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Washington Focus: New York Times reporter Elizabeth Williamson has explored a recent uptick in the use of public records laws by lobbyists and companies to inundate public universities with requests for records on academic researchers whose work has questioned business policies as one way to apply pressure on universities to reconsider the costs of such research. Williamson focused on the case of Dennis Ventry, a law professor at the University of California, Davis who criticized a free tax filing service provided by Intuit and H&R Block through the IRS. In response, the trade association filed public access requests for all of Ventry's records, including emails and text messages, yielding 1,189 pages; the University estimated it spent 80 to 100 hours complying with the requests. Commenting on the rise in the use of such tactics, University of Denver law professor Margaret Kwoka told Williamson that such requests pose "a real danger that we'll hit a tipping point, where the cost and burden of open records laws will overcome the benefits and we'll see a retrenchment of transparency rights."

Court Rejects Request to Speed Processing Of Records for Use in Class-Action Suit

A recent case pitting the legitimate need for government information by an attorney whose primary practice is completely unrelated to FOIA against the realities of expedited disclosure under FOIA provides an interesting discussion about the limited usefulness of FOIA as a vehicle for supporting class-action suits that would benefit from the inclusion of government information but that fail to articulate any recognized basis for forcing an agency to expedite the processing of a request.

The case involved a request from Joshua Baker, an attorney at the Rosen Law Firm that was representing purchasers of Zillow securities in a class action suit alleging violations of the Securities Exchange Act of 1934. Baker submitted a FOIA request to the Consumer Financial Protection Bureau for records concerning its investigation of Zillow. The agency provided a fee estimate of $35,160 to search for the records. Rosen promptly sent a check for the full amount, but weeks later discovered that the agency had not cashed the check. When Baker called the FOIA analyst assigned to his request for an explanation, he was told that the

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agency had held off on cashing the check because it was likely to withhold or redact the vast majority of the 630,000 potentially responsive records. Baker was given an opportunity to narrow the scope of his request, but he declined to do so. The agency then told Baker his request had been put in the complex queue, that there were approximately 20 complex requests ahead of his, and that it would probably take six to nine months to process his request. Baker filed a complaint arguing that the agency had violated FOIA by failing to respond within the statutory 20-day time limit and ultimately asked the court to grant him a preliminary injunction requiring the agency to process and disclose the records within 90 days.

Judge Colleen Kollar-Kotelly started by explaining the four factors for assessing whether or not to grant a preliminary injunction – (1) the likelihood of success on the merits, (2) the likelihood that the plaintiff will suffer irreparable harm without preliminary relief, (3) the balance of equities tips in favor of the plaintiff, and (4) the injunction is in the public interest. After describing the four factors, Kollar-Kotelly observed that Baker had not requested expediting processing, the remedy included in FOIA for speeding the process of responding to a request. She pointed out that "if such processing is not sought, Defendant considers the complexity of the request and other facts in deciding where in the processing queue the request falls. In this case, having failed to request expedited processing administratively, Plaintiff asks this Court to help him jump from his position as approximately twentieth in the 'complex' queue and have his request proceed before those of all the other individuals waiting, including those approved for expedited processing." She added that "but even ignoring Plaintiff's failure to request expedited processing, the Court concludes that Plaintiff has failed to establish a likelihood of success on the merits, to show irreparable harm, or to demonstrate that the balance of hardships and the public interest weigh in favor of injunctive relief."

Baker based his likelihood of success claim on the obvious fact that the agency had failed to respond within 20 days. In response, Kollar-Kotelly noted that "but, Plaintiff misunderstands the consequences that follow when an agency fails to meet this twenty-day deadline." She pointed out that "Plaintiff argues that Defendant's failure to comply with the twenty-day deadline means that 'Plaintiff is entitled to the immediate processing of his request and the release of the requested records.' But, an agency's violation of the twenty-day deadline does not entitle the requester to immediate processing and release of the responsive documents." She explained that in *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), the D.C. Circuit held that "when an agency fails to make an initial determination within twenty days, 'the penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court. Rather, the requester is deemed to have exhausted his administrative remedies and can seek immediate judicial review of the agency's processing of the request. In sum, *CREW v. FEC* makes clear that the impact of blowing the 20-day deadline relates *only to the requester's ability to get into court*.'"

