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Washington Focus: A Sept. 27 report from the Bureau of Land Management recently obtained by the Washington Post suggests ways in which the agency might slow down the FOIA process. One suggestion contained in the report is to "limit the number of FOIA requests from any one group, requiring more stringent justification for fee waivers, and increased search and redaction fees so [the] agency can recover all of its direct costs." Writing for Gizmodo Media, Dell Cameron noted the report highlighted that the agency received "nearly 1,000" FOIA requests in FY 2017 and that in FY 2016, it spent $2.8 million on FOIA-related costs. Relying on statistics from the Department of Interior's annual reports, Cameron pointed out that BLM's FOIA requests peaked in 2006 with 990 requests and in 2016 it received only 852 requests. However, the number of FOIA suits filed against BLM by environmental groups like WildEarth Guardians, headquartered in Santa Fe, have increased since the Trump administration took office.

Court Rules Comey Memos Have Not Been Publicly Acknowledged

Ruling in a case consolidating five suits brought by media organizations and public interest groups, Judge James Boasberg has found that the Department of Justice properly withheld a series of contemporaneous memos written by former FBI Director James Comey memorializing his conversations with President Donald Trump under Exemption 7(A) (interference with ongoing investigation or proceeding) because they are part of the current investigation by Special Counsel Robert Mueller into Russian interference with the 2016 presidential election. While Boasberg's decision comes as no surprise as a legal matter, it leaves unanswered questions about how documents such as the Comey memos, the details of which are so frequently in the news, can still remain unknown to the public. Boasberg's decision, in fact, is yet another illustration of how nearly impossible it has become to make a case for public acknowledgment through repeated references in the media, and, now, by Trump's barrage of tweets.

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The case was brought by CNN, *USA Today*, the Daily Caller, Judicial Watch, Freedom Watch, and the James Madison Project. To bolster its case for withholding the memos, DOJ submitted an *ex parte* and *in camera* affidavit from David W. Archey, Deputy Assistant Director with the Counterintelligence Division. Boasberg accepted that affidavit, but also had the agency produce the memos for *in camera* review. To aid his deliberations further, Boasberg also received a sealed affidavit from Michael Dreeben, Counsel to the Special Counsel.

Boasberg first addressed whether the memos met Exemption 7's threshold requirement that the records were created or compiled for law enforcement purposes. He noted that the Special Counsel's jurisdiction included "the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses." He pointed out that "although the Government has been tight-lipped in its briefing about exactly why the Special Counsel compiled these Memos, the First Archey Declaration confirms that the Office did so for law-enforcement purposes – *i.e.*, in service of that investigation." Recognizing that the plaintiffs did not have access to the government's *in camera* affidavits, Boasberg indicated that several plaintiffs argued that Comey created the memos for political purposes, not law enforcement purposes. Boasberg, however, pointed out that "that may be so, but it matters not if the Memos 'were generated on an earlier occasion for a different purpose.'" He explained that "Comey's intent –whatever it was – is therefore irrelevant for Exemption 7 purposes." He continued: "Here, the Special Counsel has 'gathered' or 'used' each of the Comey Memos for his investigation. That suffices to satisfy Exemption 7's threshold requirement." The Daily Caller argued that the FBI had found the Comey Memos in its own files, not those of the Special Counsel. Boasberg responded that "this is true, but irrelevant." He pointed out that "the exemption applies to 'documents already collected by the Government originally for non-law-enforcement purposes.' Naturally enough, copies of those documents might remain in their original, innocuous file. But a 'plaintiff may not circumvent the effect of Exemption 7 by seeking information in the investigatory file from other unprotected government sources.' Nor does the agency lose Exemption 7 protection simply because it happened to search for the document there, rather than in the Special Counsel's files. The fact that 'other copies exist in government files does not strip those documents – and the information they contain – of their exemption from disclosure.''

Having found the memos were compiled for law enforcement purposes, Boasberg turned to an examination of whether disclosure would interfere with the ongoing investigation. The plaintiffs emphasized that Comey had spoken publicly about the Memos and "they wonder how much damage release could inflict now." Boasberg observed that 'while Comey may have testified about some material in his Memos, he has never disseminated copies publicly." He pointed out that "until the Memos themselves enter the public domain, much remains uncertain about their contents" and explained that "those 'lingering doubts' about the accuracy or thoroughness of Comey's [public] testimony suffice to satisfy Exemption 7(A)." He added that "the important point is that until the Memos are released, the public (or potential witnesses) cannot *know* how accurate his recall of the Memos' content was."

The plaintiffs argued that Justice had waived any exemption claim "principally because Comey testified publicly as to the contents of the documents and also provided a copy of at least one Memo to his personal friend, Columbia Law School Professor Daniel Richman. These actions, they say, forfeited any 'otherwise valid exemption claim,' at least as to those Memos (or portions thereof) publicly discussed." Boasberg disagreed, noting that "in this case, the Director's oral account of the memos is no substitute for the written hard copy." Pointing out that Comey testified after he had been fired from the FBI, Boasberg observed that "statements made by former government officials, even high-level ones, do not constitute official acknowledgement." Although Comey had testified that he considered the Memos his personal recollections, and not official agency records, at the time he disclosed information to Richman, Boasberg explained that

"Comey's limited disclosure to one friend, even if made in his official capacity, is insufficient to waive Exemption 7(A) protection." He pointed out that "in this case, the withheld documents are far from 'truly public. On the contrary, they exist – at most – in one law professor's possession. Professor Richman's home or office hardly qualifies as the 'public domain.'" The plaintiffs argued that in *Students Against Genocide v. Dept of State*, 257 F.3d 828 (D.C. Cir. 2001), the D.C. Circuit found that "a disclosure made to any *FOIA requester* is effectively a disclosure to the world at large." Boasberg observed that "they argue by analogy that a disclosure made to *any person* had the same effect, but that is a bridge too far. Comey's discretionary release of documents to a close friend is hardly analogous to the agency's release of information due to statutory obligation. . .Here, Comey apparently made a judgment call that he could entrust at least one Memo to Richman *without* their broader release. His choice to do so did not automatically catapult those documents into the public domain, and the Court will not assume Richman will release them more widely absent evidence to the contrary." Comey had authorized Richman to describe the contents of the Memo to the *New York Times*, but the *Times* reporter did not see a copy of the Memo. Boasberg noted that "to the extent Richman still holds copies, he has kept them close to his vest. Were it otherwise, Plaintiffs would have little need to seek the Memos by way of FOIA."

