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Washington Focus: Writing in the FOIA Blog, Scott Hodes noted that the DOJ FOIA Guide seems to have fallen victim to the ease of posting government materials on the Internet. Hodes pointed out that in its earlier years, the DOJ FOIA Guide was updated and published in hard copy each year, although it eventually went to a two-year cycle. But with the advent of the Internet, Hodes explained that "the Guide went online. However, there is no longer any schedule for its sections to be updated, and many of its sections have not been updated since 2009. In fact, the most recent update for any section was 2015." Commenting on the consequences of failing to update the Guide, Hodes observed that "of course there have been many significant Court rulings as well as statutory amendments on the FOIA itself in 2016 since the Guide has last been updated." He added that "requesters and FOIA professionals would all benefit from a fresh up-to-date FOIA Guide."

CIA Limitation on Requests for Emails Constitutes Illegal Policy or Practice

Judge Ketanji Brown Jackson has ruled that the CIA's policy of refusing to process requests for emails unless the requester provides specific information identifying the individuals who sent and received the emails, the time frame of the email, and the subject matter of the email constitutes an illegal policy or practice under FOIA and has ordered the agency to discontinue using the policy. Jackson also found the agency had conducted adequate searches for records sought by MuckRock and had properly withheld records under Exemption 3 (other statutes).

In what has become a common practice in recent years, MuckRock filed suit consolidating multiple requests it had made to the CIA, with its primary challenge being to the email policy. The agency refused to process four of MuckRock's requests for emails because they did not provide the four data elements required by the agency before it would be willing to process such requests, claiming routinely that requests that did not include the four data elements were insufficiently specific to allow the agency to locate the emails. However, after MuckRock filed suit, the agency changed its mind and processed the requests for emails. Since it had now processed

the requests for emails, the CIA argued that MuckRock's claim was now moot because its requests were now complete.

Because the primary focus of FOIA litigation is to challenge an agency's refusal to disclose records, the typical FOIA suit involves whether or not the agency has improperly withheld records, including whether or not the agency conducted an adequate search for records. But there are equitable remedies available as well and in *Payne Enterprises v. USA*, 837 F.2d 486 (D.C. Cir. 1988), the D.C. Circuit found that an Air Force policy to deny Payne Enterprises' requests for contract information under Exemption 4 (confidential business information), but then disclose the information once Payne Enterprises appealed constituted a policy or practice that violated FOIA, even though Payne Enterprises ultimately received the information it requested.

In the MuckRock case, Jackson found the CIA's policy to be remarkably similar to the Air Force policy rejected in *Payne Enterprises*. In an attempt to distinguish its policy from the Air Force policy rejected in *Payne Enterprises*, the CIA argued that while the Air Force admitted the existence of its policy, the CIA claimed it had no such policy and instead was only informing requesters of the level of specificity required to allow the agency to search for emails. Jackson found the agency's claim that relief was tied to its admission that such a policy existed to be irrelevant. She pointed out that "it makes little sense to argue, as the CIA does here, that the plaintiff needs to point to a regulation that establishes the policy, or that the agency must concede the policy's existence, as a *threshold* matter (i.e., in order for a plaintiff to have standing to sue), because whether or not 'an agency's refusal to supply information actually evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials,' can *itself* be the ultimate question at issue in a FOIA policy-or-practice case." She added that "the CIA fails to explain why the fact that the Air Force *acknowledged* the existence of the challenged policy in *Payne Enterprises*, whereas here the CIA refuses to concede that it employs such a policy, makes any difference as far as the jurisdictional questions are concerned. Regardless, so long as the plaintiff has made plausible allegations that an illegal policy exists, and that the plaintiff has not only been subjected to it at some point in the past but also likely will be subjected to it again in the future, there is a justiciable case or controversy that the plaintiff can pursue in federal court."

The CIA argued FOIA already provided MuckRock with a remedy to the agency's email policy because it could file suit each time the agency denied such a request. Referring to MuckRock as a "serial requester," Jackson observed that "the very injury that a FOIA policy-or-practice lawsuit seeks to remedy *is* the unreasonable delay that results from an agency's seriatim application of an unlawful policy or practice during the processing of FOIA requests, so the CIA's insistence here that individual lawsuits to remedy future harm are available to MuckRock as a plaintiff who is perpetually aggrieved by the alleged illegal FOIA policy makes little sense. In other words, as far as the delay injury is concerned, individual FOIA lawsuits concerning an agency's treatment of particular requests do not provide *any* remedy, let alone an *adequate* one."