Baker argued that CFPB had not shown the existence of exceptional circumstances that would qualify them to process the request more slowly. Kollar-Kotelly disagreed, noting that CFPB had shown that its number of FOIA requests each year had consistently grown by 25 percent and that its increase in 2017-2018 had been 47 percent. This had resulted in the agency having 174 pending requests, 75 of which were considered complex. Further, the agency had increased from three to five its full-time FOIA staff. In response to Baker's allegation that CFPB was not showing due diligence, Kollar-Kotelly pointed out that "the fact that Defendant has not been able to review and release these responsive documents due to the approximately 100 FOIA requests ahead of Plaintiff's, twenty of which are complex, does not show a lack of diligence."

Kollar-Kotelly rejected Baker's irreparable harm claim as well. Baker argued that class-action plaintiffs would be harmed if the records were not disclosed in 90 days. Kollar-Kotelly observed that "this is not they type of harm that FOIA was created to address." She added that "while Plaintiff's rights under FOIA are not diminished by the personal reason for his request, neither is FOIA concerned with the effect disclosure or lack thereof will have on Plaintiff's lawsuit." She dismissed Baker's claim that access to the records would allow

him to write a more effective complaint in the class-action litigation. She pointed out that "Plaintiff has pointed to no case law supporting his proposition that the inability to draft a more effective complaint is a legally recognized irreparable harm." She also rejected Baker's claim that the public interest would suffer if the records were not disclosed in a timelier fashion. She observed that "the Court is not convinced that Plaintiff will be irreparably harmed if the preliminary injunction is not granted. Besides his own pleading deadline, Plaintiff has not presented evidence of any time-sensitive need for the documents."

Balancing Baker's need for immediate access against the purported hardships caused to other requesters, Kollar-Kotelly found Baker was not entitled to an injunction. She explained that "Plaintiff is in effect asking the Government to expend resources to process quickly his request for documents needed for his clients' lawsuit, before processing the records of other requesters. Granting the type of request made by Plaintiff would harm the approximately 100 other requesters, 20 of whom have complex requests, in line ahead of Plaintiff and would erode the proper functioning of the FOIA system." (*Joshua Baker v. Consumer Financial Protection Bureau*, Civil Action No. 18-2403 (CKK), U.S. District Court for the District of Columbia, Nov. 1)

Views from the States…

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

Connecticut

The supreme court has ruled that the trial court erred when it concluded that a statute governing searches and seizures by the police that shielded from disclosure all seized property not used in a criminal prosecution qualified as an exempting provision under the Connecticut Freedom of Information Act allowing the police to withhold records pertaining to property seized at the home of the Sandy Hook Elementary School shooter in response to a request from the *Hartford Courant*. *Courant* reporter David Altimari requested the records seized from the shooter's home that were mentioned in a report by the Connecticut State Police of its investigation of the shooting. Emergency Services and Public Protection initially told Altimari that the records were not public records. Altimari complained to the FOI Commission, which found that the records were public records and that there was a clear public interest in disclosure of the records. However, since the agency had relied only on its claim that the records were not subject to FOIA, the Commission remanded the case back to the agency to give it an opportunity to assert an exemption. The agency instead filed suit challenging the FOI Commission's decision. The trial court found that the records were public records subject to disclosure, but further ruled that the statutory provision shielding seized property from disclosure acted as an exemption to protect all the records. The FOI Commission then appealed the trial court's ruling to the supreme court. The supreme court began by noting that the trial court based its interpretation of the seizure statute on the state's obligation to return seized property to its lawful owner, but observed that the real question was whether or not the seizure statute required confidentiality to the extent that it qualified under the "as otherwise provided" language allowing other state or federal laws to constitute prohibitions on disclosure. The supreme court found that it did not. The supreme pointed out that "the trial court pointed to nothing in the express terms of the search and seizure statutes that creates confidentiality in the documents or otherwise limits the disclosure, copying, or distribution of the documents. Indeed, the search and seizure statutes are silent on the issues of confidentiality, copying, or disclosure to the public. Therefore, the trial court's conclusion that the search and seizure statutes form the basis for an exemption under [the other statutes exemption in FOIA] is inconsistent with our case law interpreting this exemption." (*Commissioner of*

