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Washington Focus: The FOIA Project has looked at the sudden increase in FOIA litigation filed by non-profits since the beginning of the Trump administration. The FOIA Project found that 209 non-profits had filed suit in 2016 but the number has continued to rise at a pace of nearly 100 new suits by non-profits every six months, reaching more than 500 by March 2018 and fluctuating above 500 through July 2018. Analyzing the number of suits by non-profits filed between 2001 and 2018, the FOIA Project found that Judicial Watch remains the most prolific with 391, while the ACLU comes in a distant second with 130. But progressive groups that did not exist before the Trump administration have surged into the current top ten list, including groups like American Oversight with 43 suits, Democracy Forward Foundation with 30 suits, and Protect Democracy Project with 22 suits. Even during the Trump administration, Judicial Watch continues to file the most litigation with 93 suits.

Courts Largely Uphold Exemption Claims In Competitive Harm and Privilege Cases

Two recent district court decisions explore issues of how and when to apply Exemption 4 (confidential business information) and Exemption 5 (privileges) to records submitted by or compiled from various regulated industries, and one includes a still rare intersection with Exemption 9 (data on wells) pertaining to Nestle Company's permit to use natural aquifers located in the San Bernardino National Forest.

The cases involve requests by the Story of Stuff Project and the Courage Campaign Institute, two non-profits advocating for environmental sustainability in the region near the San Bernardino National Forest, who requested records about Nestle's water operations. The other case involves a request from the Cornucopia Institute, a Wisconsin non-profit, for records about official visits from the Agricultural Marketing Service's National Organic Project to inspect organic dairies in Texas and New Mexico. In both instances, the agencies withheld records under Exemption 4 and Exemption 5, with the Forest Service claiming Exemption 9 in relation to Nestle's water drilling sites. Responding to the

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Cornucopia Institute's request for records on NOP officials' visits to organic dairies in Texas and New Mexico, the agency also cited Exemption 5 to protect certain materials gathered during those visits that the agency insisted would reveal deliberations.

In response to the request by Story of Stuff Project and the Courage Campaign Institute for records about Nestle's water operations, the U.S. Forest Service located 928 photos, 728 GIS files, 4 spreadsheets, one video, and 11,425 pages of responsive records. The agency disclosed 8,193 pages in full, 1,991 pages in part, and withheld 1,241 pages entirely, citing Exemption 4 and Exemption 9, as well as Exemption 5 and Exemption 6 (invasion of privacy).

Under Exemption 4, the agency withheld mapping information describing the location of springs and pathways to those locations, technical specifications of equipment, geological and hydrogeological analysis of springs, and proprietary groundwater production information. The agency also withheld the text of a report consisting of GIS files, photographs, field inventory forms and analytical reports. The agency claimed that disclosure of this information would likely cause substantial competitive harm to Nestle. Story of Stuff Project argued that a 1999 Dames & Moore report assessing Arrowhead Springs in the San Bernardino Mountains, released by the California State Water Resources Control Board, had made public much of the information about the location of wells and water operations that Nestle was claiming as proprietary. The agency provided an affidavit from Nestle arguing that the Old Fire of October 2003 in the San Bernardino Mountains had destroyed Nestle's existing infrastructure requiring the company to completely rebuild it. Mehta agreed that Nestle's affidavit undercut Story of Stuff Project's public domain argument but pointed out that the plaintiffs questioned whether or not the 2003 fire had destroyed Nestle's underground infrastructure. Mehta observed that "the court is persuaded that the 2003 fire led [Nestle] to replace nearly all the above-ground infrastructure in place prior to the fire, but the Forest Service does not provide any details as to whether the locations of [Nestle's] boreholes and springs changed as a result of the 2003 fire. In other words, while the agency's declarations make clear that the 2003 fire affected [Nestle's] operations *above* ground, the court cannot determine whether the fire affected [Nestle's] field conditions *below* ground, rendering the information from the 1999 Dames & Moore report as to the locations of [Nestle's] boreholes and springs likewise obsolete." In a footnote, Mehta pointed out that this uncertainty also affected the agency's Exemption 9 claim. He told the agency that it could supplement its affidavits to address the issue.

On the matter of competitive harm, Story of Stuff Project argued that Nestle did not face competition for its operations in the San Bernardino National Forest. Mehta indicated that was too narrow a frame. He explained that "the inquiry here is not whether disclosure of the withheld information will cause competitive harm to [Nestle] solely as to its ability to obtain a specific use permit to draw water from the San Bernardino National Forest, but instead whether disclosure will cause competitive harm to [Nestle] as to 'day-to-day competition' with other businesses offering bottled spring water." Nestle argued that its competitors "could use the [withheld information] to reverse-engineer [Nestle's] internal business processes – a unique system that [Nestle] uses to scientifically evaluate, license, and operationalize spring sites – in order to use these internal processes to develop their own spring sources and spring water business." In response, Story of Stuff Project once again asserted that the information was in the public domain. Finding Nestle's arguments persuasive, Mehta agreed that disclosure could cause substantial competitive harm.

Mehta rejected the plaintiffs' argument that certain records were not protected by either the deliberative process privilege or the attorney-client privilege. Story of Stuff Project argued that records concerning methods of collecting data on waterways were not deliberative because they did not reflect any policy discussion. Mehta disagreed, noting that "the Forest Service's discussions pertaining to data collection reflect deliberative 'policy judgments' because the Forest Service is engaged in a 'back and forth' as to the best method of accomplishing a particular agency objective." However, he found that the Forest Service's use of

Exemption 6 to withhold names was too broadly applied. He pointed out that "rather than provide detailed information about *why* disclosing the withheld names would constitute an invasion of privacy, the Forest Service merely concludes that these individuals have a privacy interest in the nondisclosure of their names. Such a conclusory assertion is clearly insufficient to satisfy an agency's burden to invoke Exemption 6."

