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Washington Focus: Politico has put together a database of visitors to the White House, Mar-a-Lago, and other venues used by President Trump, including phone calls, using public sources, billing it as an unauthorized replacement for the official White House visitors' logs that were available, with a three-month lag, during the Obama administration, but were stopped after Trump took office. Politico explained that the database currently had 3,647 individual interactions with the president by 2,079 members of the public, politicians, foreign leaders and others, including large public events. A review of the statistics indicated that 80 percent of the visitors were men. There were 349 Republican politicians and 129 Democratic politicians, 389 executives, and 84 celebrities. . .The SEC has proposed revisions to its FOIA regulations on what constitutes a request from an educational institution, indicating that the request needs to be authorized by the educational institution and must be for scholarly research. Although such an interpretation has been common in the past, the D.C. Circuit recently ruled that the provision included students as well as authorized institutional faculty.

Court Rules Trump's Tweets Don't Constitute Official Acknowledgment

In the first court assessment of what role President Donald Trump's tweets play in constituting an official acknowledgment of documents, Judge Amit Mehta has concluded that while Trump's tweets constitute public statements of the President, they may bear little or no relevance as to whether they serve to confirm their contents. While Mehta's assessment hinges on the extent to which Trump's tweets specifically identify documents under the official acknowledgment doctrine, one implication of his ruling is that Trump's tweets are frequently divorced from any relationship to actual government policy that may be revealed through the existence of records.

The case involved a request by the James Madison Project and Politico reporter Josh Gerstein for a copy of the two-page synopsis of the 35-page Steele Dossier containing allegations that Russia had compromising personal and financial information about Trump, that was given to Trump in January 2017. The Office of the Director of National

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Intelligence, the CIA, and the National Security Agency all told JMP and Gerstein that they had the Synopsis but refused to disclose it. The three agencies also issued a *Glomar* response, neither confirming nor denying the existence of records, concerning any final determinations regarding the allegations in the Steele Dossier. The FBI issued a *Glomar* response, declining to confirm the existence of the synopsis as well. JMP and Gerstein then filed suit, claiming that various public statements made by Trump, as well as statements made by former Director of National Intelligence James Clapper and former FBI Director James Comey constituted an official acknowledgment of the existence of the records that waived the agencies' ability to rely on a *Glomar* response.

Mehta agreed with the government that the official acknowledgment standard first enunciated in *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990), required that the information requested must be as specific as the information previously disclosed, that the information must match the information previously disclosed, and that the disclosure must have been made through an official and documented disclosure. JMP and Gerstein argued for a more lenient standard where a plaintiff "must point to official disclosures that warrant a 'logical and plausible' inference as to the existence or nonexistence of the requested records." Mehta responded that "to the extent Plaintiffs contend that *Fitzgibbon*'s three-part test does not apply in the *Glomar* context, they are mistaken. The D.C. Circuit consistently has applied *Fitzgibbon*'s three prongs to evaluate a claim of 'official acknowledgment' in the *Glomar* context." He explained that "ultimately then, to overcome an agency's *Glomar* response when relying on an official acknowledgement, 'the requesting plaintiff must *pinpoint* an agency record that both matches the plaintiff's request and has been publicly and officially acknowledged by the agency.'" He rejected JMP and Gerstein's claim that the more recent D.C. Circuit decision in *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), found that *Glomar* responses could be judged based on whether they were "logical or plausible." Instead, he pointed out that "in the *Glomar* context, the specificity requirement concerns the 'fit' between thee particular records sought and the records that are the subject of the public official statements." He noted that "the 'logical nor plausible' language of *ACLU*, by contrast, is used to evaluate an agency's justification for invoking a FOIA exemption to withhold records or issue a *Glomar* response," and added that "while *ACLU* establishes a standard relevant to the *Glomar* context, it does not displace the specificity requirement of *Fitzgibbon*."

JMP and Gerstein claimed that a number of Trump's tweets confirmed the existence of the records, as well as statements made by Clapper and Comey both before and after they left the government. JMP, Gerstein, and the government all agreed that Trump's tweets constituted presidential statements. In addition to the tweets, the plaintiffs also relied on various interviews Trump gave to the media, Trump's termination letter to Comey, and statements made by White House Press Secretary Sarah Huckabee Sanders. JMP and Gerstein also offered testimony by Comey before the House Select Committee on Intelligence before his termination and testimony given to the Senate Intelligence Committee after his termination. Mehta agreed that Comey's testimony before his termination constituted an official statement of the FBI but pointed out that "statements made after leaving government service, however, are a different matter. They do not constitute official statements and, therefore, cannot be treated as an official acknowledgement of the existence of a record." JMP and Gerstein argued that Comey's statement after his termination lent context to statements Trump had already made. But Mehta declined to broaden the scope that far, noting instead that "the official statement must stand on its own – it either rises to the level of a public acknowledgement or it does not." As to Clapper's statements, Mehta recognized that a press release issued before Clapper resigned constituted an official statement, but that comments Clapper made after he resigned did not.

Mehta found Trump's statements did not reveal that he had received the synopsis. Even in an interview with the *New York Times*, Mehta observed, "the President did not say that Director Comey presented him with *the Synopsis*. This is not hair-splitting. Distinguishing between [the Dossier and the Synopsis] is critical, for the D.C. Circuit's decision in *Wolf* [*v. CIA*, 473 F.3d 370 (D.C. Cir. 2007] teaches that the record

demanded must 'match' exactly the record that is publicly acknowledged." He pointed out that the "official acknowledgment standard is not a 'surely the agency must have it' standard. The official statements themselves must 'leave no doubt' that the agency possesses the requested records. Here, the President acknowledged in his *New York Times* interview that, at most, he received *some* information about the Dossier's contents from Director Comey. . .It does not inexorably follow [from Trump's comments], however, that the FBI possesses the Synopsis. To be sure, a document purported to be the Dossier is in the public domain, and the media has reported on some of its more salacious allegations, but no official statement from any authoritative source has revealed its precise contents."