Boasberg acknowledged the skewed state of affairs, calling the situation "rather unprecedented." He pointed out that "it is not every day that an FBI Director feels the need to memorialize his conversations with a sitting President and then publicize that he did so. But the caselaw aligns with common sense. The public-domain doctrine exists because release of a 'truly public' document can do little harm to the agency's interests; in that case, the exemption 'can serve no purpose.' Here, by contrast, the Memos are possibly held by one person outside the agency, and the Bureau and Special Counsel still have something to lose by their dissemination to the broader public. The Court therefore holds that Comey's release of any documents to his close friend does not waive the agency's otherwise valid Exemption 7(A) defense." (*Cable News Network, Inc., et al. v. Federal Bureau of Investigation*, Civil Action No. 17-1167, 17-1175, 17-1189, 17-1212, and 17-1830 (JEB), U.S. District Court for the District of Columbia, Feb. 2)

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 FOI Commission properly concluded that records concerning traffic stops and arrests for driving under the influence maintained by the Montville Police Department are agency records of the police department and are subject to disclosure to Robert Cushman, but that because the FOI Commission failed to consider the department's claim that the records were preliminary drafts that issue must be remanded to the commission for consideration. By contract, the Department of Emergency Services and Public Protection provides resident state police officers to operate Montville's police department. In response to Cushman's request to Montville, the town adopted the argument of the DESPP that arrest records belonged to the state police and not the town. The FOI Commission rejected that contention and ruled that Montville must disclose the records it maintained. The court sided with the commission, noting that its holding that "the records maintained by the plaintiff are subject to disclosure by the plaintiff is, implicitly, a holding that DESPP has no statutory authority to order the plaintiff to deny a public records request in the circumstances of this case." But the court found that Montville had asserted at a rehearing that the reports were preliminary

drafts. Here, the court pointed out that "based at least in part on the hearing officer's mistaken representation that the claim had not been raised before her, and the interjection of another person that the commission's regulations preclude raising an issue before the commission that was not raised before the hearing officer, the commission did not include in its final decision a ruling on the applicability of the preliminary draft exemption." The court noted that evidence existed supporting both the rejection and adoption of the exemption and as a result explained that 'the plaintiff's substantial rights were prejudiced when the commission failed to rule on a claim that it had duly presented." The court sent the case back to the commission to consider the applicability of the preliminary draft exemption to the arrest records. (*Montville Police Department v. Freedom of Information Commission, et al.*, No. HHB-CV-14-6026251-S, Connecticut Superior Court, Judicial District of New Britain, Feb. 1)

Florida

A court of appeals has ruled that the State Attorney did not violate the Public Records Act when it required an attorney to travel 25 miles to inspect records he had requested. Kevin Carson, the attorney for L.J. Johnson, requested records from an assistant state attorney in Lake City about the state attorney's investigation into an unintentional discharge of a gun while Johnson was in a local store. The state's attorney who had handled the case was located in Live Oak. The state attorney reviewed the records and sent a letter dated February 2, telling the defense attorney that he could review the records in Live Oak. The letter was inadvertently delayed in the mail and did not arrive until February 9. By that time, Carson had filed suit, claiming the state attorney had failed to respond within the statutory time limit. The trial court sided with Carson, not because of the delay, but because the response would require Carson to travel 25 miles to review the records. The appeals court found that the delay was minimal but reversed the trial court on the issue of whether requiring Carson to travel was improper. The appeals court explained that the statute required agencies to provide reasonable access and noted that "the Act does not define 'reasonable' as requiring government officials to move records from where they are being maintained to a different place convenient to the requester." The appeals court pointed out that "by making the records available at his main office in Live Oak, where they had been reviewed for exemptions pending Mr. Carson's inspection, [the state attorney] satisfied his legal obligation. His office was a reasonable place to make the State Attorney's records available in the Third Circuit, even if Mr. Carson had to drive some twenty-five miles to view them." (*Jeffrey A. Siegmeister v. L.J. Johnson*, No. 1D17-992, Florida Court of Appeal, First District, Feb. 20)

Maryland

A court of appeals has ruled that the Office of the Attorney General properly withheld some records concerning its decision to terminate an African American female employee because they fell within several legal privileges. After being terminated, the former employee filed a complaint with the Maryland Commission on Civil Rights. During that proceeding, she learned for the first time that the OAG had received written complaints about her work. She then requested records concerning her termination under the Public Information Act. The OAG withheld some records, the former employee filed an administrative appeal, and an administrative law judge ruled in favor of the agency's decision. The MCCR also concluded that her firing was not done on the basis of race. The former employee filed suit and the trial court sided with the agency. The former employee appealed the case to the Court of Special Appeals, which upheld the lower court's ruling. The former employee argued that OAG communications with the MCCR regarding its investigation were not confidential when in the possession of another agency. But the appellate court noted that "a literal reading of the words of [the statutory provision] could support the appellant's view but would produce absurd results. While the MCCR's internal communications about an investigation would be confidential, all its investigative communications would be exposed to disclosure. That could not have been what the General Assembly intended." The former employee claimed the OAG waived its attorney work-product privilege

when it shared its final decision with MCCR. The court rejected the claim, noting that "draft documents are not themselves facts that underlie the final versions; rather, they are work product that likely contain mental impressions, conclusions, and opinions that did not make it into the final version." Dismissing her argument that some of the privilege claims undercut the public interest in disclosure, the appeals court observed that "when a privilege applies to protect a document from disclosure, there is a presumption that disclosure of the document is contrary to the public interest. That is because the interest that underlies a privilege suffices to prove that inspection of the document is contrary to the public interest. The public policy behind the deliberative process privilege is to encourage open and frank administrative discussions between government decision-makers. Allowing these 'frank discussions' to be revealed is contrary to the public interest." (*A.C. v. Office of the Attorney General*, No. 791, September Term, 2016, Maryland Court of Special Appeals, Feb. 13)

