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Washington Focus: New York Times reporter Maggie Haberman notes that a White House review has confirmed earlier media reports that Ivanka Trump frequently used a personal account to send emails concerning public business during 2017. Although candidate Donald Trump frequently slammed Hillary Clinton for using a private server for her emails when she was Secretary of State, leading to cries at Trump rallies that Clinton should go to jail, Ivanka Trump's use of personal email was downplayed by supporters. A statement released by Ivanka Trump's attorney indicated that "when concerns were raised in the press 14 months ago, Ms. Trump reviewed and verified her email use with White House counsel and explained the issue to congressional leaders." FOIA requests by the progressive group American Oversight uncovered many more emails Ivanka Trump sent to various agencies on her personal account.

FOIA Project Report Questions DOJ Reporting on Attorneys' Fees

The FOIA Project, a database project that collects statistics on FOIA litigation and is operated by the Transactional Records Access Clearinghouse at Syracuse University, has explored the way in which the Department of Justice reports attorney's fees awards, a statistic mandated by FOIA's annual reporting provisions, and has confirmed the findings of a 2016 GAO report faulting DOJ for underreporting fee awards. While changes in FOIA's attorney's fees provision included in the 2007 OPEN Government Act amendments made agencies more sensitive to the costs of FOIA litigation – particularly by requiring agencies to pay fees themselves rather than taking them from a general government judgment fund – there still is no evidence that such amendments have had any effect on encouraging agencies to avoid litigation in the first place. However, TRAC's additional data collection supports GAO's 2016 findings that DOJ has instead sought ways of statistically minimizing fee awards by underreporting them.

The vast majority of FOIA complaints ask for attorney's fees, even in cases where the plaintiff is not actually entitled to them because they are representing themselves. In the summer of 2018, TRAC intern Taylor Lamb, a student at Georgetown University Law School, contacted 42 of 97 attorneys whose

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fee awards were listed by DOJ in 2016 and found that 60 percent of them had not received the fee award reported by DOJ. Christine Mehta, who was a faculty member at the Newhouse school of journalism at Syracuse University during the preparation of the report on attorney's fees, then conducted phone interviews with 22 attorneys about their experiences litigating FOIA cases. Although agencies often criticize attorney's fees as some kind of self-enrichment scheme for attorneys, Mehta found that several attorneys she spoke with believed that "recovering attorney's fees was a matter of principle, rather than practicality, as the amounts awarded were insufficient to cover the real costs of litigation." Another attorney told Mehta that "you can't fund your operations on attorneys' fees. They are a drop in the bucket. It's nice to get [them] to hold the government accountable. But you're never going to get all of your attorneys' fees even if you win." Mehta noted that this reality was underscored by the size of the awards, usually amounting to less than $10,000. She acknowledged that there were at least five cases in 2016 where attorney's fees awards exceeded $100,000, but those are exceptions that are primarily driven by the cost of litigating in San Francisco.

A plaintiff is eligible for attorney's fees if he or she substantially prevails in the litigation. But beyond that, district court judges have substantial discretion to decide whether or not a plaintiff is entitled to fees. That assessment is usually based on a four-factor test included in the Senate report for the 1974 amendments, which introduced the concept of awarding attorney's fees, but was not codified at that time, in part because critics thought it might be seen as too limiting. Nevertheless, courts have universally adopted the four-factor test – the public interest in disclosure, the commercial interest of the requester, the personal interest of the requester, and the reasonableness of the agency's legal position – as the basis for deciding whether or not a plaintiff is entitled to fees. Regardless, even once a district court judge determines a plaintiff is eligible for fees, the agency may still claim that the fees should be reduced based on such elements as the number of hours expended, the hourly rate requested, and the accuracy of claimed hours. The basis for the four-factor test was rejected in a per curiam decision authored by then D.C. Circuit Court Judge Brett Kavanaugh earlier this year. In *Morley v. CIA*, 894 F.3d 389 (D.C. Cir. 2018), Kavanaugh concluded that the reasonableness of an agency's legal position outweighed all the other factors and unless there was clear evidence that the agency's position was wrong a district court judge was within his or her discretion to side with the agency. This argument was first articulated by D.C. Circuit Senior Court Judge A. Raymond Randolph in a dissent to *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008), and was picked up by Kavanaugh in the *Morley* case. At the moment, Kavanaugh's decision in *Morley* is an outlier, but if it is cited as precedent in future D.C. Circuit decisions, it may require a congressional amendment to clarify the status of the four-factor test.

