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Washington Focus: Zach Kopplin, an investigator at the Government Accountability Project, noted that the FBI used FOIA as a primary tool to ferret out Terry Albury, a long-time FBI agent in Minneapolis, who has been charged with illegally disclosing classified information. According to Kopplin, the FBI "used as evidence against Albury FOIA requests made by the Intercept." He added that "after the Intercept published documents [it had received as a result of two FOIA requests], the timing of an earlier FOIA request allowed the FBI to pinpoint Albury as a likely source." Kopplin pointed out that the affidavit filed by the FBI to support its charges against Albury explained that "Albury accessed the document on February 19, 2016, approximately one month and ten days prior to the FOIA request." . . .A four-day trial over whether disclosure of the number of chickens at various egg farms would cause competitive harm took place recently in San Francisco. The case, Animal Legal Defense Fund v. FDA, has already led the Ninth Circuit to adopt the de novo standard for deciding such cases. Writing for Courthouse News Service, Nicholas Iovino noted that there have been only 86 FOIA cases that went to trial since 1970.

Confirmation Hearing Discussions Protected by Consultant Corollary

Judge Rudolph Contreras has ruled that records prepared for use in confirmation hearings for Hillary Clinton as Secretary of State, and Harold Koh as State's legal advisor, are protected by Exemption 5 (privileges). In so ruling, Contreras rejected Judicial Watch's argument that since neither Clinton nor Koh were officially employees of the agency at the time of their hearings their communications did not qualify as "inter- or intra-agency" records. Instead, Contreras found that the records fell within the consultant corollary exception since State shared the same goals with Clinton and Koh in supporting their nominations.

Judicial Watch's original March 2015 request asked for records concerning possible conflicts of interest pertaining to Clinton's personal or charitable relationships with foreign

governments and business entities. In his previous ruling, Contreras found State had conducted an adequate search for records except for those that had recently been turned over to the agency by Huma Abedin but explained that records dealing with Clinton and Koh's confirmation hearings that State claimed were protected by the deliberative process privilege raised questions about whether those records actually reflected the agency's policies and goals, or only reflected the interests of Clinton and Koh in being confirmed. The State Department conducted another search of Abedin's records and renewed its deliberative process privilege claims.

Although courts have long-recognized that non-agency parties can be considered as consultants to an agency for purposes of qualifying for the deliberative process privilege, the limitations imposed by the "inter- or intra-agency" record requirement was not seriously considered until the Supreme Court's decision in *Dept of Interior v. Klamath Water Users Protective Association* 532 U.S. 1 (2001), where the Court ruled that the deliberative process privilege did not apply if the parties do not share the same interest. In that case, the Court concluded that discussions between the Bureau of Indian Affairs and a specific Indian tribe were not deliberative because while the agency was responsible to Indian tribes broadly the specific Indian tribe here had its own interest that differed from that of the BIA. Since *Klamath*, appellate courts have nibbled away at the edges of the decision. In *National Institute of Military Justice v. Dept of Justice*, 512 F. 3d 677 (D.C. Cir. 2008), the D.C. Circuit adopted a functional test, finding that outside experts could be considered consultants for purposes of Exemption 5 even though they had no formal relationship with the agency. And in *Hunton & Williams v. Dept of Justice*, 590 F. 3d 272 (4th Cir. 2010), the Fourth Circuit recognized the common interest doctrine to protect deliberations between the Justice Department and a technology company that was being sued for patent infringement.

Turning to the records concerning the Clinton and Koh confirmation process, Contreras explained that "State argues that the records – all of which were apparently drafted by individuals who were not employed by any entity regarded as an agency under FOIA – qualify for protection under the deliberative process privilege. State explains that all of these documents were created to prepare prospective high-level State Department officials 'to understand relevant issues and to be ready to lead the agency upon his or her confirmation.'" By contrast, Judicial Watch argued that "Clinton's emails to State – and communications sent by her staff – might show that she asked State for assistance in juggling her potential conflicts of interest, but her emails do not show that *State consulted her* on any agency decision."

Contreras found the consultant corollary protecting outside consultants applied here. The corollary requires that "1) the agency solicited the records from the non-agency party or there exists some indicia of a consultant relationship between the outsider and the agency, and (2) the records were created for the purposes of aiding the agency's deliberative process." Finding that State met both conditions here, he accepted as reasonable State's claims that "an agency and a nominee for a high-level agency position must and will engage in communications to align their messages, discuss logistics, and prepare the agency for new leadership. In light of the Circuit's precedents, this Court finds that the fact than an individual has been nominated to a high-level agency position suffices to trigger a consulting relationship under the consultant corollary. That relationship must extend not only to the nominee but also to those acting on behalf of the nominee."