Oregon

The supreme court has ruled that a provision in the Public Meetings Law requiring public bodies to meet in public if a quorum is present raises a factual question as to whether contract negotiations between the Tri-County Metropolitan Transportation District of Oregon and the Amalgamated Transit Union Local 757 can be closed if a quorum of TriMet's negotiating team is present at any session. When the union indicated that it expected the bargaining sessions to be held in public under the Public Meetings Law, TriMet filed for a declaratory judgment that it was not required to bargain in open session. The trial court ruled in favor of TriMet, but the court of appeals found that because TriMet's negotiating team represented a governing body of the agency, when and if a quorum was present the meetings had to be held in public. The supreme court agreed, noting that "TriMet's construction of [the Public Meeting Act's meeting requirements] would mean that a public body could shield deliberations and decisions on a given matter from public scrutiny simply by delegating authority over those deliberations to a governing body and failing to specify a quorum requirement for the governing body to act." The supreme court added that "the overarching policy of the Public Meetings Act persuades us that the legislature intended the broad language of [the provision] ('may not meet in private') to reach some decision-making of a governing body that does not occur in a 'meeting.'" The supreme court concluded that TriMet had not shown that a quorum of its negotiating team would not meet with the union. Instead, the court noted that TriMet's explanation that it would not bargain with a quorum of its members "does not preclude a determination that, by default, the 'quorum' consists of a majority of the members of the team or, perhaps, that the team's 'quorum' is simply the number of members who, in fact, show up to exercise the bargaining authority that TriMet has delegated to the team." The court rejected the union's contention that TriMet was required to bargain with a quorum, observing that such a requirement would prohibit the ability of a public agency to use a single negotiator. (*Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union Local 757*, No. SC S064006, Oregon Supreme Court, Feb. 15)

Pennsylvania

A court of appeals has ruled that the Office of the Attorney General properly withheld records concerning the identities of officials involved in an investigation of the receipt of inappropriate email. In response to Justin Credico's request for the identities of individuals involved in the scandal, the OAG denied his request. But the OAG's appeals officer concluded that because a redacted version of the Gansler Report on the investigation had been made public, OAG was required to determine if the report was responsive. However, after reviewing the Gansler report, the appeals officer found it was not responsive because the identities had been redacted. She then also denied Credico's request. Credico argued that the criminal law investigation exemption did not apply once an investigation was closed. The court disagreed, noting that "to the contrary, Section 708 exempts from disclosure records and reports relating to criminal investigations regardless of the status of the investigation." The court added that "because the unredacted Gansler Report is

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a 'record of an agency relating to or resulting in a criminal investigation,' it is exempt from disclosure under the criminal investigation exemption. . ." (*Justin Credico v. Office of Attorney General*, No. 251 C.D. 2017, Pennsylvania Commonwealth Court, Feb. 14)

Wisconsin

The supreme court has ruled that the Wisconsin Employment Relations Commission properly denied requests from Madison Teachers, Inc. for records identifying the employees of the Madison Metropolitan School District who had voted as of the date of the requests during union certification elections because the public interest in keeping elections free from voter intimidation and coercion outweighed the public interest in disclosure. After WERC denied its requests, MTI filed suit. The trial court ruled in its favor, awarding $41,462.50 in attorney's fees and $100 in statutory damages. As a result of changes in Wisconsin's laws concerning union representation of public employees, WERC is required to certify annually that the union representing public employees received at least 51 percent of the votes of all employees included in the collective bargaining unit. If the union falls short of 51 percent, WERC is required to decertify the union as the employees' collective bargaining representative once the then-existing collective bargaining agreement expires. The court pointed out that "given MTI's repeated requests for the names of those who voted before the election concluded, it is entirely possible that those employees who had not yet voted would become subject to individualized pressure by MTI of a type that MTI could not exert when speaking to all members of the bargaining unit collectively." The court observed that "the public has a significant interest in fair elections, where votes are freely cast without voter intimidation or coercion. Accordingly, the public interest in elections that are free from intimidation and coercion outweighs the public interest in favor of open public records under the circumstances presented in the case before us." Decrying the court's third recent decision upholding agency exemption claims, Justice Ann Walsh Bradley explained that "neither the majority nor the records custodian points to any evidence of voter intimidation or coercion by MTI in this recertification election. Rather, this concocted concern is based solely on one uninvestigated and unsubstantiated complaint from Racine County. . .that did not involve a public records request." Bradley noted that "the unfounded speculation that the records might be used for improper purposes does not outweigh the strong public interest in opening the records to inspection." (*Madison Teachers, Inc. v. James R. Scott*, No. 2016AP 2214, Wisconsin Supreme Court, Feb. 6)

The Federal Courts…

To settle Public Citizen's suit against the Secret Service for visitor's records for the handful of EOP agencies subject to FOIA – OMB, the Office of Science and Technology Policy, the Office of National Drug Control Policy, and the Council on Environmental Quality – the agency has agreed to make modifications in its Workers and Visitors Entry System database to capture information about visitors to those four offices. The White House Office of Records Management will separate the records based on the individual EOP employee's email address contained in the Caller_Email field. The settlement agreement notes that "if the Caller_Email field in the record does not indicate that the requester is employed by one of the FOIA Components, the record will be treated as not responsive to the FOIA requests. No other records will be considered responsive to Public Citizen's FOIA requests. For purposes of this settlement, Public Citizen's FOIA requests underlying the instant litigation, as well as requests pending at the Secret Service for WAVES and [Access Control Records System] records of visits to the FOIA Components as of the date of settlement." Beginning 60 days after settlement, OMB agreed to post responsive records from January 20, 2017 until the date of the settlement agreement in its FOIA online reading room. OMB committed to posting one-third of the

records within 5 months, two-thirds of the records within 8 months, and all the records within 11 months. The settlement also indicated that "Public Citizen reserves the right to request under FOIA from the FOIA Components any Responsive Records that are redacted or withheld and to file actions against the FOIA Components challenging any such redactions and withholdings. The Secret Service agreed to pay Public Citizen $35,000 to settle the suit. (*Public Citizen, Inc. v. United States Secret Service*, Civil Action No. 17-01669-CRC, U.S. District Court for the District of Columbia, Feb. 13)