JMP and Gerstein asked Mehta to apply a 'presumption of regularity' to the President's statements and tweets" and to "presume that, when he addresses the public, the President is properly discharging his official duties and relying on 'official U.S. Government information' to do so." Mehta found that none of Trump's tweets went so far as to actually identify the existence of records for purposes of the official acknowledgement standard, but he agreed with the plaintiffs that it was difficult to understand how to view his various tweets. Referring to a tweet in which Trump accused Huma Abedin of disclosing secure protocols on her laptop, Mehta observed that "applying Plaintiff's logic to this tweet, the court would have to find that federal law enforcement agencies had determined that [Abedin] gave foreign agents classified passwords and that documents exist to support that conclusion. But no reasonable jurist would so hold based on the President's tweet alone. To be sure, a presidential tweet could satisfy the stringent requirements of the official acknowledgement doctrine. But it does not follow that just because a tweet is an 'official' statement of the President that its substance is necessarily grounded in information contained in government records." (*James Madison Project, et al. v. Department of Justice, et al.*, Civil Action No. 17-00144 (APM), U.S. District Court for the District of Columbia, Jan. 4)

Views from the States…

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

Arkansas

A trial court has ruled that a series of informal email discussions concerning whether the City of Fort Smith should amend the rules of the Civil Service Commission to allow the new police chief to hire or appoint officer positions to include external applicants constitutes an informal meeting subject to the FOIA. The court indicated that the public's ability to understand the reasons public bodies took certain actions "meant not only the action taken on particular matters, but likewise the reasons for taking that action. Actually, public knowledge of the reasons can well result in a board decision being more acceptable or palatable; to the contrary, decisions rendered in secret, the reasons not being known, can well result in perhaps unjustified criticism of a board. Is not the public entitled to know *why* a board adopts certain rules or regulations? The 'why' is the essence of the action taken. Accordingly, in reviewing the emails the discussions and statements of position, or votes, made the emails constituted a meeting to which no notice was provided to either the public or the media." The court added that "under the facts of this case the Court concludes that informal meetings subject to the FOIA were held by way of emails, the purpose of which were to either opine or survey the members as to the demise of the CSC and/or acceptance/rejection of a settlement. These are clearly matters that should have occurred in a public meeting." (*Bruce Wade v. City of Fort Smith*, No. CV-2017-657 (V), Sebastian County Circuit Court, Arkansas, Jan. 4)

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Connecticut

A trial court has ruled that the FOI Commission acted appropriately in dismissing most of Michael Aronow's claims that the University of Connecticut Health Center improperly delayed responding to his multiple requests. Under the circumstances, the FOI Commission allowed the Health Center nine months in which to respond to some requests. The court accepted the FOI Commission's finding that "due to financial constraints of the Health Center, [its information officer] was taking on ever increasing additional duties in addition to his role as information officer. . . there were a large number of information requests pending; that the plaintiff was the requesting party for a substantial number of those pending requests; and that the plaintiff had received a number of the documents requested through discovery in a prior action against the Health Center. Thus, the FOIC had substantial evidence upon which to base its decision to order a rolling out of information over a nine-month period of time." Aronow also challenged the narrowing of his request. The court pointed out that Aronow "never stated that the agreed upon restriction was of limited duration. A failure of the commission to divine the plaintiff's unstated intent does not render its admittedly correct statement clearly erroneous nor does it evidence an arbitrary or unwarranted exercise of discretion." (*Michael Aronow, M.D. v. Freedom of Information Commission*, No. HHB-CV-15-5017072 S, Connecticut Superior Court, Judicial District of New Britain, Jan. 9)

New Jersey

A court of appeals has ruled that a report prepared for the City of Clifton by LVH, an accounting firm, to explain the difference in wages if Clifton went from paying its employees biweekly to paying them semi-monthly is a draft report protected by the deliberative process privilege, as well as being protected by the attorney work product privilege because of its likely use in defending grievances brought by the union. After workers complained that they would be underpaid as a result of Clifton's decision to go to a new pay schedule, *The Record* launched an investigation that concluded some workers would be underpaid. Clifton hired LVH to prepare a report explaining the changes, which was revised six times before finalized. Clifton then provided payments to workers it believed were underpaid by the change. The new pay schedule resulted in grievances filed by the union. In response to *The Record*'s request for the report, Clifton withheld the report claiming it was protected by the deliberative process privilege and the work product privilege. Although the trial court found the report was primarily statistical, it agreed with Clifton that it was privileged. The court of appeals upheld the trial court's decision, noting that "the fact that the report underwent six revisions at Clifton's request bespeaks its ongoing draft status." The court added that "the fact that the report contains statistical data and other factual information does not preclude protection by the privilege." Finding the attorney work product privilege applied as well, the appeals court observed that "the information contained in the report would be highly relevant to the issues raised in the grievances and arbitrations filed by the affected employees. The revisions to the report were requested, in large part, for its intended use in the grievance and arbitration process." (*North Jersey Media Group, Inc. v. City of Clifton*, No. A-1469-16T4, New Jersey Superior Court, Appellate Division, Jan. 11)

A court of appeals has ruled that the Ocean County Prosecutor's Office is not required to provide an explanation of why an employee resigned under an exception to the Open Public Records Act requiring public agencies to provide basic information about employees, including their status. Libertarians for Transparent Government received an anonymous tip that an individual was being forced to resign because he failed a drug test. OCPO provided information showing that the individual has resigned, but not the reason for his resignation. Libertarians for Transparent Government filed suit and the trial court ruled in favor of OCPO. The appeals court affirmed its decision as to the personnel records information but found the agency had failed to show it had conducted an adequate search for records. The appeals court noted that the exception "requires only the provision of the reason for an employee's date of separation. It does not require the provision of the

circumstance that may have caused an employee to choose to resign, or anything beyond the reason for the employee's 'date of separation.' In other words, the statute does not require the provision of the information that plaintiff argues the OCPO failed to provide here." As to the agency's search, the appeals court observed that 'we discern no permissible reason the OCPO limited its search for the requested records to Doe's personnel file and perceive no justification for it." (*Libertarians for Transparent Government v. Ocean County Prosecutor's Office*, No. A-1608-16T1, New Jersey Superior Court, Appellate Division, Jan. 5)

Rhode Island

The supreme court has ruled that records concerning an employee's private law practice, even if held by the Rhode Island Department of Elementary and Secondary Education, are not public records for purposes of the Access to Public Records Act. Paul Pontarelli requested the records several times from the department, which rejected his requests both times, claiming the records were not public records because they were not "made or received pursuant to law or ordinance in connection with the transaction of official business by any agency." After Pontarelli sued, the trial court ruled in favor of the department. On appeal, the supreme court agreed. The supreme court pointed out that "we hold without hesitation that the records Pontarelli requested are not public records for the purposes of APRA. In no way are records related to the *private* law practice of a RIDE employee 'made or received pursuant to law or ordinance or in connection with the transaction of official business by [RIDE]. Indeed, the very nature of the requested documents undermine his claims." (*Paul E. Pontarelli v. Rhode Island Department of Elementary and Secondary Education*, No. 2016-336-Appeal, Rhode Island Supreme Court, Jan. 16)

