Volume 44, Number 21
October 31, 2018

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: Writing in POLITICO, Josh Gerstein noted that H.R. 70, a bill to overhaul loopholes exploited by agencies to get around the committee meeting requirements in the Federal Advisory Committee Act that has been sponsored for the past decade by Rep. Lacy Clay (D-MO) has been effectively torpedoed for the remainder of this Congress by being put on hold by Sen. Lamar Alexander (R-TN) on behalf of the Department of Health and Human Services, which claims the new meeting and voting requirements would result in costly disruptions to government operations. Initially considered uncontroversial, the bill passed the House last year on a voice vote and was passed last October by the Senate Homeland Security and Governmental Affairs Committee with a ringing endorsement. However, after HHS complained to Sen. Mitch McConnell (R-KY) about the bill, Alexander stopped any further progress by putting a hold on the legislation. Complaining about Alexander's scuttling of his bill, Clay said in a statement that "my bill would make the committees of outside advisors that shape government policies transparent and accountable." He added that "we have engaged in a bipartisan process to address concerns raised by NIH, but I am not willing to gut my bill to allow any agency to operate in secrecy."

Court Finds Disclosure of Pricing Information Would Cause Substantial Competitive Harm

The case law that has evolved under Exemption 4 (confidential business information) has remained reasonably consistent for some time. Aside from occasional surprises – like Judge Colleen Kollar-Kotelly's initial conclusion that business submitters who did not respond to pre-disclosure notification letters had waived their confidentiality claims (a decision she reversed on reconsideration) or a federal court in Colorado finding that the voluntarily submitted test from *Critical Mass* applied and prohibited the government from claiming confidentiality for a subscription database of physicians because the same kind of information was available at public libraries – the resolution of cases involving claims of substantial competitive harm are generally straightforward. And one of the most bedrock, albeit controversial, principles has been that the confidentiality of cost information cannot be effectively questioned by agencies.

ACCESS REPORTS

As if any further reminders were needed to underscore the sanctity of pricing information, a recent decision by Judge Randolph Moss in a reverse-FOIA action brought by Northrop Grumman against NASA concerning pricing information pertaining to Northrop Grumman's contract to build the James Webb Space Telescope, shows once again that any suggestion by the agency that contracts are awarded based on a number of variables aside from price will not get a warm reception by the court. What is even more remarkable about this case is that NASA already lost this argument in the D.C. Circuit and one would think the agency would just give into reality rather than continue to beat it heads against a judicial wall. There are certain details about this case that make it slightly more favorable to the agency's position – particularly the fact that Northrop Grumman already had the contract to build the Webb Telescope and it seems highly unlikely that NASA would have changed horses in midstream just because of price considerations. But again, the bedrock nature of the "price is everything" holding of *McDonnell Douglas v. Dept of Air Force*, 375 F.3d 1182 (D.C. Cir. 2004), and its progeny has never been successfully challenged. While Circuit Court Judge Merrick Garland wrote an eloquent dissent in *McDonnell Douglas* defending the government's position to disclose unit pricing information, he lost the argument. Garland's *McDonnell Douglas* dissent was referenced in the dissent in *Canadian Commercial Corp. v. Dept of Air Force*, 514 F. 3d 37 (D.C. Cir. 2008), the next unit pricing information reverse-FOIA case to make it to the D.C. Circuit, as the best explanation of the government's position, but again in a losing cause.

This case began with a request by the FOIA Group for records concerning Northrop Grumman's contract for the Webb Telescope and any modifications from 2004 to 2009. NASA sent Northrop Grumman a pre-disclosure notification for comment. Northrop Grumman responded by sending a letter accompanied by more than 1,000 pages of attachments. One item for which Northrop Grumman asserted confidentiality was the wrap rates for 2002-2009. Wrap rates are composed of three indirect cost components – related payroll expenses, overhead, and general and administrative expenses – which are projected for each year of the contract and can fluctuate depending on what the Defense Contract Audit Agency determines is the actual allowable rate. If DCAA concluded that Northrop Grumman's wrap rates were excessive it could penalize the company by requiring it to pay back the difference, a process referred to as a "negative fee incentive." Four months later, NASA informed Northrop Grumman that the agency intended to disclose the wrap rates because they were only projections from nearly ten years earlier that could not be extrapolated by competitors for future procurements with very different requirements. NASA also told Northrop Grumman that for any future contract "competition is likely to be based on a variety of factors including cost, past performance, and technical capability" so that the wrap rate information "is only one aspect of a myriad of fluctuating variables relevant to a future contract award." Northrop Grumman filed a reverse-FOIA suit, asking Moss to block disclosure of the information.