Having found that the consultant corollary applied, Contreras agreed with State that "an agency has a vested interest in preparing nominees for high-level agency positions to address potential conflicts of interests and to be ready to lead upon confirmation." He continued, observing that "an agency has an interest in preventing the upheaval and distraction that would likely result if potential conflicts were identified only after confirmation. . . Thus, to the extent that communications between an agency and a nominee bear on these

matters, such correspondence is not, as Judicial Watch seems to suggest, solely in the nominee's interest or solely part of the nominee's decisionmaking process." He pointed out that the agency needed to align it nominees with a vision for the future of the agency, observing that "to expose discussions intended to align a nominee's proposed responses with an agency's existing policies might prematurely disclosure proposed policies and might create 'public confusion through the disclosure of documents suggesting reasons for policy decisions that were ultimately not taken.'"

Contreras rejected Judicial Watch's suggestion that such deliberations were skewed in favor of the nominee's interests. He noted that "the Court does not believe that the fact that agency-nominee communications involve more than obviously unidirectional advice to the agency should defeat an agency's claim that the consultant corollary applies. All such communications are part of a fluid process that furthers the nominee's and the agency's shared interest in the nominee's smooth transition to power." Judicial Watch also argued that application of the consultant corollary here violated the rule established in *Klamath*. Contreras disagreed, pointing out that "a nominee for a high-level agency position is not an interested party seeking a government benefit at the expense of others, but the president's selection for a position who will become an agency decisionmaker so long as he or she is confirmed by the Senate." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 15-688 (RC), U.S. District Court for the District of Columbia, Mar. 29)

Views from the States…

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

Arkansas

The supreme court has reaffirmed its previous ruling that the Arkansas Department of Correction may not withhold the identity of the manufacturer of a drug used in lethal injection executions because manufacturers are not covered by the Method of Execution Act, but that the ADC had properly redacted label and insert information to protect the identities of sellers and suppliers, who were covered by the confidentiality provisions in the MEA. Attorney Steven Shults requested records about the agency's supply of potassium chloride under the Arkansas Freedom of Information Act. The agency told Shults that it had 100 vials of the chemical, but refused to provide any more information. Shults filed suit and the trial court ruled in his favor, finding the MEA did not apply to manufacturers and ordering the agency to disclose unredacted copies of the labels and inserts. During the litigation, Shults filed a second suit alleging the ADC had improperly refused to disclose essentially the same records pertaining to midazolam, another drug used in the execution process. In that case, the trial court also ruled in favor of Shults, but the supreme court took the case on expedited appeal. The supreme court ruled that the MEA did not apply to manufacturers, but found that labeling information could be redacted. Ruling in the second case, the supreme court explained that the ADC was now arguing that the supreme court's first ruling resolved the matter. The supreme court agreed, noting that "here, simply put, the holding from *Shults I* is directly on point with the case before us, and we affirm the circuit court's finding that the identity of drug manufacturers is not protected under the confidentiality provisions of [the MEA]." The supreme court sided with the agency on the confidentiality of the labeling information. The supreme court observed that "here, consistent with *Shults I*, because disclosure of information such as lot, batch, and/or control numbers could lead to the identification of the seller and/or supplier of the potassium chloride, the

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ADC is required to redact and maintain this information as confidential under [the MEA]." (*Arkansas Department of Correction v. Steven Shults*, No. CV-17-544, Arkansas Supreme Court, Mar. 29)