The Federal Courts…

The Ninth Circuit has ruled that only those portions of the USABook, an internal Department of Justice resource manual for federal prosecutors, containing original legal analyses are protected by **Exemption 5 (attorney work product privilege)** and that no portions of the manual are protected by **Exemption 7(E) (investigative methods and techniques)**. The ACLU of Northern California requested records pertaining to DOJ's policies for obtaining location information from electronic devices for tracking and surveillance purposes. After the agency withheld sections of the manual under Exemption 5 and Exemption 7(E), the ACLU of Northern California filed suit. The district court ruled that template applications and orders for pen registers and trap and trace devices, and two narrative sections dealing with tracking devices and electronic surveillance provided only general information that did not anticipate any specific case and were not protected by either exemption. However, the district court found that a PowerPoint presentation on legal issues arising from the use of location tracking devices and three legal memoranda analyzing the implications of recent case law regarding GPS location tracking were privileged because they constituted attorney work product. The Ninth Circuit divided the withheld records into three categories – (1) technical information, (2) considerations related to seeking court authorization for obtaining location information, and (3) legal background and arguments related to motions to suppress location information in later criminal prosecutions. Writing for the court, Circuit Court Judge Marsha Berzon first noted that "the technical information about electronic surveillance techniques contained in the USABook is not attorney work product. . .Such technical information assists investigators in the conduct of their investigations. It does not include the 'mental impressions, conclusions, opinions, or legal theories of [DOJ attorneys.]'" She pointed out that "instructions to investigators on securing court authorization to obtain location information about a suspect, including the type of authorization required, are not attorney work product, as they can serve a non-adversarial purpose. Even of we view the portions of the USABook containing such instructions as serving both a non-litigation and a

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litigation purpose, recognizing that criminal investigation often do lead to prosecutions, the documents do not satisfy this circuit's 'because of' test for such so-called 'dual purpose documents.'" But Berzon explained that "the portions of the USABook that present legal arguments supporting the agency's positions on the type of authorization necessary to obtain electronic information are attorney work product. These portions of the documents reflect the legal theories of DOJ's attorneys." She indicated that there were limitations. She pointed out that "unless a given portion of the document here at issue contains some original analysis – particularized arguments, strategies, or tactics generated in anticipation of litigation, even if not for a particular claim – it cannot claim the protection of Exemption 5." Although agencies are not required to consider **segregability** for records protected by the attorney work product privilege, Berzon indicated that only applied to those portions of a document that actually qualified for attorney work product protection. She explained that "the USABook is a generic resource rather than a case-specific work product, and the portions of it not prepared in anticipation of litigation may be segregable from those that were. . .[B]road recitations of case holdings and summaries of applicable law, if segregable, must be disclosed. Only analytic portions bearing upon, and prepared in advance of, litigation are exempt." Berzon also found Exemption 7(E) did not apply. She noted that "the documents do not contain non-public details regarding the use of these surveillance techniques." (*American Civil Liberties Union of Northern California v. United States Department of Justice*, No. 14-17339, U.S. Court of Appeals for the Ninth Circuit, Jan. 18)

Judge Amit Mehta has ruled that email communications between Sandia National Laboratory and its legal counsel at Lockheed Martin are protected by **Exemption 4 (confidential business information)** and that the Department of Energy appropriately redacted personal information pertaining to individuals involved in an OIG investigation of Sandia's attempt to improperly lobby for a no-bid extension of Lockheed Martin's contract to operate the laboratory under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, but to the extent that Sandia disclosed more information than required under both exemptions, that information was now public and no longer subject to an exemption. OIG published its report in 2014, finding Sandia had acted inappropriately and making a series of recommendations that DOE accepted. The Justice Department also fined Sandia $4.7 million to settle alleged violations of the Byrd Amendment and the False Claims Act. The Center for Public Integrity requested all records pertaining to the OIG investigation of Sandia. In an earlier decision, Mehta resolved all the issues, but the Exemption 4 privilege claim and the scope of the Exemption 7(C) claims. After the agency provided supplemental affidavits, he found he was now able to resolve those issues as well. The Center for Public Integrity argued that Sandia had waived its claim that the emails were privileged by disclosing the emails to OIG. Mehta agreed, noting that "although not publicly disclosed at first, Defendant produced the OIG Report to Plaintiff *without redacting* references to the e-mail communications, yet Sandia did not complain to Defendant about the release. Sandia's silence in the face of public revelation of its privileged communications is fatal to Defendant's invocation of Exemption 4." DOE claimed that sharing the emails with OIG did not waive the privilege under the common interest doctrine. But Mehta pointed out that "Sandia and OIG did not have 'substantially identical' interests at the time Sandia disclosed the emails. In fact, they had diametrically opposed interests: OIG was investigating the illegal expenditures of taxpayer funds by Sandia, and Sandia denied any wrongdoing. The fact that Sandia and Defendant now claim to have 'substantially identical interests' in this litigation cannot resurrect a privilege that Sandia waived long ago." Mehta then assessed whether the emails could be considered commercially confidential. While in his previous decision, Mehta has noted that the agency had the power to compel Sandia to provide records about its lobbying scheme, "the same cannot be said of Sandia's privileged attorney-client communications. OIG could not have compelled Sandia to produce those e-mail chains; that Sandia did so was a voluntary act." Using the *Critical Mass* test for voluntary submissions, Mehta found the emails constituted information Sandia would not customarily disclose to others. But Mehta pointed out that some portions of the emails had been made public in the OIG report. He indicated that "defendant cannot, however, rely on Exemption 4 to redact the portions of the e-mails that OIG officially acknowledged through release

into the public domain." Turning to the Exemption 7(C) claims, Mehta explained that Sandia had disclosed the names of employees that OIG had redacted. Assessing the disclosures' impact on the 7(C) claim he observed that disclosures by components of the same agency constituted public acknowledgment. He noted that "thus, [the National Nuclear Safety Administration's] disclosures trigger an official acknowledgment waiver on behalf of other DOE subcomponents, including OIG." He added that "if an unredacted document released by NNSA is directly discussed or quoted in a released OIG record, such as the OIG Report, then Defendant can no longer rely on Exemption 7(C) to protect the identity of persons who appear in both records." With that caveat, Mehta found the agency's Exemption 7(C) claims appropriate. He rejected the Center for Public Integrity's claim that disclosure of employees' identities was in the public interest. Mehta pointed out that "Plaintiff here does not explain how releasing the names of Sandia employees will get Plaintiff any closer to learning whether OIG pulled its punches or, for that matter, anything else about the investigation." (*Center for Public Integrity v. U.S. Department of Energy*, Civil Action No. 15-01314 (APM), U.S. District Court for the District of Columbia, Jan. 12)