A federal court in New York has ruled that the Secret Service properly withheld details concerning its air transportation costs for providing protection to Donald Trump and Hillary Clinton during the 2016 Presidential campaign under **Exemption 7(E) (investigative methods and techniques)** and **Exemption 7(F) (harm to any person)** in response to four requests from *New York Times* reporter Jeremy Merrill. The agency provided the total costs per trip, but redacted information disclosing the total number of passengers, the total number of Secret Service passengers, the total cost of each leg, and the cost per passenger on each flight. The *New York Times* argued that disclosure of staffing on 2016 flights was not predictive of staffing guidelines for the 2020 Presidential campaign nor staffing guidelines outside the campaign context and, as a result "would not divulge anything about the staffing of protective details on future flights." The court accepted an *in camera* affidavit filed by the agency, but indicated that "this opinion analyzes only the public declaration," adding that "the analysis of the *in camera* declaration is provided in an appendix to this opinion, which is filed under seal in the U.S. District Court for the Southern District of New York." Judge Paul Crotty began by indicating that the term "guidelines" as used in Exemption 7(E) "provide guidance for *future* conduct. Guidelines cannot merely be a recitation of something that has already happened." The agency argued that disclosure of staffing information from the 2016 would allow adversaries to infer the staffing needs more generally. Crotty pointed out that "the redacted information, when extrapolated, enable a person to predict the number of agents assigned to protective details in similar flight operations, and hence, the Service's protective means and methods. These protective means and methods are not merely a recitation of what has already happened; they provide guidance on the Service's future operations. They are exactly the type of 'guidelines' on resource allocation that Exemption 7(E) is designed to protect." He noted that "the redacted information would expose a portion of the Service's protective means and methods used under similar circumstances. After all, the number of agents assigned to protective details *is* one part of the Service's protective operational means and methods. It may not reveal the protective methods in their entirety. But Exemption 7(E) does not require that. As long as withheld information would reveal an aspect of a resource allocation scheme. . .Exemption 7(E) applies." Crotty then found the agency had shown a risk of circumvention of law if the information was disclosed. He explained that "the number of agents assigned to a 2016 campaign flight would enable an adversary to estimate the number of agents that would be staffed on future flights." In *ACLU v. Dept of Defense*, 543 F.3d 59 (2d Cir. 2008), the Second Circuit rejected the government's contention that Exemption 7(F) could be applied to all U.S. troops as well as Iraqi and Afghani citizens, but had recognized that the exemption could apply if a discrete group was sufficiently identified. Crotty found that standard had been met here to include certain government officials and Secret Service agents. He pointed out that "this risk of danger is reasonably specific to the Identified Group. . .Here, Secret Service protectees are high priority targets of organizations and foreign powers, as well as terrorist organizations." He noted that "accordingly, the Court finds that the Service has identified 'any individual' with reasonable specificity; and established that the disclosure of redacted information could reasonably be expected to endanger the Identified Group." (*New York Times Company and Jeremy Merrill v. United States Secret Service*, Civil Action No. 17-1885 (PAC), U.S. District Court for the Southern District of New York, Feb. 5)

Judge James Boasberg has ruled that the IRS has not shown that Thomas and Beth Montgomery's FOIA requests pertaining to a suspect tax investment scheme used by the Montgomerys are subject to either **collateral estoppel** or ***res judicata***. The IRS previously found that two partnerships that allowed the Montgomerys to claim tax losses without any real economic loss were shams and disallowed losses the Montgomerys had claimed on their individual tax returns. The two partnerships filed suit against the government and the Fifth Circuit found that one of the partnerships was legitimate. As the result of a settlement agreement, the IRS was ordered to refund the Montgomerys $485,588. The Montgomerys then submitted FOIA requests to the IRS looking for the identity of a likely confidential informant. The IRS denied that portion of the Montgomerys' request under **Exemption 7(D) (confidential source)**. The Montgomerys filed an administrative appeal, which was denied. The IRS claimed that its settlement agreement with the Montgomerys prohibited any further action by them on the issue. Boasberg, however, noted that the term "ongoing disputes" in the Settlement Agreement "is limited to the consolidated cases in [the previous litigation resulting in the refund]. As Plaintiffs' FOIA suits had not yet been filed, it is not barred by the plain language of the agreement." The IRS then argued that collateral estoppel, which prevents a party from bringing suit on an issue that has been previously decided, applied to block the Montgomerys' FOIA suit. Boasberg disagreed. He noted that "the Service never alleges that [in the litigation resulting in the refund] Plaintiffs asked for, and were denied, access to the records that they seek here." He pointed out that "access to records, not what those records may detail, is the relevant question here." Boasberg also rejected the IRS's claim that *res judicata* – prohibiting the same parties from relitigating issues that had already been decided in prior litigation – applied. Boasberg pointed out that "the Government's *res judicata* argument founders on a more basic ground: this FOIA suit and the previous litigation do not share a cause of action." He observed that "Plaintiffs' FOIA claim – *i.e.*, whether the IRS's search was adequate and its claimed exemptions appropriate – is wholly different from what the previous courts assessed – namely, the Mongomerys' correct tax liability. The present suit is, therefore, not barred by *res judicata*." (*Thomas A. and Beth W. Montgomery v. Internal Revenue Service*, Civil Action No. 17-918 (JEB), U.S. District Court for the District of Columbia, Feb. 20)

Judge Amy Berman Jackson has ruled that, with one exception, the EPA has now shown that it conducted an **adequate search** for records concerning the investigation into toxic contamination at former Army Base Fort McClellan, but both the Department of Defense and the Department of Justice have still failed to show that their searches were sufficient. Because DOD's explanations of its further search for electronic records was inadequate, Jackson granted Raymond Pulliam limited **discovery**. Jackson also approved the EPA's exemption and segregability claims. In a prior ruling in 2017, Jackson found that none of the agencies has supported their search and exemption claims in response to Pulliam's FOIA requests and ordered all three agencies to conduct further searches and provide better justifications for their searches and exemption claims. Pulliam's request to DOD was for all correspondence received by Elizabeth King or Mary McVeigh. Jackson previously faulted DOD for only searching for emails. This time, the office of the Assistant Secretary of Defense for Legislative Affairs told the FOIA Office that any correspondence involving King or McVeigh would only be stored electronically. The Office of Environment, Safety and Occupational Health and the Office of Acquisition, Technology, and Logistics told the FOIA Office they had no paper records for the relevant time frame of Pulliam's request. Jackson found these explanations insufficient, noting that DOD "never argued in its papers that the search included electronic files other than emails." As a result, she granted Pulliam's request "to take a limited telephonic disposition of a DOD witness that is no more than ninety minutes in length." As to the search for paper records, Jackson noted that DOD's affidavit "fails to provide the 'rationale for searching certain locations and not others,' and [it] does not describe how the [offices] were actually searched. Therefore, [the affidavit's] description of a search for paper records is too cursory to enable the Court to determine whether the search was adequate." Jackson had ordered a further search of the EPA's OIG Office of Investigations. Pulliam complained that the agency's search of its outgoing correspondence files had failed to turn up any records for the period of his request. But Jackson pointed out that "the fact that

