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Washington Focus: In response to a letter sent by Rep. Elijah Cummings (D-MD) and Rept. Eliot Engel (D-NY) concerning allegations that the State Department's decision to reassign staff to deal with its FOIA backlog constitutes retaliation for work done during the Obama administration, the State Department's Inspector General has indicated that he is "looking into" the allegations. According to Government Executive, Cummings and Engel asked the IG to investigate whether reassignments were made according to civil service laws and department regulations, whether employee rights were violated, and whether political retaliation was a motivating factor.". . .A federal judge in Maryland has rejected an attempt by companies associated with the Kushner family's real estate business to seal documents pertaining to case claiming the companies collected illegal fees from tenants. Judge James Bredar noted that "increased public interest in a case does not, by itself, overcome the presumption of access."

State's Inability to Process Requests on Time Does Not Constitute Pattern or Practice

Judge James Boasberg has ruled that the Department of State's inability to respond to FOIA requests until after requesters file a lawsuit does not constitute a policy or practice designed to evade its statutory obligations under FOIA. Although he had previously allowed a lawsuit filed by the American Center for Law and Justice to continue based on ACLJ's allegations of the existence of such a policy or practice, after considering the merits of ACLJ's claim, Boasberg found no indication that the agency was acting improperly and that its inability to meet the statutory deadlines was due to the usual suspects – increased FOIA obligations and the agency's limited resources. However, an unexplored thread in ACLJ's lawsuit is the extent to which its founder Jay Sekulow, who has emerged as a legal adviser to the Trump administration, may have influenced Trump's decision ordering the agency to clean up is backlog.

ACLJ sued the agency after waiting five months for State to respond to its request concerning funding of a political organization opposed to Israeli Prime Minister Benjamin Netanyahu, alleging the agency had a pattern or practice of

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failing to respond to requesters within the statutory time limits. Boasberg had previously found that ACLJ had not pointed to a specific policy or practice but allowed it to amend its complaint. ACLJ then amended its complaint to allege that State required requesters to file suit before it would respond to requests. Finding this allegation stated a claim, Boasberg allowed the suit to continue. Boasberg started by indicating that "standing in such cases to challenge and receive relief from an agency policy or practice is limited 'to the FOIA requests submitted by the plaintiff actually at issue in this case," and pointed out that "to warrant equitable relief, a plaintiff must show that the agency (1) repeatedly violated FOIA through a (2) policy that is (3) 'sufficiently outrageous.' As the agency does not dispute that its delays contravene the Act, the Court focuses on the last two elements."

ACLJ pointed to the agency's "chronic FOIA understaffing and undertraining, as well as its admitted policy of prioritizing FOIA requests in litigation over others" as evidence of a conscious illegal policy. But Boasberg observed that "the Court finds no evidence that State has any policy, formal or otherwise, of forcing requesters to file suit before releasing material. No one would deny that Defendant is habitually late in providing determinations to requesters, but 'while tardiness would violate FOIA, it only becomes *actionable* when "some policy or practice" also undergirds it.'"" He added that "a policy-or-practice plaintiff must, rather, show that the agency's actions are 'done to delay requests.'" Boasberg agreed that State's annual FOIA report substantiated its claims that it suffered from a "substantial FOIA caseload and backlog" made worse by "high FOIA litigation demands."

State's 2016 annual report showed that it had 11,731 pending requests and that the agency processed 15,482 requests throughout the year. However, "it still ended up in the hole," because it received 27,961 requests that year. Boasberg noted that "going into 2017, therefore, State had 24,210 pending requests – more than double what it started the year with. It is hardly shocking, then, that Defendant rarely meets the twenty-day FOIA-response deadline." In 2016, according to State's annual report, the agency took 342 days to process a simple request and 517 days to process a complex request. The median number of days to complete a simple request was 166, while the median number of days to complete a complex request was 392. Boasberg observed these figures were "roughly 8 and 20 times longer than FOIA allows." He explained that "while these statistics are clear evidence of the Department's non-compliance with FOIA, the numbers do *not* lead to the conclusion that litigation is the only hope for requesters. State 'is engaged in approximately 108 FOIA litigation cases,' which is roughly 1% of the total requests. The vast majority of FOIA requests, then, are completed without judicial involvement."