In ruling that the Animal and Plant Health Inspection Service has now reposted redacted versions of the records it had taken down because of privacy concerns, Judge Christopher Cooper has resolved a suit brought by PETA challenging the agency's decision to remove the records in the first place. Cooper found that PETA had not shown that the agency was required to post the records under Section (a)(2)'s affirmative disclosure provisions, particularly the provision requiring agencies to make available frequently requested records. At the beginning of the Trump administration APHIS started removing records pertaining to a variety of animal welfare laws, resulting in a number of suits brought by advocacy organizations challenging the action. Although such organizations assumed this was the first shoe to drop in an expected policy resulting in less public information, the APHIS move seems to have had more to do with the agency's concern that it was making too much personal information about family-owned businesses available. As a result of that process, APHIS reposted inspection reports but did not repost animal inventories that had previously accompanied those reports. Cooper indicated that the agency had reposted three of the four categories of records that PETA sought. As to those categories of records, Cooper noted that "in light of this fact, there is no further meaningful relief that the Court can grant as to PETA's request for injunctive relief. As such, that request is **moot** as to any reposted record." PETA argued that its request for declaratory relief to force APHIS to continue to post the records was not moot because the agency could choose to remove the records again. But Cooper noted that "given the temporary, one-time nature of the Department's removal of the records, it is reasonably certain that the Department will not remove these records again." Cooper acknowledged that PETA could still challenge the agency failure to repost the animal inventories. He pointed out, however, that PETA needed to show that the animal inventories fell within the frequently requested category for disclosure. PETA argued that "because the records were previously posted on APHIS's website, they *must* be records within the scope of the reading room provision." Cooper responded that "but that is not necessarily so. An agency could clearly decide to post a wider swath of records than obligated to under FOIA: for instance, an agency could preemptively post a record that has *never* been requested (and thus is not a frequently requested record under the statute) but that it anticipates will be requested repeatedly." He added that "the Court does not agree that merely because a record has been posted on an agency's website, the agency was required to post that record under FOIA." (*People for the Ethical Treatment of Animals, et al. v. U.S. Department of Agriculture, et al.*, Civil Action No. 17-0269 (CRC), U.S. District Court for the District of Columbia, Jan. 18)

Judge Reggie Walton has ruled that he needs to conduct an *in camera* review of eight asylum assessment reports to determine if U.S. Citizenship and Immigration Services has disclosed all **segregable** factual information for the reports. The agency has long maintained that the entire reports were protected by

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Exemption 5 (deliberative process privilege), but that claim has been winnowed down by rulings in *Abtew v. Dept of Homeland Security*, 47. F. Supp. 3d 98 (D.D.C.). 2014), *aff'd* 808 F.3d 895 (D.C. Cir. 2015), *Gosen v. U.S. Citizenship and Immigration Services*, 118 F. Supp. 3d 232 (D.D.C. 2015), and *Bayala v. Dept of Homeland Security*, 2017 WL 3841828 (D.D.C. Sept. 1, 2017), where the courts found that introductory paragraphs included in the reports were factual and should be disclosed. After allowing USCIS to provide three supplemental affidavits explaining that it had disclosed biographical information in the eight asylum reports to first-party requesters, Walton concluded that the agency still had not indicated whether or not that information was as extensive as information disclosed in the previous three cases. He observed that the agency's supplemental affidavits "provide little to no information about the type or origin of the factual content in each section, or the length or structure of each section. On the other hand, the plaintiffs have submitted evidence, some of which the defendant relies on in its briefing, suggesting that all assessments follow a 'standard format' and therefore, the assessments at issue here likely contain the same factual paragraphs that the court in *Abtew*, *Gosen*, and *Bayala* determined could be released. In light of this evidence, as well as the decisions in *Abtew*, *Gosen*, and *Bayala*, the defendant must do more to enable the Court to make an independent *de novo* determination of segregability in this case." He pointed out that "in light of the fact that the defendant has now submitted three additional declarations, all to no ultimate avail, the Court concludes that *in camera* review is necessary." (*Rica Gatore, et al. v. United States Department of Homeland Security*, Civil Action No. 15-459 (RBW), U.S. District Court for the District of Columbia, Jan. 4)

A federal court in New York has ruled that the Department of State must **expedite** the processing of the Brennan Center's FOIA request for six documents concerning President Trump's travel ban within a month. After the Trump administration issued its second travel ban, the Brennan Center sent a multi-part request to the State Department, which granted its request for expedited processing. Although the request was referred to the Department of Homeland Security as well, only six identified documents were currently at issue. After the agency had not responded in six months, the Brennan Center filed suit to force the agency to expedite its request, asking the court to order the agency to disclose the records within 21 days and provide a *Vaughn* index as well. The agency argued the Brennan Center's timeline was not practicable because parts of its request had been referred to DHS, the records pertained to national security, and there was no legal obligation for the agency to provide a *Vaughn* index before it submitted its summary judgment motion. The court pointed out that "it has now been nearly six months since Plaintiff's FOIA request was submitted, and nothing has been produced. Nor is there any schedule for production. Accordingly, the presumption of agency delay applies." Turning to the State Department's claims, the court noted that "as an initial matter, Defendant cannot evade responsibility for failing to produce the requested records by referring the request to DHS or other Executive Branch components for review." The court pointed out that "moreover, Defendant's claim that Plaintiff's request is 'broad and complex' and 'burdensome' in light of the State Department's backlog of FOIA requests is not supported by the records. Although Defendant argues that Plaintiff's FOIA request contains twenty-three sub-parts, Defendant has conceded that Plaintiff is seeking 'only a subset of [these] records in this litigation' and that only 'six documents' are actually in dispute. . .Accordingly, Defendant has not demonstrated that production of the non-exempt portions of the six documents at issue – with an explanation as to which exemptions apply to material that is withheld – would be overly burdensome." On the issue of a *Vaughn* index, the court observed that "while 'a *Vaughn* Index is not. . .required. . . "where it is not [necessary] to restore the traditional adversary process" – because the 'requestor has acquired sufficient facts to permit the adversary process to function' – here the State Department has provided no information regarding the exemptions it plans to claim." The court concluded that "because (1) Plaintiff has demonstrated that its FOIA request merits expedited treatment, and (2) Defendant has not rebutted the presumption of agency delay, Plaintiff's motion to expedite will be granted." The court ordered the agency to produce non-exempt records and a *Vaughn* index by Feb. 3. (*Brennan Center for Justice at New York University School of*