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Emergency Services and Public Protection, et al. v. Freedom of Information Commission, et al., No. SC 19852 and SC 19853, Connecticut Supreme Court, Oct. 30)

Michigan

A court of appeals has ruled that the trial court erred when it ordered the City of Lansing to pay $1,000 in punitive damages to Arthur Ostaszewski for its delay in disclosing the clerk's tape recording of a city council meeting. Sherri Boak, the council clerk, transcribed meetings in real-time, but also recorded them as well. After a meeting, she would review the recording to make sure her transcription was accurate. Ostaszewski requested a copy of the recording. The city council denied his request, claiming that the notes were personal, but disclosed the official typed minutes of the meeting. Ostaszewski filed suit, naming the council's FOIA coordinator as the defendant. The council asked the court to remove the FOIA coordinator's name as defendant and substitute the council. The trial court granted the council's motion but allowed Ostaszewski to amend his complaint. However, before he had a chance to amend his complaint, the council voluntarily disclosed Boak's recording. The trial court then awarded Ostaszewski $1,000 in punitive damages for the council's delay in disclosing the recording. On appeal, the appellate court found that the trial court had gone too far in awarding punitive damages. The appeals court pointed out that before a trial court could award punitive damages, it had to rule against the agency and find the agency's behavior was arbitrary and capricious. The appeals court explained that neither requirement happened here. Instead, "the trial court did not order defendant to disclose or provide requester a copy of the recording to plaintiff. Rather, the defendant voluntarily provided the recording to plaintiff after the trial court granted plaintiff an opportunity to amend his complaint to add defendant as a party. Indeed, because defendant was not made a party to this case before it provided the recording to plaintiff, the trial court would have had no authority to order defendant to provide the recording to the plaintiff." (*Arthur Ostaszewski v. City of Lansing*, No. 343537, Michigan Court of Appeals, Nov. 15)

New Mexico

A court of appeals has ruled that conversations between Maureen Sanders, an attorney representing then Albuquerque School Superintendent Winston Brooks, and Tony Ortiz, the attorney for the Albuquerque School Board, are not privileged under either an exemption in the New Mexico Open Meetings Act or the attorney-client privilege. Brooks suddenly announced his resignation at the beginning of the 2014 school year and the school board approved a $350,000 buyout of his contract as part of the settlement agreement. The school board met in closed session on August 11, 2014 to discuss a report prepared by attorney Agnes Padilla concerning allegations of misconduct by Brooks. Brooks and Sanders waited in a room separate from where the closed meeting was taking place, but Ortiz came to speak to Brooks and Sanders several times during the closed meeting. Four days later, the Board approved a settlement agreement with Brooks. The school board received seven requests for records concerning the settlement agreement, including the Padilla Report. The school board disclosed some records, but withheld the Padilla Report, claiming that it was protected by the attorney-client privilege, the attorney work-product privilege, and the personnel files exemption in the New Mexico Inspection of Public Records Act. The *Albuquerque Journal* and KOB-TV filed suit. The media plaintiffs deposed Padilla and several school board members. The media plaintiffs also deposed Sanders because they believed her conversations with Ortiz may have waived the school board's privilege. At her deposition, Sanders refused to provide details of her conversations with Ortiz, arguing they were privileged. The trial court ordered Sanders to respond more fully to the media plaintiffs' questions. Sanders appealed the order, arguing that the exemption in the Open Meetings Act to allow sensitive private personnel matters to remain confidential applied. The appeals court disagreed, noting that "Sanders identifies no privilege – either adopted by our Supreme Court or recognized under the Constitution – on which to base her argument that communications regarding 'limited personnel matters' that occur during a closed public meeting are immune

from discovery." Sanders also argued that her conversations with Ortiz were privileged because Brooks share a common interest with the school board. Noting that "at best, [there was some indicia] that Brooks and APS at some time – possibly even various times – shared a common goal or desire," the appeals court observed that "much of what Sanders contends supports her position of a common interest instead suggests the possibility that Brooks' interests were *not* aligned with those of the Board. . ." (*Albuquerque Journal and KOB-TV, LLC v. Board of Education of Albuquerque Public Schools*, No. A-1-CA-35864, New Mexico Court of Appeals, Nov. 13)