Illinois

A court of appeals has ruled that the Attorney General properly concluded that records pertaining to the report of the Housing Task Force created by the City of Danville to identify housing issues and trends is a public record subject to the Illinois FOIA. The Task Force included 18 community members and four city employees. After the Task Force issued its publicly available final report, Kevin Flynn requested records about the task force's work from the City. The City told Flynn that since the task force was not a public agency its records were not public records. Flynn filed a complaint with the Attorney General, who ruled in his favor. The City then appealed. The appellate court agreed with the Attorney General. The court pointed out that "the requested records pertain to 'public business' as they appear to concern business or community interests and not private affairs." The court added that "the City's housing strategies and the daily decision of City officials in such matters, clearly pertain to public or community interests – not private affairs." The Attorney General had also found that the City had possession of the records. The appeals court noted that "the fact that the City produced the requested documents [for the Attorney General's review] is certainly persuasive evidence that it possessed the documents." The City argued such a ruling would require the City to disclose any record merely because it was in the City's possession. The appellate court disagreed, observing that "when a FOIA request is submitted to a public body, and the requested record is possessed by the public body, the record is subject to disclosure only if it qualifies as a 'public record' that pertains to public business. There is no unrestricted right to examine all documents possessed by a public body." (*City of Danville v. Lisa Madigan*, No. 4-17-0182, Illinois Appellate Court, Fourth District, Mar. 28)

Kansas

A court of appeals has ruled that Kansas Supreme Court Rule 362, which deals with the use of audio recordings of court proceedings by court reporters in preparing transcriptions, does not provide a basis for withholding an electronic copy of an open court hearing under the Kansas Open Records Act. Linus Baker, an attorney whose adult daughter was served with a temporary order of protection from abuse at Baker's residence, requested audiotapes of two PFA hearings for which he was neither a party nor counsel to a party from the Johnson County District Court. Katherine Stocks, the Court Administrator for the Tenth Judicial District, told Baker that while he could arrange to have a court reporter transcribe the hearings in written form he could not have an electronic copy of the hearing because Rule 362 limited access to such recordings only to counsel in the proceeding to check its accuracy. Baker filed suit, claiming he had a right to access under both KORA and the common law and that he was entitled to attorney's fees. The trial court ruled in favor of Stocks and Baker appealed. The appeals court reversed, noting that "Stocks asks us to affirm the district court. But to do so, we would have to find that the Kansas Supreme Court intended the use of electronic recordings in courtrooms to be limited to helping the court reporter prepare a transcript and assisting counsel to correct transcription errors. Construing Rule 362 in the manner suggested by Stocks is not only contrary to the clear and unambiguous language used by the Supreme Court in the rule, but also is incompatible with the framework within which the Supreme Court categorized the rule." The court explained that "a rule relating to court reporters that permits counsel to access electronic recordings to determine the accuracy of the prepared transcript stands in stark contrast to a broad rule enacted by the Kansas Supreme Court that specifically prohibits and restricts public access to all electronic recordings of proceedings under KORA." The court observed that "in short, there is no Kansas statute or Supreme Court rule that prohibits or restricts the disclosure of audio recordings of open court proceedings. The district court's reliance on Supreme Court Rule 362 was erroneous and did not promote the public policy of opening public records for inspection as

determined by the Legislature." (*Linus Baker v. Calvin Hayden and Katherine Stocks*. No. 117,989, Kansas Court of Appeals, Apr. 6)