Moss began his analysis by pointing out that "release of requested information may cause substantial competitive harm if disclosure would 'allow competitors to estimate, and undercut, the plaintiff's bid.' Pricing information is not categorically shielded from disclosure under Exemption 4, however; rather, 'each case must be evaluated independently to determine whether the particular information at issue could cause substantial competitive harm if it were released.'" He then rejected NASA's contention that the wrap rates were merely projections that were no longer relevant years later. He noted that to justify its wrap rate to the agency, "Northrop Grumman needed to ensure that its proposed wrap rate was predictive of its actual wrap rate. And as Northrop Grumman explained in its April 7, 2017 submission to NASA, 'because the wrap rates' included in Clause B.7 therefore 'reveal [the company's] cost of doing business, they can be used by competitors to gain an unfair competitive advantage when bidding on competitive contracts against [Northrop Grumman].'" Moss then explained that "even if competitors are not able to 'extrapolate' Northrop Grumman's 'actual rates,' the proposed wrap rates are themselves 'proprietary information' that Northrop Grumman treats as 'closely held' and does 'not share with competitors.' Because the actual rates are unknown at the time of contracting, the proposed wrap rates are one means by which the government evaluates the bidder's proposed costs."

Moss rejected NASA's further assertion that the earlier wrap rates were not relevant for future contracts. Instead, he observed that "the significance of the wrap rates is the role they play at the time of contracting. To be sure, a competitor might be interested to know whether Northrop Grumman's actual wrap rates triggered the negative fee incentive. That information, for example, might let Northrop Grumman's competitors infer how Northrop Grumman might change its proposed wrap rates in future bids. But the absence of that additional information does not deprive the proposed wrap rates that Northrop Grumman used of trade secret status." Rejecting NASA's claim that contracts were awarded on the basis of a host of variables, Moss noted that "Northrop Grumman's proposed wrap rates were an important component of 'price' under the [Webb Telescope] cost-plus contract. Release of that information 'would likely cause [Northrop Grumman] substantial competitive harm because it would significantly increase the probability [its] competitors would underbid it in' future contracts."

NASA argued that *Boeing v. Dept of Air Force*, 616 F. Supp. 2d 40 (D.D.C. 2009), supported its conclusion that age of the wrap rates diminished any likelihood of competitive harm to Northrop Grumman. Moss disagreed, noting that "the 'wrap rates' at issue in the *Boeing* case differ from those at issue here in a dispositive respect: the [Webb Telescope] wrap rates were simply a measure of indirect costs, while the wrap rates at issue in *Boeing* included both indirect costs *and* direct cost, such as 'labor rates.'. . .To the extent that NASA suggests that *Boeing* supports a *per se* rule that the release of wrap rates can never meet the substantial competitive harm requirement for FOIA Exemption 4, that argument is untenable." (*Northrop Grumman Systems Corporation v. National Aeronautics and Space Administration*, Civil Action No. 17-1902 (RDM), U.S. District Court for the District of Columbia, Sept. 28)

Views from the States…

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

Florida

A court of appeals has ruled that the trial court erred in not conducting an *in camera* review to assess the Town of Gulf Stream's exemption claims in response to two requests filed by Martin O'Boyle and Asset Enhancement, Inc. – one for text messages sent by board members and the other for invoices for attorney billing records. In response to O'Boyle's request for text messages, the Town claimed the records were not public records. Responding to the second request, the Town redacted the attorney billing records under the attorney work-product privilege. O'Boyle filed suit, requesting a mandatory in camera review. The Town then disclosed unredacted copies of the attorney billing records and asked the court to dismiss the case, which it did. The appeals court pointed out that personal cell phone text messages could be considered public records if they discussed public business. The appeals court noted that "the Town's reasons for its lack of disclosure. . .necessitates a judicial review of the available communications to identify those which are subject to disclosure and any defenses to allegations of noncompliance." The appeals court found that the second request for attorney billing records had not been mooted by the Town's subsequent disclosure. Instead, the court pointed out that "this claim was not moot due to the presence of collateral issues yet to be decided by the trial court – specifically, a determination whether the Town's initial redactions of the bills were proper, and whether any reasonable attorney's fees, costs, and expenses should be awarded." (*Martin E. O'Boyle v. Town of Gulf Stream*, No. 4D17-2725, Florida Court of Appeal, Fourth District, Oct. 24)

# #

ACCESS REPORTS

Mississippi

The supreme court has ruled that records submitted by the winning bidder in response to a request for proposal issued by the Mississippi State Hospital for insurance plan administration was properly withheld from John Morgan, an unsuccessful bidder, under the confidential business information exemption in the Mississippi Public Records Act. The supreme court found that the agency had provided a sufficiently detailed affidavit explaining why the records were protected, while Morgan had provided no contrary evidence supporting his claim that they should be disclosed. The supreme court pointed out that the winning bidder's "RFP response contains trade secrets and confidential commercial and financial information, including insurance quotes, charges showing employee cost savings, and other marketing materials designed solely to entice MSH to award XLK the contract. The [trial court] correctly ruled that only the Agreement between MSH and XLK dated September 25, 2015, was subject to disclosure under [the public records act]." (*John Morgan v. XLK International, LLC*, No. 2016-CA-01477-SCT, Mississippi Supreme Court, Oct. 25)