The Cornucopia Institute requested records about inspection trips to organic dairies in Texas and New Mexico. The Agricultural Marketing Service sent predisclosure notifications to some of the dairies to allow them to comment on whether or not they believed that some information was confidential. By the time Judge Rudolph Contreras issued his ruling, AMS had provided 4,254 pages with redactions under Exemption 4, Exemption 5, and Exemption 6. Contreras found the majority of withholdings appropriate under either Exemption 4 or Exemption 5 but told the agency that it must disclose photographs taken by agency staff that the agency had claimed were protected by Exemption 5.

Under the deliberative process privilege, AMS withheld drafts of the reports prepared as a result of the Texas and New Mexico inspection trips. Approving these withholdings, Contreras noted that "the report – and prior drafts of the report – are predecisional because the agency had yet to officially adopt any approach to or take any position on the issues that were addressed in the report. Likewise, the report is deliberative because it describes findings from the Texas and New Mexico trip and assesses how the agency may proceed in light of those findings." But Contreras rejected the agency's claim that photographs taken by agency staff during the trips were deliberative as well because "the photographs were taken for the express purpose of aiding the agency in evaluating, among other things, whether diaries understood and were complying with agency regulations and how the 2012 drought was impacting operators." Contreras found this argument insufficient. He observed that "it cannot be that the mere act of taking a photograph – an act during which the photographer necessarily elects to capture only certain images – alone renders the photograph part of the deliberative process." He pointed out that "AMS fails to explain – other than in broad and vague terms – the role that these photographs played in any decisionmaking process." Contreras has no trouble upholding the agency's deliberative process privilege claim as to witness audit checklists. Here, he noted that "these materials are predecisional because they relate to the specific process of whether to offer accreditation to a prospective [accrediting certifying agent], and they are deliberative because they reflect the give-and-take of the process of determining whether a prospective ACA is worthy of accreditation."

Turning to Exemption 4, the Cornucopia Institute argued that a provision in the Organic Foods Production Act, encouraging public access to certification documents, was an independent disclosure provision superseding FOIA. Contreras disagreed, noting that "the statute features no mention of FOIA and no suggestion that Congress intended to supersede any FOIA exemptions." Contreras found that the records at issue qualified as confidential business information. Upholding the agency's claims, he noted that "AMS has presented sufficient evidence that the dairies face actual competition and that disclosure of the information regarding the dairies' respective productive output would likely cause competitive harm." (*Story of Stuff Project, et al. v. United States Forest Service*, Civil Action No. 17-00098 (APM), U.S. District Court for the District of Columbia, Sept. 27 and *Cornucopia Institute v. United States Department of Agriculture*, Civil Action No. 16-148 (RC), U.S. District Court for the District of Columbia, Sept. 27)

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Views from the States…

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

New Mexico

A court of appeals has ruled that the trial court erred in applying a recent supreme court ruling holding that statutory penalties for an agency's failure to provide records did not apply in litigation stemming from the denial of a request to litigation brought by animal welfare activist Marcy Britton for emails from the Attorney General's Office delegating state authority to investigate complaints of animal cruelty to municipal law enforcement agencies. After learning of the existence of such delegations of authority, Britton sent requests to the Attorney General's Office under the Inspection of Public Records Act for records evidencing the delegations. The agency initially balked at the request, claiming it was too burdensome, but eventually located 1,000 potentially responsive emails, releasing 378 and claiming that the others were duplicative or non-responsive. Two years later, Britton learned through discovery in separate litigation by the attorney who represented her that there were additional emails. She filed suit and the agency disclosed another 350 emails. Britton asked the trial court to assess a mandatory penalty of up to $100 a day against AGO for violating the IPRA by failing to disclose the additional emails earlier. Based on the recent ruling by the supreme court in *Faber v. King*, in which the supreme court held that IPRA litigation based on the denial of a request was limited to the recovery of attorneys' fees and costs only, the trial court found Britton could not ask for the statutory daily penalties. The court of appeals, however, reversed, finding that *Faber v. King* was inapplicable because Britton's litigation was based on an incomplete response. The appeals court noted that "because the undisputed facts establish that the AGO's response to Plaintiff's June 2009 request was 'incomplete,' we hold as a matter of law that the AGO was not in compliance with IPRA at the time Plaintiff brought her IPRA enforcement action." Sending the case back to the trial court to determine whether or not to assess penalties, the appeals court observed that "we agree with [Britton] that to uphold the district court's ruling would be to incentivize incomplete responses in direct contravention of the legislative purpose that underpins IPRA." (*Marcy Britton v. Office of the Attorney General*, No. A-1-CA-35346, New Mexico Court of Appeals, Sept. 24)