New York

The Court of Appeals has adopted the *Glomar* response from federal case law, ruling that the New York Police Department properly invoked the *Glomar* response in refusing to neither confirm nor deny the existence of records on Talib Abdur-Rashid, Samir Hashmi, and various Islamic organizations with which they were affiliated in response to FOIL requests for records concerning themselves. After a number of press articles appeared concerning covert surveillance of Islamic leaders and organizations by the NYPD intelligence division because of concerns about terrorism, Rashid and Hashmi requested records about themselves and their affiliations, including membership in an Islamic organization at Rutgers University. Although the *Glomar* response had never been recognized under New York law, the NYPD told both Rashid and Hashmi that confirming the existence of records about them would reveal information protected by the law enforcement exemption in FOIL. Rashid and Hashmi sued separately and, while the trial court accepted the NYPD's position in Rashid's suit, the trial court rejected the claim in the suit brought by Hashmi. The two cases were consolidated on appeal, where the appellate court ruled in favor of the NYPD and recognized the *Glomar* defense. That decision was appealed to the Court of Appeals, where Chief Judge Janet DiFiore, joined by three other judges, voted to recognize the *Glomar* defense. Judge Leslie Stein, joined by Judge Jenny Rivera, dissented. Judge Rowan Wilson took a middle position, recognizing that the *Glomar* defense did not violate the FOIL, but concluding that the NYPD had used the claim too broadly, sweeping in records about Rashid and Hashmi that had no conceivable connection with terrorism. Writing for the majority, DiFiore explained that "this Court has never held that FOIL compels a law enforcement agency to reveal records relating to an ongoing criminal investigation of a particular individual or organization to the target, the press or anyone else – and the structure and purpose of the law enforcement and public safety exemptions are rendered meaningless by a contrary conclusion." She pointed out that "it is the rare case where, due to the surrounding circumstances and the manner in which a FOIL request is structured, acknowledging that any responsive records exist would, itself, reveal information tethered to a narrow exemption under FOIL. But when a FOIL request seeks to ascertain if a specific person or organization is under investigation by the NYPD Intelligence Bureau, such a response is entirely consistent with the purpose and structure of our statute." Rashid and Hashmi argued that the NYPD had made its *Glomar* response in bad faith, primarily because much of the information had already been made public. Noting that "nor do we adopt wholesale the approach taken by the federal courts," DiFiore indicated that "we agree that a police agency that has already revealed the records sought and for which it claims an exemption cannot credibly support such a response." She noted that New York courts often resorted to *in camera* review where agencies had not sufficiently justified exemptions. For *Glomar* responses, she pointed out that "some form of in camera review may be warranted, even if modifications to the typical procedure are necessary." Stein dissented, noting that "to adopt the Glomar doctrine is, therefore, to endorse an impermissible blanket exemption that is not set forth in the statute and which applies without regard to whether the harm protected by the relevant FOIL exemption is actually implicated or whether it is merely speculative." While Wilson found the *Glomar* response was appropriate under FOIL, he explained that the NYPD "either failed to justify categorically refusing to acknowledge the existence of records pertaining to closed investigation or – equally fatally – must be taken to justify withholding such information permanently." To remedy the problem, Wilson recommended the cases be sent back to the trial level to figure out an appropriate response for any closed investigations. (*In the Matter of Talib W. Abdur-Rashid and Samir Hashmi v. New York City Police Department*, No. 19, New York Court of Appeals, Mr. 29)

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The Federal Courts…

Judge Ketanji Brown Jackson has ruled that the Department of Commerce failed to show that a combination of the Mutual Educational and Cultural Exchange Act of 1961 and the Consolidated Appropriations Act of 2016 established an independent fee-setting mechanism that supersedes the **fee** provisions in FOIA under § 552(a)(4)(A)(vi). David Yanofsky, a journalist with Quartz, an online publication of the Atlantic Monthly Group, requested records from Commerce concerning the number of visitors and international flights to the United States. The agency told Yanoksky the information was available as part of a subscription service used by a number of institutional clients which had its own fee structure under the MECEA and the annual appropriations acts. As a result, the agency told Yanofsky that the data would cost $173,775. The agency denied Yanoksky's request for a fee waiver and Yanoksky filed suit. Because the agency did not flesh out its argument pertaining to the statutory basis for its claim that the MECEA constituted a superseding fee-setting mechanism until after Yanoksky filed suit, he argued that the agency was now prohibited from amplifying its claim because it was restricted to the administrative record before the agency at the time of the decision. But Jackson noted that "this Court disagrees with Yanofsky's analysis of the implication of section 552(a)(4)(A)(vii) for one simple reason: while it is certainly true that a court's review 'is limited' to the facts submitted to the agency, and that 'the agency must stand on whatever reasons for denial it gave in the administrative proceeding,' there is a world of difference between providing *new* reasons for the agency's decision at the district court stage and merely refining the same legal arguments that the parties advanced in the proceedings below." She indicated that "any fair reading of the arguments that DOC now makes compel the conclusion that its current position is a mere refinement of the legal argument that DOC has advanced ever since Yanofsky filed suit." She added that "the DOC 's present assertion that the MECEA and the Appropriations Act qualify as the pertinent superseding statute implicates considerations of law that this Court must evaluate by virtue of DOC's persistent contention that the FOIA's displacement provision applies. It makes little sense for this Court to be stuck analyzing the legal effect of a statutory provision that the DOC has long since abandoned, and while any such analysis is necessarily substantively different than the one conducted during the administrative process, the Court is still evaluating displacement as a matter of law – not a *new* or *different* reason for the denial of Yanoksky's fee waiver in violation of 5 U.S.C. § 552(a)(4)(A)(vii)." Having decided that the agency was able to make its claim that the MECEA and the Consolidated Appropriations Act superseded the FOIA fee provisions, Jackson concluded that the statute did not qualify under the D.C. Circuit's holding in *Oglesby v. Dept of Army*, 79 F.3d 1172 (D.C. Cir. 1996). In *Oglesby*, the National Archives claimed that 44 U.S.C. § 2116(c) displaced FOIA's fee provisions. The D.C. Circuit agreed, finding that it both set "the level of fees" and described "particular types of records." By contrast, the MECEA only encouraged foreign governments, international organizations, and other identified groups to make contributions, including the assessment of fees. Jackson pointed out that "this silence regarding how the fees are to be calculated stands in stark contrast to the statutes that the D.C. Circuit and Congress have acknowledged as superseding fee-setting statutes within the meaning of the FOIA." She explained that those statutes "demonstrate that a proper superseding fee statute reflects Congress's intent as it relates specifically to the agency's task of setting the level of fees for records. Neither the MECEA nor the Appropriations Act speaks to how the DOC's fees with respect to its data need to be determined, and thus this Court concludes that those statutes do not qualify as laws that supersede the fees provided for in the FOIA." (*David Yanofsky v. United States Department of Commerce*, Civil Action No. 16-00951 (KBJ), U.S. District Court for the District of Columbia, Mar. 30)