Nevada

Ruling en banc, the supreme court has found that the trial did not err when it ordered the Clark County School District to disclose minimally redacted investigative materials generated during an investigation of sexual harassment charges against Trustee Kevin Child, but adopted a public interest/privacy balancing test recently articulated by the federal Ninth Circuit in *Cameranesi v. Dept of Defense*, 856 F.3d 626 (9th Cir. 2017) as the appropriate basis for weighing privacy interests in withholding records against the public interest in disclosure. The case involved an investigation of sexual harassment of school district employees by Child, who was considered by school employees to be their boss. The Las Vegas *Review-Journal* requested records about the investigation and the school district disclosed what it considered explanatory materials but withheld personally-identifying information about victims. The *Review-Journal* filed suit and the trial court ordered CCSD, noting the need to balance privacy interests against the public interest, to disclose the records with minimal redactions. The school district then appealed to the supreme court. The supreme court indicated that regulations adopted by CCSD to comply with state records management requirements did not make the records confidential. Instead, the court noted that "while the regulations undoubtedly play an essential role in CCSD's internal operations for sensitive harassment issues, we hold that they do not render the withheld documents confidential under the [Nevada Public Records Act]." The supreme court rejected the school district's claim that many of the records were protected by the deliberative process privilege. The court pointed out that "Trustee Child's behavior, and CCSD's investigation into it, are not part of a deliberative process because there is no decision or policy CCSD is making that would invoke this privilege to begin with. Thus, the policy set forth by CCSD is not an 'important public policy' but merely a 'particular personnel matter' limited to a single individual under specific and isolated facts." Finding that the common law supported the concept of balancing privacy and public interests, the supreme court explained that "we hold that Nevada's common law protects personal privacy interests from unrestrained disclosure under the NPRA, and we adopt the test in *Cameranesi* to balance the public's right to information against nontrivial personal privacy interests." (*Clark County School District v. Las Vegas Review-Journal*, No. 73525, Nevada Supreme Court, Oct. 25)

Also sitting en banc, the supreme court has ruled that the Public Employees Retirement System must conduct an electronic search of its database if records exist in its database and are not exempt. The Nevada Public Research Institute requested records of payments to retired government employees, including their names, for 2014. PERS claimed that its database did not contain names of retirees, only redacted social security numbers and that it was not required to create a record. NPRI filed suit and the trial court ruled that the records were not confidential and ordered PERS to disclose only the names of retirees, years of service

credit, gross pension benefit amount, year of retirement, and last employer. PERS appealed to the supreme court. PERS argued that a previous supreme court ruling – *PERS v. Reno Newspapers*, P.3d 221 (2013) – held that PERS did not have a duty to create records in response to a request. The court found PERS's interpretation too broad. Instead, the court noted that "while an individual retiree's physical file, which contains personal information such as social security numbers and beneficiary designations, may not be inspected in its entirety, that does not make all the information kept in that file confidential when the information is stored electronically and PERS can extract the nonconfidential information from individual files." The court found that the Nevada Public Records Act "requires a state agency to query and search its database to identify, retrieve, and produce responsive records in an electronic database. In doing so, we clarify that the search of a database or the creation of a program to search for existing information is not" the creation of a record. The court added that "if there is confidential information within the requested information, disclosure with the appropriate redactions would not constitute the creation of a new document or customized report." The supreme court sent the case back to the district court, observing that "the PERS database is not static, and PERS may not be able to obtain the information as it existed when NPRI requested it in 2014." The supreme remanded the case back to the trial court "to determine how PERS should satisfy NPRI's request and how the costs, if any, of producing the information at this time should be split." (*Public Employees' Retirement System of Nevada v. Nevada Policy Research Institute, Inc.*, No. 72274, Nevada Supreme Court, Oct. 18)

New Hampshire

Specifically rejecting the federal rule on who can sue under FOIA, the supreme court has ruled that Lisa Censabella may proceed with her Right-to-Know Law suit against the Hillsborough County Attorney, even though her attorney actually made the requests without identifying her. The case involved a series of requests made by Tony Soltani, Censabella's attorney, that were late and incomplete. Censabella was identified as the plaintiff for the first time when she filed suit. The Hillsborough County Attorney argued that Censabella was not an aggrieved party under the statute because she had not been officially associated with the requests. Noting that "nothing in the statute required the petitioner to 'directly' request inspection of government records," the supreme court pointed out that "with respect to requests for access to [requested] information, there would be little reason to engraft a disclosure requirement upon the requester – when a request is made by an attorney on a client's behalf, the client's identity at that point is irrelevant." The court rejected the analogy to the federal FOIA, explaining that "the FOIA provides a remedy to a 'complainant' who has had agency records improperly withheld from him or her. Thus, it is not surprising that the federal courts have developed a more restrictive definition of standing under the FOIA. Although we find federal law interpreting the FOIA to provide helpful guidance when interpreting analogous exemptions under our law, we conclude that it is of little assistance in determining standing." (*Lisa Censabella v. Hillsborough County Attorney*. No. 2017-0429, New Hampshire Supreme Court, Oct. 17)