The Federal Courts…

Resolving the remaining handful of issues from two consolidated cases asking for records pertaining to PSD-11, a presidential directive issued by President Barrack Obama concerning the Muslim Brotherhood, Judge Randolph Moss has ruled that the Department of State conducted an **adequate search** for records and properly withheld records under **Exemption 1 (national security)** and **Exemption 5 (privileges)**. George Canning and Jeffrey Steinberg filed suit in 2013 for records pertaining to PSD-11. Two years later, based on an item in the *Gulf News Report*, SAE Productions requested records mentioned in the article as having been part of ongoing FOIA litigation against the State Department. Although both the Canning and the SAE Productions suits were originally filed separately, because of their similarity the State Department asked to have them consolidated. SAE Productions challenged the adequacy of the agency's search, questioning whether State had properly concluded that the records referenced by the *Gulf News Report* were the records the agency had located. Moss found the search appropriate. He noted that "there was no reason for the Department to search for records created after its earlier release of records to the *Canning* Plaintiffs – or after publication of the *Gulf New Report* article – and the record clearly establishes that the Department not only searched for, but located, the records from the relevant timeframe." He approved of the agency's decision to limit its search to its database containing FOIA-disclosed records. He pointed out that "because SAE sought records that the Department had released in response to a prior FOIA request, this was the obvious place to search." Canning challenged the classification of documents after his FOIA request was submitted. Canning contended that the Executive Order on Classification required State to explain the changed circumstances requiring the agency to classify the records after receiving his request. Moss found this went too far. He noted that "it is appropriate to put the classifying agency to the test of explaining – in general terms – how disclosure could harm the national security interests of the United States. Once the agency does so, however, it has shown that the record at issue was 'properly classified pursuant to [the] Executive Order' and FOIA requires no more." Canning argued more broadly that the agency had failed to show whether the Under Secretary had exercised appropriate supervision over classification decisions made by former State Department FOIA Officer Margaret Grafeld and current FOIA Officer Eric Stein. Moss pointed out that "the Under Secretary is free to decide *how* he will guide, supervise, or manage the review process, but the Court must decide *whether* he has done so." Moss found that Grafeld's classification decisions had been subject to review, but that there was a lack of evidence showing that Stein's more recent decisions were subject to review. He pointed out that "there is no evidence that the Under Secretary was aware that the four records were subject to reclassification; there is no evidence that he had the opportunity to exercise a contrary view; and there is no evidence he guided, managed, or supervised Stein's review in any way, beyond merely assigning the review responsibility to him." Canning argued that drafts of a letter to be sent to King Abdullah of Saudi Arabia were not protected by the deliberative process privilege because they contained no deliberations. Moss rejected the claim, noting that "the deliberative process privilege is designed to protect the 'open and frank discussion' of proposals within the government regardless of how a proposal or suggestion is offered. When a government employee or official prepares a draft letter – or speech, brief, or guidance

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document – for an intermediary or ultimate decisionmaker's consideration, she is offering a proposal for consideration, just as she would do in drafting an options memo or in participating in a group discussion." However, Moss agreed with Canning that there was insufficient evidence to determine whether several drafts of the letter were deliberative. He pointed out that "to be sure, none of the documents bear the President's signature, and none is printed in final form on presidential stationary. If all that remained to be done, however, was to print and sign the letter – and if, in fact, any of the three documents is identical in *substance* to the letter sent to King Abdullah – it is difficult to discern how that documents reflects anything that is '*pre*-decisional.'" SAE Productions had challenged the application of Exemption 5 broadly. However, Moss found that the deliberative process privilege applied to all the documents SAE Productions had questioned. (*George Canning, et al. v. United States Department of State*, Civil Action No. 13-8311 (RDM) and *SAE Productions, Inc. v. United States Department of State*, Civil Action No. 15-1245 (RDM), U.S. District Court for the District of Columbia, Oct. 24)