ACLJ pointed to the fact that there was a total of 31 vacancies in the FOIA staff because of a department hiring freeze as evidence that State was not trying to comply with FOIA. State responded that once it got authorization for 25 new FOIA positions it quickly filled 10 positions and also reassigned some Foreign Service officers to review documents. Boasberg indicated that "this evidence strongly supports Defendant's assertion that it is its FOIA backlog and caseload – not lack of effort or a specific policy – that makes it difficult (if not impossible) to comply with the statutory deadlines." ACLJ argued that State had not actually made any real progress in tackling its backlog. Boasberg disagreed, noting that "in fact, total processed requests increased by 105% between 2015 and 2016, and, in this past year, the agency's backlog decreased by a substantial 52%. In absolute terms, therefore, the agency is showing some improvement." In response to ACLJ's claim that State improperly prioritized cases in litigation, Boasberg observed that "prioritizing litigation cases, however, is not 'an improper litigation-forcing policy,' but part of the statutory scheme. In fact, it seems that litigation – such as the five suits brought by ACLJ – only exacerbates delays." ACLJ complained that the agency took 286 days to respond its requests. Boasberg pointed out that those responses were "still two months shorter than the Department's average time for all simple FOIA requests. The statistics thus do not bear our ACLJ's claim that State treats it differently. Perhaps Plaintiff would prefer

State to move faster in filling open positions and processing requests, but the Department's pace does not amount to a 'willful and intentional dereliction of its FOIA responsibilities.'"

Boasberg explained that the pattern or practice cause of action stemmed from *Payne Enterprise v. USA*, 837 F.2d 486 (D.C. Cir. 1988) and *Long v. IRS*, 693 F.2d 907 (9th Cir. 1982), where the agencies "admitted that the documents should be released but intentionally decided not to." By contrast, he observed that "here, State has not even made its determination about whether to disclose ACLJ's requested documents. An agency's intransigence in processing requests could give rise to a 'viable' policy-or-practice claim, but 'inevitable but unintended delay attributable to lack of resources' is insufficient to support one." ACLJ pointed to a 2016 Inspector General's report finding numerous deficiencies in State's FOIA processing as evidence that State had not taken the findings seriously. But Boasberg noted that "weighing State's non-compliance against its good-faith efforts to come up with ways to reduce its backlog and respond promptly, as well as the absence of malice in its delays, the Court sees no need for an injunction here. State has begun to address its FOIA backlog and has implemented procedures to improve its response time. Absent some evidence that the agency is deliberately trying to shirk its FOIA obligations or other ill intent, ACLJ is not entitled to equitable relief." (*American Center for Law and Justice v. United States Department of State*, Civil Action No. 16-2516 (JEB), U.S. District Court for the District of Columbia, Jan. 30)

Views from the States…

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

California

A court of appeals has ruled that records pertaining to the implementation by the California Labor & Workforce Development Agency of a safe-harbor provision carve-out for minimum wages for employees paid on a piece-rate basis are protected by the deliberative process privilege under the supreme court's ruling in *Times Mirror Co. v Superior Court*, 813 P.2d 240 (1991), a case in which the supreme court found that then Gov. George Deukmejian's appointment schedule was covered by the deliberative process privilege, as well as the attorney-client privilege. The case involved FOIA requests from Fowler Packing Company and Gerawan Farming, after the agency decided that neither company qualified for the carve-out provision. The trial court ruled that the agency was required to provide an index identifying the author, recipient, general subject matter, and the nature of the exemption. The agency appealed, and the appeals court reversed. Agreeing that the identities of participants were privileged, the appellate court noted that "the harm in revealing the identities of third parties who communicated confidentially with the Agency is that it will tend to dissuade stakeholders on issues subject to future legislative efforts from commenting frankly, or at all, on matters for which only varying viewpoints can provide a more complete picture. . .Just as revealing the substance of the Agency's confidential communications with third parties would run afoul of the deliberative process privilege, so too disclosure of the identities of the persons with whom the Agency communicated implicates the same concern." Fowler and Gerawan argued that the attorney-client privilege applied only between the Legislative Counsel and the Governor, not executive agencies. The appeals court disagreed, pointing out that "the separation of the executive branch into agencies and departments is for the convenience of the Governor and does not warrant the denial of the attorney-client privilege for communications with Legislative Counsel made at the request of the Governor." (*Labor and Workforce Development Agency v. Superior Court of Sacramento County; Fowler*

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Packing Company, et al., Real Parties in Interest, No. C083180, California Court of Appeal, Third District, Jan. 8)

Connecticut

A trial court has ruled that the FOI Commission properly concluded that a meeting of the City of Meriden's town leadership group, which consisted of less than a quorum, constituted a meeting because it was acting on behalf of the city council. The City argued that the appellate court had previously concluded in *Town of Windham v. FOI Commission*, that a meeting of less than a quorum did not constitute a meeting for purposes of the FOIA. However, the trial court pointed out that, in *Meriden Board of Education v. FOI Commission* it had relied on another appellate decision, *Emergency Medical Services Commission v. FOI Commission*, in which the appeals court had found that a meeting of less than a quorum did constitute a meeting. Here, the trial court judge observed that "the court continues to adhere to the statutory interpretation set forth in *Meriden Board*. The court concludes that the *Windham* holding is not completely determinative on the issue. Rather, there are times, factually, where certain agency members are merely 'convening' and there is a requirement of a quorum under [the statute]; and there are times, factually, where agency members are gathering with the implicit authorization of the city council as a whole and this gathering 'constitutes a step in the process of agency-member activity.'" (*City of Meriden v. Freedom of Information Commission*, No. CV 17 6035943 S, Connecticut Superior Court, Judicial District of New Britain, Jan. 29)