Virginia

A trial court judge has ruled that the Virginia Freedom of Information Act does not apply to the judiciary, including the Office of the Executive Secretary, and that both the doctrine of sovereign immunity and separation of powers bars enforcement of VFOIA against the judiciary. (*Virginia Information Technologies Agency v. William H. Turner and Office of the Executive Secretary*, No. CL17-5280, City of Richmond Circuit Court, Oct. 15)

Washington

A court of appeals has ruled that a Jane Doe plaintiff who filed suit to block disclosure of all identifying information about herself contained in records created during an employee investigation by the

ACCESS REPORTS

Department of Fish and Wildlife failed to show that her privacy would be invaded by any mention of her in the records being disclosed. Doe was informed that the agency had received a Public Records Act request for records of the investigation. She objected to any disclosure that would identify her and provided proposed redactions. After the agency refused to incorporate her proposed redactions, Doe filed suit. The trial court found that the unredacted references to Doe did not connect her with alleged sexual misconduct and did not invade her privacy. Doe then appealed. The appeals court agreed with the trial court, noting that "many of the references to Doe's identity do not concern her private life and merely disclose details about everyday life. These references do not connect Doe to alleged sexual misconduct, concerning intimate matters of her private life, or reveal unique facts about Doe." The court observed that "although a person may be able to figure out Doe's identity from references to her in the records that do not implicate her privacy interest, that does not mean that such references must be redacted as the contents of these records do not implicate Doe's privacy interest." (*Jane Doe v. Washington State Department of Fish and Wildlife*, No. 49186-9-II, Washington Court of Appeals, Division 2, Oct. 16)

The Federal Courts…

Judge Christopher Cooper has ruled that the Department of Homeland Security did not conduct an **adequate search** for records requested by the Government Accountability Project pertaining to "ideological tests" and "searches of cellphones" at the U.S. border. The agency did an electronic records search for records containing the verbatim language used by GAP – "ideological tests" and "border" for the first request, and "search" and "cellphone" for the second request – and found no responsive records. After GAP filed suit, DHS conducted a further search of emails between dhs.gov and eop.gov containing the keywords. This search yielded no records concerning ideological tests and 807 documents containing the terms "search" and "cellphone." But after reviewing those records, DHS determined none were responsive to GAP's request. GAP complained that the searches were too limited and should have contained more keywords. Cooper agreed, finding that *Summers v. Dept of Justice*, 934 F. Supp. 458 (D.D.C. 1996), where the court found that a search for former FBI Director J. Edgar Hoover's commitment calendars was insufficient because the FBI only used the word "commitment," instead of obvious search terms like "appointment" and "diary." Cooper pointed out that "while 'ideological tests' may not have quite as obvious substitutes as 'commitment calendars,' searching for that phrase verbatim was always doomed to return limited results. At the very least, the agency should have used synonyms for 'test' and proxies for 'ideological' and should not have grouped the two words together – since that risks excluding any emails where both 'ideological' and 'tests' were used, but not in the precise 'ideological tests' syntax." Cooper also found that *Bagwell v. Dept of Justice*, 311 F. Supp. 3d 223 (D.D.C. 2018), where a search for records concerning DOJ's involvement in the sexual abuse scandal at Penn State was found inadequate because the agency searched only the term "Pennsylvania State University" rather than including "PSU" or "Penn State." Cooper noted that *Bagwell* applied here as well. He pointed out that "searching only for the word 'cellphone' is inadequate, variants that may well be used in correspondence – like the two-word version 'cell phone' or simply 'phone' – must also be included. Such variants may be just as likely to be used by the relevant government officials." Ordering the parties to confer on a reasonable list of search terms, Cooper observed that "FOIA requests are not a game of Battleship. The requester should not have to score a direct hit on the records sought based on the precise phrasing of his request. Rather, the agency must liberally interpret the request and frame its search accordingly." (*Government Accountability Project v. U.S. Department of Homeland Security*, Civil Action No. 17-2518 (CRC), U.S. District Court for the District of Columbia, Oct. 12)