One of the findings of the GAO report was that the Office of Information Policy at the Department of Justice treated the annual reporting requirement for attorney's fees to apply only to actual court awards and not to settlement agreements or awards at the appellate level. While that may or may not be a legitimate reading of the requirement, if the congressional purpose in requiring that fees be reported was to accurately capture the costs of FOIA litigation to the government, such a reading inevitably leads to underreporting actual costs. Many of the attorneys Mehta spoke with told her they often reach settlement agreements with agencies short of obtaining a court order on attorney's fees. One attorney told Mehta that "sometimes you forego attorneys' fees as part of leverage for your client. They can work as leverage for negotiation of all kinds of cases." Indeed, Mehta pointed out that "for other lawyers, fee recovery was a separate question from the rest of the case. They lawyers involved in settlement negotiations said after the case is settled, they would send a letter to the agency requesting a fee award based on a spreadsheet of costs, including filing fees, time spent by attorneys on the case, and so on. All [the attorneys] said that the federal agency concerned would negotiate for lower rates, as is the case in other cases where fee-shifting statutes apply." My personal experience bears this out. I was involved in a single suit – *Access Reports v. Dept of Justice*. We won at the district court level and intended to send a letter to DOJ asking for about $7,000 in attorney's fees, rather than filing a motion with the district court for a fee award. However, the agency decided to appeal instead and since I lost the case at the D.C. Circuit, I was no longer eligible for fees.

There is no doubt that FOIA litigation is expensive for everyone. However, since government attorneys are salaried their costs are not reflected at the market rate of private attorneys, whose hourly rates may be in the thousands of dollars for billing purposes. On the requesters' side, many attorneys work for public interest organizations that absorb the costs of FOIA litigation when they lose, but usually request hourly rates considerably below market rates. Nevertheless, courts in San Francisco and Washington occasionally recognize the talent and sophistication of such public interest attorneys by awarding them market rates. There has been a growth in law school clinics willing to represent FOIA requesters, including at Yale and New York University, both of whom represent FOIA plaintiffs in New York City. Even law firms have become regular sources of attorneys for public interest groups, usually representing them pro bono with the possibility of attorney's fees if litigation is successful. Regardless of the actual costs, the prospect of attorney's fees allows organizations that could not afford such an expense to continue to vindicate the public interest through disclosure of government information.

Views from the States…

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

Connecticut

A trial court has ruled that the City of Derby Board of Police Commissioners waived attorney-client privilege when it provided a copy of the report prepared by an outside attorney pertaining to disciplinary charges against the police chief to the police chief to explain its decision to discipline him. Attorney Patricia Cofrancesco requested records from the board concerning its decision to discipline the police chief. The board provided some records but refused to disclose the outside attorney's report because it was protected by attorney-client privilege. Cofrancesco filed a complaint with the FOI Commission, which found that, while the report was privileged, the board waived its privilege by disclosing the report to the police chief. The board filed suit, arguing that it needed to provide the police chief with an explanation of why it had disciplined him. The trial court found that the board was not required to disclose the full report, pointing out that "the statutory protection and the case law required the board to provide notice and a hearing to the police chief." The trial court observed that "the due process in an administrative hearing is flexible. So long as the chief received a notice of the charges followed by a formal hearing, there was no constitutional, statutory or other law requiring him to receive the report." Referencing *Berlin Public Schools v. FOI* Commission, a 2016 superior court ruling in which the court found that the Berlin Public Schools had waived attorney-client privilege only to those portions of a report quoted in its final decision, the trial court pointed out that "the board had the option of quoting brief passages from the report without risking the full report being disclosed. The court concludes that with the several options other than complete disclosure available to the board, the mailing of the report to the chief was 'voluntary.'" The court rejected the board's argument that basic fairness supported the decision to disclose the report to the police chief and the board should not have been penalized for disclosing it under the circumstances. The court noted that 'the public's right to know must prevail here over