Law, v. United States Department of State, Civil Action No. 17-7520 (PGG), U.S. District Court for the Southern District of New York, Jan. 10)

The Tenth Circuit has ruled that records used by Western Ecological Resource, Inc., a third-party contractor hired by Leavell-McCombs Joint Venture to prepare an environmental impact statement for a proposed exchange of land between LMJV and the Forest Service do not qualify as **agency records** even though the Forest Service had a right to obtain the records. After the announcement of the Wolf Creek Project land swap, Rocky Mountain Wild requested records from the Forest Service concerning the proposal. Rocky Mountain Wild filed suit after the agency failed to respond within the statutory deadline and the district court ruled that the Western Ecological records were not agency records and the Forest Service had no obligation under FOIA to retrieve and process them. The Tenth Circuit agreed. The court noted that "if the materials were not created by the agency itself and were never acquired by the agency, the materials are not 'agency records' even if they were prepared by a contractor acting on the agency's behalf." Rocky Mountain Wild argued the Forest Service had constructive possession of the records. The appeals court pointed out that "here, private contractors, not the Forest Service, created the documents. And as the Forest Service has never even *seen* the requested materials, it cannot be fairly said that the Forest Service ever obtained them." The court added that "it does not matter that the Forest Service *could* possess the documents by requesting them from Western Ecological; a federal right of access does not render a private organization's data 'agency records' subject to FOIA, because 'FOIA applies to records which have been *in fact* obtained, not to records which merely *could have been* obtained.'" Rocky Mountain Wild argued that the records fit under § 552(f)(2)(B), a provision added by the OPEN Government Act making records maintained by a third-party under a records management contract agency records. Referring to this claim as "an over-expansive reading of § 552(f)(2)(B)," the Tenth Circuit observed that "western Ecological was not hired to manage the Forest Service's records; it was hired to prepare an EIS. The provisions in the employment agreement between LMJV and Western Ecological (assuming it can be considered a 'government contract') amount to little more than an agreement that Western Ecological would document its work in an orderly way." (*Rocky Mountain Wild, Inc. v. United States Forest Service*, No. 17-1119, U.S. Court of Appeals for the Tenth Circuit, Jan. 5)

Judge Trevor McFadden has ruled that Cause of Action Institute has **standing** under the **Federal Records Act** to force the Department of State to take further action to recover former Secretary of State Colin Powell's emails since the organization has two FOIA requests pending for Powell's emails. Since the D.C. Circuit's ruling in *Judicial Watch v. Kerry*, 844 F.3d 952 (D.C. Cir. 2016), the Federal Records Act has been transformed from a statute that was thought to have no useful private remedy to one in which FOIA requesters can now demand agencies involve the Attorney General in trying to recover records that oftentimes may not exist any longer. Because the *Judicial Watch* case involved a criminal investigation that led to the recovery of some more of former Secretary of State Hillary Clinton's emails, the D.C. Circuit was suspicious that the State Department had done enough to recover those records. Emphasizing what it characterized as the mandatory requirement that an agency enlist the Attorney General's assistance in further investigating possible violations of the FRA, the D.C. Circuit thought DOJ could "shake the tree harder" in exhausting all possible avenues of recovering the records. Judge James Boasberg ultimately found the State Department and the Justice Department had done as much as possible and dismissed the case as **moot**. Recognizing Boasberg's most recent decision, McFadden used the *Judicial Watch* decision as a springboard to normalizing such challenges. Although the State Department had asked Powell to return any emails he had from his time as Secretary of State, the inquiry had largely ended when AOL told Powell that his account no longer existed and it had no records. Allowing the Cause of Action suit to continue, McFadden criticized the lack of effort on the part of the government. "Here, all they have done has been to ask Secretary Powell to seek the emails himself, and

then declare 'mission accomplished' when Secretary Powell's representative informed them that AOL believed the emails no longer existed. If AOL were to be contacted directly by the Government, rather than by Secretary Powell's representatives, perhaps they would undertake a more thorough search for Secretary Powell's account, or the servers on which it was stored." McFadden emphasized the importance of bringing the Justice Department's power to bear, indicating that "the Defendants' refusal to turn to the law enforcement authority of the Attorney General is particularly striking in the context of a statute with explicitly mandatory language." He added that the FBI investigation into the recovery of Clinton's email had borne fruit, although subpoenas to service providers had not yielded any records. He pointed out that "but emails stored by third party service providers may not be the only source at issue. And even if AOL processes have erased Secretary Powell's emails on the AOL servers, a thorough investigation undertaken by the Attorney General might well yield fruit via other avenues." He concluded that "there is a substantial likelihood that Plaintiff's requested relief would yield access to at les some of the emails at issue." (*Cause of Action Institute v. Rex W. Tillerson and David S. Ferriero*, Civil Action No. 16-2145 (TNM), U.S. District Court for the District of Columbia, Jan. 9)

After conducting an *in camera* review, Judge Collen Kollar-Kotelly has ruled that Judicial Watch failed to point to any discussions the State Department had withheld under **Exemption 5 (privileges)** pertaining to the use of unauthorized electronic devices by former Secretary of State Hillary Clinton or her staff that qualifies for the government misconduct exception. Although Kollar-Kotelly explained that the D.C. Circuit's decision in *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) did not approve of the government misconduct exception in the FOIA context, she indicated that district court judges in the D.C. Circuit had accepted the possibility that the exception could apply through FOIA. But she pointed out that those judges had found the plaintiff was required to satisfy a high bar for invoking the exception. Applying that high bar, Kollar-Kotelly noted that "these documents show that agency leadership apparently sought to use personal electronic devices in ways that were not customary within the agency. In turn, agency staff engaged in discussions of the leadership's preferences and the efforts to accommodate those preferences. While staff had to resolve some disagreements in the process, these discussions do not evince 'nefarious motives' or warrant a finding of 'extreme government wrongdoing.'" She pointed out that "plaintiff essentially asks the Court to make, or rely on, a determination that the Secretary's conduct constituted wrongdoing. But it is unnecessary to decide that issue because the discussions themselves do not rise to the level so as to trigger the exception, regardless of the lawfulness, or propriety, of the underlying conduct." Kollar-Kotelly also indicated that the issue of whether the State Department now controlled emails the FBI recovered from a laptop belonging to Huma Abedin's ex-spouse might now be **moot**. Since the agency had now processed those records, the only remaining challenge Judicial Watch could raise would be if the State Department had withheld any of those emails under exemptions. (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 15-646 (CKK), U.S. District Court for the District of Columbia, Jan. 11)