Judge Trevor McFadden has ruled that the IRS properly responded to the Institute for Justice's request for a database dump of its Asset Forfeiture Tracking and Retrieval System, which monitors seized assets, by providing a heavily redacted 78-page Excel table because the information is largely protected by **Exemption 7(A) (interference with ongoing investigation or proceeding)**. In response to the Institute for Justice's request, the agency initially told the Institute that processing its request would cost $753,760. After the Institute filed suit, the IRS produced the heavily redacted table. The Institute argued that the IRS should have provided an electronic copy of the contents of its AFTRAK database. But McFadden pointed out that "the IRS produced a Report that – in unredacted form – contains every data point on every relevant seized asset. The Institute argues that even if AFTRAK is not a database, the IRS should have searched for all records accessible through its AFTRAK system. But that is essentially what happened. The Institute fails to identify any record, or even a single data point, that the IRS improperly excluded from its search when it created the Report." He observed that "the real problem for the Institute is the Report's format, not the data itself. But the IRS has abundantly established that the other formats proved unobtainable." Turning to the agency's exemption claims, McFadden found the agency had properly applied Exemption 7(A) as well as **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. McFadden noted that "since the Report is a giant table, and each line on the report represents a single seizure, this results in the line for each 'open' asset being redacted in full." The Institute argued that the agency had not adequately described the columns being withheld and that the Department of Justice has released similar information. McFadden indicated that "granted, individuals will likely know when their property has been seized. But further specific information might give tips about the larger investigation that 'could result in the destruction or dissipation of additional assets that might also be subject to seizure at a later date." McFadden agreed that the privacy exemptions applied as well. He noted that information contained in two columns was not publicly available and pointed out that "making them available for cross-referencing against public seizure notices could endanger the substantial privacy interests of investigation targets." He added that "the Court credits the Institute's representation that it is vindicating the public interest in learning about law enforcement policy and civil forfeitures. But that generalized interest is outweighed by the specific privacy interest. . . that asset owners have in 'ensuring that their relationship in the investigation remains secret.'" (*Institute for Justice v. Internal Revenue Service*, Civil Action No. 16-02406-TNM, U.S. District Court for the District of Columbia, Sept. 28)

Judge Royce Lamberth has ruled while nine of the **Exemption 5 (privileges)** claims made by the Department of State pertaining to a handful of Hillary Clinton's emails are appropriate, ten are not. As a result of litigation brought by journalist Jason Leopold, the State Department disclosed an email Clinton sent to chief of staff Jake Sullivan apparently directing Sullivan to strip headings from a classified document and send it over an unsecured fax machine. Following up on the email, Judicial Watch filed a request for more records which eventually led to litigation. The State Department argued that Judge James Boasberg's ruling in *American Center for Law & Justice v. Dept of Justice*, 2018 WL 4283561, in which Boasberg found that talking points prepared for former Attorney General Loretta Lynch to use in responding to inquiries about her meeting with Bill Clinton were deliberative because it was up to Lynch to decide the extent to which she would use the talking points, was dispositive in this instance. Noting that Lynch's position as head of the Justice Department made those circumstances more unique than the run-of-the-mill use of talking points, Lamberth found the claim went too far, pointing out that "government officials give hundreds of speeches each day, all of which are important, though many elude recording or transcription. So stretching the deliberative process privilege would put many important public statements outside FOIA's grasp, even after the statements were made." Judicial Watch argued that the government misconduct exception applied, meaning that the deliberative process privilege was waived. Lamberth found that some of the email exchanges were not protected by the deliberative process privilege. He indicated that State had properly claimed the

ACCESS REPORTS

privilege for five documents that circulated and critiqued a draft letter responding to Congressional inquiries about the Clinton-Sullivan exchange, pointing out that "soliciting revisions and feedback on a draft is plainly predecisional and deliberative." However, he rejected the claim for two emails characterized as talking points used during a press conference. Here, he noted that "the emails mechanically reproduce – without any analysis – finalized talking points that were already used. If State had copied-and-pasted a transcript of the press conference into the email, their claim for deliberative process privilege would plainly fail. And here, State has done the functional equivalent, effectively copying-and-pasting their side of the script from the press conference." Finding that the government misconduct exception did not apply to any of the disputed emails, Lamberth observed that "at bottom, these documents show State Department officials suffering the slings and arrows of abiding by [the judge's] order to release thousands of pages of nonexempt work-related emails sent by Hillary Clinton from her private server while Secretary. Simply put, these documents shed light on government compliance – not misconduct. It would be very odd to characterize as misconduct documents created downstream from compliance with a judicial order, regardless of whether that order itself remedied prior misconduct." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 16-885, U.S. District Court for the District of Columbia, Oct. 1)