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the non-disclosure of the report, as might be the case in general personnel matters. Discipline was imposed, and taxpayers had funded the report." (*City of Derby Board of Police Commissioners v. Freedom of Information Commission and Patricia Cofrancesco*, No. CV 17 6039551 S, Connecticut Superior Court for the Judicial District of New Britain, Nov. 28)

Nevada

The supreme court has ruled that a disclosure order issued by the district court judge who took over public records litigation filed by the Las Vegas *Review Journal* and other media plaintiffs for access to recordings and related records pertaining to the 2017 Harvest Festival shooting does not affect the Las Vegas Metropolitan Police Department's appeal of the underlying decision except on the issue of evidence logs and certification of records. The *Review Journal* and other media outlets filed suit against the police department to disclose an array of records and to speed up the disclosure of those records. The case was heard by District Court Judge Richard Scotti, who ordered the police department to start disclosing non-exempt records within six months. After Scotti issued that order, he disqualified himself and the matter was reassigned to Judge Stefany Miley, who ordered the police department to continue to process the request and provide a list of existing records, and to certify instances in which there were no existing records. The police department filed an emergency appeal, arguing that Miley had been divested of jurisdiction over certain portions of the litigation. The supreme court found that Miley retained jurisdiction over most of the litigation. It noted that "Metro is not required to produce any actual records in its possession. . . Rather, the district court's order asks Metro to provide any lists or documentation regarding information in its possession that it has not produced. This is consistent with, and does not modify, [Scotti's order]." However, the supreme court concluded that Miley was divested of jurisdiction on the issue of the evidence log and the certification of records "because they affect matters that are currently on appeal." (*Las Vegas Metropolitan Police Department v. Eighth Judicial District Court, and American Broadcasting Companies, et al.*, No. 76023, Nevada Supreme Court, Nov. 28)

The Federal Courts…

A federal court in Washington has ruled that Planned Parenthood of the Great Northwest and the Hawaiian Islands is entitled to a **preliminary injunction** blocking the Department of Health and Human Services from disclosing its winning FY18 grant application to provide services in Honolulu and Maui Counties in response to a FOIA request. HHS told Planned Parenthood that it was reviewing the FY18 grant application for disclosure pursuant to a FOIA request. The agency asked Planned Parenthood to provide its objections to disclosure. Planned Parenthood sent an 11-page letter objecting to disclosure, explaining in part that much of the application contained trade secrets or confidential business information falling within **Exemption 4 (confidential business information)**. Two months later, HHS told Planned Parenthood that it disagreed with many of its objections, although it would redact portions of the grant application, and indicated that this was its final decision. Planned Parenthood filed a motion for a preliminary injunction. In response, the agency told Planned Parenthood that it would issue a revised response, but that it intended to proactively disclose a redacted version of the grant application by December 31. District Court Judge John Coughenour found Planned Parenthood was entitled to a preliminary injunction, indicating that "the Court is particularly skeptical of HHS's proactive disclosure justification, given that it initially represented to Plaintiff, falsely, that the agency had received a FOIA request seeking the FY18 Application. HHS' misrepresentation of the actual basis for its disclosure decision strikes the Court as a stalking horse for the true reason behind the agency's action." Coughenour pointed out that "HHS' failure to adequately address [the Plaintiff's] objections in its November 2, 2018 letter demonstrates that the agency failed to provide a reasoned explanation for its

disclosure decision." Finding that Planned Parenthood had shown that disclosure would cause substantial competitive harm, he noted that "plaintiff has sufficiently demonstrated that the FY18 Application – even with the redactions proposed by HHS – contains confidential business information, the release of which would cause substantial competitive harm to Plaintiff's competitive position in obtaining future Title X grants. Plaintiff has a clear commercial interest in the information contained in the FY18 Application because that information is needed to obtain grant funding in a competitive bidding process." Coughenour noted that granting an injunction was also in the public interest. He pointed out that "the Court sees a clear public interest in correctly applying FOIA, and the Government has not explained how a delay in its 'proactive disclosure process' would harm the public." As a result, Coughenour ordered that the records be sealed. (*Planned Parenthood of the Great Northwest and the Hawaiian Islands, Inc. v. Alex M. Azar II and the United States Department of Health and Human Services*, Civil Action No. 18-1627-JCC, U.S. District Court for the Western District of Washington, Nov. 29)