Jackson declared that the CIA's email policy violated FOIA but refused to provide injunctive relief. She noted that "the CIA has done nothing to demonstrate that the agency's employees need all four pieces of information – the sender, recipient, subject, and time frame – in order to locate email records in the agency's information systems; indeed, by its own admission, the CIA can often determine what email records are being sought, and can conduct a search for those records, *without* having all four of the pieces of information that the alleged policy delineates. This means that the FOIA does not authorize the CIA to deny a FOIA email request categorically, simply and solely because the request does not reference the sender, recipient, subject, and time frame." Jackson rejected MuckRock's request for injunctive relief, however, because there was no evidence that the CIA would continue using the policy if she decided it was illegal.

Although MuckRock won on its claim alleging the existence of a pattern or practice in denying requests for emails, Jackson ruled in favor of the agency on the other remaining issues. She found the agency had properly relied on the expertise of staff to determine the keywords used in searching for several of MuckRock's requests and concluded the agency had properly withheld information under the National Security Act. (*MuckRock, LLC v. Central Intelligence Agency*, Civil Action No. 14-997 (KBJ), U.S. District Court for the District of Columbia, Feb. 28)

Views from the States…

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

Kansas

A court of appeals has ruled that the trial court erred in awarding attorney's fees and damages to Eric Clark when Unified School District No. 287 failed to respond to his two requests submitted under the Kansas Open Record Act within the three days required by the statute because attorney's fees are only available upon a court's finding of bad faith by the public body and damages are not available under the statute at all. Clark requested a copy of a letter banning Gene Hirt from school property because he had insulted the superintendent at a school board meeting. Clark also requested policies for sanctioning or disciplining a non-student. The school district told Clark it could not disclose the letter to Hirt without obtaining Hirt's permission. As to Clark's request for policies, the school district provided a PowerPoint presentation, but later provided a copy of the Board Policy Book. When Clark filed suit, the trial court ruled in his favor on his request for school district policies but found that the Hirt letter was protected. However, the court awarded Clark attorney's fees and damages. On appeal, the school district argued the case was moot because Clark had obtained a copy of the Hirt letter from another source. The appeals court disagreed, noting that "but that is not all Clark seeks. Clark also seeks a finding that the School District violated the KORA in denying his request and that it should be assessed costs and damages. Moreover, the statutory interpretation of an exemption to the KORA is clearly a matter of public importance, and an issue capable of repetition. Clark's claims regarding the Hirt letter are not moot." The school district contended that an exemption for correspondence between a public agency and a private individual that does not relate to a regulatory or supervisory responsibility applied, arguing that it was not acting in a regulatory or supervisory capacity. The court of appeals, however, noted that statutes provided school districts with the responsibility to regulate school property. The court observed that "therefore, the [trial] court's decision protecting the Hirt letter was error. We pause to note that the issue presented here involved a letter to an adult about an adult. We make no finding one way or the other regarding whether the same rule would apply to a letter to a parent or student banning a student from school district property." The appellate court found the trial court had erred in awarding damages. The appeals court noted that "the KORA does not authorize an individual to recover damages from a public agency for a violation." The court also rejected the trial court's award of attorney's fees because it had not found that the school district acted in bad faith. Instead, the appeals court observed that "the only evidence that supports a finding of bad faith is that the School District mistook the nature of Clark's request and quickly corrected its mistake. This does not constitute substantial competent evidence that the School District acted in bad faith." (*Eric Clark v. Unified School District No 287*, No. 117,343, Kansas Court of Appeals, Mar. 9)

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Nevada

The supreme court has ruled that an injunction issued by a trial court prohibiting the *Las Vegas Review-Journal* and the Associated Press from writing about an anonymized autopsy report of those individuals shot and killed by a sniper at the Route 91 Harvest music festival violates the First Amendment. The anonymized autopsy report was disclosed under the Nevada Public Records Act. The family of one of the victims, Charleston Hartfield, found out after the press coverage and filed a suit asking the court to find that his autopsy report was confidential and that the *Review-Journal* and the AP could not report on it. The court ruled that Hartfield's autopsy report was confidential and that the Hartfield family and the coroner should review the anonymized reports to determine which referred to Hartfield. The *Review-Journal* appealed, claiming such a prohibition violated its First Amendment rights. The supreme court agreed, noting that "the [trial] court placed the burden on the Review-Journal to defend the newsworthiness of the redacted autopsy reports. But it is the proponent of the prior restraint who must bear the heavy burden of justifying it. Because the anonymized and redacted autopsy reports were already in the public domain. . .any damage to the Hartfields' privacy interest had already been done and the district court's subsequent order could not remedy that damage. Thus, the real parties in interest failed to demonstrate a serious and imminent threat to a protected competing interest that would warrant the prior restraint imposed in this case." (*Las Vegas Review-Journal v. Eighth Judicial District Court*, No. 75073, Nevada Supreme Court, Feb. 27)