Oregon

A court of appeals has ruled that John Wood's suit against the Board of County Commissioners of Wasco County for violating the Public Meetings Law became moot once the Board rescinded its decision to withdraw from the North Central Public Health District, formed in 2013 by an intergovernmental agreement between Wasco, Sherman, and Gilliam Counties, at its next public meeting. Woods filed suit alleging that the decision was taken without public notice. In response to Wood's suit, the Board rescinded its action at its next public meeting. Wasco County then asked the trial court to find the case was now moot. The trial court agreed and entered judgment in favor of the County. Woods then appealed. The appeals court agreed with the trial court's finding that the case was now moot but pointed out that the trial erred in entering judgment in favor of the County, noting that the case should have been dismissed instead. Instructing the trial court to enter in a judgment of dismissal, the appeals court pointed out that "once the board rescinded its decision to give notice of intent to withdraw from NCPHD, the only nonspeculative relief requested by plaintiff that was based on present facts had been rendered moot. However, the trial court erred in entering a judgment in defendants' favor when the case was moot." (*John L. Wood v. Wasco County*, No. A161351, Oregon Court of Appeals, Sept. 19)

Washington

A court of appeals has ruled that Okanogan County properly withheld records related to inmate phone calls made in the county's jails under a provision exempting records of confined prisoners, but then took the unusual step of considering whether Okanogan County had an obligation under the Public Records Act to search for responsive records by limiting its conclusion that the County was not obligated to conduct such a search to this decision only. Juan Zabala submitted five requests to Okanogan County for records on inmate phone calls and records related to the phone calls. Because the agency's recordkeeping system did not allow it to search for such records, it told Zabala that his requests did not identify searchable records. Zabala filed suit and the trial court ruled in favor of the County. In its published portion of its decision, the court of appeals found that the records fell under an exemption for records of confined prisoners but decided to address Zabala's challenge to Okanogan County's obligation to search for the requested records in a non-precedential portion of its decision for purposes of this appeal only. The appeals court held that "the exemption extends to all recordings and documents related to the recordings, even when in possession of the Okanogan County Prosecuting Attorney's Office." Turning to Okanogan County's obligation to search for records, the appellate court noted that "the inability to perform a key word search in computer files does not excuse a government entity's response to a public records request. Nevertheless, we also conclude that the inability to perform a key word search for electronic records can be considered in determining whether the records sought are identifiable. Juan Zabala seeks 'any and all' records related to jail inmate recordings. We discern difficulty in a governmental agency responding to a request seeking 'all' records relating to a broad subject." (*Juan Zabala v. Okanogan County*, No. 34961-6-III, Washington Court of Appeals, Division 3, Oct. 2)

The Federal Courts…

Judge Dabney Friedrich has ruled that commission percentages contained in four contracts awarded by the IRS for debt collection represent line-item prices, which are protected under **Exemption 4 (confidential business information)** and do not represent the final price, which would normally be disclosable. Scott Hodes requested copies of the four contracts, including their final prices. The IRS disclosed the contracts except for the commission percentages, arguing disclosure would cause substantial competitive harm. Hodes filed an administrative appeal, which was denied. He then filed suit, arguing that the percentage commissions constituted the final price for the contracts. Friedrich, however, disagreed. She explained that "the commission percentages are multipliers used to calculate the price of four separate line items [depending on the value of the debt]. For this reason, the commission percentages more closely resemble line-item (as opposed to total) prices. Each line-item price is the commission percentage multiplied by the total dollar amount of tax debt collected within each category. And the total price is the sum of all four line-item prices. In this sense, each commission percentage is no different than a typical mark up in a contract that includes prices for various line-item goods or services." She pointed out that this interpretation was "consistent with the plain meaning of the term 'total' contract price; the aggregate amount that the government pays for goods or services – in this case taxpayer debt collection services for four separate categories of debt. Each individual commission percentage is not even a dollar price at all; rather, it is just one of several figures used to calculate the total contract price." She observed that "the commission percentage – the multiplier used to calculate each *line-item* price – is just *one* of several numbers used to calculate the total contract price." To substantiate its claim of the likelihood of substantial competitive harm, the IRS asserted that "should the IRS decide to expand its debt-collection program, new bidders might draw misleading inferences about their competitors' pricing approach that could cause bidders to include unrealistically low commission percentages." Hodes argued that because the agency would consider other aspects of a bidder's ability to perform, disclosure of the

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commissions agreed on with the four current debt collection services would not cause confusion. Friedrich accepted the agency's claim, noting that "it is plausible that even a small drop in a percentage rate could be perilous for a new bidder that is in weak financial condition or has an unrealistic aspiration about its profitability and ability to perform." Hodes also challenged the agency's **segregability** analysis. But Friedrich pointed out that "given that the commission percentages are the only part of the task order contracts that the IRS redacted and withheld under FOIA Exemption 4, the Court finds that there is no remaining nonexempt information that can be segregated and disclosed to Hodes." (*Scott A. Hodes v. U.S. Department of Treasury, et al.*, Civil Action No. 17-0219 (DLF), U.S. District Court for the District of Columbia, Sept. 28)