A federal court in California has ruled that U.S. Immigration and Customs Enforcement **conducted an adequate search** for records responsive to a multi-part request from Ariel Cervantes Anguiano, who was picked up by ICE agents in San Francisco in 2015 and faced deportation, although Magistrate Judge Jacqueline Scott Corley found the agency had not yet sufficiently explained the search terms it used for several of its searches. Ruling on the agency's exemption claims, Corley ordered the agency to provide records it withheld under **Exemption 5 (privileges)** and some records withheld under **Exemption 7(E) (investigative methods and techniques)** for *in camera* review before she could make a final determination on their applicability. The agency also redacted personally-identifying information of ICE employees and third parties under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. ICE focused its search on the Office of Enforcement and Removal Operations after determining ERO was the office that would have handled such a removal. Cervantes complained that ICE had improperly limited its search to ERO, but Corley sided with the agency on that issue. Cervantes also questioned why five ICE agents in San Francisco had used differing search terms. Agreeing with Cervantes here, Corley pointed out that "ICE has not shown that their responsibilities with respect to Plaintiff's apprehension or apprehension actions generally was different such that the same search terms should not be used across all their searches." Addressing Cervantes' request for training materials, she pointed out that "this request for training materials is specific to these officers and thus would not have been captured by the searches ICE did for training materials generally within the ERO Policy Library." Corley also rejected ICE's claim that Cervantes' request for policies relating to ICE agents identifying themselves as police officers was too vague. Instead, she noted that "Plaintiff's request is reasonably described such that ICE can determine without guesswork what documents would be responsive – that is, any communications between ICE and the San Francisco Police Department which relate to ICE officers identifying themselves as police officers." Pointing out that the agency had not provided enough information for her to determine whether certain redactions were privileged under Exemption 5, she ordered the agency to provide the documents for *in camera* review. Challenging the agency's redactions under the privacy exemptions, Cervantes argued that *CREW v. Dept of Justice*, 746 F.3d 1082 (D.C. Cir. 2014), supported his public interest claim in knowing how the agency had treated his arrest. Corley disagreed, noting that "Plaintiff does not suggest that there was misconduct on the part of ICE, but rather that the public has an interest in understanding how law enforcement policy is carried out. This asserted public interest is insufficient to outweigh the ICE employees' legitimate interest in keeping their names private." Cervantes asserted that the investigative techniques that ICE had withheld under Exemption 7(E) were already publicly known. Corley upheld most of the agency's Exemption 7(E) claims, agreeing with the agency's affidavit on the policy of ICE agents identifying themselves as police officers that "even if the public knows that ICE uses a particular technique, the step-by-step guide to how it is used is not widely known." However, Corley ordered the agency to submit another claim for her to review *in camera* because its description was too vague. She pointed out that "without even the name of the technique

or any context for why this technique out of all the techniques referenced in the handbook is not commonly known, the Court lacks sufficient information to consider whether ICE properly redacted this information under Exemption 7(E)." (*Ariel Cervantes Anguiano v. United States Immigration and Customs Enforcement*, Civil Action No. 18-01782-JSC, U.S. District Court for the Northern District of California, Nov. 13)

Judge Colleen Kollar-Kotelly has ruled that the final termination letter for Raymond Granger, a former Assistant U.S. Attorney in the Eastern District of New York who was terminated in 1995, is protected in its entirely under **Exemption 6 (invasion of privacy)**. Howard Bloomgarden, who was convicted of murder charges in California in 2014, had previously requested records about Granger's termination with the hope that they might help him get a new trial. In earlier litigation that went up through the D.C. Circuit, Judge Ellen Segal Huvelle reviewed more than 3,600 pages from Granger's file and found that a draft termination letter prepared in Granger's case was protected by Exemption 6. This time, Bloomgarden requested Granger's records from the National Archives and Records Administration, which found three potentially responsive records, including the final termination letter, but decided to withhold them under Exemption 6 as well. This time around, Kollar-Kotelly found that disclosure of the historic records would still be an invasion of Granger's privacy. She agreed that "the public does have an interest in knowing how the agency or department in question dealt with the misconduct," but pointed out that "due to the two decades which have passed since Mr. Granger was terminated, the information contained in the requested letters will illuminate little about the current internal operations of the U.S. Attorney's Office." She observed that "here, the invasion of privacy resulting from the disclosure of the two letters would be clearly unwarranted. Mr. Granger maintains a strong privacy interest in the information contained in the termination letters. His interest is especially strong given his continued work in the legal field. In contrast, the public's interest in disclosure of the letters is relatively low. The letters related only to the two-decades old termination of a lower-level government attorney. The letters do not show systemic failures or a larger pattern of misconduct on the part of the U.S. Attorney's Office." (*Howard Bloomgarden v. National Archives and Records Administration*, Civil Action No. 17-2675 (CKK), U.S. District Court for the District of Columbia, Oct. 26)