Judge Emmet Sullivan has ruled that David Cole is not entitled to **discovery** concerning why the Federal Emergency Management Agency first told him it had archival records concerning the collapse of the World Trade Center buildings on September 11, 2001 then later told him it had located no archival records, at least until FEMA submits its own summary judgment motion which may provide a sufficient explanation. Cole requested records from FEMA in 2011. He was told that FEMA had found no records, but that the National Institute for Standards and Technology had 3,789 pages of records releasable in full or in part. Later, FEMA told Cole it had 490,000 pages in storage at the National Archives. In 2016, FEMA produced some documents and after reviewing them, Cole asked for drawings referenced in the materials but not provided. At that point, FEMA said it had not been able to locate any archival records but would search Region 2's off-site archives. Six weeks later, in what was termed its final response, FEMA told Cole that there was no Region 2

archive and that responsive records had not been sent to NARA. Cole asked Sullivan to grant limited discovery as to the existence or non-existence of the records. Sullivan indicated that he was "troubled by the government's inconsistent, even contradictory, responses to Mr. Cole's inquiries regarding his FOIA requests. For example, FEMA initially represented that it had located 490,000 pages of potentially responsive records in storage at NARA. Later, FEMA also represented that potentially responsive records may be located in regional offsite archives. But in its final response, FEMA stated that no such archive existed and that it had been unable to find any additional responsive documents. In this correspondence, FEMA nowhere provided a clear explanation as to its changing position regarding the availability of additional records." But rather than grant Cole's discovery request, Sullivan noted that "discovery is premature at this juncture" because "the government has not yet moved for summary judgment – and therefore has not submitted documents setting forth details related to its search for documents responsive to Mr. Cole's request – the Court does not have sufficient information to determine whether a genuine factual dispute exists or whether Mr. Cole requires additional facts essential to oppose the government's motion. Therefore, the Court cannot determine at this time whether discovery is warranted and, if it is, how it should be limited in scope." He pointed out that after the agency submitted its summary judgment motion, "if Mr. Cole believes that FEMA's declarations are insufficient to show that its search was adequate, he may oppose the government's motion for summary judgment on that ground. If the Court agrees with Mr. Cole, it may reconsider Mr. Cole's request for discovery at the summary-judgment stage." (*David Cole v. Kent. B. Rochford, et al.*, Civil Action No. 15-1991 (EGS), U.S. District Court for the District of Columbia, Jan. 3)

Judge Richard Leon has ruled that the IRS properly withheld portions of the Office of Professional Responsibility's investigation of misconduct by tax attorney Bradley Waterman under **Exemption 5 (privileges)**. After the Tax-Exempt Bond office complained of practitioner misconduct by Waterman, the OPR started an investigation and determined that no further action against Waterman was necessary. After Waterman failed to get a copy of the report through more informal means, he filed a FOIA request with the IRS. The IRS withheld records about its investigation under Exemption 5 and Waterman filed suit. Waterman did not contest that the records were predecisional but argued instead that they were factual accounts and not deliberative. Leon found the factual material contributed to the deliberative process. He noted that "our Circuit has allowed agencies to withhold factual material that has been selected, summarized, or organized for the purposes of assisting in a deliberative process." He pointed out that "requiring the IRS to reveal the particular fact its employees thought warranted a referral of misconduct would expose the employees' deliberative evaluation of Waterman's conduct against IRS rules and standards." He upheld a redaction in an email between an OPR legal analysis manager and an OPR attorney, observing that "the redacted information therefore recounts a 'discussion that took place before any action was taken and describes an action (but not a final action) to be taken in the future.' That kind of conversation involving the planning and evaluation of a 'proposed' agency action, prior to adoption of a final agency position, is by its nature predecisional and deliberative." (*Bradley S. Waterman v. Internal Revenue Service*, Civil Action No. 16-1823 (RJL), U.S. District Court for the District of Columbia, Jan. 24)

Judge Trevor McFadden has ruled that the Department of State conducted an **adequate search** for records concerning its determination that former Secretary of State Hillary Clinton's emails between January and April 2009 would not be considered agency records. Judicial Watch submitted a request for a determination by State's legal office based on portions of an FBI Form 302 summarizing an interview conducted with a staffer at the Office of Information Programs and Services suggesting that State had made such a determination. The State Department searched IPS and the Office of Legal Adviser and found no records. Challenging the agency's search, Judicial Watch argued that "a reasonably calculated search in

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response to its request necessarily should have included asking the IPS interviewee whether the requested documents exist, and where they may be located." McFadden pointed out that "the State Department's searches were anything but rote: they were designed and executed in a manner reasonably expected to produce the information requested. In particular, the State Department was aware of the identity of the interviewee, and its searches included a search of the files and accounts of the interviewee." McFadden observed that Judicial Watch's suggestion of just asking the interviewee directly "would have placed the State Department in a quandary." Because Judicial Watch had narrowed the identity of the interviewee to three employees, one of whom no longer worked at State, "describing the efforts taken by the State Department would inevitably have either identified the interviewee or narrowed the list to two. FOIA does not require – and in fact expressly exempts – disclosure of the interviewee's identity, and this litigation should not be used as a back-door means of discerning the same." He concluded that "the search efforts undertaken by the State Department appropriately balanced the rights of Judicial Watch to obtain information with the right of the interviewee to remain anonymous. Nothing more is required." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 16-02368 (TNM), U.S. District Court for the District of Columbia, Jan. 19)