A federal court in New York has ruled that the Office of the U.S. Trade Representative properly withheld information pertaining to the U.S. position on the Trans Pacific Partnership negotiations under **Exemption 3 (other statutes)** and **Exemption 4 (confidential business information)**. In an earlier ruling in a case brought by Intellectual Property Watch, Judge Edgardo Ramos had found that both exemptions applied, although he had rejected the agency's Exemption 5 (privileges) claims. In his second ruling, Ramos decided that the definition of the term "in confidence" contained in § 2155(g) of the Trade Act should be assessed using the explicit/implicit test for confidentiality under Exemption 7(D) (confidential sources) articulated by the Supreme Court in *Dept of Justice v. Landano*, 508 U.S. 165 (1993) and had asked the parties to brief that issue. Ramos rejected the agency's claim that § 2155(g)(3) covered anything the USTR claimed was confidential, noting instead that withheld communications "must fall into one of the categories identified by the [industry trade advisory committee manual]: they must be 'security-classified information' or 'trade-sensitive information.'" Although the agency had failed to identify withheld portions with specificity, Ramos found they qualified as confidential. Ramos then concluded that affidavits from industry officials were sufficient to show that participants in the negotiations considered their information confidential. He observed that "after all, these interested parties were disclosing industry-sensitive information with the potential to negatively affect their organizations if disclosed publicly. Indeed, these private-sector leaders aver that they would be significantly less likely to engage in such government consultation if their views were not kept confidential." (*Intellectual Property Watch and William New v. United States Trade Representative*, Civil Action No. 13-8955 (ER), U.S. District Court for the Southern District of New York, Sept. 30)

Judge Tanya Chutkan has ruled that former foreign service officer Joan Wadelton, joined by the media outlet Truthout, is entitled to **attorney's fees** for their litigation against the Department of State pertaining to the Bureau of Human Resources' attempts to force Wadelton to resign, although Chutkan reduced the amount requested to $11,727 after opting to adopt the more stringent USAO matrix over the LSI matrix that Wadelton urged Chutkan to use. State argued that Wadelton had not shown that disclosure of the records was in the public interest. Chutkan, however, pointed out that her case had been written up in an article that appeared in *The Atlantic*, and noted that "Wadelton's allegations of wrongdoing, coupled with governmental investigations and media attention regarding the leadership vacuum at the OIG, are sufficient to convince this court that the requested records had more than 'potential' or 'likely' public value." Chutkan also pointed to Truthout's involvement in the litigation as evidence of media interest. She observed that "the Truthout journalist Jason Leopold wrote an article about Wadelton and sought approval to publish the article, but it appears it was never

published. The reasons for this are unclear, but clearly there was media interest in the requested records." State argued its basis for withholding the records was reasonable. Chutkan responded, noting that "State did not provide a reasoned explanation for why it needed eighteen months and sequential rounds of review to process the records, and at several later intervals, the court ordered State to move more quickly than it had claimed to be able to do." Wadelton and Truthout had requested $19,200 in fees and costs. Turning to the reasonableness of the fee calculation, Chutkan acknowledged that courts had accepted both the USAO and LSI matrices in various attorney's fees decisions. But here, she accepted the USAO matrix, noting that "the changes to the matrix, as well as the more recent survey data used to develop its rates, indicate that the 2015 version provides a more 'useful starting point,' for calculating fees than does the prior version. Moreover, Plaintiffs have failed to meet their burden of establishing that the LSI's higher rates are justified and have not fully addressed the concerns raised by State's expert regarding the matrix." Chutkan rejected Wadelton's request for fees on fees for arguing the attorney's fees issue, finding the plaintiffs had been unsuccessful on that issue. (*Joan Wadelton, et al. v. Department of State*, Civil Action No. 13-412 (TSC), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in Massachusetts has ruled that the Department of Defense has still not shown that it conducted an **adequate search** for records in response to multi-part requests from Thomas Stalcup, who previously had sued the CIA and the National Transportation Safety Board for records concerning the crash of TWA Flight 800, particularly the theory that the crash was caused by nearby missile practice. Stalcup's requests were sent to the Missile Defense Agency, the Office of the Secretary of Defense, and the Joint Staff. Stalcup filed suit more than two years after he submitted his requests and the agencies subsequently disclosed records. The district court ruled in favor of the agencies, finding that their searches were adequate. Stalcup appealed to the First Circuit, which in a per curiam decision, found the agencies' searches were inadequate and ordered them to provide a more detailed explanation as to whether the agencies had searched all locations likely to have responsive records. Even with the addition of a new supplementary affidavit, on remand the district court found the agencies' explanation still fell short. The court found that the supplementary affidavit failed to justify the completeness of all the three searches. The court pointed out that the agency only expanded its search after Stalcup suggested that other Joint Staff Directorates might have responsive records. The court indicated that "defendant offers no justification for requiring Stalcup, who requested all records in the possession of any component of the agency, to direct the agency's decisions about its search design." (*Thomas Stalcup v. Department of Defense*, Civil Action No. 13-11967-LTS, U.S. District Court for the District of Massachusetts, Oct. 15)