Judge Christopher Cooper has ruled that the Department of State and the CIA have now **conducted adequate searches** for records concerning two former undercover CIA agents whom journalist David Talbot believed had knowledge of the CIA's alleged involvement in the assassination of President John F. Kennedy. Talbot had requested records from the CIA and the State Department pertaining to William King Harvey and F. Mark Wyatt, two former CIA agents who served covertly abroad at various times in their careers. In an earlier decision in the case, Cooper found that the CIA had to search for records on Harvey in its operational files and that the State Department had to search for passport records using Harvey's pseudonyms. Cooper first rejected Talbot's request for reconsideration. Talbot argued that both agencies failed to search for security clearances or certifications. Cooper pointed out that "Talbot's FOIA request sought 'all passport and visa records' pertaining to Harvey and Wyatt; it did not seek employment or personnel records – whether those be the 'security clearances' Talbot said he was entitled to in the first round of summary judgment briefing or the 'security certifications' he now demands. And though Talbot contends these certifications were so integral to the passporting process for CIA operatives that the agencies should have searched for them pursuant to his suggestion for 'passport and visa records,' he has not offered the Court any reason to believe that the agency deliberately avoided searching for those certifications despite knowing they were responsive to Talbot's request." Talbot argued that Cooper had applied the National Security Act too broadly. Cooper disagreed, noting that "whether that information is 'confidential or nonpublic' does not determine whether it can be properly withheld under the National Security Act, despite Talbot's contentions to the contrary." When State searched under Harvey's pseudonym "William Walker," it came up with the passport of an African-American man while Harvey was white. The agency concluded that was a false positive. Talbot suggested that Harvey could have disguised himself as an African-American, but Cooper observed that 'while the Court admires Talbot's fertile imagination – and grants that what he posits is possible – his theory still amounts to speculation, not the sort of 'countervailing evidence sufficient to raise a substantial doubt' about the agency's search and its determination that the William Walker record does not pertain to William King Harvey." The CIA opted to search its operational files for records on William King Harvey. The search yielded 56 hits, none of which turned out to be about William King Harvey. Talbot found that defied logic, but Cooper pointed out that "the agency searched for 'William King Harvey,' but it also searched for 'William Harvey' and 'Harvey.' The search for 'Harvey' alone could have yielded all sorts of false positives, pertaining to some other Harvey in the CIA's operational files." He observed that "in any event, a FOIA requester's incredulity is not enough to overcome the 'presumption of good faith' courts normally accord agency declarations." (*David Talbot v. U.S. Department of State, et al.*, Civil Action No. 17-588 (CRC), U.S. District Court for the District of Columbia, Nov. 16)