agency personnel did not have records that are more than ten years old on hand does not mean they did not comply with FOIA. [The agency's] explanation of the 'Outgoing Correspondence' files is sufficient to satisfy the Court that EPA conducted an adequate search." Jackson also agreed that the agency's search of the OIG Immediate Office was sufficient. Pulliam challenged the agency's decision to limit its email search to the email accounts of three staffers most likely to have responsive records. Jackson pointed out that "if further investigative steps had been taken by one of the three named individuals, those notes would have turned up in one of the searches that had already been conducted and that produced no responsive records. So [the agency] has sufficiently explained why specified record systems did not have to be searched again." However, Jackson found that the agency had failed to "provide any description of how the search [of one office] was actually conducted" and told the agency to clarify that issue. Jackson had previously found the search conducted by the OIG at the Department of Justice was insufficient because it did not include the names of several individuals. Finding DOJ's search was still inadequate, Jackson indicated that "as illustrated by the list of search terms used by EPA, terms exist that could have been used in a supplemental [database] search and a search of the audit and inspection records." (*Raymond C. Pulliam v. United States Environmental Protection Agency, et al.*, Civil Action No. 15-1405 (ABJ), U.S. District Court for the District of Columbia, Feb. 13)

Judge Christopher Cooper has ruled that the FBI properly issued a *Glomar* response neither confirming nor denying the existence of records in response to a request from Judicial Watch for records concerning whether the FBI had considered paying former British intelligence operative Christopher Steele for his dossier pertaining to allegations the Russians had compromising information about Donald Trump. Judicial Watch argued that Trump had publicly acknowledged the existence of records concerning payment for the Steele dossier in an Oct. 21 tweet that read "Officials behind the now discredited 'Dossier' plead the Fifth. Justice Department and/or FBI should immediately release who paid for it." Cooper disagreed. He noted that "clearly, this tweet does not publicly and officially acknowledge the existence of *any* documents related to the first and third parts of Judicial Watch's FOIA request – which sought records of communications between the FBI and Mr. Steele and records produced in preparation for any meetings or conversations between the FBI and Mr. Steele. The tweet makes no reference to any meetings or communications between the FBI and Mr. Steele. As such, it does not constitute a public acknowledgment of the existence of any documents within the scope of the first and third parts of Judicial Watch's request." Nor did the tweet address the matter of whether or not the FBI paid for the Steele dossier. Here, Cooper explained that "while the President's tweet could arguably suggest that the FBI has some records concerning who paid for the Trump Dossier, it does not acknowledge that there are records that *the FBI* paid for it. Because Judicial Watch must point to a public acknowledgement of the specific records it seeks, this tweet is insufficient to constitute public acknowledgement." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 17-0916 (CRC), U.S. District Court for the District of Columbia, Feb. 5)

Judge Timothy Kelly has ruled the Department of Justice has conducted an **adequate search** for records concerning Attorney General Jeff Sessions' calendar for several days during the period in which he recused himself from the investigation of the 2016 presidential campaign. In response to a request from CREW for Sessions' calendar as well as any ethics recommendations he had received, the Office of Information Policy provided some records and explained to CREW that Sessions' calendar was subject to daily change and might not always reflect his official calendar. CREW challenged the agency's search for Sessions' calendar, pointing to irregularities in his calendar for one of the days covered by CREW's request, including the fact that the press conference at which Sessions announced his recusal was not listed, and because the agency only located 11 pages of records, none of which contained advice to Sessions about his possible recusal. Kelly noted that "CREW's arguments boil down to this: DOJ's assertion of a reasonable

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search is not to be believed because it failed to produce the number and type of documents that CREW expected to receive. Unfortunately for CREW, courts have rejected such arguments time and time again." Kelly pointed out that "CREW's belief that additional documents must exist is based on nothing but supposition. And even as supposition, it cannot withstand scrutiny. It is hardly surprising that a busy day might turn out differently for a senior government official than was planned on his calendar. Nor is it unheard of that an official might receive sensitive advice orally rather than in writing." Kelly faulted CREW for asking DOJ to conduct a new search and indicated that CREW "provides no inkling of how those searches would differ from the ones that DOJ has already undertaken." Rejecting CREW's requested relief, Kelly observed that "CREW apparently wants DOJ to keep tilling the same ground until it hits pay dirt. But there is no good reason to compel DOJ to undertake this Sisyphean task. Thus, DOJ's labors in this case are at an end." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 17-599 (TJK), U.S. District Court for the District of Columbia, Feb. 15)

Judge Christopher Cooper has ruled that the CIA properly invoked a *Glomar* response neither confirming nor denying the existence of records in response to a request from Judicial Watch for the 2016 White House report on Russian meddling after the report was referenced in a *Wall Street Journal* article pertaining to a demand from House Intelligence Committee Member Rep. Mike Turner (R-OH) that the Obama administration release the report. Judicial Watch argued that the CIA had already publicly acknowledged the existence of the report through a January 2017 report issued by the Office of the Director of National Intelligence about Russian attempts to interfere in the U.S. election, which was prepared by the CIA, the FBI and the NSA. Cooper rejected Judicial Watch's claim, noting that "but even if the 2017 Assessment did prove that the CIA was responsible for that information, it still does not amount to a public acknowledgement that can overcome a *Glomar* response. This is because Plaintiff requested a *specific document*: 'a copy of the unclassified assessment or report identified in the *Wall Street Journal* article. And nowhere does the 2017 Assessment acknowledge the existence of a CIA report assessing Moscow's interference in foreign elections. The only person alleged to have acknowledged the existence of that report is Congressman Mike Turner when he spoke to the *Wall Street Journal*. Needless to say, this does not constitute a public acknowledgement *by the Agency*." Cooper added that "here Judicial Watch has not requested all documents related to a particular topic; rather, it has requested *one, particular* document. And the 2017 Assessment's brief reference to Russia's interference in European elections is not 'an agency record' that acknowledges the existence of that particular document." Cooper observed that "while it may be that the CIA does in fact have the report referenced in the *Wall Street Journal* article, the Court's inference that a record exists cannot stand in for a Plaintiff's showing of an official acknowledgment. Participating in intelligence community-wide assessments about related topics does not amount to a public acknowledgement that the CIA has a specific document." Cooper found that both **Exemption 1 (national security)** and **Exemption 3 (other statutes)** provided an adequate basis for the agency's *Glomar* response. (*Judicial Watch, Inc. v. Central Intelligence Agency*, Civil Action No. 17-00414 (CRC), U.S. District Court for the District of Columbia, Feb. 7)