Florida

A court of appeals has ruled that monthly reports provided by Uber to Broward County pursuant to a licensing agreement governing Uber services at the airport and Port Everglades do not contain trade secret information protected by the public records law. Yellow Cab made a FOIA request to Broward County for information about Uber pick-ups and the amount of money owed to the county for such pickups. Broward County responded that the reports were marked as confidential trade secrets and produced a redacted set of the reports. The trial court initially sided with Broward County, but after rehearing the case and conducting an *in camera* review of the unredacted reports, the trial court found that much of the information did not constitute a trade secret and ordered Broward County to disclose all non-exempt portions. The appeals court upheld the trial court's final ruling. The appeals court noted that "the total number of pickups and the fees paid to Broward County do not meet the definition of trade secrets under [the public records law]. Nothing indicates the fees or total pickups provide an advantage to Yellow Cab or that Uber derives independent economic value from keeping that information secret." (*Rasier-DC, LLC v. B&L Service, Inc.*, No. 4D16-3070, Florida Court of Appeal, Fourth District, Jan. 10)

New Jersey

A court of appeals has ruled that the Government Records Council properly withheld the minutes of its previous meeting because they were considered in draft form until they were actually approved and adopted by the GRC at its next meeting. In April 2016, Libertarians for Transparent Government requested a copy of the GRC's minutes for its February 2016 meeting. Because the GRC had not met in March due to a lack of a quorum, the GRC denied the request and told the organization that the minutes were considered a draft until actually approved. Libertarians for Transparent Government filed suit. The trial court ruled in favor of the GRC, finding that the minutes remained deliberative until they were approved. On appeal, Libertarians for Transparent Government argued that minutes could not be considered pre-decisional or deliberative merely because they had not been approved. The appeals court disagreed, noting that "we cannot conclude, as plaintiff urges, that because these minutes as approved appear to have only minor changes from the published agenda, they have lost the protection of the deliberative process privilege. Like all draft documents, they remained

subject to qualification and supplementation. It is not until an agency's members approve the minutes that they become public record." (*Libertarians for Transparent Government v. Government Records Council*, No. 1-5563-15T4, New Jersey Superior Court, Appellate Division, Jan. 26)

A court of appeals has ruled that the New Jersey Society for the Prevention of Cruelty to Animals is subject to the Open Public Records Act and that the trial court's award of $42,000 in attorney's fees to Colleen Wronko was within its discretion. After the NJSPCA took over an animal shelter in receivership, Wronko submitted a request for records concerning the agency and the shelter. The NJSPCA ignored Wronko's request until she filed suit. At the trial court, the NJSPCA conceded it was a public agency and was given six weeks to develop policies for responding to OPRA requests. The trial court found Wronko's request reasonable and awarded her $42,000. On appeal, the appeals court found that the 'the NJSPCA clearly meets the definition of a public agency under OPRA." It also upheld the trial court's fee award, noting that "while we recognize the award of $42,147.50 is a significant portion on the NJSPCA's budget, we note that defendant not only failed to comply with plaintiff's OPRA request, it also did not even respond to the request until served with this litigation." The court added "we are satisfied the judge did not abuse his discretion in awarding counsel fees." (*Collene Wronko v. New Jersey Society for the Prevention of Cruelty to Animals*, No. A-1737-15T1, New Jersey Superior Court, Appellate Division, Jan. 26)

Pennsylvania

A court of appeals has ruled that a request for communications between the Pennsylvania Public Utility Commission and First Energy Corporation made by Sunrise Energy must be remanded to the Office of Open Records to determine whether any of the records are protected by the attorney work product privilege. Sunrise Energy had sued First Energy and the PUC submitted an amicus brief on behalf of First Energy. Sunrise Energy requested the communications between First Energy and the PUC and the agency claimed the records were protected by the attorney work product privilege. OOR found that the records were not privileged and ordered them disclosed. At the appellate court, Sunrise Energy argued that to the extent the records were privileged the privilege belonged to First Energy and the company had waived the privilege by sharing them with the PUC. The appeals court found the records could well be privileged and sent the case back to OOR to determine "whether the emails identified by the PUC constitute attorney-work-product of either the PUC or First Energy. To do so, the PUC is directed to, first, notify First Energy of the disclosure dispute, and, second submit a privilege log to the OOR." The PUC had also argued that David Hommrich had not identified himself as requesting the information on behalf of Sunrise Energy and that he thus did not have standing to appeal the denial. But the court observed that "while it is true that Hommrich failed to expressly indicate that his requests were being made on behalf of Sunrise, he made that clarification on appeal. . .[T]he PUC did not produce any evidence to indicate that Hommrich is not, in fact, an officer or employee of Sunrise. Thus, we find that Hommrich's initial error was not fatal to his standing to appeal, and that he satisfies the definition of a 'requester' under the [Right to Know Law]." (*Pennsylvania Public Utility Commission v. Sunrise Energy, LLC*, No. 503 C.D. 2017, Pennsylvania Commonwealth Court, Jan. 12)