Judge Dabney Friedrich has ruled that the IRS has failed to show why identifying information from non-taxpayer FOIA requests can be withheld under either **Exemption 3 (other statutes)** or **Exemption 6 (invasion of privacy)**. Margaret Kwoka, a professor at the University of Denver Law School specializing in the implementation of FOIA by agencies, sent a request to the IRS for a list or log of FOIA requests received in 2015. Kwoka's asked for nine categories of information, including the name of the requester for third-party requests and the organizational affiliation of the requester if there was one. Using its automated system, the IRS responded to Kwoka's request but did not include the names or organizational affiliations of requesters. Kwoka filed an administrative appeal, which the agency denied, claiming that the information was protected under Exemption 3 and Exemption 6. Kwoka then filed suit. The agency argued that since it had an online log of FOIA requests containing request numbers and details about the topic of a request, Kwoka could cross-reference the identities of requesters and their organizational affiliations to deduce the identities of taxpayers. Friedrich found that claim illogical. She noted that "even armed with the information she requests and the publicly accessible FOIA log, in most cases Kwoka could not know with any certainty the identity of particular taxpayers. Neither the log nor the information Kwoka requests generally reveals the *target* of a FOIA request – the person whose tax records the requester is seeking. Thus, for third-party requests in which a requester submits a request for someone else's information, knowing the name and organizational affiliation of the requester (from her own FOIA request) in conjunction with the topic of the request (from the publicly accessible log) would not reveal the identity of the *target* of the request." The agency argued that with additional research, Kwoka might be able to identify corporate shareholders or relatives of deceased individuals based on whether they had asked about a corporation or an estate. Friedrich responded that "the 'corporate shareholder' *might* be requesting information about the corporation, but he might also be requesting information about any number of other organizations (or individuals). And importantly, Kwoka would have no way of knowing." Friedrich rejected the agency's argument concerning organizational affiliation as well. She pointed out that "because most organizations have many affiliated individuals, knowing a requester's organizational affiliation – even in conjunction with the topic of the request – would not ordinarily reveal the identity of the requester (and thus the identity of the taxpayer)." Kwoka conceded that there might be some instances in which organizational affiliation would reveal taxpayer identities, but Friedrich observed that "if those exceptions in fact exist, the IRS can make redactions. But it will have to justify its withholding 'with reasonably specific detail' to 'demonstrate that the information withheld falls within the claimed exemption.'" Friedrich found that the agency's Exemption 6 claim fared no better, although she agreed with the IRS that occasionally the topic of some FOIA requests could be so specific and personal to trigger privacy concerns. But she observed that "as Kwoka notes, she still would not know the *purpose* of the request." Friedrich added that "if the IRS identifies specific instances where revealing a requester's name or organizational affiliation could indeed implicate substantial privacy interests, it can redact those portions, but it must justify its redactions 'with reasonably specific detail.'" Friedrich rejected the agency's claim that providing identifying information would require the **creation of new records** since the agency admitted that the records existed. She rejected the agency's contention that that the records were not **segregable** as well, pointing out that "if the IRS means to argue that the exempt and non-exempt portions of the records in this case are 'inextricably intertwined' in the sense that it would be impossible to produce meaningful information while redacting the

exempt portions, that is simply wrong; redacting individual names and organizational affiliations of exempt entries (as assessed under the standards articulated above) would not render the remaining records unintelligible." The IRS had estimated that its review 9,882 FOIA requests would take 2,200 hours of work and that to do so would be **unduly burdensome**. Friedrich disagreed, pointing out that "in fact, it is not a *search* at all. . .[T]he IRS has already located the responsive records and thus need not conduct any additional search; the only issue is whether it must spend the time to review those records to make redactions." She added that "where the IRS already has all the requested records in its possession, the Court will not allow it to withhold the documents wholesale simply because it will (potentially) take 2,200 hours to review them for redaction." (*Margaret B. Kwoka v. Internal Revenue Service*, Civil Action No. 17-1157 (DLF), U.S. District Court for the District of Columbia, Sept. 28)

A federal judge in Nevada has ruled that EOUSA improperly withheld records from Micah Wellman because they were **non-responsive**. Wellman, who worked for the Bureau of Alcohol, Tobacco, and Firearms, was the subject of an internal investigation. He requested records about the investigation, some of which were referred to EOUSA for processing. EOUSA withheld some records under **Exemption 5 (privileges)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** but declined to disclose most of the referred records because they were non-responsive. Wellman argued that the D.C. Circuit's decision in *American Immigration Lawyers Association v. Executive Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016), which held that agencies could not withhold records without citing an exemption, applied to his case. The court agreed, noting that "the Government released documents to Plaintiff, but redacted portions of pages, sentences, paragraphs, etc., as 'non-responsive.' This Court is persuaded by the D.C. Circuit's reasoning in *Immigration Lawyers*. This practice is improper because it is contrary to FOIA. More specifically, the practice of redacting responsive documents on the basis that certain portions are 'non-responsive' runs counter to FOIA, which only permits partial document redaction if the applicable agency properly asserts one of the nine statutory exemptions. 'Non-responsiveness' is not one of those exemptions." The court rejected the agency's claim that the court's ruling should only apply to those disclosures made after the *AILA* decision. Instead, the court observed that "because the Court finds that the structure and the text of FOIA itself – as interpreted by the D.C. Circuit in *Immigration Lawyers* – renders the practice of partial redaction while citing the reasons 'non-responsive' improper, the Court finds that the Government must reexamine all documents released to Plaintiff to comply with this order." (*Micah K. Wellman v. Dept of Justice, et al.*, Civil Action No. 14-000348-MMD-WGC, U.S. District Court for the District of Nevada, Sept. 27)