Judge Amit Mehta has barred Freedom Watch from challenging the Department of State's withholdings, searches, and segregability decisions pertaining to the majority of its 50-part request for records concerning former Secretary of State Hillary Clinton after Freedom Watch twice failed to meet and confer with the agency as ordered by the court. Freedom Watch ignored the first meeting, claiming later that it had no desire to narrow the issues in dispute. Mehta then ordered State to provide a *Vaughn* index so that Freedom Watch could review it and then meet with the agency. As to the second meeting, Mehta noted that "despite this straight forward directive, Plaintiff's counsel apparently viewed compliance as optional." Nearly a week after the deadline had expired for the second meeting, State's attorney reached out to Freedom Watch's

attorney, who said he had not even looked at the *Vaughn* index and asked State to re-send it. State did so and tried to arrange a phone call three days later. Instead, Freedom Watch emailed State and told it that the agency had a pattern and practice of improperly withholding records during Clinton's tenure and that the court should either review the records *in camera* or allow Freedom Watch to take discovery. Fed up with Freedom Watch's behavior, Mehta noted that "Plaintiff's counsel's disregard of the court's orders in this case is remarkable. Counsel apparently thinks that meeting and conferring 'in good faith' means on whatever schedule is convenient for him and in whatever manner he so chooses. He also must believe that the court's orders do not place any real obligation on him, but instead present opportunities to take baseless potshots at opposing counsel. It takes real chutzpah to ignore the court's orders and, at the same time, to act the aggrieved party. One would think that, if counsel's objective is to convince this court that his opponent is acting in bad faith, he would hold himself to a higher standard. Apparently not." Mehta explained that he was reluctant to sanction Freedom Watch by dismissing the case and indicated instead that 'the lesser sanction chosen by the court – barring Plaintiff from challenging Defendant's withholdings, searches, and segregability determinations as to certain requests – is fair." He noted that the subject matter of those requests was being litigated by other plaintiffs as well and pointed out that "to the extent responsive, non-exempt materials are not already in the public domain, they surely will be at some point and thus available to Plaintiff. Consequently, Plaintiff's inability to press its own arguments as to those records does not substantially impair its interests but does relieve Defendant of re-litigating those issues in this case. In light of Plaintiff's counsel's conduct, that is a just outcome." (*Freedom Watch, Inc. v. U.S. Department of State*, Civil Action No. 15-01264 (APM), U.S. District Court for the District of Columbia, Feb. 21)

Although Judge James Boasberg had dismissed on January 30 a pattern or practice claim brought by the American Center for Law and Justice against the Department of State alleging the agency required requesters to sue to obtain records, Judge Trevor McFadden has allowed ACLJ to continue a separate suit with the same allegations. Relying on Boasberg's prior ruling on June 8, 2016, finding that ACLJ had sufficiently stated a pattern and practice claim sufficient to move forward, McFadden agreed that "ACLJ makes such an allegation, claiming that State has an 'impermissible practice, policy, and pattern of refusing to [comply with FOIA] unless and until Plaintiff files suit.'" McFadden noted that "despite State's arguments to the contrary, ACLJ has sufficiently alleged a pattern of violating FOIA akin to the 'persistent refusal' to comply with the law that justified equitable intervention in *Payne Enterprises v. USA*, 837 F.2d 486 (D.C. Cir. 1988)." (*American Center for Law and Justice v. United States Department of State*, Civil Action No. 16-01975-TNM, U.S. District Court for the District of Columbia, Feb. 8)

A federal court in Maryland has ordered the IRS to provide records it withheld from Abelrahman and Sara Ayyad for *in camera* inspection after finding the agency has failed to justify most of its exemption claims. The Ayyads requested records concerning their tax returns from 2006-2012, identifying Kenneth Feldman as the IRS agent in Baltimore who had handled their case. The agency located 2,885 pages and told the Ayyads that it would disclose them in PDF form. The agency redacted 21 pages and withheld 120 pages. After their administrative appeal was denied, the Ayyads filed suit, claiming the agency had failed to conduct an **adequate search** because it had not disclosed Feldman's email correspondence. Feldman located an additional 872 pages. The agency redacted 176 pages and withheld 27 pages entirely. The Ayyads questioned why certain correspondence to their attorney was not included, but the agency was unable to resolve that issue. However, the agency then found another 6,568 pages. The agency redacted 412 pages and withheld 3,474 pages. While the court found the agency's search was now adequate, it noted that "it is almost impossible to determine the significance of the remaining claimed deficiencies in the IRS production. This is because the Court cannot ascertain whether any of the 'missing' documents to which the Ayyads point are part of the

withheld records under claimed exemptions. The Court suspects this may be the case." But the court found that the agency's multiple claims under **Exemption 5 (privileges)**, **Exemption 3 (other statutes)**, and **Exemption 7 (law enforcement records)** were not sufficiently explained. The court accepted some of the agency's claims under **Exemption 7(A) (interference with ongoing investigation or proceeding)** and **Exemption 7(E) (investigative methods and techniques)** but indicated that for others "the descriptions are simply too vague and nonspecific to make any determination. Even with the more deferential standard given to law enforcement withholding, the agency's conclusory assertions cannot carry their FOIA burden." Finding the agency had dragged out the litigation too long, the court ordered the agency to provide the records for *in camera* review. The court observed that "the Ayyads' initial FOIA requests were propounded almost *two years* ago, and yet the conversation remains centered on the IRS' failure to fulfill its well-established obligation to describe *with particularity* the bases for claiming withholding so that the Court can properly assess the legal propriety of the claimed exemptions. This Court will not delay further review any longer." (*Abelrahman & Sara Ayyad v. Internal Revenue Service*, Civil Action No. 16-3032, U.S. District Court for the District of Maryland, Feb. 2)