Judge Timothy Kelley has ruled that the Department of Homeland Security has now shown that it conducted an **adequate search** for records concerning former DHS employee Cynthia Roseberry-Andrews and that it appropriately considered whether further non-exempt records could be **segregated** and released. Although DHS disclosed 1,826 pages to Roseberry-Andrews, in his earlier opinion in the case, Kelly agreed with Roseberry-Andrews that the agency's search was insufficient because it had not searched three offices that Roseberry-Andrews had identified in her request as having potentially responsive records. This time, DHS told Kelly that it had searched the other offices and explained that it used consistent search terms for each separate search. Roseberry-Andrews still contended the search was inadequate because it failed to tun up information concerning an EEO investigation. However, Kelly pointed out that "in this case, there is no doubt that Defendant conducted a reasonable search for those types of documents. In the EEO sub-office, for instance, a program manager searched among other places the 'iComplaint' database, which contains 'all records relating to an individual's EEO process.'" Kelly found the agency had provided a sufficient explanation of its segregability review as well. He rejected Roseberry-Andrews' contention that records were not covered by the attorney-client privilege. Instead, he observed that "she is simply incorrect that an attorney-client relationship may not exist between government employees and their agency' counsel." (*Cynthia L. Roseberry-Andrews v. Department of Homeland Security*, Civil Action No. 16-63 (TJK), U.S. District Court for the District of Columbia, Nov. 2)

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Judge Colleen Kollar-Kotelly has ruled that EOUSA conducted an **adequate search** and properly withheld records from Peter Liounis under **Exemption 3 (other statutes)** and **Exemption 5 (privileges)**. Liounis requested records of the grand jury that indicted him on criminal charges that resulted in a prison sentence of more than 20 years. The agency withheld the grand jury materials, citing Rule 6(e) on grand jury secrecy as an Exemption 3 statute. In an earlier order, Kollar-Kotelly had told the agency that its categorical claim that all records were exempt without further explanation was insufficient. Liounis complained that the search was inadequate because it had not uncovered the grand jury voting records. Finding that EOUSA's explanation of its search was sufficient, she noted that "even if this information had been found in Defendant's search, any records concerning the grand jury voting and attendance records would likely have been exempt from disclosure." Turning to the exemptions, Kollar-Kotelly pointed out that "the exhibits presented to the grand jury are exempt from FOIA under Exemption 3 because they would reveal 'the strategy or direction of the investigation.'" She noted that "here, Plaintiff requested only documents relating to his grand jury proceeding. Accordingly, it would be obvious that any material which was released had been presented to the grand jury. Knowing the contents of exhibits presented to the grand jury would reveal secret aspects of the direction and scope of the investigation." Kollar-Kotelly found that the agency had not shown that one category of records containing draft indictments qualified as grand jury material. However, she noted that the draft indictments were protected under Exemption 5 because they constituted attorney work-product. (*Peter Liounis v. United States Department of Justice*, Civil Action No. 17-1621 (CKK), U.S. District Court for the District of Columbia, Nov. 7)

Judge James Boasberg has ruled that the Center for Biological Diversity does not at present have **standing** to sue the Department of State under the Administrative Procedure Act for failing to produce a report mandated by an earlier UN agreement requiring participants such as the United States to report annually on steps taken to stabilize greenhouse-gas concentrations because it has not shown that it expended resources to mitigate potential harm caused by the government's failure to publish the report. The Center for Biological Diversity filed suit against State for its failure to publish the report, but also asserted claims under FOIA for access to records about production of the report. The government claimed that CBD had not shown that if suffered an informational or organizational injury as a result of the agency's failure to publish the report. Noting that the bar to establishing such an injury was relatively slight, Boasberg agreed with the agency that CBD had not shown that it expended organizational resources in an effort to mitigate potential harm. The agency argued that CBD had not shown that the report was required to be made public. Boasberg noted that "there is good reason for such omission. The two counts at issue involve an APA remedy and mandamus relief to redress the Government's 'failure to complete and submit' the reports by the January 1 deadline. That is, Plaintiff seeks to enforce a deadline provision that itself contains no disclosure requirement." He observed that the D.C. Circuit, in *Friends of Animals v. Jewell*, 828 F.3d 989 (D.C. Cir. 2016), held that an informational injury could not be shown unless there was a requirement for public disclosure of information. As to the organizational injury, Boasberg pointed out that CBD had not shown that it expended any resources to mitigate the damage caused by non-disclosure. He noted that "to the extent Plaintiff appears to discount as necessary any showing on [this] prong, it misunderstands the law, which requires both that the organization's interest be injured, *and also* that it expend resources to counteract that harm." Boasberg indicated that "CBD does not have a strenuous burden at the motion-to-dismiss stage." Allowing CBD to amend its complaint, he observed that "CBD may well ultimately be able to clear this hurdle. . ." (*Center for Biological Diversity v. United States Department of State, et al.*, Civil Action No. 18-563 (JEB), U.S. District Court for the District of Columbia, Nov. 8)

