer Protection Act, which amended the public disclosure provision in the Tariff Act to include aircraft cargo manifests as well as ship manifests. But in October 1996, Congress amended the Tariff Act once again, this time removing the phrase "such manifest" and inserting "a vessel manifest." The Office of Law Revision Counsel of the House of Representatives attempted to amend the provision in the U.S. Code that corresponds with § 431 of the Tariff Act to be consistent with both the July and October 1996 acts, which is the version that still exists. That language reads in part that "except as provided in subparagraph (2), the following information, when contained in a vessel or aircraft manifest, shall be available for public disclosure" and listed eight data elements. Panjiva insisted that the public disclosure provisions continued to apply to aircraft as well as ships, while CBP argued that the October 1996 amendment removed aircraft manifests from the public disclosure provision. Oetken pointed out that "the Court cannot combine the ACPA and the Correction Act [the October 1996 amendment] in a straightforward manner to yield a single, definitive statutory text that fully incorporates both amendments." As a result, Oetken agreed with the agency that Congress was working with a copy of the text of § 431 that pre-dated the ACPA amendment. He observed that "on its face, the Corrections Act was purporting to amend language in § 431(c)(1) as it existed prior to the ACPA. Given that the ACPA was enacted only three months prior, and different committees of the Senate originated the conflicting amendments, a mistake of this nature is easy to comprehend. And if this outdated-text scenario is indeed what occurred, it would mean that when adopting the Corrections Act amendment, Congress would have understood the new text of § 431(a)(1) to refer to vessel manifests only. And contrary to Panjiva's assertion, Congress's failure to expressly strike the phrase 'aircraft manifest' under these circumstances would provide an indication of a deliberate effort to keep the words in the statute. Looking at the plain meaning of the text in conjunction with the statutory history of § 431(c)(1), therefore, the Court is inclined to favor the Government's understanding of the statute." Rejecting Panjiva's further statutory construction arguments, Oetken noted that "if the Corrections Act is to be construed as having in any way substantively amended § 431(c)(1), the only plausible understanding of its effect is that it exempted airplane cargo manifests from public disclosure." Finally, Oetken dismissed Panjiva's argument that CBP had a policy or practice of violating FOIA by failing to disclose aircraft cargo manifests. (*Panjiva, Inc., et al. v. United States Customs and Border Protection, et al.*, Civil Action No. 17-8269 (JPO), U.S.

ACCESS REPORTS

District Court for the Southern District of New York, Sept. 24)

Judge Randolph Moss has ruled that that EOUSA has not shown that it conducted an **adequate search** for records in response to three FOIA requests from prisoner Richard King concerning his prosecution and conviction, which included proceedings in the Eastern District of New York and the District of Arizona. Moss had earlier found the agency's search was inadequate because it was based on the agency's assertion that the records were sealed. Finding this explanation insufficient, Moss ordered the agency to supplement its affidavits. This time, the agency told Moss that it could not confirm whether or not the records were sealed, but that it had conducted an adequate search and withheld records under **Exemption 5 (privileges)**. Moss found the agency's revised position raised more questions than it answered. He pointed out that "the description offers little more than boilerplate that could be used in virtually any case in which a FOIA requester seeks records from one or more United States Attorneys' Offices. The reader is left to infer which office received the requests, and the declaration fails to identify who oversaw the search or what files, other than the LIONS system, were searched. Likewise, the declaration asserts that a 'systematic' search was conducted 'on each given subject,' but does not indicate what 'subjects' those charged with responding believed were implicated." Moss observed that although King had asked for all emails there were only a handful of emails produced. He indicated that "although it is possible that the only records that exist were sent to or received by the array of Assistant United States Attorneys, FBI Special Agents, and other lawyers identified in King's November 27, 2014 request are maintained in [the LIONS] system alone, just as it is possible that only 24 pages of records exist, the Department needs to do more to convince the Court that it has conducted a thorough search." Moss also noted that he was he was not convinced that many of the emails were privileged. (*Richard Alan King v. U.S. Department of Justice*, Civil Action No. 15-1445 (RDM), U.S. District Court for the District of Columbia, Sept. 23)