After dismissing Jack Jordon's persistent demands that he recuse himself because he was biased or reverse his previous ruling in favor of the Department of Labor, Judge Rudolph Contreras has resolved the remaining FOIA issues in a case brought by Jordan for communications made by DynCorp International

during an administrative proceeding in which Jordan was representing his wife Maria in a labor dispute with DynCorp International. By the time of his first decision, the case had boiled down to whether two emails that originated with DynCorp were privileged under **Exemption 4 (confidential business information)**. While Contreras found that the confidentiality prong of Exemption 4 applied to the emails, he concluded that, without further justification from the agency, only one of the emails qualified under the attorney-client privilege. He told the agency to either disclose the second email or to better justify its privilege claim. In response, DOL supplemented its affidavits in an attempt to show the second email was privileged as well. This time, Contreras rejected the agency's claim. He noted that "here, DOL seems to argue that [the email sent by Robert Huber, who was DynCorp's Senior Contracts Director] qualifies for protection under the attorney-client privilege because it was sent as part of DynCorp's broader efforts to address a legal issue and because it was sent to an in-house attorney to provide him 'with a complete understanding of the facts relevant to the matter that was being discussed in the email.'" Rejecting that claim, Contreras pointed out that "it is difficult to say, under the circumstances of this case, that one of the primary purposes of the Huber email was to obtain legal advice. The email is specifically directed to another person – a non-attorney – and the email specifically (and only) seeks information from that person. It is not at all apparent from DOL's submission how Mr. Huber's request that [the non-attorney] provide certain information might in any way shape [DynCorp's in-house attorney's] legal advice on the business contract or any other legal matter. DOL's contention that some broader legal problem existed in the background is insufficient to connect this specific communication to that legal problem or to any prospective legal problem. [Further], the Huber email does not appear to contain any factual information on which the [in-house attorney] might rely to form a legal judgment." He added that "the Huber email's topic and distribution list appears to be nearly identical to that of the final email in the chain, which was not withheld on the basis of attorney-client privilege. The only difference between the two emails is that the Huber email was copied to an attorney while the final email in the chain was not. . .Simply copying an attorney on a communication does not make that communication privileged." (*Jack Jordan v. U.S. Department of Labor*, Civil Action No. 16-1868 (RC), U.S. District Court for the District of Columbia, Mar. 30)

A federal court in Arizona has ruled that the U.S. Fish and Wildlife Service improperly withheld data elements in its Law Enforcement Management Information System Database under **Exemption 4 (confidential business information)** from the Center for Biological Diversity. The agency is required to clear any wildlife imported or exported to the United States. To accomplish that, importers and exporters are required to submit Form 3-177, which is compiled in the LEMIS database. From 2001 to 2015, data from the LEMIS database was publicly available pursuant to a FOIA request. Starting in mid-2015, the agency began to inconsistently withhold a variety of information about shipping, claiming Exemption 4. In November 2016, USFWS published a *Federal Register* notice soliciting comments from submitters of LEMIS data as to whether the data was confidential under Exemption 4. Ultimately, the agency identified 32 submitters who had provided sufficient information to warrant exemption. In response to a request by CBD, the agency withheld information pertaining to those 32 submitters. CBD sued, arguing that four data fields – foreign importer/exporters, United States permit numbers, quantities, and carrier names – were not exempt. After reviewing the submitters' claims that disclosure of the data would cause substantial competitive harm, the court sided with CBD. The court explained that "in this case, LEMIS data has been released in full for more than a decade prior to USFWS redacting any information. Once USFWS began redacting fields, it did so without any sort of consistency. Neither has USFWS presented a change of policy, circumstances, or statute that might explain its uneven responses to FOIA requests." The court pointed out that "if there were a true *likelihood* of *substantial* competitive injury, at least one instance of harm would have been documented based on years of unredacted LEMIS data release. USFWS has not met 'its burden of showing a potential of