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The Ninth Circuit has ruled that the district court did not err when on remand it affirmed that immigration attorney James Mayock did not have **standing** to join a class-action suit alleging that U.S. Citizenship and Immigration Services had a **pattern or practice** of failing to respond to FOIA requests on time. In an earlier ruling, the Ninth Circuit had dismissed a suit brought by Mirsad Hajro, Mayock, and other individuals who had made FOIA requests to USCIS to enforce a decades-old judicial agreement resulting from Mayock's prior challenge to the then Immigration and Naturalization Service requiring it to comply with FOIA's statutory deadline, but had agreed that individual plaintiffs with multiple FOIA requests, or who had shown they were likely to continue to make FOIA requests to the agency in the future, could continue their pattern or practice claim against USCIS. However, the Ninth Circuit concluded that on the record before it Mayock had not shown that he had standing and that Hajro's challenge was moot because the agency has responded to his request. The Ninth Circuit remanded the case to the district court to allow Mayock to provide sufficient evidence that he had standing. On remand, the district found Mayock had not shown evidence that he either had multiple requests or was likely to make them in the future and dismissed him for lack of standing. Mayock continued to argue that he had standing because he had made FOIA requests to USCIS and that the agency had never responded to them on time. The Ninth Circuit noted that "that declaration, however, is the same declaration that the prior panel rejected as 'insufficient' to confer standing on Mayock. Whatever salience the adage 'if at first you don't succeed – try, try again' has in daily life, expecting identical arguments to yield different results is a poor strategy for success in our court." Hajro and Mayock argued that "because Hajro had standing to bring the pattern and practice claim before his claim became moot, the district court ought to have allowed Appellants to substitute plaintiffs." The Ninth Circuit noted that the cases that Hajro and Mayock cited involved class-action suits and that this was not a class-action suit. The Ninth Circuit observed that "when Appellants filed their [second amended complaint], neither Hajro nor Mayock had standing to bring any claims. The district court could not grant any motions brought by plaintiffs who lacked a legally cognizable interest in the relief they were seeking." (*Mirsad Hajro and James R. Mayock v. United Sates Citizenship and Immigration Services, et al.*, No. 17-15984, U.S. Court of Appeals for the Ninth Circuit, Nov. 23)

Judge Amy Berman Jackson has ruled that EOUSA conducted an **adequate search** for records requested by federal prisoner Ismael Arenas Gonzales and that Gonzales **failed to exhaust his administrative remedies** by not responding to the agency's request that he commit to pay estimated fees exceeding $25 after the agency expended his free two hours of search time. Gonzales requested a copy of bond documents pertaining to his case directly from the U.S. Attorney's Office for the District of Colorado. USACO determined that there were no bond documents related to his case. Gonzales then requested a copy of two case files related to his prosecution and conviction. Because the cases were more than ten years old, USACO requested the records from the Federal Records Center in Broomfield, Colorado. After receiving six boxes of records, the USACO FOIA coordinator determined that three boxes related to Gonzales' appeal of his criminal case and began searching one box for records responsive to any of the 34 items requested by Gonzales. She was able to search approximately 40 percent of one box in two hours, resulting in a search estimate of five hours per box, or 13 hours for all three, deducting Gonzales' free two hours and 100 pages of records, for an estimate of $195. USACO sent Gonzales a letter asking him to commit to paying the fees, but after he failed to respond, the agency closed his request. Noting that *Winston & Strawn v. McLean*, 843 F.3d 503 (D.C. Cir. 2016), required district court judges to assess whether the party moving for summary judgment was entitled to summary judgment, even in the absence of any opposition from the other party, Jackson explained that she would consider whether the agency had carried its burden of proof. She found that USACO had conducted an adequate search for bond documents even though it found no records. She pointed out that "the fact EOUSA found no records responsive to plaintiff's first request for information pertaining to bonds does not render the search inadequate. [The agency] explains that plaintiff had been detained without a bond, and therefore USACO would not have had bond-related information about him." She agreed that EOUSA had properly

closed Gonzales' second request after he failed to commit to paying fees. She noted that "in this case, EOUSA has demonstrated that it provided the two hours of search time without charge, that it notified plaintiff of its fee estimate, and that plaintiff had an opportunity either to pay the fees, to reformulate his request, or to appeal that fee determination. EOUSA has also shown that plaintiff did not respond timely to its notice. Thus, the record establishes that plaintiff failed to exhaust his administrative remedies prior to filing this civil action." (*Ismael Arenas Gonzales v. United States of America*, Civil Action No. 16-1716 (ABJ), U.S. District Court for the District of Columbia, Nov. 19)