A federal court in Virginia has ruled that James Crockett is not eligible for **attorney's fees** for his suit against the Department of Veterans Affairs because he did not substantially prevail. Crockett filed suit against VA after it failed to respond to his request in a timely fashion. He argued that his suit was necessary because the agency had previously responded to another request he had submitted within a month. The court found this did not show that Crockett's suit was the cause of the agency's disclosure of records in response to his second request. The court pointed out that "simply because the VA had responded more quickly in the past does not mean that his lawsuit caused the VA's more delayed response; in fact, Crockett does not demonstrate how this is relevant to the issue of causation." Crockett claimed he relied on the fact that the status of his request as shown on the agency's website had not changed before he filed suit as evidence that it would not have disclosed the records without a suit. But the court observed that "to rely on the website's lack of a status update prior to the lawsuit to show causation, Crockett must also show hat there was a status update after filing. The mere absence of any change to the website before his lawsuit is inconsequential." Crockett also argued that the agency was required to explain why it did not disclose his records until after he filed suit. The court, however, noted that Crockett "has not presented any evidence to refute the VA's assertion that it did not know of his lawsuit until after it produced his records, and he cannot argue from the materials in the record that there is a genuine issue of material fact." (*James H. Crockett v. Department of Veterans Affairs*, Civil Action No. 17-00186, U.S. District Court for the Western District of Virginia, Sept. 21)

A federal court in California has ruled that Smart-Tek Services is not entitled to tax information about alleged alter ego companies for which the IRS had held Smart-Tek Services liable for payroll taxes. Smart-Tek Services made FOIA requests under its corporate identity as well as under corporate identities of subsidiaries asking the IRS to disclose identifying information about the alter ego companies and eventually

filed five separate actions against the agency. In searching for the records, the agency quickly concluded that all potentially responsive information was in a single large file pertaining to its investigation of the various alter ego companies. But because the alter egos had separate tax identification numbers, Smart-Tek Services was never able to establish that it had a right of access under Section 6103. The court explained that "if a document contained Plaintiff's return information as well as the return information of one or more of the other FOIA requesting entities, it was marked as partially responsive to Plaintiff's FOIA request and partially responsive to each of the other FOIA requesting entities whose return information was included on the document. If a document contained Plaintiff's return information but also the return information of other taxpayers who did not submit FOIA requests, it was marked as partially responsive to Plaintiff's request only." Smart-Tek Services argued that the agency's search was inadequate because it did not mark records as responsive if they did not contain Smart-Tek Service's taxpayer information. The court disagreed, noting that "Plaintiff only requested its own administrative file and a search of [Power of Attorney] authorizations revealed that 'each taxpayer whose records were in the commingled file had not authorized its records to be disclosed to the other taxpayers.' The IRS's search in response to Plaintiff's FOIA request was adequate." The court found that because the names of the alter ego companies were now in the public domain, the IRS was required to disclose them. The court pointed out that "although the return information was not disclosed through court proceedings specifically, the identities of Plaintiff's alter-egos have been 'made a part of the public domain' through legal process and the creation of a public record. It therefore follows that the identities of the taxpayers named in the public tax lien are no longer privileged under § 6103." The court rejected Smart-Tek Service's claim that the alter-egos were one entity for purposes of the FOIA requests. Instead, the court indicated that "businesses treated as separate entities for tax assessment purposes are also separate entities for disclosure purposes." (*Smart-Tek Services, Inc. v. United States Internal Revenue Service*, Civil Action No. 15-0449-BTM-JMA, U.S. District Court for the Southern District of California, Sept. 25)

ACCESS REPORTS

**1624 Dogwood Lane, Lynchburg, VA 24503 (434) 384-5334**

Please enter our order for Access Reports Newsletter. It will help us stay on top of developments in FOI and privacy.

- ❑ Access Reports Newsletter for $400
- ❑ Bill me
- ❑ Check Enclosed for $_____

Credit Card
Master Card / Visa / American Express
Card # _____-_____-_____-_____ Expiration Date (MM/YY):_____/_____
Card Holder:_____ Phone # (_____) _____-_____

Name: _____ Phone#: (____) _____-_____
Organization: _____ Fax#: (____) _____-_____
Street Address: _____ email: _____
City: _____ State:_____ Zip Code: _____

#