In two separate cases brought by TRAC against U.S. Immigration and Customs Enforcement to require the agency to explain why it stopped providing certain statistical data on who was detained and/or deported as a result of various programs, Judge Amit Mehta of the U.S. District Court for the District of Columbia and Judge Brenda Sannes of the U.S. District Court for the Northern District of New York have both rejected the agency's claims that gaps in the data that had previously been released in response to TRAC's regular requests were caused because TRAC was asking the agency to **create records** in response to various questions. Although ICE had previously responded to TRAC's monthly requests by providing computer extracts furnished as Excel spreadsheets derived from its Enforcement Integrated Database, starting in January 2017, the agency provided fewer data points, claiming the information was not contained in the EID. TRAC filed several suits to force the agency to provide the missing data or justify its change in policy. Mehta pointed out that "ICE concedes that 'a search for "data points" or "points of data" means a search of records.' Nevertheless, ICE asserts that in this case, Plaintiffs' requests command the agency to go above and beyond such requirements by essentially asking the agency 'to create new methods of organizing archival data

or. . . answer. . .specific interrogatories.' And although ICE previously provided data in response to virtually identical requests to those at issue here, ICE contends that it should not be penalized for going above and beyond what the FOIA requires in the past." The agency provided an affidavit from Marla Jones, Unit Chief of the Statistical Tracking Unit. Jones explained that TRAC's questions required the agency to make assumptions that required the creation of records not already in the database. Mehta found Jones' affidavit failed to provide enough information for him to rule. He noted that "in a case such as this one, where ICE previously has provided fields and data elements in response to virtually identical requests, individualized explanations as to why FOIA does not obligate ICE to produce the same fields and data elements are essential. Such individualized explanations would help the court understand why the agency now interprets certain numbered requests to ask a question, as opposed to seeking fields and data elements in the EID that indicate the existence or nonexistence of some event or state of facts. They also would shed light on the nature of the 'additional analysis' required to respond to each request – something the court cannot discern from either the conclusory statements or Jones's explanation as to *other* requests pertaining to different types of data." He added that "even to the extent Jones offers a specific explanation as to a particular request, her explanations lack sufficient detail to allow the court to conclude that ICE has satisfied its burden of demonstrating that the data requested is not subject to disclosure under FOIA. In other words, not only are Jones's explanations too generic to apply across the board to all requests, but they also fail to adequately support the agency's position that responding to even those requests specifically referenced by Jones requires the creation of a new record." Mehta pointed out Jones' explanations often made no sense in relation to TRAC's actual requests. Jones had complained that TRAC's request for whether a detainer exists required the agency to assume that only one detainer existed. But Mehta observed that "rather, their request pertains to the date of issuance of any detainer issued prior to the removal of a person pursuant to the Secure Communities Program – not whether there is a causal connection between the detainer, if one exists, and the removal." Indicating that he could not rule in favor of either party on the current record, Mehta noted that "while an agency can change its mind [on whether or not to make discretionary disclosures], the court is not convinced that the reasons offered by ICE in this case justify its change of heart." (*Susan B. Long, et al. v. Immigration and Customs Enforcement*, Civil Action No. 17-01097 (APM), U.S. District Court for the District of Columbia, Sept. 28)

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TRAC's suit in the Northern District of New York challenged the same set of circumstances present in the District of Columbia litigation. Again, ICE refused to provide data in response to requests by TRAC that the agency had provided in the past, arguing that to respond to TRAC's queries would require the agency to create records. Finding that neither party was entitled to summary judgment, Sannes pointed out that "in this case, as Plaintiffs argue, ICE has misconstrued certain requests, and Plaintiffs have provided tangible evidence regarding ICE's response to other FOIA requests and inconsistencies within ICE's declarations, all of which amount to more than 'purely speculative claims about the existence and discoverability of additional responsive records.' The Court therefore finds that Plaintiffs have made met their burden of showing that summary judgment based upon the [agency's] declarations is not appropriate. Accordingly, ICE's motion for summary judgment is denied, both with regard to the data fields it previously provided in response to Plaintiffs' FOIA requests, as well as the remaining fields to which it has never provided responsive data." (*Susan B. Long and David Burnham v. United States Immigration and Customs Enforcement*, Civil Action No. 17-00506 (BKS/TWD), U.S. District Court for the Northern District of New York, Sept. 27)

After reviewing a representative selection of 120 documents, Judge Rudolph Contreras has ruled that, with a few exceptions. the Army Corps of Engineers and the EPA properly withheld records under **Exemption 5 (privileges)** in response to FOIA requests from the law firm of Hunton & Williams concerning jurisdictional matters under the Clean Water Act and the Rivers and Harbors Act for an industrial site located in Redwood

City, CA. The Corps of Engineers has jurisdiction under the RHA but shares jurisdiction with the EPA under the CWA. In 2014, the Corps prepared an Approved Jurisdictional Determination addressing jurisdictional matters, but before it was released, the Army conducted a review in its role as the Corps' parent agency. After that review was complete and the Corps had resumed its work on the AJD, the EPA invoked its "special case" authority to take over the CWA portion of the AJD. The agencies redacted or withheld records under the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege. Contreras found that the agencies had appropriately claimed the deliberative process privilege but considered the status of the Corps' draft jurisdictional memo in light of whether or not it constituted the agency's final decision on the matter of jurisdiction. In his earlier ruling in the case, Contreras had indicated that it probably retained its predecisional nature and after having reviewed it *in camera* confirmed that it did not constitute the agency's final decision. He pointed out that "while the document constituted the Corps' final decision on the matter, the document was ultimately sent to the EPA, along with a timeline of when the Corps planned to issue the decision, in order to allow the EPA, based on its review of the document, to invoke its special case authority. In effect, the document served as a proposal to the EPA: it had the option to either not act, thereby allowing the document to be finalized and issued, or, if it disagreed with what the document contained, to intervene and provide its own jurisdictional analysis under the CWA." Contreras agreed that the Army's review of the Corps' jurisdictional report was also protected by the deliberative process privilege. Here, he noted that "each document was predecisional and contributed to one of the Army's decision-making processes: either deciding how best to communicate and work with outside actors, be they personnel in other agencies or the public, in light of the Army's decision to conduct the review, or the ultimate result of the review itself." Contreras found two Corps email exchanges from supervisors to subordinates were not protected by the deliberative process privilege. He explained that "directives from decisionmakers are not covered by the deliberative process privilege." Examining the attorney-client and work-product privilege claims, Contreras found several claims did not qualify for those privileges because they did not involve legal advice, but that all of them were exempt because they qualified under the deliberative process privilege. In one instance, the Corps had claimed the attorney-client privilege for isolated facts and statistics. The Corps claimed disclosure of those materials would reveal what agency attorneys believed were important. Contreras rejected the privilege on that basis but noted they were deliberative because "they contain suggestions from Corps attorneys to other Corps personnel regarding which portions of the documents the attorney believed were important to the AJD process." (*Hunton & Williams LLP v. U.S. Environmental Protection Agency, et al.*, Civil Action No 15-1203 (RC), No. 15-1207 (RC), and No. 15-1208 (RC), U.S. District Court for the District of Columbia, Sept. 27)