Judge Emmet Sullivan has ruled that the U.S. Marshals Service, the FBI, the DEA, and EOUSA all properly responded to FOIA and Privacy Act requests from Jorge Garza concerning himself and his conviction on drug charges. The FBI located 137 pages and disclosed 81 pages in full or in part. The Marshals Service located 77 pages and disclosed 29 pages in full and 48 pages in part. Garza challenged the agencies' searches as well as their exemption claims under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(D) (confidential sources)**, and **(j)(2)** of the Privacy Act. The agencies searched under Garza's real name – Guillermo Huertas Sanchez – as well as several aliases. Garza contended that the agencies had mistaken him for someone with a similar name and argued that "if the agencies conducted detailed and comprehensive searches, then these searches would necessarily render information responsive to his Requests, revealing documents confirming his own identity, or the identity of another individual with a similar name." But Sullivan noted that "plaintiff's bare allegations that defendants have either negligently or intentionally failed to provide information is insufficient to overcome the presumption of good faith accorded to the agency declarations." Sullivan agreed with the

ACCESS REPORTS

agencies that any records subject to the Privacy Act were contained in (j)(2) exempt systems of law enforcement records. Garza argued that since he was only looking for records on himself there were no third-party privacy concerns at issue. Sullivan pointed out that since Garza claimed he was a victim of mistaken identity if "such information exists, he would be, by definition, seeking information regarding a third-party. The Court understands that plaintiff feels that he is in a 'catch-22,' as he seeks information regarding his identity, and potentially, if in existence, that of another individual with a similar name, however, to the extent that he seeks disclosure of this information to prove his purported innocence, FOIA/PA is not the suitable vehicle." He observed that "given the expansive and complex safety concerns involving the underlying criminal investigation, the Court finds these privacy interests of continued importance." Sullivan approved of the FBI's use of **Exemption 7(E) (investigative methods and techniques)** to withhold internal email addresses and phone numbers. He pointed out that "an agency may withhold information from disclosure where, as here, it would provide insight into its investigatory or procedural techniques. Likewise, internal website and email addresses may be properly withheld under Exemption 7(E)." (*Jorge Luis Garza v. U.S. Marshals Service, et al.*, Civil Action No. 16-076, No. 16-0980, and No. 16-985, U.S. District Court for the District of Columbia, Sept. 28)

A federal court in Alaska has ruled that the U.S. Army must disclose the identities of individuals who witnessed an accident that took place while trying to load an Army Stryker vehicle on a rail car when the brakes failed, resulting in the death of Charlie James. His brother Dayle James brought suit against General Dynamics Land Systems for wrongful death. His attorney made two requests to the Army – one for the identity of other witnesses in case they needed to be deposed in the wrongful death suit, and another for records concerning the inspection of the Stryker. The Army withheld the identities under **Exemption 6 (invasion of privacy)** and several email chains concerning the investigation under **Exemption 5 (privileges)**. James sued and the Army argued that if the witnesses were deposed as a result of being identified, that would constitute an inappropriate embarrassment and harassment of the individuals. The court rejected that argument, noting that "speaking to a witness or even taking a witness deposition certainly does not constitute an intrusion 'long deemed impermissible under the common law and in our cultural traditions.' Of course, providing the names and locations does mean the individuals lose total control of their privacy, but in a context wherein the individuals may have information relating to the death of another individual the intrusion does not rise to such a level that the names and locations must be kept secret. This is especially so, because the individuals may have information tending to show that the Army is responsible for the death. Defendant also suggests that giving information about a wrongful death would embarrass, shame or stigmatize a witness in the circumstances here. A better description of the impact on the individuals is that disclosure would inconvenience them." The agency also argued that the privacy interests of lower level employees normally were heightened because they were less likely to be in positions of responsibility. The court agreed in principle, but noted that "in the case at bar, there are no higher-level persons who would have the relevant information." Addressing the privileged status of the emails, the court explained that James had challenged the lack of a sufficient explanation for why the redacted portions were protected by the deliberative process privilege. Finding that the agency had now provided an affidavit justifying why the information was privileged, the court accepted the agency's claims. (*Dayle James v. United States Department of Defense and U.S. Army*, Civil Action No. 18-00028 JWS, U.S. District Court for the District of Alaska, Oct. 10)

Judge James Boasberg has ruled that two claims based on the Administrative Procedure Act filed by Gilberto Rodriguez Chaverra on behalf of the estate of Jeancarlo Alfonso Jimenez Joseph, who died last year while in the custody of U.S. Immigration and Customs Enforcement, should be dismissed for **failure to state a claim** because Chaverra has an adequate remedy under FOIA. Chaverra initially made a FOIA request for information concerning the circumstances of Jimenez's death, but the agency cited **Exemption 7(A)**