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substantial competitive harm.'" (*Center for Biological Diversity v. United States Fish and Wildlife Service*, Civil Action No. 16-00527-TUC-BGM, U.S. District Court for the District of Arizona, Mar. 30)

Judge Trevor McFadden has ruled that U.S. Customs and Border Protection has not shown that it conducted an **adequate search** for records concerning instructions provided to customs officers at port-of-entry about the discontinuation of the Inspector's Field Manuel and the implementation of the Officer's Reference Tool. The American Immigration Lawyers Association requested the records and CBP produced a one-page memorandum and a one-page briefing document, a 25-page index of Chapter 11 of the ORT with 31 document titles redacted, and a one-page index of Chapter 12 of the ORT, explaining that only Chapters 11 and 12 had been drafted so far. The agency told McFadden that it had provided some additional records about the discontinuation of the IFM and that since no other portions of the ORT had yet been drafted, there were no other responsive records. McFadden found these statements insufficient, noting that "although the agency is not required to search every system if additional searches are unlikely to produce any marginal return, here, the Government utterly failed to describe the systems searched, much less why its method is 'reasonably calculated to uncover all relevant documents.'" In response to AILA's request for the drafted portions of the ORT, the agency contended that drafts contained only cross-references to other documents, but not the documents themselves, and, thus, the agency was not required to provide the cross-references. McFadden pointed out that "the Government's position is too clever by half. While it properly liberally construed AILA's request to produce a working substitute in lieu of its finalized manual, the Government adopted a hyper-technical approach to the contents of the manual. It is clear that AILA, as an organization that provides information about immigration issues and policy to the public, sought the Government's policies and procedures with respect to entry into the United States. Thus, a reading that constrains AILA's request merely to an index of applicable policies of documents, but not review, at minimum, of those policies of documents for responsiveness is too narrow. The Government is obligated to review and disclose responsive records – to include the underlying policies or documents that make up the ORT – unless the records fall into one of FOIA's statutory exemptions or there is another recognized legal objection to this disclosure." (*American Immigration Lawyers Association v. United States Department of Homeland Security, et al.*, Civil Action No. 26-02470 (TNM), U.S. District Court for the District of Columbia, Mar. 30)

Judge Tanya Chutkan has ruled that the FBI has sufficiently justified its **fee** policy for producing CDs containing 500 pages each and charging $15 a CD. Journalist Jeffrey Stein had challenged the policy, arguing that it required requesters whose requests were in excess of 500 pages to pay for multiple CDs rather than putting all the pages on one or a smaller number of CDs. All that was left of the case at this point was whether or not the FBI's actual costs for providing the CDs exceeded the cost it was charging. Chutkan explained that "the FBI calculates its direct labor costs to be between $24.50 and $46.00 per CD, which certainly exceeds the $15 it charges per CD. Accordingly, the court finds that the FBI's interim release policy, as implemented through its Integrity program, does not violate FOIA's requirement that an agency recover 'only the direct costs of search, duplication or review.'" Stein argued that because the process was convoluted and cumbersome it was inefficient. Since the case was back before Chutkan on remand from the D.C. Circuit, Chutkan pointed out that "the Circuit ordered the FBI to 'provide a sufficient factual basis upon which the district court can make the determination that the fees assessed under the interim release policy do not exceed direct costs' and remanded the case for 'further proceedings consistent with [its] opinion.' Thus, the only question before this court on remand is whether the FBI's fees exceed its direct costs." As a result, she pointed out that "this court is prohibited from considering the reasonableness of the FBI's direct costs." Chutkan explained that even if she considered the appropriateness of the FBI's costs, Stein had failed "to demonstrate that the FBI's procedures, and therefore the direct costs, are unreasonable." She observed that Stein did not "provide the court with details regarding what a proper, reasonable CD production process

entails. Instead, he asserts, without any factual support, that the FBI's 'process serves very little actual purpose' and is 'unnecessarily complex and redundant.' Such conclusory allegations do not create a triable issue of fact." (*National Security Counselors, et al. v. Department of Justice*, Civil Action No. 13-0556 (TSC), U.S. District Court for the District of Columbia, Mar. 31)