West Virginia

The supreme court has ruled that the trial court erred in ordering the disclosure of a *Vaughn* index, as well as 89 documents, prepared by the Attorney General to Steel of West Virginia because they are protected by the investigatory records exemption in the West Virginia Antitrust Act. Steel of West Virginia opposed the merger of St. Mary's Hospital with Cabell Huntington, another hospital in the Huntington area, arguing the merger would increase healthcare costs. After consideration of antitrust implications by the Federal Trade Commission and the Attorney General, the two hospitals were allowed to merge subject to conditions that

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would remain in place for a period of years. Steel of West Virginia filed a FOIA request for records pertaining to the merger. The Attorney General filed a *Vaughn* index under seal with the trial court listing 349 documents it claimed were exempt from disclosure. The trial court ordered the Attorney General to provide Steel with a copy of the *Vaughn* index, which otherwise remained sealed. Steel agreed that 200 documents were exempt. The trial court then reviewed the documents *in camera* and ordered the Attorney General to disclose 89 documents. Because the Attorney General had shared with the FTC that portion of the *Vaughn* index containing documents originally provided by the FTC, the trial court unsealed the *Vaughn* index and ordered the Attorney General to disclose the 89 documents. The Attorney General appealed and the supreme court reversed. The supreme court noted that the West Virginia Freedom of Information Act "incorporates the investigative exemption from disclosure of information set forth in the West Virginia Antitrust Act. The investigative exemption is mandatory in specifying that the Attorney General 'shall not' make public the names or identity of a person whose acts or conduct he investigates or 'the facts' disclosed in the investigation." The court observed that "a denial of the full import of the Attorney General's statutory exemption would place investigations of illegal conduct under the Antitrust Act at a disadvantage and would be contrary to the public's interest in enforcement of the law." (*St, Mary's Medical Center, Inc., et al. v. Steel of West Virginia, Inc., et al.*, No. 16-1101, West Virginia Supreme Court of Appeals, Jan. 31)

The Federal Courts…

Judge Colleen McMahon of the Southern District of New York has ruled that the CIA must provide a better explanation for why it invoked a *Glomar* response neither confirming nor denying the existence of records in response to reporter Adam Johnson's request for all information the agency had leaked to three reporters. Johnson argued that he was "just as entitled to this information as any other reporters now that it has been voluntarily disclosed by CIA to certain members of the press – who are, in addition, members of the public." McMahon noted that "plaintiff does not contest that the withheld information would not be exempt from disclosure if it had not been divulged to his competitors; rather, he argues that CIA has, by disclosing to reporters not authorized to have access to this classified information, waived its right to rely on the relevant exemptions." McMahon indicated that Johnson "seeks only disclosure of the emails that were admittedly sent to other reporters, after [the CIA's Office of Public Affairs] was authorized by senior officials to do so. He has not asked for any other information. So CIA cannot argue that plaintiff is trying to obtain information in excess of that which was previously disclosed, or that the disclosure was unauthorized." The CIA relied on *U.S. v. Philippi*, 655 F.2d 1325 (D.C. Cir. 1981), the case which gave the *Glomar* defense its name. In a hypothetical discussion in *Philippi*, the D.C. Circuit suggested that a disclosure by the CIA to the press could still be withheld under **Exemption 3 (other statutes)** because such a disclosure was still quite limited and not a release to all. McMahon was unconvinced by the discussion in *Philippi*. She noted that "but the fact that journalists might not have published everything they were told does not address a waiver argument. Waiver is a voluntary relinquishment of a known right. In this case, the known right is for CIA to keep the public – all of it, every single member – from learning certain classified information that might reveal sources and methods. No third party can by its actions work a waiver on behalf of the CIA; only the CIA can waive it by disclosing that which it is permitted by law not to disclose." McMahon observed that "in this case, CIA voluntarily disclosed to outsiders information that it had a perfect right to keep private. There is absolutely no statutory provision that authorizes limited disclosure of otherwise classified information to anyone, including 'trusted reporters,' for any purpose, including the protection of CIA sources and methods that might otherwise be outed. The fact that the reporters might not have printed what was disclosed to them has no logical or legal impart on the waiver analysis, because the only fact relevant to waiver analysis is: Did the CIA do something that worked a waiver of a right it otherwise had? The answer: CIA voluntarily disclosed what it had no obligation to disclose (and, indeed, had a statutory obligation *not* to disclose). In the real world, disclosure to

some who are unauthorized operates as a waiver of the right to keep information private as to anyone else." She noted that "contrary to the Government's suggestion, *Phillipi* does not announce that limited disclosure of information that the CIA is not supposed to disclose can never operate as a waiver. It does not authorize the Government to distinguish between 'trusted journalists' and other journalists." McMahon sent the case back to the CIA to address the effect waiver might have on the information, observing that "the Government has access to a library of national security cases that the court could never locate; I would be very surprised to learn that none of them addresses the issue of waiver by limited disclosure, or, perhaps, whether the fact that third parties do not further publish the classified information that has been disclosed to them has some impact on conduct that would otherwise constitute waiver." (*Adam Johnson v. Central Intelligence Agency*, Civil Action No. 17-1928 (CM), U.S. District Court for the Southern District of New York, Jan. 30)