New Mexico

The supreme court has ruled that messages posted on the Facebook page of First Judicial District Judge Matthew Wilson concerning his rulings in a case involving Valley Meat are not public records because his Facebook page is not an agency record for purposes of the New Mexico Inspection of Public Records Act. The court also found that an email between Wilson and his wife Stephanie, who worked as a law librarian at the New Mexico Supreme Court, asking for her help proofreading an order, was privileged, as were four other emails between Wilson and staff members. The supreme court also concluded that Fifth Judicial District Judge James Hudson, who heard the suit brought by Valley Meat, did not have jurisdiction to decide a case involving a judge from another district. After failing to obtain records from Wilson, Valley Meat filed suit in the Fifth Judicial District against Wilson for access to the Facebook postings from his personal campaign site. Stephen Pacheco, the executive officer of the First Judicial District Court, told Valley Meat that he was the records custodian for the First Judicial District and would be responsible for responding to Valley Meat's requests. In responding to the requests, Pacheo told Valley Meat that Wilson's Facebook page was not under the control or custody of the court and that those postings were not agency records. He also withheld a series of emails from Wilson under the judicial deliberations privilege. In the Fifth Judicial District case, Hudson agreed that Wilson's Facebook page was not an agency record and found that emails to staff were privileged, but that Wilson's email to his wife was not privileged because she did not work for him. Hudson decided that Valley Meat was eligible for attorney's fees but refrained from awarding them because he believed he did not have the constitutional authority to do so. Ruling in its superintending capacity to run the state judiciary, the supreme court agreed that Wilson's Facebook page was not an agency record, pointing out that "there is no evidence that Judge Wilson's personal election campaign or its Facebook site were acting on behalf of the First Judicial District Court or any other public body, or that any government funding was involved in maintenance of the Facebook site or any of its activities, or that Judge Wilson conducted public business through the site." Warning about the dangers posed by social media sites for elected judicial officials, the court observed that "if a judge or any other public employee has engaged in misconduct beyond the performance of official activities, the fact that evidence of the misconduct may be found outside public records does not transform that evidence into a public record maintained by a public body." But the court found that the email to Stephanie Wilson was also protected by the judicial deliberations privilege. The court noted that "we perceive no principled reason why the judicial deliberation privilege would protect a judge's thought

processes that are reflected in a draft order to a subordinate to review but would fail to protect the same thought processes reflected in the same draft order when it is submitted to a Supreme Court law librarian or other judicial branch colleague for review." The supreme court dismissed the case for lack of jurisdiction. The court pointed out that "the Fifth Judicial District Court had no constitutional jurisdiction to litigate any aspect of an IPRA enforcement action against the First Judicial District Court." (*Stephen Pacheo v. James M. Hudson*, No. S-1-SC-35445, New Mexico Supreme Court, Mar. 5)

Vermont

For the second time in the last month, a state supreme court has ruled on whether or not the state's open meetings law applies to contract negotiating sessions between public bodies and unions. In February, the Oregon Supreme Court found the presence of a quorum at labor negotiations might trigger the open meetings obligation in its law and remanded the case for further determination. Now, the Vermont Supreme Court has ruled that labor negotiations do not constitute "meetings" for purposes of its Open Meeting Law. This case involved labor negotiations between the Caledonia Central Supervisory Union School Board's negotiating committee and the Caledonia Central Education Association. The association insisted that the negotiations be held in open session, while the committee said it would only negotiate in closed session. The trial court ruled in favor of the association's request that it dismiss the case, finding that it lacked subject-matter jurisdiction to hear the case. The supreme court found that the Open Meeting Law was ambiguous on the issue of whether labor negotiations qualified as meetings, but concluded that other evidence, such as the fact that the Public Records Act contained an exemption for labor negotiation records, suggested that such negotiations were not required to be open. The supreme court noted that "because the Legislature protected records of these negotiations from public access under the Public Records Act, opening these same sessions to the public as 'meetings' under the Open Meeting Law directly contradicts this Legislative scheme. It would make little sense that a written record, such as minutes of a negotiating session, is exempt from public disclosure but the meeting itself is open to the public." The court found that the Labor Relations for Teachers and Administrators Act also supported this interpretation by recognizing the ability to conduct negotiations in closed session. (*Negotiations Committee of Caledonia Central Supervisory Union v. Caledonia Central Education Association*, No. 2017-142, Vermont Supreme Court, Feb. 23)