A federal court in California has ruled in the final three of five separate FOIA suits filed by Smart-Tek Service Solutions against the IRS for records concerning alter-ego companies for which the IRS had concluded that Smart-Tek Service Solutions was liable for payroll taxes. In response to the requests submitted by Smart-Tek Service Solutions and its various subsidiaries, the agency found that the file concerning the tax liability investigation contained thousands of records, most of which contained tax identification numbers unrelated to Smart-Tek or its subsidiaries. Approving the agency's **search**, the court observed that "the Court finds the IRS's approach of marking documents as non-responsive if they did not contain Plaintiff's taxpayer information to be reasonable because Plaintiff's FOIA request only requested its own, and not any other taxpayers' administrative file." The court agreed that **Exemption 3 (other statutes)** protected taxpayer information unrelated to Smart-Tek and its subsidiaries, noting that "that the IRS named other taxpayers publicly in connection with Plaintiff does not entitle Plaintiff to those taxpayers' undisclosed, non-public documents through the FOIA." The court rejected Smart-Tek's claim that it was entitled to the alter-ego companies' tax information because the agency had publicly associated Smart-Tek with those companies' tax liability. Instead, the court pointed out that "if the IRS discloses another taxpayer's information pursuant to such a rule, only so that the requester can use that information to disprove alter ego status, the disclosure automatically violates § 6103(a) and conflicts with its core purpose of protecting taxpayer privacy." However, the court agreed with Smart-Tek that the names of the alter-ego companies had been made public by disclosure in a court case. (*Smart-Tek Service Solutions Corp. v. United States Internal Revenue Service*, Civil Action No. 15-0452-BLM-LL, *Smart-Tek Automated Services, Inc. v. United States Internal Revenue Service*, Civil Action No. 15-0453-BTM-LL, U.S. District Court for the Southern District of California, Nov. 26, and *American Marine, LLC v. United States Internal Revenue Service*, Civil Action No. 15-0455-BTM-LL, U.S. District Court for the Southern District of California, Nov. 20)

A federal court in Pennsylvania has ruled that the Bureau of Prisons properly invoked a number of subsections of **Exemption 7 (law enforcement records)** to withhold from prisoner Michael Charles a DVD depicting an incident that occurred in 2015 in the FMC-Devens facility. Agreeing that the exemptions protected the DVD, the court noted that "additionally, the Court finds that the BOP does not have the ability to blur, black-out, or edit images on the requested DVD, and therefore, is unable to provide Charles with the DVD in a redacted format." (*Michael Charles v. United States Department of Justice, Federal Bureau of Prisons*, Civil Action No. 17-02250, U.S. District Court for the Middle District of Pennsylvania, Nov. 19)

Judge Royce Lamberth has ruled that John Edmond's request to the U.S. Postal Service for its file on him fails to provide sufficient detail for the agency to locate such a file. Dismissing Edmond's suit, Lamberth noted that "here, Edmond failed to reasonably describe his request. A generalized request for the Postal Service's file on a single individual does little to identify the records' subject matter, location, or form. Indeed, it presumes the existence of a file the Postal Service swears it doesn't maintain. And even if the Postal Service did keep the type of file Edmond seeks, locating it would require individually searching the Postal

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Service's approximately 35,000 facilities, doubtlessly an unreasonable imposition." (*John Edmond v. United States of America, et al.*, Civil Action No. 17-2611, U.S. District Court for the District of Columbia, Nov. 19)

A federal court in California has ruled that Richard Phillips, who was granted a retrial of his 1979 conviction for murder in Madera County by the Ninth Circuit because of special circumstances, may amend his FOIA complaint against the FBI to show that his litigation is not barred by the six-year statute of limitations. Phillips requested records from the FBI pertaining to wiretaps of his phone conversations. The FBI reviewed a total of 156 pages and provided 145 pages with redactions. When Phillips filed suit in 2018, he told the court that his complaint might be untimely because he was seeking collateral relief in federal court. Recognizing this, the court pointed out that "it is still possible Plaintiff filed his FOIA request less than six years before filing his complaint in this matter because his case was not closed until June 12, 2013." The court allowed Phillips to amend his complaint "to establish that his case is not barred by the six-year statute of limitations for FOIA appeals in federal court. To the extent Plaintiff decides to file another amended complaint, Plaintiff should allege all pertinent dates including the dates he filed his FOIA request and appeal as well as the dates he received responses." (*Richard L.A. Phillips v. U.S. Department of Justice, et al.*, Civil Action No. 18-00973-DAD-SKO, U.S. District Court for the Eastern District of California, Nov. 20)