The Ninth Circuit has ruled that law enforcement agencies are not required to show the statutory basis for their investigations to qualify for the "compiled for law enforcement purposes" threshold in **Exemption 7 (law enforcement records)**. The ACLU of Northern California, the Asian Law Caucus, and the San Francisco Bay Guardian submitted a request to the FBI for records concerning surveillance of Muslim-Americans. The FBI disclosed more than 50,000 pages but withheld 47,794 pages under various exemptions. After the ACLU sued, the case focused on the applicability of Exemption 7. The district court found that the agency had failed to show a rational nexus to the enforcement of a federal law and granted the plaintiffs summary judgment. At the Ninth Circuit, the appeals court noted that while the agency needed to show a rational nexus to the enforcement of a federal law when it collected information about individuals, it did not have to do so when the records were compiled for general law enforcement purposes and not linked to a particular investigation. Circuit Court Judge Andrew Hurwitz observed that "Exemption 7 applies on its face to 'records or information compiled for law enforcement purposes.' It would be anomalous to deny the benefit of the Exemption to documents that plainly meet its facial requirements because, although they apply to the FBI's law enforcement duties, they are not yet tied to a particular investigation conducted pursuant to a particular federal law." Hurwitz pointed out that in 1986 Congress amended the threshold language of Exemption 7, which originally applied only to "investigatory records" to the broader term of "records or information." Meanwhile, Congress also amended Exemption 7(E) (investigative methods and techniques) to protect "guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." Hurwitz noted that "the statutory scheme plainly contemplates that guidelines and similar general documents will be evaluated under Exemption 7(E). Exemption 7(E) perforce comes into play only after the government meets its threshold burden to qualify for Exemption 7. Congress surely would not have specifically protected the type of information described in Exemption 7(E) from disclosure if the Exemption 7 threshold always precluded the government from seeking this protection." Hurwitz added that "when a FOIA request seeks guidelines and other generalized documents compiled by a law enforcement agency not related to a particular investigation, the government need not link the document to the enforcement of a particular statute in order to claim the protection of Exemption 7. Rather, the agency need only establish a rational nexus between the withheld document and its authorized law enforcement activities." (*American Civil Liberties Union of Northern California, et al. v. Federal Bureau of Investigation*. No. 16-15178, U.S. Court of Appeals for the Ninth Circuit, Feb. 1)

Judge Rosemary Collyer has ruled that the Department of Homeland Security has not yet shown that it conducted an **adequate search** for quarterly statistical reports compiled for its Secure Communities program or that quarterly reports are protected by **Exemption 5 (privileges)**. The National Immigrant Justice Center requested information about the Secure Communities program and agreed to narrow its request to the quarterly statistical reports. The agency located 2,519 pages but ultimately withheld 2,448 records entirely because they

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were protected by the deliberative process privilege. Regardless of the number of records its search found, Collyer noted that DHS had failed to explain "how the search was conducted, and it provides no facts from which the Court could make a finding that its search was adequate. Although a search must have been conducted because documents were located and produced in part, there is insufficient information in the record for the Court to make the required finding that the search was reasonable. . ." As to the Exemption 5 claim, Collyer indicated that "DHS has failed to provide information sufficient to determine what potential agency decision was at issue. . .A mere recitation of the standard for protection under the deliberative process privilege is not sufficient. Rather, DHS must identify what prospective 'final policy' the documents predate." Collyer also rejected the agency's claim that the reports were protected because they were drafts. Collyer pointed out that "the fact that the documents are drafts and contain edits does not, alone, qualify them for protection under the deliberative process privilege: they must be part of an articulated decision-making process." NIJC argued that the reports could not be deliberative because they were compilations of publicly available information. Collyer agreed, observing that "to the extent the withheld statistical reports are part of the first step in DHS's plan to conduct statistical monitoring of Secure Communities and included any or all of the metrics DHS publicly indicated would be calculated, the Court finds the information contained in the reports is not deliberative. DHS publicly disclosed in great detail the metrics it would use to evaluate Secure Communities; therefore, any report containing completed metrics involved no individual decision-making or judgment." (*Heartland Alliance for Human Needs & Human Rights v. United States Department of Homeland Security*, Civil Action No. 16-211 (RMC), U.S. District Court for the District of Columbia, Jan. 31)