Washington

A court of appeals has ruled that information posted on the personal Facebook pages of public officials are public records if they pertain to public business but has rejected Arthur West's claim that a Facebook page maintained by the "Friends of Julie Door," a Puyallup city council member, contained such information. West requested records from Door's Facebook page. After consulting with Door, the City told West that her Facebook page did not contain any information pertaining to public business and declined to disclose any records. West then sued, citing several instances that he believed qualified as public business. Relying on *Nissen v. Pierce County*, 357 P.3d 45 (2015), a Washington Supreme Court ruling in which the court found that text messages from a personal cell phone were public records if they related to public business and that searches for such records were adequate when the public body directed the individual to conduct a good-faith search, the court of appeals found West's claims fell short. The court noted that "there is no indication that Door was acting in her 'official capacity' as a City Council member in preparing these posts. The Facebook page was not associated with the City and was not characterized as an official City Council member page. Instead, the Facebook page was associated with the 'Friends of Julie Door,' which according to Door's declaration was used to provide information to her supporters." (*Arthur West v. City of Puyallup*, No. 49857-0-II, Washington Court of Appeals, Division 2, Feb. 21)

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Wisconsin

A court of appeals has ruled that emails sent by Dane County Board of Supervisor Paul Rusk to various members of the board pertaining to their vote to not renew a lease for three billboards owned by Adams Outdoor Advertising did not constitute a serial meeting because since they were not sent to a quorum of the board membership they could not have affected the board's vote. The court noted that "the complaint fails to establish that a sufficient number of supervisors engaged in discussions capable of affecting the vote. . . Rusk did not email or otherwise reach out to a majority of the supervisors." (*State of Wisconsin ex rel Richard Zecchino and Adams Outdoor Advertising Limited v. Dane County Board of Supervisors*, No. 2017AP2, Wisconsin Court of Appeals, Feb. 27)

The Federal Courts…

Judge Trevor McFadden has ruled that CREW **failed to state a claim** in its suit against the Department of Justice to force the agency to post Office of Legal Counsel opinions that constitute final opinions under the affirmative disclosure provisions of Section (a)(2) because some OLC opinions are protected by **Exemption 5 (privileges)** and are not subject to FOIA disclosure. McFadden reviewed the intertwined litigation brought by CREW and the Campaign for Accountability, both requesting the agency post OLC opinions. Because CREW and the government believed that (a)(2)'s affirmative disclosure provisions could not be enforced under FOIA, CREW originally brought a case under the Administrative Procedure Act, arguing that the agency's failure to post OLC opinions constituted arbitrary and capricious conduct. But in *CREW v. Dept of Justice*, 164 F. Supp. 3d, 145 (D.D.C. 2016), Judge Amit Mehta ruled that FOIA did provide a remedy. His decision was upheld by the D.C. Circuit in *CREW v. Dept of Justice*, 846 F.3d 1235 (D.C. Cir. 2017), but the D.C. Circuit limited FOIA relief only to plaintiffs whose requests had been denied under FOIA. The litigation next moved to a suit brought by the Campaign for Accountability, also asking that OLC opinions be posted under (a)(2). Interpreting the D.C. Circuit's ruling in *CREW v. Dept of Justice*, Judge Ketanji Brown Jackson found that CfA had not shown that all OLC opinions were subject to affirmative disclosure, but allowed CfA to amend its complaint to a smaller universe of OLC opinions that could arguably be characterized as final opinions. However, with that state affairs, McFadden claimed in a footnote to his decision that Brown Jackson's presaged "the logic of this one." He acknowledged the existence of the amended complaint in the CfA litigation, but concluded that "interests of judicial economy currently weigh in favor of keeping these cases separate, given the different claims at issue and the fully-briefed status of the instant motion to dismiss." In dismissing CREW's suit, McFadden made the somewhat bizarre claim that "by its terms, the entire Act – including the reading room provision – 'does not apply' to nine specific exemption categories, referring to the Supreme Court's decision in *NLRB v. Sears, Roebuck*, 421 U.S. 132 (1975), which is a case about the Section (b) exemptions and not the affirmative disclosure provisions. McFadden then noted that "CREW's suit is premised on a universal claim – 'all existing and future OLC formal written opinions' and indices thereof are subject to mandatory disclosure under [Section (a)(2)]. Accordingly, if the DOJ can identify any formal written opinions that are *not* subject to FOIA disclosure, CREW's universal claim fails, and the suit cannot survive the motion to dismiss." He pointed out that the D.C. Circuit had ruled in *EFF v. Dept of Justice*, 739 F.3d 1 (D.C. Cir. 2014), that an OLC opinion for the FBI was privileged because it did not constitute the working law of the FBI. McFadden indicated that "this holding dooms CREW's complaint as currently articulated, because it established that at least one of OLC's formal written opinions – the opinion in *EFF* – is exempt from FOIA disclosure pursuant to Exemption 5. Even more broadly, the opinion suggests that many of OLC's formal written opinions would be subject to the same deliberative process privilege." McFadden pointed out that OLC opinions might also be protected by attorney-client privilege. McFadden recognized that the CfA litigation might ultimately provide CREW some