A federal court in Massachusetts has ruled that **Exemption 7 (law enforcement records)** does not apply to Department of Education records concerning the repayment of student debt because failure to repay student debt would be a breach of contract, not a violation of law. The ACLU and the National Consumer Law Center filed FOIA requests with the Education Department for records concerning the servicing of student debt. In response to the requests, the agency withheld records under Exemption 7 as well as **Exemption 5 (privileges)**. Challenging the application of Exemption 7, the ACLU argued that students' obligations to repay debt arose from a contract, which did not constitute a violation of law. Citing *New York Legal Assistance Group v. Dept of Education*, 2017 WL 2973976 (S.D.N.Y., July 12, 2017), the court agreed with the ACLU. The court noted that "when a borrower defaults on a student loan, he or she has not violated the law, and is not subject to criminal or civil sanctions. Thus, Defendant's debt collection activities fall outside the scope of 'law enforcement purposes' protected by Exemption 7. . ." The court rejected the agency's deliberative process privilege claims because it had not provided sufficient support to show the withheld emails were either predecisional or deliberative. The court pointed out that the agency "has not proven that the emails were written for the purpose of assisting the agency official responsible for making the final decision." The ACLU challenged the agency's attorney work-product claim because the withheld records had not been prepared by an attorney. The court, however, observed that "there is no requirement that a document must be written by an attorney to be protected by the privilege. Instead, Defendant need only prove that the document was prepared '*under the direction of an attorney* in contemplation of litigation.'" The ACLU also argued that the records were merely administrative rather than legal. The court indicated that "the material at issue here goes beyond. . .administrative matters. These portions of the manual contain 'legal analysis and strategies' in preparation for litigation and set forth a particular method of preparing documents for litigation in anticipation of certain legal challenges. For example, some sections of the manual explain which loans should be referred to litigation, and how the litigation materials should be prepared. Thus, the information sheds light on Defendant's litigation strategy, thoughts, and plans for the presentation of evidence." (*American Civil Liberties Union Foundation, Inc. and National Consumer Law Center v. United States Department of Education*, Civil Action No. 16-10613-ADB, U.S. District Court for the District of Massachusetts, Mar. 30)

Judge Tanya Chutkan has ruled that the Department of Justice conducted an **adequate search** for records concerning Anthony Viola's allegations that Judge Donald Nugent of the Northern District of Ohio was improperly influenced to rule against Viola, who was convicted on federal charges of conspiracy to commit mortgage fraud, although he was acquitted of similar charges at the state level. Viola learned that Nugent had been removed from another case for alleged misconduct. He requested records about that incident as well as records about Paul Tomko, an FBI "expert" and "informant." Viola's requests were referred to the Executive Office for U.S. Attorneys and the FBI. EOUSA determined that the U.S. Attorney's Office for the Northern District of Ohio was the only office likely to have responsive records. Because Viola had not provided third-party privacy waivers, the agency limited it search to records including his name. After conducting a search in the Northern District, the agency found no records responsive to his request. Viola challenged the agency's decision to limit its search to the Northern District, arguing that a federal/state Mortgage Fraud Task Force had been involved in his prosecution and that its records should have been searched. He also claimed that a woman named Dawn Pasela, who he identified as working for the Mortgage

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Fraud Task Force, had told him that the agency had destroyed or removed relevant records. Although Pasela had since died, Viola submitted an affidavit from her father supporting her claims. Chutkan pointed out that "the statements in the affidavits regarding MFTF evidence constitute inadmissible hearsay, not subject to an exception and are therefore inadequate to rebut the EOUSA declaration." She also rejected Viola's claims concerning the MFTF records. She noted that "if, as Plaintiff asserts, the Northern District of Ohio office transferred records to the MFTF and did not retain copies in its system, EOUSA is correct that it is not required to search files that it does not maintain. And if, on the other hand, the Ohio office transferred records to the MFTF and retained copies in its system, then the records would have been located by the EOUSA search." The FBI initially refused to process Viola's request on Nugent and Tomko and issued a *Glomar* response neither confirming nor denying the existence of records. After reviewing the court records on Nugent's alleged misconduct, the agency withdrew its *Glomar* response and instead told Viola the records were subject to an ongoing investigation. The FBI then withheld the records under **Exemption 3 (other statutes)** and **Exemption 7 (law enforcement records)**. Viola argued that the records had been publicly disseminated at various trials. Chutkan rejected the claim, noting that "plaintiff has proffered no evidence that the recordings were played in court or were disclosed without a protective order. Indeed, the court takes judicial notice of the docket in [the case alleging Nugent's misconduct], which contains several motions and orders – some of which are sealed – involving protective orders." (*Anthony L. Viola v. United States Department of Justice, et al.*, Civil Action No. 16-1411 (TSC), U.S. District Court for the District of Columbia, Mar. 31)