Judge James Boasberg has ruled that the Patent and Trademark Office has now conducted an **adequate search** for records concerning its Sensitive Application Warning System, which was discontinued in 2015, after finding another 67 pages of documents in response to requests from Danny Huntington. While the agency had disclosed more than 4,000 pages in response to Huntington's requests, Boasberg previously found that the agency had not explained why it did not search records of the chief judge of the Patent Trial and Appeal Board and ordered the agency to conduct further searches. This time, Boasberg agreed with the agency that its search was now sufficient. Huntington challenged the agency's search of electronic records, arguing that the agency's claim that only 72 individual administrative patent judges might have responsive records was too small because a 1998 Department of Commerce Audit Report indicated that the turnover rate of judges may have been 200 percent. Boasberg observed that "this argument is speculative at best and misleading at worst. . . [T]here is no reason to believe that the 1994-98 time period used as the baseline for the PTAB's 'churn rate' is representative of the next 17 years. In fact, the opposite is likely true: not only has PTAB grown from 43 APJs in 1998 to 205 today, but most of the departures driving the alleged turnover occurred in one year (1994) in what the Audit Report described as a 'wave of retirements.'" Huntington argued that the search of the chief judge's office was insufficient because it found no records. Boasberg pointed out that "even if Huntington were granted the search of his dreams, there might just be no there there." Finally, Huntington complained that the use of a singular-form search might miss plural forms. Boasberg indicated that "this is simply incorrect." He added that "unlike plural-form-only searches, those using singular forms *include* documents containing the plural form." (*R. Danny Huntington v. U.S. Department of Commerce*, Civil Action No. 15-2249 (JEB), U.S. District Court for the District of Columbia, Jan. 31)

Judge Trevor McFadden has ruled that the Department of Justice properly responded to seven requests from researcher Ryan Shapiro pertaining to Operation Mosaic, an attempt by the FBI to convince Congress to limit the applicability of the 1974 amendments to the agency. Shapiro relied on a 1982 article written by then-FBI Director William Webster explaining that release of seemingly innocuous information could lead to the revelation of sensitive information when combined together with other pieces of seemingly non-sensitive information, usually referred to as the mosaic theory. Shapiro requested FBI file 94-69979, which contained

Webster's article. The FBI disclosed 49 pages. He then requested records on Operation Mosaic, but the agency informed him that the only record it found was the Webster article. He then asked for records relating to the term "mosaic." The agency rejected his request as too broad for it to conduct a search. Shapiro then asked for series 94 files, which represent FBI research matters, referring to FOIA or the Privacy Act. The agency found 1.1 million potentially responsive records and after searching for five and a half hours without finding any responsive records, the agency closed his request. He next asked for records referring to "Operation Mosaic" and "mosaic study." The agency told Shapiro it had found no records responsive to that request. Shapiro next requested records pertaining to the processing of three of his previous requests. In response to this request, the agency disclosed 185 pages with redactions. Shapiro's last request asked OIP to provide records pertaining to his prior three requests. OIP located 128 pages. It disclosed 24 pages in full, seven pages in part, and referred 97 pages to the FBI. Shapiro claimed the agency had not conducted an **adequate search** because it had not conducted a detailed enough search of its Electronic Case Files database. McFadden agreed, pointing out that "since the FBI determined to conduct an ECF text search, it should have used a method – here, search terms – that would reasonably be expected to produce responsive records. As investigative files may be referred to both with and without the office of origin, both [94-HQ-69979, the search term used by the FBI, and 94-69979, the additional search term requested by Shapiro] should have been searched." But McFadden indicated that he had ordered the FBI to search under both terms and its search had still come up empty. McFadden also indicated that he had ordered the FBI to perform an ECF text search for "Operation Mosaic" as well, which yielded five additional records, none of which were deemed responsive. McFadden rejected Shapiro's claim that the FBI should have searched under the term "mosaic," noting that "given the FBI's ECF search of 'Operation Mosaic' produced no responsive records, conducting an ECF text search for 'mosaic' is not a necessary component to a search reasonably calculated to uncover records responsive to Mr. Shapiro's request." The FBI determined that it had 119 shelves containing "94" files and that even an electronic search produced 8,300 potential hits. McFadden explained that "the FBI's collective five and a half hour paper-based review and electronic review of the first 100 hits did not flush out any indication that further review would likely contain records responsive to Mr. Shapiro's request, and I have no reason to believe the expenditure of further limited FBI resources would be worth the effort." The FBI redacted portions of search slips created during the processing of Shapiro's FOIA requests under **Exemption 5 (deliberative process privilege)**. McFadden agreed with the redactions, noting that they "reflect FBI employees' comments as to how they searched for documents potentially responsive to Mr. Shapiro's requests, and the employees' evaluations as to the responsiveness of certain documents resulting from their searches. These comments were made during the FBI's search and review process – *i.e.*, prior to the FBI's final determination on these documents – and are therefore predecisional as well as deliberative." (*Ryan Noah Shapiro v. U.S. Department of Justice*, Civil Action No. 16-01399 (TNM), U.S. District Court for the District of Columbia, Feb. 1)