Judge Amy Berman Jackson has ruled that the Cornucopia Institute is entitled to **attorney's fees** for its suit against the Agricultural Marketing Service, but that its fee request is excessive because the vast majority of the time claimed pertained to the attorney's fees dispute. As a result, Jackson reduced its $41,965 request to $12,145. The Cornucopia Institute requested information about candidates for five vacancies on the National Organic Standards Board. The agency denied the request entirely under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. Shortly after the Cornucopia Institute filed suit, the five vacancies were filled, and the agency decided to withdraw its deliberative process privilege claim. It disclosed 264 pages in full and 407 pages with redactions of personal information. The agency disclosed more information about the five appointed candidates after deciding disclosure would be in the public interest. As the result of discussions with the Cornucopia Institute, the agency also decided to disclose the state of residence for each applicant and to produce several other pages that had been inadvertently omitted. Although the parties never appeared before Jackson, they could not agree on an award of attorney's fees. The agency claimed that the Cornucopia Institute's suit had not caused the agency to disclose the records, but, instead, the fact that the vacancies were filled. Noting that it was a "close question," Jackson explained that "it is clear that the change in circumstances played some role in the agency's change of position. But it also true that the change came shortly after plaintiff filed its lawsuit, and while communications between the parties were underway. Therefore, while it cannot be said that the filing of the lawsuit was the sole basis for the agency's change in position, there was a substantial causal connection." Jackson also pointed to the disclosure of the state of residence of applicants as a significant piece of information that was disclosed as a result of the suit. She observed that "the Court is not relying on these additional limited disclosures alone for its determination. In any event, the geographic makeup of the applicant pool is not entirely insignificant. . ." Jackson found there was a public interest in disclosure of the information, noting that appointment of board members "is relevant to the broader goal of monitoring the administration and enforcement of organic standards." She also found the agency's legal position was reasonable, but after balancing the factors concluded the Cornucopia Institute was entitled to fees. However, she observed that "the total fee request is unreasonable because an undue portion of it derives from time billed litigating and mediating the amount of attorney's fees, rather than the merits of the underlying FOIA action," and pointed out that "this amount accounts for approximately 70% of the total fee request." She reduced the fees on fees request to $2,000 and indicated that the $12,965 requested for the merits seemed excessive. She explained that "the parties were able to resolve the FOIA request within six months from the date plaintiff filed its suit and without any briefing. There was nothing particularly complex about the narrow FOIA request. Therefore, the Court will reduce the award for time billed on the merits by 25% and will award $9,723." (*Cornucopia Institute v. Agricultural Marketing Service*, Civil Action No. 16-2252 (ABJ), U.S. District Court for the District of Columbia, Jan. 10)

A federal court in California has ruled that the ACLU Immigrants' Rights Project and the Center for Gender and Refugee Studies at Hastings College of Law are entitled to **attorney's fees** for their litigation against U.S. Immigration and Customs Enforcement but has reduced their fee request by $13,420, awarding a total of $63,385 instead of the original request of $76,805. The organization submitted two FOIA requests for records concerning parole for arriving asylum seekers. The agency failed to respond within the statutory time limit and the organizations filed suit, settling the case ten months later. ICE argued that the requesters were not entitled to fees for time spent drafting the FOIA requests and pursuing administrative appeals. Magistrate Judge Jacqueline Scott Corley agreed with the agency, noting that "FOIA provides an award of fees to a plaintiff prevailing in a case brought in district court. Accordingly, work performed during administrative proceedings prior to litigation is not recoverable under FOIA." The requesters argued that administrative appeals were necessary to determine whether or not to sue in the first place. But Corley pointed out that "the only evidence before the court shows Plaintiffs are seeking fees for work performed during the administrative process and nothing more. The statute does not provide for an award of fees for work performed during the administrative process even if the plaintiffs view the process as necessary." Noting there was a split in the case law as to whether fees could be recovered for document review, she indicated she agreed with both lines of cases. She explained that "a prevailing plaintiff is not entitled to recover fees for merely having its attorney review the documents. However, when a defendant produces documents during FOIA litigation, plaintiff's counsel must review the documents to determine if the production ends the litigation or if there are still compliance issues that necessitate further litigation. Such costs are litigation costs." Corley agreed that the attorneys who had made the requests also served in a legal capacity during the litigation and could be compensated as a result. However, she reduced the total fee award for excessive and duplicative billing. (*American Civil Liberties Union Immigrants' Rights Project, et al. v. U.S. Immigration and Customs Enforcement*, Civil Action No. 16-06066-JSC, U.S. District Court for the District of Northern California, Jan. 19)

A federal court in California has ruled that Dennis Raimondo has not shown that the FBI violated section (e)(7) of the **Privacy Act**, restricting agencies' ability to collect and maintain information about the exercise of an individual's First Amendment rights, because the information was collected as the result of a legitimate law enforcement function. Raimondo and Eric Garris filed a FOIA suit against the FBI after learning that their antiwar.com website was mentioned in a 2004 threat assessment conducted by the agency. The agency originally told Raimondo and Garris that it had no records, but after their connection to antiwar.com was clarified, the agency found records pertaining to their website. After the FOIA claims were resolved, Raimondo and Garris continued to pursue several Privacy Act claims based on the agency's alleged violation of (e)(7). The remaining claim pertained to the inclusion of antiwar.com in a list of sites mentioning a 2006 Halliburton shareholder meeting; Vice President Dick Cheney had previously been the chairman of Halliburton before he became Vice President. Raimondo argued that the mention implicated their First Amendment rights and should be removed. Raimondo and Garris challenged the affidavit of an FBI special agent, claiming the agent had no personal knowledge of the records. But Magistrate Judge Jacqueline Scott Corley noted that "while there is some similarity between FOIA and Privacy Act claims, the purpose of the declaration in a Privacy Act action is different. In a Privacy Act action such as this the declaration is relied upon to establish the purpose for the historical document and not just the methodology of a search for documents." Finding that the special agent was qualified to explain the nature of the document, Corley pointed out that the special agent "has adequate personal knowledge to testify *why* a memo such as the April 2006 Memo would have been prepared." Corley then found the memo was prepared as part of a law enforcement function. She observed that "information as to how broadly information regarding the meeting was shared, and how it was shared, is relevant to determining what law enforcement might expect to occur at the meeting and how it should prepare in advance." Raimondo and Garris also contended that the memo was

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not "authorized." She indicated that "the memo here was prepared as part of the FBI's collaboration with local law enforcement. The Court is not in a position to parse the way in which the FBI collaborated with local law enforcement and conducted its assessment of the public safety risked involved." (*Dennis Joseph Raimondo, et al. v. Federal Bureau of Investigation*, Civil Action No. 13-02295-JSC, U.S. District Court for the Northern District of California, Jan. 12)