Judge James Boasberg has ruled that EOUSA properly responded to Mickey Pubien's request for the dates on which a grand jury was impaneled by informing him that it could find no records. Pubien filed a

request in 2016 for records concerning the date on which a grand jury in the Southern District of Florida was impaneled and the date on which the grand jury expired. The agency told Pubien that the Office of the U.S. Attorney for the Southern District of Florida no longer had that information because it had been destroyed pursuant to its records retention schedule. However, the court clerk was able to furnish the dates on which the grand jury was impaneled and expired. That record was disclosed to Pubien with redactions under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Pubien then submitted a second request asking for all the dates on which the grand jury was in session. Once again, the agency found that it had no responsive records beyond the record provided by the court clerk. The clerk's record was disclosed again with the same redactions. Pubien filed suit, arguing that the **search was inadequate** and that the exemptions were improper. Pubien argued the U.S. Attorney's Office for the Southern District of Florida had failed to ask other personnel who might have knowledge of the dates. But Boasberg indicated that "the U.S. Attorney's Office does not assert in this case that it *never* had such records. Rather, it represents only that any of 'the records that might have related [to Pubien's request]. . .have been destroyed in accordance with the [office's] records retention schedule.' The Government is not required to produce documents that no longer exist or to retain indefinitely the records it has." Pubien also faulted the agency for failing to address the more specific dates in his second request. Here, Boasberg pointed out that "that the Memo does not contain the information Plaintiff requested is true, but that is because more specific records do not exist. EOUSA is clear, moreover, that it *did* undertake an additional, renewed search in response to Plaintiff's [second] request." Boasberg rejected the agency's claim that Exemption 7(C) applied. He noted that "it strains credulity to suggest that the information compiled about grand jury dates over a decade after it was impaneled and discharged – and in response to a FOIA request – was assembled for law enforcement purposes. Indeed, the Memo was created only for *FOIA* purposes." However, he found that Exemption 6 applied because the privacy interests of the individuals outweighed any public interest in disclosure. Pubien argued that because he had found a document online confirming the existence of the grand jury the privacy exemptions did not apply. Calling this a "*non sequitur*," Boasberg explained that "that some material related to a grand jury is public does not imply that the *names* of the staff members who exchanged the Memo are also public." (*Mickey Pubien v. Executive Office for United States Attorneys*, Civil Action No. 18-172 (JEB), U.S. District Court for the District of Columbia, Nov. 13)

Judge James Boasberg has ruled that Dennis Chase, whose FOIA suit against the Department of Justice after several components failed to respond to his FOIA request for records concerning his prosecution and conviction for possession of child pornography resulted in an earlier decision by Boasberg in favor of the agencies, has failed to show why Boasberg should reconsider his previous decision. In his earlier decision, Boasberg found the agencies had conducted an adequate search that yielded more than 2,000 pages of records and that the agencies' exemption claims were appropriate. This time, Chase complained that EOUSA had improperly withheld a grand jury transcript that had been furnished to him during his preparation for trial and attached 51 pages to prove his point. Boasberg observed that if Chase already had a copy of the transcript, "the Court is perplexed as to why Plaintiff wants the same document again. While the Court thus sees no logical reason to compel disclosure of a document already in Plaintiff's possession, precedent also precludes such an action. To begin, even if information exists in some form in the public domain, that is not equivalent to official disclosure through FOIA channels. As such, 'an agency responding to a FOIA request is not foreclosed from asserting exemptions to withhold information that it had previously disclosed to a party in a non-FOIA proceeding.'" He noted that **Exemption 3 (other statutes)** would still apply "if the transcript Plaintiff attached is *not* the entirety of the grand-jury material he wants. In such an instance, Chase still has not stated why the exemptions the Government applied – and the Court previously accepted – are improper. A motion for reconsideration must present new evidence or arguments in order to be granted, and here Plaintiff does neither." The U.S. Marshals Service had redacted personally-identifying information under **Exemption**