relief as well, but decided to dismiss the case altogether. Rejecting CREW's request to take discovery, he observed that "but the possibility that *some* formal written OLC opinions are subject to disclosure cannot rescue a complaint that by its own terms seeks *all* opinions. To avoid dismissal, CREW must file a complaint – not proposed discovery – stating a plausible claim to relief." (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, Civil Action No. 17-00432-TNM, U.S. District Court for the District of Columbia, Feb. 28)

Judge James Boasberg has resolved the remaining issues left over from his recent decision concerning whether or not the Comey memos were publicly acknowledged by ruling that other similar records are also protected by **Exemption 7(A) (interference with ongoing investigation or proceeding)**, but that an email that had been withheld on the grounds that it was non-responsive had to be disclosed because it was not exempt. Both *USA Today* and Freedom Watch asked for records more broadly related to the Comey memos. Having found the memos were protected, Boasberg had no trouble concluding that the related records were also protected by Exemption 7(A). Boasberg first noted that the records qualified as law enforcement records under the threshold standard of Exemption 7, explaining that "there is little doubt that the Special Counsel's investigation into Russian interference in the election serves law-enforcement needs. Further, the documents 'sought merely must have been "compiled" when the Government invokes the Exemption.'" He pointed out that "in an ongoing criminal investigation such as the Special Counsel's, the Government must be somewhat obscure in its public filings about the effect of disclosure so as not to risk spilling the very information it seeks to keep secure." He added that "disclosing the records 'would highlight particular activities, interactions, and individuals,' which could assist subjects or targets of the investigation in shaping their testimony. These averments meet the specificity required by 7(A)." Turning to the **segregability** issue, Boasberg noted that "'email can pose special challenges' for segregability 'because it is not unusual for an email chain to traverse a variety of topics having no relationship to the subject of a FOIA request.' Such is the case here. One responsive document includes two separate conversational threads, one of which relates to the Comey Memos and the other of which is a wholly distinct discussion regarding a meeting with a senator. Although the only non-exempt information – *i.e.*, the senator discussion – is not responsive to Plaintiffs' requests, the Bureau must nonetheless produce it because 'once an agency. . .identifies a particular document or collection of material – such as a chain of emails – as a responsive "record," the only information the agency may redact from that record is that falling within one of the statutory exemptions.' In other words, the information's non-responsiveness is now irrelevant. Under the clear language of the statute and Circuit precedent, it must be disclosed." (*Cable News Network, Inc., et al. v. Federal Bureau of Investigation*, Civil Action No. 17-1167 (JEB), et al., U.S. District Court for the District of Columbia, Feb. 23)