Even though federal prisoner Ismael Gonzales did not respond to EOUSA's motion for summary judgment, Judge Amy Berman Jackson has ruled that the agency has not shown that it conducted an **adequate search** for the records Gonzales requested. Gonzales, who was tried in the District of Colorado, filed two FOIA requests with the U.S. Attorney's Office in Colorado for records pertaining to bond applications and all records pertaining to his conviction. The agency told Gonzales that it had located two boxes of records responsive to his request about his conviction, each box containing between 2,000 and 4,000 pages of records. The agency told Gonzales that the estimated fees for records would be $195, and after Gonzales failed to respond, the agency closed his request. Because *Winston & Strawn v. McLean*, 843 F.3d 503 (D.C. Cir. 2016), required district courts to satisfy themselves that an unopposed motion for summary judgment should be granted, Jackson assessed the adequacy of the agency's motion. She was puzzled as to why the agency had provided an affidavit from the FOIA Contact in the U.S. Attorney's Office for the District of Columbia even though Gonzales' request pertained to the District of Colorado. She noted that the "defendant's submission on summary judgment fails to explain the relevance or the reasonableness of a search for records located in the USAO-DC instead of similar records systems in Colorado." She observed that "under all these circumstances, defendant 'leaves substantial doubt as to the sufficiency of the searches' and it has failed to meet its burden on summary judgment." (*Ismael Arenas Gonzales v. United States o America*, Civil Action No. 16-1716 (ABJ), U.S. District Court for the District of Columbia, Jan. 3)

Judge Amit Mehta has ruled that federal prisoner Andre Kanaya has failed to show that the Bureau of Alcohol, Tobacco, and Firearms received his FOIA request sent to the U.S. Attorney for the Southern District of Florida, even though he insisted that he had put the request in the prison mail system. Two years later, Kanaya filed suit against BATF for its failure to respond. BATF told Mehta that it was unaware of Kanaya's request until he filed suit and it had been unable to find any indication that it received the request. Mehta pointed out that "a federal agency has no obligation to respond to a FOIA request it has not received. Where, as here, an agency submits a declaration stating it did not receive the FOIA request, the burden falls on the requester to come forward with proof to create a genuine dispute of fact that he sent the FOIA request to the agency *and* the agency received it." Mehta added that "plaintiff's declaration does not show he mailed the FOIA request to ATF at an address associated with ATF. Moreover, Plaintiff fails to acknowledge that, on its face, his FOIA request (1) is directed at 'Department of Justice, U.S. Attorney of Southern District of Florida,' not ATF, and (2) does not include an address where it supposedly was mailed. Therefore, even the FOIA request itself does not help Plaintiff satisfy his burden." (*Andre Kanaya v. Alcohol, Tobacco, Firearms and Explosives*, Civil Action No. 17-1103 (APM), U.S. District Court for the District of Columbia, Jan. 11)

A federal court in Illinois has ruled that federal prisoner William White, who was convicted of a variety of hate crimes, **exhausted his administrative remedies** by mailing an amended complaint before the statutory deadline. Litigating over a number of requests White sent to components of the Department of Justice, the agency claimed White had failed to appeal various requests administratively. But the court agreed with White that he mailed an amended complaint addressing those issues before the statutory time limit expired. The court pointed out that "although the Court did not allow [White] to file the Amended Complaint until July 2017, after the agencies responded to his requests, the Court deems his Amended Complaint filed

the day he tendered it to the Court, not the date the Court allowed it to be filed. Further, under the mailbox rule, White is considered to have 'filed' a document when he turns it over to a prison official to be sent to the Court." The agency argued that *Oglesby v. Dept of Army*, 920 F.2d 57 (D.C. Cir. 1990), required White to file an administrative appeal. But the court observed that "*Oglesby*'s rule does not require actual exhaustion where White filed his claims before the agencies responded. It would have required actual exhaustion only if the agency had responded *before* White filed suit on his claims. However, because White tendered his Amended Complaint before any agency response, *Oglesby*'s rule does not apply." The Bureau of Prisons argued that White had **failed to state a claim** challenging its response to one of White's requests. Construing White's claim liberally, the court observed that "he asserts that his FOIA challenges include 'exhausted records where the agency denies having any responsive records, but public sources show that the agency must have some responsive records.' This can be construed as an assertion that the BOP's search was unreasonable because it did not locate other responsive documents about which White is aware and which were known by the agency and available to it." (*William A. White v. Department of Justice, et al.*, Civil Action No. 16-948-JPG-DGW, U.S. District Court for the Southern District of Illinois, Jan. 19)

A federal court in New York has ruled that U.S. Citizenship and Immigration Services properly withheld information that was allegedly provided by the ex-wife of Jaswinder Pal Singh. Singh's attorney, Allen Kaye, argued that Singh's ex-wife's identity was no longer confidential because he had guessed that she was the confidential source based on the records. The court agreed with DHS that "as to exemption 7(C) [invasion of privacy concerning law enforcement records], even if Plaintiff has correctly guessed the identity of the witness, because the witness has not waived his or her privacy interest, the witness's right to privacy must still be respected." Upholding the agency's invocation of **Exemption 7(F) (harm to any person)**, the court pointed out that "revealing the identity of a witness who testified against an individual regarding immigration fraud should remain private to afford protection to the witness; the Court defers to the agency's assessment of the risk and recognizes the possibility of retaliation, regardless of Singh's purported relationship with his former wife, who may or not actually be the witness." (*Allen E. Kaye v. U.S. Department of Homeland Security*, Civil Action No. 16-9384 (VEC), U.S. District Court for the Southern District of New York, Jan. 17)

A federal court in New Jersey has dismissed all of Macvest Group's claims against the IRS except for its FOIA claim. Dismissing Macvest's claim under the Administrative Procedure Act and the Mandamus Act, the court pointed out that "plaintiff's FOIA claim provided it with a complete and adequate remedy for the IRS's alleged wrongful withholding of information." The court also dismissed Macvest Group's Privacy Act claim, noting that "claims under the Privacy Act may only be brought by individuals. As a Delaware corporation, Plaintiff may not bring suit under the Privacy Act." (*Macvest Group, Inc. v. United States of America*, Civil Action No. 17-9833 (SDW)(LDW), U.S. District Court for the District of New Jersey, Jan. 16)

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