Judge Randolph Moss has resolved the remaining issues in a case brought by prisoner Christian Borda for records about grand jury proceedings in the District of Columbia, as well as records concerning his 2010 conviction on conspiracy to commit a narcotics offense, ruling that the Department of Justice has now shown that it conducted an **adequate search** and that four plea agreements the FBI withheld because they were sealed remained properly sealed. Borda had filed suit in 2014 and his motion to amend his complaint had been pending for more than sixteen months, largely because he had failed to pursue his suit. Under the circumstances, Moss ruled that Borda's motion to amend should be dismissed. He noted that "the delay here, moreover, is substantial. Forty-two months elapsed from when Borda filed this suit to when he sought leave to amend the complaint for a second time to add substantial, new allegations, and he could easily have sought leave to amend long before he did so." In an earlier decision, Moss found that the FBI had not substantiated whether or not the four plea agreements it withheld because they were sealed were still subject to a sealing order. Finding that all four plea agreements were still subject to the sealing order, Moss agreed the FBI had properly withheld them. Moss also found that several documents had been properly withheld under **Exemption 3 (other statutes)**, citing Rule 6(e) on grand jury secrecy, but that although other documents did not qualify for Rule 6(e) protection they were properly withheld under **Exemption 5 (privileges)**. (*Christian Borda v. U.S. Department of Justice, Criminal Division*, Civil Action No. 14-229 (RDM), U.S. District Court for the District of Columbia, Mar. 31)

Judge Ellen Segal Huvelle has ruled that although the PACER system of access to court documents takes in far more in fees than its direct costs, Congress approved the way in which the Administrative Office of the U.S. Courts used funding for promoting electronic access to court records in the E-Government Act of 2002. However, she found that projects initiated after passage of the E-Government Act that did not directly relate to electronic access to court records violated the spending limitations, regardless of whether or not Congress had adopted the funding requests submitted by the AO. The National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice filed a class-action suit alleging that PACER fees were in excess of the amount needed to recover direct costs. After examining the history of the development of the program since 1993, Huvelle noted that the judiciary had collected more than $920 million

in PACER fees between 2010 and 2016, with the amount collected annually rising each year from $102.5 million in 2010 to $146.4 million in 2016, while during the same period the judiciary spent $217.9 million on the Court Management/Electronic Court Filing or PACER system, $229.4 million on Telecommunications/ Communications Infrastructure, and $74.9 million on Court Allotments. The plaintiffs argued that PACER was only allowed to recoup its direct costs, while the government contended that the statute allowed PACER fees to be used for any expenditures related to "disseminating information through electronic means." Huvelle rejected both extremes. Instead, she pointed out that "the overall purpose of the section pertaining to the judiciary [contained in the E-Government Act] was to 'require federal courts to provide greater access to judicial information over the Internet.' To that end, the Act mandated that the judiciary expand the public's access to electronically stored information that was accessible via PACER." She indicated that "this ambitious program of providing an electronic document case management system was mandated by Congress, although no funds were appropriated for these existing and future services, but Congress did provide that fees could be charged even though the fees could be 'only to the extent necessary.'" She explained that "however, Congress' endorsement of the expenditures being made in 2002, in conjunction with the statutory language, the evolution of the E-Government Act, and the judiciary's practices as of the date of the Act's passage, leads the Court to conclude that the E-Government Act and its predecessor statute imposed a limitation on the use of PACER fees to expenses incurred in providing services, such as CM/ECF, that are part of providing the public with access to electronic information maintained and stored by the federal courts on its CM/ECF docketing system." As a result, she found that several later programs funded to increase courtroom technology did not fall within the permissible use of PACER funds. (*National Veterans Legal Services Program, et al. v. United States of America*, Civil Action No. 16-745 (ESH), U.S. District Court for the District of Columbia, Mar. 31)

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