In a ruling that serves as a graphic illustration of the lengths to which an agency will go to prevent disclosure of a record it does not want to release, Judge Royce Lamberth has rejected out of hand the U.S. Patent and Trademark Office's claim that an email from a patent examiner to a colleague commenting on Gilbert Hyatt's divorce was not subject to disclosure to Hyatt because it was not an **agency record** and, further it was protected by **Exemption 6 (invasion of privacy)**. Hyatt is such a prolific inventor that the Patent Office has an entire team of patent examiners working on his patent applications alone. As a result of litigation over Hyatt's patent applications, Hyatt discovered an email sent by patent examiner Walter Briney sharing with colleagues a link to a 1993 newspaper article about Hyatt's divorce proceedings and indicating the article "provides a unique glimpse into Hyatt's mind." Another patent examiner, Hien Dieu Thi (Cindy) Khuu responded to the email. Since Hyatt already had the Briney email, he filed a FOIA request for the Khuu email. The agency refused to disclose the email, claiming it was a personal opinion not related to agency business. Lamberth found neither claim applied. He pointed out that "the PTO attempts to frame the email as containing a personal opinion 'in the context of an email exchange about divorce proceedings.' But a close reading of its filings reveals that it was unable even to assert that the email in question was *about* divorce.

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Indeed, a personal record in that context might have included Ms. Khuu making a general comment about divorce, lamenting about a personal experience with divorce. . .or expressing something similar. This email does not. Instead, it comments specifically on an element of Mr. Hyatt's character that reasonably would be at issue in any negotiation between Mr. Hyatt and agency employees at any level, from examiners to policymakers." The agency argued the email constituted a personal record because it did not bear on agency business. Lamberth disagreed, noting that "here, however, the Court has before it a FOIA request concerning what the requested document may reflect about how examination of a large group of patents has proceeded, and Khuu clearly expresses an opinion about a character at the center of her examination portfolio, to a colleague who has that same portfolio." Lamberth observed that "the PTO appears to wish the Court to find that opinion-laden documents are not agency records where the law does not allow for government employees to consider their personal opinions in the course of their official duties, or where statute or regulation limits the extent to which an employee's personal opinion is permitted to enter into consideration in the course of those duties." Responding, he indicated that "the fact that the creation and reading of the email thread may have been outside the scope of the sending and receiving examiners' employment with the agency is not dispositive as to whether the email is an agency record." He rejected the agency's claim that the email was protected under Exemption 6, finding instead that Khuu did not have a personal privacy interest in the content of the email. He noted that "Ms. Khuu does not give an opinion about divorce or other matters personal to her in the email; rather, she related an opinion about her charge. Further, it is worth repeating that Mr. Hyatt is not merely one of many patent applicants whose purported inventions Ms. Khuu is reviewing – he is the full-time subject of her job." (*Gilbert P. Hyatt v. U.S. Patent and Trademark Office*, Civil Action No. 18-234 (RCL), U.S. District Court for the District of Columbia, Sept. 28)

Judge Rudolph Contreras has ruled that the Defense Department conducted an **adequate search** and properly withheld records under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)** in response to multiple FOIA and Privacy Act requests submitted by Yolanda Bell, who worked as a program analyst at the Defense Logistics Agency from July 2011 through her termination in February 2015. In response to Bell's requests, the agency disclosed thousands of records, although the agency refused to release some records because Bell did not pay the estimated fees. Contreras found that the agency's search was sufficient and that its *Vaughn* indices provided a detailed explanation of its actions. The agency withheld records under the attorney-client privilege, the attorney work-product privilege, and the deliberative process privilege. Although Bell questioned whether certain records were compiled in anticipation of litigation, a requirement to claim the attorney work-product privilege, Contreras found all three privileges applied. Addressing Bell's claim that records created before she filed her employment discrimination complaint did not qualify for the work-product privilege, Contreras pointed out that " it would appear that Defendant was on notice of impending litigation from as early as fall of 2012, if not earlier, as Plaintiff began requesting modifications and expressing continued concerns regarding office safety and her reasonable accommodations throughout 2011 and early 2012." He added that "the Defendant does not appear to have invoked the work-product privilege until the end of 2012, around the time Plaintiff filed her first informal EEO complaints." Approving the agency's attorney-client privilege claims, Contreras observed that "given the context in which these documents were prepared – potential or ongoing litigation with Plaintiff – the Court finds that the documents are exempt from disclosure under the attorney-client privilege and work-product doctrine." Contreras agreed that the deliberative process privilege applied as well. He noted that "these documents were, by their nature, 'predecisonal' and prototypically 'deliberative.' These documents all involved drafts and/or proposed responses to various administrative, legislative, and/or legal matters." Bell argued that there was a public interest in disclosing information about how the agency accommodated disabilities to overcome the privacy interest in Exemption 6. Contreras disagreed, indicating that "this type of disclosure would constitute a clearly unwarranted invasion of personal privacy, outweighing the vague and overly broad public interest in

disclosure that Plaintiff has asserted." (*Yolanda Bell v. Department of Defense*, Civil Action No. 16-0959 (RC), U.S. District Court for the District of Columbia, Sept. 27)