Judge Amit Mehta has ruled that neither the Criminal Division of the Department of Justice nor EOUSA has shown that it conducted an **adequate search** in responding to a request by prisoner Victor Rodriguez. about his death penalty case from the Eastern District of Pennsylvania. The Criminal Division searched its Capital Case Section and located 574 pages. It withheld 97 pages in full and referred 473 pages to EOUSA for a direct response. EOUSA told Rodriguez that it was withholding the 473 pages entirely under a variety of exemptions. DOJ argued that both searches were adequate. Mehta, however, noted that the affidavit submitted by the Criminal Division "is not sufficiently detailed to permit the court to share in that assessment. [The affidavit] states that the search was sent *only* to CCS 'based upon the nature of the records Plaintiff requested.' [The affidavit] does not, however, explain why 'the only reasonable place to look for' the documents was within CCS or why 'no other records systems are reasonably likely to contain' responsive records. Moreover, although [the affidavit] discloses the number of responsive records that the agency located, [it] does not set forth the search terms CCS used or the method and type of search CCS performed to identify those records. As a result, neither Plaintiff nor the court can adequately assess whether the agency's search complied with FOIA." Mehta found the affidavit submitted by EOUSA added little. He noted that "although [EOUSA's affidavit] suggests that EOUSA conducted its own independent search for records responsive to Plaintiff's request, [it] is silent as to whether any such search was conducted. Instead, [the EOUSA affidavit] merely affirms that EOUSA received and reviewed the 473 pages of responsive documents referred by the Criminal Division." Mehta concluded that "without evidence of the search terms and method of search used by the Criminal Division and an explanation for why CCS was the *only* location that housed responsive documents, the court finds that genuine issues remain about the adequacy of the search." (*Victor Rodriguez v. Federal Bureau of Investigation, et al.*, Civil Action No. 16-02465 (APM), U.S. District Court for the District of Columbia, Feb. 21)

Judge Christopher Cooper has ruled that the Department of Homeland Security properly issued a *Glomar* response neither confirming nor denying the existence of records in response to Jason Mount's request for Inspector General records pertaining to allegations that a special agent lost his official credentials to a prostitute and the credentials had to be retrieved by the local police. The agency claimed **Exemption 7(C) (invasion of privacy concerning law enforcement records)** provided the justification for its *Glomar* response. The agency claimed the Inspector General's function was to investigate allegations of fraud and abuse that could lead to criminal charges. Cooper pointed out that 'given this function, any OIG investigation of a Special Agent losing his credentials to a prostitute would be related to the enforcement of federal laws and connected to OIG's law enforcement duties." Cooper agreed with the agency that disclosure would confirm

that the agency had investigated the special agent. Mount argued that the public interest in knowing how the agency handled allegations of misconduct was sufficient to override the privacy interest. But Cooper pointed out that "the D.C. Circuit 'has consistently found that interest, without more, insufficient to justify disclosure when balanced against the substantial privacy interest weighing against revealing the targets of a law enforcement investigation.' Mount does not provide 'more' here. Consequently, under D.C. Circuit precedent, the public interest is not strong enough to justify the privacy invasion." (*Jason Mount v. Kirstjen Nielsen*, Civil Action No. 16-2532 (CRC), U.S. District Court for the District of Columbia, Feb. 5)

Judge Beryl Howell has ruled that the Bureau of Prisons properly responded to prisoner Michael Evans' requests for records concerning an altercation he had with a fellow prisoner who allegedly stabbed Evans with a screwdriver. Evans submitted a photo of the screwdriver and asked BOP to identify it and explain how it got in the hands of the prisoner who stabbed Evans. He also requested a videotape of the incident. The agency withheld the videotape under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)** and told Evans FOIA did not require it to answer questions about the screwdriver. Howell noted that "the plaintiff's reformulated request indeed calls for responses to inquiries: the plaintiff supplied a copy of a screwdriver, and expected the BOP to identify its manufacturer, to provide the manufacturer's phone number and mailing address, to specify the tool's use, and to explain how and when a particular screwdriver found its way to FCI Gilmer. The FOIA is designed 'to provide access to those [records] which [an agency] in fact has created and retained.' Any substantive response to the plaintiff's inquiries about the screwdriver exceeds the FOIA's scope, and the BOP was not obligated to answer questions presented in the guise of a FOIA request." Howell found that both Exemption 7(C) and Exemption 7(E) applied. She pointed out that "BOP demonstrates that release of the video recording necessarily identifies the location of the cameras and the methods employed in responding to or investigating incidents such as the inmate-on-inmate assault recorded here." (*Michael S. Evans v. Federal Bureau of Prisons*, Civil Action No. 16-2274 (BAH), U.S. District Court for the District of Columbia, Feb. 5)

A federal court in California has ruled that emails revealing the identity of a Postal Service employee at the Santa Cruz post office who took a picture of postal activist Douglas Carlson while he was filming the new post office there are protected by **Exemption 5 (privileges)** because they related to the agency's investigation into Carlson's complaint rather than its response to Carlson's FOIA request for the employee's identity. After Carlson requested records identifying the employee, the Postal Service withheld the information under Exemption 5 and Exemption 6 (invasion of privacy). The agency contended that an email exchange between an agency attorney and the employee who took the photo fell within the attorney-client privilege, while Carlson argued that the exchange pertained to his FOIA request for the employee's identity. The court sided with the agency, noting that "given that [the Postal Service attorney who investigated Carlson's complaint] was also copied on the email. . .that began the internal investigation of Carlson's complaint, the fact that the email [from the employee who took the photo] was passed on to her is not necessarily inconsistent with the Postal Service's claim that the email exchange between [the employee who took the photo and a supervisor] was part of its investigation and not in response to Carlson's FOIA request." (*Douglas F. Carlson v. United States Postal Service*, Civil Action No. 15-06055-JCS, U.S. District Court for the Northern District of California, Feb. 16)

A federal court in Virginia has ruled that EOUSA properly responded to Brian Hill's request for records concerning his prosecution in the Middle District of North Carolina by disclosing 68 pages in full and 26 in part. Hill complained that records about the investigation that led up to his prosecution were missing from the records disclosed. Ruling for the agency, the court noted that "with regard to both of his arguments,

Plaintiff has failed to present any evidence to establish the records are *currently* in EOUSA or DOJ's possession." The court observed that "Plaintiff has established that, on September 30, 2014, the audio CD of his confession was in EOUSA's possession. But his FOIA request was filed on July 25, 2016, almost two years later. It is well-settled that an agency, when responding to a FOIA request, is only obligated to produce records 'that are either created or obtained by the agency and are subject to the control of the agency at the time the FOIA request is made.' If EOUSA or DOJ did not possess [the records Hill was seeking] at the time of Plaintiff's FOIA request, there is no obligation under the law for EOUSA or DOJ to produce them pursuant to Plaintiff's FOIA request." (*Brian David Hill v. Executive Office for the United States Attorneys, et al.*, Civil Action No. 17-00027, U.S. District Court for the Western District of Virginia, Feb. 6)