Judge Richard Leon has ruled that American Oversight has not shown that it is entitled to **expedited processing** for its request to the Department of Justice concerning the ethical implications of the Trump administration's appointment of Noel Francisco as Solicitor General because while American Oversight met DOJ's requirement that the subject of the request be "a matter of widespread and exceptional media interest," it failed to show that Francisco's appointment was a matter "in which there exist possible questions about the government's integrity [that] affect public confidence." Francisco was nominated to be Solicitor General after having served for several months as Acting Solicitor General. While he was Acting Solicitor General, Francisco noticed his appearance in a Ninth Circuit challenge to the Trump administration's travel ban. Two days later, Jones Day, his former firm, filed an amicus brief in the case opposing the government's position. Francisco did not sign the government's brief, but he also did not withdraw from the case. American Oversight then submitted a FOIA request to DOJ for records concerning Francisco's role in the travel ban litigation and ethics issues relating to Francisco's service in the Office of the Solicitor General. American

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Oversight also requested expedited processing. American Oversight's request for expedited processing was denied because it had not shown that the issues affected public confidence in the government. American Oversight then filed suit. Two weeks later, DOJ disclosed four emails granting Francisco ethics waivers – three of which pertained to the travel ban litigation. American Oversight argued that deference was not due to DOJ's interpretation of its expedited processing regulation. Leon disagreed, noting that "although the [agency's declaration] does not chart the origin of DOJ's interpretation, the Department has advanced a similar interpretation of subsection (iv) in several past cases. And in both cases, this District Court accepted and applied the DOJ's interpretation of subsection (iv) to the record before the DOJ at the time of its decision as to the expedited processing request. As such, this is hardly a case in which the Department's 'interpretation was unannounced and would have a negative impact on the rights of affected parties who has no notice of the interpretation.'" Leon added that "the regulation does not ask whether possible questions exist that *might or could* – should they become known – affect public confidence in the government's integrity. It asks whether there are possible questions as to the Government's integrity 'that affect public confidence,' full stop. The primary way to determine whether such possible questions exist is by examining the state of public coverage of the matter at issue, and whether that coverage surfaces possible ethics issues so potentially significant as to reduce public confidence in governmental institutions." Leon observed that "in the final analysis, [the agency] correctly concluded that plaintiff had met its burden of showing that there was the necessary media interest concerning [Solicitor] General Francisco's nomination, but that none of the articles raised any ethical issues concerning his nomination, or his work in the Solicitor General's Office, or for Jones Day." (*American Oversight v. U.S. Department of Justice*, Civil Action no. 17-848 (RJL), U.S. District Court for the District of Columbia, Feb. 22)

Magistrate Judge Michael Harvey has rejected the Middle East Forum's claim that its request should be processed by the Department of Homeland Security at a rate of 1,000 pages per month rather than the 500 pages per month suggested by the agency. After the Middle East Forum declined to agree to the agency's request for an extension of time to respond, the agency told the court that it had located 27,000 potentially responsive records and that it could process those records at a rate of 500 pages a month. The Middle East Forum argued that was too slow and suggested a rate of 1,000 pages a month. The agency's Privacy Office told the court that it received 1,350 FOIA requests in 2017, a 125 percent increase from 2016, that 791 of those were complex, which represented a 164 percent increase from the yearly average for the previous four years, that it currently had a backlog of 464 cases, and that it had experienced a 65 percent increase in FOIA-related litigation since 2016. The Middle East Forum argued that a handful of district courts outside the D.C. Circuit had occasionally found that an agency's backlog was not relevant to whether or not it had complied with an individual request. But Harvey noted that "Plaintiff's position fails to take into account two long-standing principles that apply to FOIA cases in this Circuit. First, since 1976, at the latest, courts in this Circuit have considered the effect of other FOIA requests when analyzing the burden on an agency of meeting deadlines for review and production of FOIA material in a given case" and that "moreover, 'agency affidavits are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims.'" He added that "Plaintiff has presented no *evidence* to undermine [the agency's] declaration." Finding the Middle East Forum had not shown that it deserved a quicker rate of production, Harvey explained that "at Defendant's proposed rate of 500 pages per month, the current universe of prioritized material will be processed in approximately seven months, rather than the three-and-one half months Plaintiff urges. On this record, 500 pages per month is an appropriate rate of production. This opinion should not be read to imply that Plaintiff's requests are insignificant or unimportant, or that a more robust schedule should not be ordered in a suitable case. Here, however, Plaintiff has not provided reasons that its requests should take precedence over the duly-made FOIA requests of others." (*Middle East Forum v. U.S. Department of Homeland Security*, Civil Action No. 17-0767 (RCL/GMH), U.S. District Court for the District of Columbia, Mar. 5)