Judge Amy Berman Jackson has ruled that the EOUSA properly referred records concerning the 2011 conviction of Gerald Michael on charges of drug trafficking and possession of a firearm in the Middle District of North Carolina to the Bureau of Alcohol, Tobacco and Firearms, which subsequently referred some of the records to the FBI; that the agencies conducted an **adequate search** for records; and that the agencies properly withheld records under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, including a *Glomar* response neither confirming nor denying the existence of audiotapes involving Tony Walser and Robert Bone, two defendants who cooperated with the government during Michael's prosecution. Michael requested the records pertaining to his conviction under both FOIA and the Privacy Act. ATF disclosed 252 pages in part and 36 pages in full, withholding 159 pages entirely. It referred 30 pages to the FBI, which disclosed 10 of them in full, and 20 in part. Jackson found the agencies' explanation of their searches sufficient. Michael argued the search was inadequate because the agencies did not locate any audiotapes. In response, Jackson noted that "defendant has averred that it found no audiotapes during its searches. The adequacy of a search is not determined by its results, *but by the method of the search itself*." Jackson agreed with the agencies that the records Michael sought were contained in exempt law enforcement systems of records for purposes of Privacy Act disclosure. ATF cited the Consolidated Appropriations Act of 2012, which prohibits the agency from using funds to disclose gun trace records, as an **Exemption 3 (other statutes)** statute. Although courts have occasionally questioned whether the Appropriations Act exemption had survived the 2009 OPEN FOIA Act requirement that Exemption 3 statutes specifically cite FOIA, Jackson, noting that the majority of district courts addressing the issue had upheld its continued use, agreed with the agency that it was applicable here. Upholding the agencies' redaction of personally-identifying information, Jackson pointed out that "disclosure of personal information of law enforcement personnel may hinder the ability to conduct ongoing investigations, may lead to unwarranted harassment, and may otherwise cause embarrassment and constitute the invasion of privacy that is contemplated by the Exemptions." Michael argued that the names of individuals identified in court should not be protected. Jackson sympathized, noting that "plaintiff makes a good point," but then indicated that "courts had held that third-parties do not waive their privacy interests in government records for FOIA purposes, even if they have previously testified in open court." (*Gerald Eugene Michael v. United States Department of Justice*, Civil Action No. 17-0197 (ABJ), U.S. District Court for the District of Columbia, Sept. 27)

Judge Randolph Moss has ruled that David Thompson does not have **standing** to pursue his **policy or practice** claim against the Department of Justice because there is no evidence that he is likely to continue making FOIA requests to the agency. Thompson, a senior attorney for DOJ's Environment and Natural Resources Division, was allowed to resign after a number of complaints from colleagues about his work behavior. Thompson filed a civil rights and age discrimination suit against the agency. As part of that litigation, Thompson made five FOIA requests to the agency. Thompson added a complaint alleging the agency had a policy or practice of failing to respond to FOIA requests in a timely fashion. In an earlier ruling, Moss dismissed the civil rights and age discrimination claims and found that the agency had properly responded to Thompson's FOIA requests. Thompson continued to press his policy or practice claim, but the government argued his claim was now moot because his FOIA requests had been resolved. Agreeing that Thompson's claim was moot, Moss noted that "Thompson's only evident interest in submitting FOIA requests to the Department is to find support for the discrimination and due process claims that he brought in this case. There is no basis to conclude, moreover, that Thompson plans to seek additional records in support of the claims that the Court dismissed almost a year ago. Absent evidence that Thompson will, in fact, seek

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additional records from the Department in the future, this Court lacks Article III jurisdiction to consider his policy or practice claim." (*David Thompson v. Jefferson Sessions, III*, Civil Action No. 16-3 (RDM), U.S. District Court for the District of Columbia, Sept. 27)

Judge John Bates has ruled that EOUSA properly referred Bobby Richardson's FOIA request pertaining to his arrest by the Petersburg, VA police for selling heroin to the Bureau of Alcohol, Tobacco and Firearms. EOUSA referred 36 pages to ATF, which disclosed them with redactions under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Richardson did not challenge the adequacy of the search or the exemption claims, but instead argued that the Petersburg police had falsified the documents in the first place. Bates accepted the agency's affidavit explaining its search and its exemption claims. Turning to Richardson's allegations of bad faith, Bates noted that "here, Richardson has failed to present 'compelling evidence' that ATF is engaged in misconduct. He primarily asserts that records were fraudulently created by the Petersburg Police Department in the course of the investigation and prosecution of his criminal case. . .[T]he allegations against the Petersburg Police Department are unrelated to the question of whether ATF – the withholding agency here – is engaged in illegal activity. Richardson has not offered any reason to believe ATF or local law enforcement mishandled discovery in his criminal case, 'and under circuit law a bald accusation to that effect does not persuade.'" (*Bobby Richardson v. U.S. Department of Justice, et al.*, Civil Action No. 17-1181 (JDB), U.S. District Court for the District of Columbia, Sept. 27)