(interference with ongoing investigation or proceeding) to withhold the records. Chaverra then requested records directly from the detention center without relying on FOIA. After his second attempt to obtain information failed, Chaverra filed suit under both FOIA and the APA. The agency claimed that Chaverra did not have a claim under the APA. Boasberg agreed. Chaverra argued that the agency was improperly withholding Jimenez's medical records. Boasberg pointed out that the APA claim was barred "because FOIA expressly provides that remedy" and added that "in such circumstances, therefore, when plaintiffs seek records also subject to FOIA. 'courts in this circuit "have uniformly [rejected their] APA claims."'" Chaverra contended that the relief was not the same because FOIA did not provide immediate access. Boasberg noted, however, that "it is well settled that the alternate remedy must be only of the 'same genre;' it need not be identical. The relevant 'genre' here is easy to identify: the disclosure of documents withheld by governmental organizations. This is what Plaintiff seeks, and this is what FOIA provides." Chaverra argued that ICE had created an independent right of access by allowing individuals released from detention camps to obtain their medical records online. Boasberg found that made no difference. He indicated that "the question under [the APA] is not whether the agency intends FOIA to be the exclusive remedy, but whether FOIA itself provided an 'adequate remedy' for the plaintiff's complaint. The fact that ICE may, in some other circumstances, provide the disclosure of medical records through other means has no bearing on this legal question." Boasberg concluded that "the legal path on which Chaverra must travel is FOIA, and FOIA alone; the APA is closed to him for now." (*Gilberto Rodriguez Chaverra v. U.S. Immigration and Customs Enforcement, et al.*, Civil Action No. 18-289 (JEB), U.S. District Court for the District of Columbia, Oct. 2)

Judge James Boasberg has ruled that William Powell **failed to exhaust his administrative remedies** when the Social Security Administration responded to his FOIA request days before he filed suit, even though Powell claimed he did not receive the agency's response, and that his failure to send his **Privacy Act** request to the correct address as required by the agency's regulations doomed that request as well. Powell has filed a number of suits against agencies, particularly the IRS, for records concerning his family's printing business. Powell made a FOIA request to the SSA for records concerning himself, his mother, his father, and his grandfather. Powell submitted his FOIA request online. The agency acknowledged receipt of the request and soon after emailed Powell to tell him to resubmit the request using an attached form and providing proof of death and proof of relationship to his parents and grandfather. Powell mailed his Privacy Act request to SSA's Privacy Officer at its Baltimore address with "Privacy Act Request" written on the front of the envelope. In court, the agency said it had no record of receiving Powell's Privacy Act request. While Powell contended that he did not receive the agency's response to his FOIA request, Boasberg pointed out that "SSA explains that it emailed Plaintiff's FOIQA decision letter on April 4, 2018 – two days before the filing of the Complaint. Actual exhaustion was thus required, and Plaintiff makes no claim to having done so." Powell claimed he had not received the agency's response. Boasberg noted, however, that "it is true that a plaintiff's non-receipt is somewhat different inasmuch as it is difficult for him to prove a negative, but here the facts militate in favor of Defendants. Powell could have checked online or with the agency to see if it had denied his request rather than rushing to file suit. . ." Although the agency found no record of having received Powell's Privacy Act request, Powell argued that he had provided sufficient information by identifying the systems of records he wanted searched. Boasberg found this was not enough, observing that "adequately identifying the records sought does not excuse Powell from the Privacy Act's additional exhaustion requirements, including the need to submit a request to the particular system manager set forth in the agency's notice of system of records." (*William E. Powell v. Social Security Administration*, Civil Action No. 180847 (JEB), U.S. District Court for the District of Columbia, Oct. 4)

# #

ACCESS REPORTS

A federal court in Illinois has ruled that the U.S. Marshals Service properly invoked a ***Glomar* response** neither confirming nor denying the existence of records concerning Andrew Hughes, the brother of Raymond Hughes who was trying to locate his brother because of an estate issue. Raymond Hughes requested records about his brother Andrew from the Marshals Service, explaining that his brother had been a fugitive in the 1980s and that his status as a felon prohibited him from serving as the personal representative for purposes of settling an estate. The agency issued a *Glomar* response based on **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Hughes appealed the agency's *Glomar* response to the Office of Information Policy, arguing that because he was not a member of the media, he had no intention of disseminating information about his brother. OIP upheld the agency's *Glomar* response and Hughes filed suit. The court agreed with the agency, noting that any agency records on Andrew Hughes would qualify as law enforcement records and that Raymond Hughes had not articulated any public interest in disclosure. The court observed that "while Plaintiff may believe the information will benefit him in the probate matter, FOIA's purpose 'is not fostered by disclosure of information about private citizens. . .'" The court added that "there is no basis here for finding the information the Marshals Service withheld would shed light on the agency's performance." (*Raymond Hughes v. United States Department of Justice*, Civil Action No. 17-5429, U.S. District Court for the Northern District of Illinois, Oct. 16)