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7(C) (invasion of privacy concerning law enforcement records). Chase argued that he would not have made that information public and he already knew the identities of individuals. Boasberg observed that "what Chase would do with the information is not relevant, and he does not make clear why he is concerned about the redactions if he currently knows the names redacted. In any event, he again falls short of explaining why the exemption invoked by USMS – and accepted by the Court – is inapplicable." (*Dennis Chase v. United States Department of Justice, et al.*, Civil Action No. 27-274 (JEB), U.S. District Court for the District of Columbia, Nov. 13)

A federal court in Pennsylvania has ruled that Marc Foley, who was convicted of money laundering in connection with a mortgage-financing fraud scheme has **failed to exhaust his administrative remedies** by failing to pay the FBI for providing him interim releases of responsive materials. In its first release, the FBI reviewed 543 pages and disclosed 107 pages in full or in part. As part of its second release, the FBI informed Foley that it had reviewed 525 pages but had withheld them entirely. It also told Foley that he would need to pay $25 to continue receiving two more interim releases. After the agency threatened to suspend his request, Foley paid the $25 fee. For its third interim release, the FBI processed 516 pages, disclosing 271 pages in full or in part and charged Foley $15. It then told Foley that it had completed its fourth interim release by reviewing 500 pages, of which 65 pages were being disclosed in full or in part. However, because Foley had not paid the $15 assessment, the FBI told him that it would not send the fourth interim release unless Foley paid a total of $30. The agency argued that the court should dismiss Foley's suit because of his failure to pay the assessed fees. The court agreed, noting that "here, it is undisputed that Plaintiff has failed to pay the duplication fees assessed by Defendant in connection with its third and fourth releases of records responsive to his FOIA request. These releases occurred over one year ago and Plaintiff has failed to respond in any way to Defendant's request for payment. Moreover, the instant motion has been pending since January 18, 2018, with no response having been filed by Plaintiff. Based on this record, it is apparent that Plaintiff has failed to exhaust his administrative remedies and that dismissal of this case is warranted." (*Marc D. Foley v. United States Department of Justice*, Civil Action No. 16-203 Erie, U.S. District Court for the Western District of Pennsylvania, Nov. 6)

A federal court in Wisconsin has ruled that Frederick Kriemelmeyer's requests for **discovery** in two FOIA suits should be dismissed and that Kriemelmeyer's claim against Kevin Krebs is **moot** because Krebs responded to Kriemelmeyer's FOIA request as soon as he became aware of it. Kriemelmeyer submitted a request to the Justice Department's National Security Division for records about foreign agent registrations. The agency told him the records were publicly available on its website. Kriemelmeyer responded by asking to depose Arnette Mallory, the information specialist at the National Security Division who had responded to his request. The court rejected Kriemelmeyer's request for discovery, pointing out that "plaintiff's discovery requests do not relate to whether Mallory took adequate steps to respond to his requests. Rather, plaintiff is seeking essentially the same information he sought in his Freedom of Information Act request. He wants Mallory to create a certified statement that would provide the information he seeks. I conclude that discovery is not appropriate under these circumstances. . ." The court also rejected Kriemelmeyer's discovery request to force the Passport Office to authenticate records he requested. The court observed that "Plaintiff cannot litigate his Freedom of Information Act claim through a motion to compel." As to Krebs, the court dismissed him as a defendant and rejected Kriemelmeyer's suggestion that he was entitled to attorney's fees, noting instead that "although the lawsuit gave Krebs notice of plaintiff's outstanding request, plaintiff could have provided the same notice without litigation, by either making a phone call or sending a letter." (*Frederick George Kriemelmeyer v. U.S. Dept of State, Chicago Passport Agency*, Civil Action No. 18-148-bcc, U.S. District Court for the Western District of Wisconsin, Nov. 9)

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