A federal court in New York has ruled that the FBI conducted an **adequate search** for photos taken during the 2001 robbery of the Greenpoint Saving Bank in Rocky Point, New York, for which Marcus Micolo was convicted in state court. During his state trial, Micolo tried to obtain photos of the bank robbery that he believed were in the possession of the FBI. After his conviction, Micolo filed four FOIA requests with the FBI and the Department of Justice for the photos and related records. Micolo contended that the photos had been attached to an FBI FD-430 report which referred to the existence of surveillance photos. The agency's first searches found no records, but after Micolo provided more information confirming his identity, a later search involving its Sentinel system found 31 records in response to one request, and five pages in response to another, but no photos. Micolo argued that the fact that records were not released until later indicated that the agency's search had been conducted in bad faith. The court disagreed, noting that "the release of additional documents after the filing of a FOIA action demonstrates the agency's continued good faith efforts to locate responsive documents. . .[T]he fact that the initial searches did not locate these documents does not support a finding of bad faith, as the FBI is not required to locate every responsive document in order for the search to be reasonable." Micolo also questioned the reference in the FD-430 report that photos existed and were of "fair" quality. The court indicated that the FBI had told Micolo that "a submission must be uploaded within 15 workdays of the offense; it does not guarantee that photos were included within the file." The court found the agency's explanation acceptable, observing that "the information noted on the FD-430 Form is insufficient to establish bad faith. The fact that photographs were 'available' does not demonstrate that the photographs were in the FBI's possession at that time or when Plaintiff made his first request in January 2015." (*Marcus Anthony Micolo v. Department of Justice*, Civil Action No. 16-5635 (JS) (ART), U.S. District Court for the Eastern District of New York, Sept. 27)

In another in a series of cases brought by Smart-Tek Services against the IRS to discover why the agency concluded that Smart-Tek Services was responsible for payroll taxes for a number of alter ego companies, a federal court in California has ruled that the agency **conducted an adequate search** and that it properly declined to disclose any records for those alter ego companies for which Smart-Tek Services could

not establish a legal connection for tax purposes. After finding that the agency considered Smart-Tek Services liable for the payroll taxes for various alter ego companies, Smart-Tek Services filed a series of FOIA requests for tax records pertaining to the collection of alter ego companies. The IRS found that responsive records were commingled in a voluminous single file and processed those records that Smart-Tek Services and its subsidiary companies' tax identification numbers but declined to disclose any records containing tax records for which Smart-Tek Services could not provide tax identifications. Smart-Tek Services filed five separate actions and this case is the second to be decided by the court. The court noted that the IRS located 3,056 responsive pages, releasing 2,319 pages in full, 617 in part, and withholding 120 pages. Smart-Tek Services argued that the agency's search was insufficient because it marked as non-responsive records which did not contain a Smart-Tek Services related tax identification. The court found the search adequate, noting that "because Plaintiff's FOIA request only requested its own [taxpayer information], and not any other taxpayers' administrative file." The court agreed with Smart-Tek Services that the names of the alter ego companies should be disclosed because they had been identified in a court filing in a related case. The court pointed out that "the identities of Plaintiff's alleged 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 taxpayers named in the public tax lien are no longer privileged under § 6103." But the court explained that the disclosure applied only to the names, noting that "that the IRS named other taxpayers publicly in connection with Plaintiff does not entitle Plaintiff to those taxpayers' undisclosed, non-public documents through the FOIA." The court found that the agency had properly withheld Risk Scores under **Exemption 7(E) (investigative methods or techniques)**. The court found that "the IRS's evidence sufficient to show that disclosure of the referenced information would disclose techniques and procedures for law enforcement investigations that could reasonably be expected to risk circumvention of the law." (*Trucept, Inc. v. United States Internal Revenue Service*, Civil Action No. 15-0447-BTM-JMA, U.S. District Court for the Southern District of California, Sept. 27)

Judge Timothy Kelly has ruled that Eric Hunter Mathis's multiple requests to Georgia and federal agencies for records concerning why his bank accounts were frozen did not qualify as FOIA requests, except for those Hunter Mathis sent to the FBI, which conducted searches but found no records. Kelly initially dismissed Hunter Mathis's inclusion of the Middle District of Georgia and the American Red Cross in his suit since neither of them constituted agencies for purposes of FOIA. Turning to Hunter Mathis's claims against the IRS, the SEC, the SSA, and the Department of Defense, Kelly found that Hunter Mathis's requests to the IRS did not sufficiently describe records, that both SSA and DOD had shown that they searched for a request from Hunter Mathis but could not find one, and that Hunter Mathis's alleged requests to two Georgia banks did not provide a basis for suing the SEC. Addressing Hunter Mathis's claim against the FBI, Kelly observed that "the FBI searched [its] database three separate times for variations on Hunter Mathis's name, DOB, and SSN, and did not find any records. The court notes that this is not entirely surprising, given that Hunter Mathis is apparently incarcerated in state prison and nowhere does he allege that he was ever the subject of a

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federal investigation or prosecution." (*Eric Jerome Hunter Mathis v. Department of Justice, et al.*, Civil Action No. 16-1712 (TJK), U.S. District Court for the District of Columbia, Sept. 27)