A federal court in New York has ruled that the Brennan Center for Justice and the Protect Democracy Project are not entitled to **expedited processing** for their FOIA requests to the Department of Justice, the Department of Homeland Security, OMB, and the General Services Administration for records concerning the work of the Presidential Advisory Commission on Election Integrity, which has since been disbanded, because they cannot show irreparable harm if the agencies fail to process their requests more quickly. The organizations argued that the Department of Homeland Security might issue a report based on the commission records as early as May 2018. But the court found that potential harm too speculative, noting that "it is of course *possible* that DHS and/or the White House will issue some sort of report along the lines of the Commission's original mandate this summer, but that is completely speculative at this point. Plaintiffs have failed to demonstrate by a preponderance of the evidence that there is an 'actual and imminent' threat of irreparable harm if DHS does not complete the requested production by July 2018." (*Brennan Center for*

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Justice and the Protect Democracy Project v. U.S. Department of Justice, et al., Civil Action No. 17-6334 (KBF), U.S. District Court for the Southern District of New York, Jan. 31)

A federal court in Texas has ruled that the FAA properly responded to Joshua Verde's request on behalf of commercial pilot Keith Johnson concerning his medical fitness to fly. After some delay in establishing the Verde had Johnson's permission to obtain his medical records, the agency ultimately disclosed 154 emails, many fewer than Verde had anticipated. But the court pointed out that "he asked for all of [FAA Flight Surgeon Dr. Susan] Northup's emails over a lengthy period. It seems that his request swept in thousands of responsive documents due to this unintentionally wide-ranging construction," which was ultimately clarified during the search process. The court observed that "these documents appear responsive to Verde's initial FOIA request only in the sense that they actually relate to his client." The court found that Verde was not entitled to **attorney's fees**. The court pointed out that Verde and his client had a sufficient personal motivation to obtain the records, explaining that "both Verde and his client had adequate motive for the FOIA request independent of a fee award. Verde is representing a client in his professional capacity as an attorney. His client, in turn, seems to have been engaged in a dispute affecting his livelihood as a pilot. Each is the sort of 'private self-interest' motive that court see as sufficient incentive for FOIA requests absent the award of fees." Verde argued that D.C. Circuit Court Judge Brett Kavanaugh's critique of the four-factor test in *Morley v. CIA*, 719 F.3d 689 (D.C. Cir. 2013), suggested that the four-factor test should be abandoned. But the court observed that "when set against the statute's legislative history, expressed preferences, purposes, and uses, the compensation of commercial FOIA requesters is not a cause so pressing as to require discarding four decades of precedent." (*Joshua Verde v. Federal Aviation Administration*, Civil Action No. 16-2659, U.S. District Court for the Southern District of Texas, Jan. 26)

Judge Trevor McFadden has ruled that the Department of Defense, the Department of Justice, the Department of State, and the Department of the Treasury properly invoked *Glomar* responses neither confirming nor denying the existence of records in response to a series of FOIA requests submitted by Faisal Bin Ali Jaber and journalist Edward Pilkington for records concerning a 2012 drone strike in Yemen that killed Salem and Waleed bin Ali Jaber. The Defense Department disclosed 1,072 pages of non-exempt records, the Justice Department disclosed 107 redacted pages, and the State Department disclosed 41 pages. The three agencies all maintained that other potentially responsive records were subject to a *Glomar* response under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Although the Treasury Department originally told Bin Ali Jaber and Pilkington that it had no records, once all the other agencies relied on a *Glomar* response, Treasury joined their *Glomar* defense. McFadden agreed that both exemptions justified the *Glomar* response, noting that "the disclosure of information that tends to confirm one way or the other any American role in the alleged drone strike would risk revealing the existence or nonexistence of intelligence relationships with foreign liaisons and could lead to the unauthorized disclosure of intelligence sources." Bin Ali Jaber and Pilkington argued that a *Glomar* response was not necessary if the United States was not actually involved. McFadden rejected that contention, pointing out that "in any case in which requested information exists, the existence of the information is classified, and no harm would be caused by stating that the information does not exist, Plaintiffs' rule would require the Government to disclose the classified fact that the information exists – even though FOIA does not require this." The plaintiffs also contended that Yemen had already publicly acknowledged the existence of the drone strike. McFadden observed that "however, a news article's allegation that a foreign government claimed that the U.S. government was responsible for a drone strike falls well short of creating a genuine dispute of material fact as to whether an official and public acknowledgement by the United States that it was involved in the drone strike could harm national security." Having found the *Glomar* response was justified, McFadden indicated that the agencies' **searches** were also appropriate. Dismissing the plaintiffs' claim that the agencies should have searched for records implicated by the *Glomar* response as well, McFadden observed that "plaintiffs have

not made any suggestions as to how a reasonable search for all responsive records would differ from the searches that were conducted, nor is it apparent to me that the Defendants' searches were inadequate even if Plaintiffs' interpretation of the law were correct." (*Faisal Bin Ali Jaber, et al. v. United States Department of Defense, et al.*, Civil Action No. 16-00742 (TNM), U.S. District Court for the District of Columbia, Feb. 1)