Judge Timothy Kelly has ruled that the Department of Justice has not shown why a series of requests made by attorney Francisco Martinez for records concerning the Chicano civil rights move in Colorado from 1968 to 1978 should not be **joined** in one suit. Martinez's requests were not identical, but many of them overlapped. He requested a fee waiver from each agency or, alternatively, to be included in the news media fee category. He filed suit against seven agencies for withholding records and denying his fee waiver requests. The government then filed a motion to sever the cases, arguing that they were not sufficiently related. Kelly disagreed. He explained that "Martinez's FOIA requests involve the same transaction because they are logically related.' All of his requests seek records referring to or relating to specific individuals, organizations, and events connected to the Chicano civil rights movement in Colorado from 1968 to 1978. That is sufficient to meet the legal standard here. FOIA requests are 'logically related' when they belong to 'essentially identical categories of records. . .regarding the same underlying subject matter.'" He added that "the 'same-transaction' prong does not require that all of these requests be identical." Kelly pointed out that "Defendants are all federal agencies with law enforcement and intelligence-gathering functions that Martinez asserts monitored the Chicano civil rights movement in Colorado during the time period in question," and agreed that "several of the relevant agencies coordinated certain operations relating to the Chicano civil rights movement and [Martinez] identifies specific inter-agency memoranda that reflect such coordination." Kelly indicated that "it appears that certain common exemptions will be asserted by the agencies at summary judgment, giving rise to common questions of law." He added that "the Court is satisfied that, as the litigation now stands, there is likely to be *some* question of law or fact between the claims," including Martinez's entitlement to a fee waiver or inclusion in the news media fee category. The government argued that the case could only proceed to summary judgment as quickly as could the slowest agency. But Kelly observed that "that argument alone cannot justify severing the case, because there are other procedures better suited to avoiding such prejudice." He indicated that "the Court may finalize individual claims against each agency to avoid prejudicing." (*Francisco E. Martinez v. Department of Justice, et al.*, Civil Action No. 16-1506 (TJK), U.S. District Court for the District of Columbia, Feb. 27)

Judge Beryl Howell has ruled that while the First Amendment does not provide reporter Jason Leopold a right to access sealed court applications approving the use of pen registers or trap and trace devices, as well as data subject to the Stored Communications Act, he does have a limited right under the common law right of access to judicial records. Ruling on Leopold's application for unsealing such records, which was joined by the Reporters Committee, Howell noted that "weighty interests of protecting privacy and public safety, and providing additional transparency for these sealed judicial records in an administratively workable manner, exist in significant tension with providing the public access sought by petitioners. Nonetheless, this Court has striven to articulate a common law right of access to sealed judicial records regarding the government's exercise of statutory surveillance authorities and strikes a reasonable balance." Noting administrative and operational advances on the part of the Clerk's Office and the Office of the U.S., Attorney for the District of Columbia, Howell identified a prospective right of access to "certain categories of information, which will be disclosed on a periodic basis, regarding the number of PR/TT and SCA warrant applications filed by the USAO, the number and type of accounts that such applications target, the names of the providers to which these applications are directed, and the primary criminal offense under investigation for these applications." She added that "the prospective right of access articulated here is designed to minimize any risk of revealing information about ongoing law enforcement investigations or the individuals targeted, but will enable the public to know, albeit on a limited basis, more about what this Court is doing in reviewing these types of surveillance applications. No retrospective right of access is recognized, in consideration of the significant administrative burdens that retrospective disclosure would impose on the Clerk's Office and USAO." (*In the*

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Matter of the Application of Jason Leopold to Unseal Certain Electronic Surveillance Applications and Orders, Misc. No. 13-00712, U.S. District Court for the District of Columbia, Feb. 26)

Judge Christopher Cooper has ruled that the DEA conducted an **adequate search** for records concerning the existence of a drug-trafficking investigation involving Ranfiel Castaneda Sanchez that was preventing Sanchez and Yolanda Vizcarra Calderon from obtaining visas to enter the United States. After being turned down by the State Department, Sanchez submitted a FOIA request to the DEA for records about himself. After a database search, the agency found no records. Sanchez sued, challenging the agency's search. The agency told Cooper that it had performed multiple queries of its Narcotics and Dangerous Drugs Information System and found no records. Sanchez argued the search was insufficient because a government official had told him that a case related to drug-trafficking allegations against him existed. Cooper observed that "nor is it even certain that any existing 'case' against Castaneda Sanchez is one involving the DEA. As the Department aptly points out, many agencies – including state agencies – have authority to investigate drug trafficking. It is certainly possible that any investigation into alleged drug trafficking involves a different law enforcement agency. At this juncture, Castaneda Sanchez does little more than speculate that the DEA had an open investigation into his alleged involvement in drug trafficking." (*Ranfiel Castaneda Sanchez v. U.S. Department of Justice*, Civil Action No. 17-1459, U.S. District Court for the District of Columbia, Mar. 6)