A federal court in Ohio has ruled that the FBI conducted an **adequate search** for records concerning John Sharkey and properly redacted records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)**. Sharkey requested records concerning his attempts to contact the FBI pertaining to his whistleblowing claims involving alleged insider trading during two weeks in June 2016. The agency found no responsive records, a decision which was upheld on appeal. However, after conducting another search, the FBI located 26 pages on Sharkey, none of which were responsive to the timeframe in his request, which it released with redactions under Exemption 7(C) and Exemption 7(E). The court upheld the Exemption 7(C) claim, noting that "records such as these, that are compiled and/or generated in the course of an investigation into potential criminal activity are the very type of records that fall within the purview of Exemption 7(C)." The court upheld the Exemption 7(E) claim as well. The court pointed out that "the FBI withheld key indicators that it uses for determining whether and how it enters data into non-public databases used for official law enforcement purposes. . .[P]ublic disclosure of such information would permit criminals to determine the types of information the FBI gathers, analyzes and utilizes within the database, and would reveal the location where such records and information is stored, making it vulnerable to cyber attackers." (*John Sharkey v. United States Department of Justice*, Civil Action No. 16-2672, U.S. District Court for the Northern District of Ohio, Feb. 13)

The D.C. Circuit has ruled that the Office of Foreign Assets Control and the Department of State did not violate the **Privacy Act** when they posted personal information about Richard Chichakli because the disclosure fell within the routine use exemption in the Privacy Act. In 2004 under the International Emergency Economic Powers Act, President G.W. Bush declared a national emergency blocking property of certain people and preventing importation of goods from Liberia. OFAC determined that Chichakli was acting on behalf of arms-trafficker Viktor Bout, who was identified in the emergency order. OFAC issued a Blocking Notice listing Chichakli as a Specially Designated National subject to the provisions of the emergency order. OFAC transmitted Chichakli's information to the Department of State, which passed it along to the United Nations. Chichakli fled to Australia, but was extradited in 2009, sentenced to five years in prison, and remained in prison until June 2017. After President Barack Obama terminated the Bush emergency order in 2015, Chichakli was removed from the SDN list. He then sued OFAC and the State Department under the Privacy Act, alleging that he had been the victim of identity theft. The district court ruled in favor of the agencies, finding the posting was compatible with the routine use exemption. The D.C. Circuit agreed, noting that "under any reasonable interpretation, the purposes of OFAC's and the State Department's disclosures were compatible with the purpose for which each agency collected the information. The purpose for collecting Chichakli's identifying information – to investigate whether to designate him for economic sanctions and to impose the sanctions – is precisely aligned with the purpose of disclosure – to implement the sanctions by publishing the information to the public. This is true for OFAC, as well as the Department of State." The D.C. Circuit then observed that both agencies had published routine use exemption

notices that covered the disclosures. (*Richard A. Chichakli v. Rex Tillerson, et al.*, No. 16-5258, U.S. Court of Appeals for the District of Columbia Circuit, Feb. 13)

Judge Beryl Howell has ruled that the FBI properly declined to process Rolando Otero's FOIA requests after discovering that he still owed fees from a request he had made in 2000 and that his **Privacy Act** to amend his records was time-barred. Otero had made a number of FOIA requests to the FBI over the years and while processing a 2014 FOIA request, the agency discovered Otero stilled owed fees from the processing of a 2000 FOIA request and declined to continue to process his current request until he paid the remaining assessed fee. Otero also contended his records contained an allegation that he was HIV positive and asked the agency to expunge that information. In addressing that issue, the FBI found Otero had requested the same relief in 2002, based on a 1996 detention at the Indianapolis County Jail, where claims that he carried the HIV virus first surfaced. In response to the 2002 amendment request, the FBI told Otero the records were in an exempt system of law enforcement records under the Privacy Act. While Howell did not address whether Otero had **failed to exhaust his administrative remedies** by not challenging the FBI's fee assessment, she agreed with that the agency's regulations allowed it to require payment of fees that are still owed. She pointed that "the FBI is entitled to refuse to perform any additional work on the plaintiff's FOIA request because he had not paid the $20.10 still owed from the release of records in June 2000 in response to [his request]." Turning to Otero's Privacy Act expungement request, Howell observed that in response to his 2002 request for expungement the FBI had denied his request. Howell noted that "on February 13, 2002, the OIP affirmed the FBI's decision to deny amendment of agency records by expunging records indicating that the plaintiff is known or suspected of having been infected with HIV. Thus, the two-year statute of limitations applicable to Privacy Act claims would have expired on or about February 13, 2004. Accordingly, the Court concludes that the plaintiff's Privacy Act claim is time-barred." She also found Otero had not shown that he suffered any damages as a result of the FBI's failure to expunge his records, pointing out that Otero "identifies no support for an award of damages – actual or otherwise – arising from a purported violation of the Privacy Act." (*Rolando Otero v. Department of Justice, et al.*, Civil Action No. 14-2004 (BAH), U.S. District Court for the District of Columbia, Feb. 12)

A federal court in New Hampshire has ruled that Jason Berry failed to show that he suffered any actual damages under the **Privacy Act** when an FBI agent left a voicemail message for Berry on his parents' phone. Berry, a former probation and parole officer for the state of New Hampshire had assisted the FBI's Safe Streets Task Force. Berry made a FOIA request for records regarding his past involvement with the task force. FBI Agent John Hastbacka called Berry's parents and left a voicemail message on their phone, explaining that he was calling about some correspondence that Berry had sent the FBI and that he was unable to contact him on his own phone. Berry's parents were confused by the phone message. Berry filed suit, alleging the phone message constituted an improper disclosure under the Privacy Act. The court found that the Supreme Court's ruling in *FAA v. Cooper*, 566 U.S. 284 (2012), holding that only actual damages could be recovered for Privacy Act violations, was dispositive. Dismissing Berry's claim, the court noted that "here, the only injury Berry alleges in support of his claim for damages under the Privacy Act is emotional distress. Because damages for emotional distress are not included in the 'actual damages' available under the Privacy Act, Berry has not alleged a plausible claim for damages." (*Jason Berry v. Federal Bureau of Investigation, et al.*, Civil Action No. 17-143-LM, U.S. District Court for the District of New Hampshire, Feb. 5)

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