A federal court in New York has ruled that the Justice Department properly withheld all records concerning its prosecution of James Giffen except for those materials that had already been made public in response to a request by Jack Grynberg. Giffen was initially charged with violations of the Foreign Corrupt Practices Act pertaining to alleged payments made to officials in Kazakhstan to obtain oil exploration and development rights. Giffen pled guilty to a single charge of failing to supply information regarding foreign bank accounts on his tax returns. Grynberg made a FOIA request for the records of the entire Giffen prosecution, but eventually narrowed his request to bank records, records from British Petroleum, and court transcripts. Documents not identified as exempt under FOIA during DOJ's initial review were logged into a 300-page index. Ultimately, the agency decided that all records except those publicly available were exempt. The agency withheld records under **Exemption 3 (other statutes)**, citing Rule 6(e) on grand jury secrecy. The court agreed, noting that "in the context of this criminal investigation, the Government's possession of these records establishes a strong likelihood that they were produced pursuant to a grand jury subpoena." To protect records that had been obtained from Switzerland, the agency had cited a mutual assistance in criminal matters agreement with Switzerland as qualifying under Exemption 3. Here, the court cited *Dongkuk International v. Dept of Justice*, 204 F. Supp. 3d 18 (D.D.C. 2016), in which a D.C. Circuit district court had ruled in a matter of first impression that a similar agreement between the U.S. and South Korea served as an Exemption 3 statute. The court observed that "like the MLAT in *Dongkuk*, this MLAT's description of what is to be withheld is limited to a particular type of matter narrow enough for Exemption 3: documents provided under Article 10, when accompanied with 'an application' requesting the document be kept private." (*Jack J. Grynberg v. U.S. Department of Justice*, Civil Action No. 17-723, U.S. District Court for the Southern District of New York, Feb. 1)

The D.C. Circuit has ruled that the FBI conducted an **adequate search** for records concerning its investigation of attorney Kel McClanahan's inadvertent receipt of classified documents during part of a FOIA suit. In 2012 and 2013, the FBI met with McClanahan and interviewed him concerning how he came into possession of the classified information. McClanahan subsequently made several requests to the FBI for information concerning its investigation of his possession of classified information. The FBI interpreted McClanahan's request as being for "records about any investigation of him or [National Security Counselors] in a particular context – the possession of classified information." The FBI located its investigative file and searched the email accounts of several FBI employees with whom McClanahan had communicated in the course of the investigation. The FBI released hundreds of pages of responsive records but withheld several hundred pages as duplicative or exempt. McClanahan argued that the FBI had interpreted his request too narrowly. But the D.C. Circuit noted that "contrary to the plaintiff's current characterization, however, McClanahan sought documents about the FBI's *investigation* into his possession of classified information, not 'documents about the classified information' itself." The court added that "if he had meant to make a sweeping request for all records about the classified information, regardless whether the records related to the investigation, the FBI could expect him to do so with greater precision, especially because FOIA largely exempts classified information." McClanahan also challenged the district court's decision to allow the FBI to submit an *in camera* affidavit. The court observed that "McClanahan sought records about the FBI's investigation into his possession of classified information. Unsurprisingly, his requests yielded classified records. . .[The FBI] determined, that, in this case, it could not responsibly [explain its justification for withholding the documents] except by submitting some of its declarations ex parte for in camera inspection."

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(*Kelly McClanahan, et al. v. Department of Justice*, No. 16-5316, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 31)

Judge Rosemary Collyer has ruled that Edward Richardson has failed to show that he suffered any actual damages under the **Privacy Act**. Richardson was hired to work in the law enforcement unit of the Federal Reserve. He had previously served as a military police officer with the U.S. Army and while serving in Iraq had been exposed to toxins and fumes that led to severe asthma and allergies. Richardson was terminated by the Board after a year because of unexplained absences. Richardson claimed Board employees had conspired to remove 22 medical documents supporting instances when he had been absent for medical reasons from his personnel file. He also claimed that after his termination two employees had illegally obtained his cellphone records and released them to other Board personnel in violation of the Privacy Act. Richardson remained unemployed after his termination and claimed the disclosures prevented him from getting a job. Collyer had previously found that the agency had not shown that disclosure of his cellphone records qualified as a routine use. The agency argued that since Richardson had not shown actual damages he had failed to state a claim under the Privacy Act. Collyer indicated that "the only remaining question, then is whether Mr. Richardson has state a claim that the alleged acts caused any *future* pecuniary loss that could be cognizable as damages under the Privacy Act." Collyer noted, however, that "setting aside whether these allegations would allege sufficient causation to sustain Mr. Richardson's claims," his claims "contain no such allegations attempting to link any improper acts by the Board to Mr. Richardson's continuing unemployment." (*Edward Richardson v. Board of Governors of the Federal Reserve System, et al.*, Civil Action No. 16-867 (RMC), U.S. District Court for the District of Columbia, Jan. 26)