Judge Randolph Moss has ruled that Darryl Burke failed to show that the Department of Justice received his request for records concerning *Brady* violations in the Southern District of Florida. After Burke, a prisoner, filed suit, EOUSA conducted a search for his request. Although it found four requests Burke had submitted, it did not find the request that formed the basis of his suit. While Burke did not respond to the agency's summary judgment motion, Moss noted that "for his part, Burke submitted 'no proof he mailed' the FOIA request described in his complaint, 'or that the [Department] received it.' Indeed, although many months have now passed and although Burke was warned of the consequences of failing to respond to the Department's evidence, he has failed to offer any response to the Department's motion for summary judgment." Moss pointed out that "here, the Department has 'presented undisputed' and convincing 'evidence that it searched for [Burke's] FOIA request in the places that it should haven located, but did not discover any such request.' Because Buke has failed to controvert that evidence, the Court concludes that he 'never properly initiated and exhausted the FOIA administrative process' and 'is not entitled to maintain a civil action with respect' to the FOIA request described in his complaint." (*Darryl Burke v. United States Department of Justice*, Civil Action No. 16-2082 (RDM), U.S. District Court for the District of Columbia, Feb. 22)

A federal court in Louisiana has ordered the U.S. Army Corps of Engineers to amend its *Vaughn* index to explain its **Exemption 5 (privileges)** claims for 154 emails made in response to a request by Robert Beard and other residents for records concerning conditions in Livingston, Louisiana. The court indicated that the amended index needed to "specifically identify the parties to the emails, including their names, positions, job duties and professional affiliation; includes more detailed descriptions of the content of the emails and their attachments other than simply the subject line of the email; describes the portion of the information that is non-exempt and how it is dispersed throughout the document so that it cannot be separately produced; and, explains the exact reason that the documents is withheld, either as an internal communication that is predecisional and deliberative or an attorney/client communication." (*Robert Beard, et al. v. U.S. Army Corps of Engineers*, Civil Action No. 17-2668, U.S. District Court for the Eastern District of Louisiana, Mar. 1)

A federal court in Washington has ruled that the FAA conducted an **adequate search** for records identifying low-altitude flights over Keerut Singh's property in Mill Creek, Washington, when it found that it did not have ability to search for such records based on a specific address. Singh complained about the flights and sent a FOIA request to the FAA for records about their identity. The agency referred the request to its Western Service Area, which determined that the Paine Field Airport Traffic Control Tower monitored that area. The agency explained to the court that "because Paine Field managers could not search their records based on a specific location, they were unable to return any responsive documents to Plaintiff." Accepting the agency's explanation, the court noted that "the Court finds that the FAA conducted a reasonable search of its records based on the request's description; Plaintiff's wish, described in his briefing, that the FAA shall search all records regarding all flights over the course of several dates is an unreasonable expansion of his original request." (*Keerut Singh v. Federal Aviation Administration*, Civil Action No. 17-822 RAJ, U.S. District Court for the Western District of Washington, Mar. 6)

A federal court in New York has ruled that Vincent Conyers failed to show that the Department of Veterans Affairs violated the **Privacy Act** when it refused to amend records Conyers claimed were inaccurate. The agency claimed Conyers had not requested an amendment, but Conyers argued that his inquiry into the procedure for amending records was sufficient. The court pointed out that "plaintiff's alleged inquiry into the VA's procedures for requesting an amendment falls short of alleging that he *actually requested* an amendment to his record. Moreover, in addition to alleging that he has made a request to the VA, plaintiff must also allege that the VA has either made a determination not to amend his record or failed to make the review required under Section 552(a)(d)." (*Vincent Curtis Conyers v. United States Department of Veterans Affairs*, Civil Action No. 16-0013 (JFB) (SIL), U.S. District Court for the Eastern District of New York, Feb. 26)