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Washington Focus: For the fourth year in a row, the Department of Defense has asked Congress to provide a new exemption to cover certain unclassified military tactics, techniques and procedures. DOD contends that the 2011 Supreme Court ruling in Milner v. Dept of Navy, finding that Exemption 2 did not include a risk of circumvention prong, left such records unprotected. Commenting on DOD's current attempt to gain protection for such records, Steve Aftergood of Secrecy News pointed out that the agency had expanded its justification for a new exemption to add tactics, techniques and procedures related to cyber-attacks as well. DOD explained that "this proposal would add a layer of mission assurance to unclassified cyber operations and enhance the Department of Defense's ability to project cyber effects while protecting national security resources."

Chemical Facility Data Protected By Exemption 7(F)

Judge Timothy Kelly has ruled that data on the level of dangerous chemicals at various facilities nationwide is protected by Exemption 7(F) (harm to any person) because the information could be used by terrorists to locate potential targets for attack. Kelly's decision shows how embedded the 9/11 mentality has become in withholding records that also have a public health and safety aspect to them, a knee-jerk political decision to always assume that a terrorist attack is far more likely than a chemical spill caused by negligence or a natural disaster. But even more telling is the extent of the influence of Justice Samuel Alito's concurrence, which was joined by no other Supreme Court Justice, in *Milner v. Dept of Navy*, 562 U.S. 562 (2011), suggesting that agencies could characterize virtually any records as security-related and then withhold them under Exemption 7 (law enforcement records), has taken hold in allowing agencies to more aggressively use Exemption 7(E) (investigative methods and techniques) – often as a substitute for the circumvention prong previously recognized as part of Exemption 2 (internal practices and procedures) – and Exemption 7(F). Starting with *PEER v. U.S. Section, International Boundary and Water Commission*, 740 F.3d 195 (D.C. Cir. 2014), and continuing with *EPIC v. Dept of Homeland Security*, 777 F.3d 518 (D.C. Cir. 2015), the

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D.C. Circuit adopted Alito's argument that records containing data that could potentially be exploited by terrorists qualified for 7(E) and 7(F) protection, regardless of how far-fetched such a scenario might be.

While the flood inundation projections involved in *PEER* were the most ludicrous claim justified under 7(F), the subsequent use of 7(E) and 7(F) in *EPIC* to protect a DHS memo addressing a possible need to temporarily shut down the cellular network in the event of a terrorist attack was a much closer call. In the case before Kelly, Greenpeace had requested data DHS compiled under the Chemical Facility Anti-Terrorism Standards program showing the "screening threshold quantity" of dangerous chemicals held in facilities nationwide. CFATS tracks the levels of dangerous chemicals and facilities can go in and out of maintaining the requisite level of chemicals, a process referred to as "de-tiering." Greenpeace requested records showing the number of facilities that had reduced their levels of dangerous chemicals so that they were no longer considered high risk. The National Protection and Programs Directorate located 123 pages of responsive records but told Greenpeace that it was withholding them all under Exemption 5 (privileges), Exemption 7(E), and Exemption 7(F). Greenpeace filed an administrative appeal, arguing that in *ACLU v. Dept of Defense*, 543 F.3d 59 (2nd Cir. 2008), the Second Circuit held that Exemption 7(F) applied only when an agency could describe a discrete group of individuals who could be harmed by disclosure. Greenpeace's appeal was heard by an attorney at the Coast Guard. The Coast Guard attorney ruled in favor of Greenpeace, finding the agency had gone beyond the holding in *ACLU v. Dept of Defense*. NPPD disagreed with the Coast Guard attorney's decision in light of the fact that in the *PEER* and *EPIC* decisions, the D.C. Circuit had decided that the *ACLU v. Dept of Defense* holding did not apply under the circumstances presented in those cases. Instead DHS's Office of General Counsel reviewed the Coast Guard attorney's decision and allowed NPPD to redact the records under Exemption 7(F). Greenpeace appealed that decision. The Coast Guard attorney once again ordered the agency to comply but indicated that he had no ability to enforce his decision. As a result, Greenpeace filed suit.

Because of the peculiar circumstances of the case, Greenpeace asked Kelly to order DHS to comply with the Coast Guard attorney's decision and require the agency to disclose an unredacted copy of the records. This put Greenpeace in the odd position of asking Kelly to uphold the agency's appeal rather than deciding the merits of the case *de novo*. Kelly explained that "in most cases, *de novo* review is a boon to plaintiffs; unlike the APA standard of review, *de novo* review generally affords no deference to the agency's decisions." However, he noted that "but FOIA plaintiffs must take the bitter with the sweet. The FOIA standard of review does disadvantage plaintiffs who would prefer to focus on the niceties of agency procedures instead of the merits of their claims." He added that "that is not to say that FOIA's procedural provisions are irrelevant. . . If the agency fails to follow FOIA's procedures, the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court. But the agency suffers no prejudice on the *merits* of its defense, nor could it, because review must be *de novo*."

DHS stressed that disclosure of the data would make the facilities more susceptible to a terrorist attack. Kelly agreed, noting that "identifying information about these facilities shares a key characteristic. . .it represents highly useful information for terrorists planning attacks on them." He pointed out that "disclosing which facilities are considered 'high risk' and which are not, has the potential to reveal the government's thinking about which facilities are *likely* targets for terrorist attacks, and which are not. Revealing the names of 'de-tiered' facilities would be dangerous [because] it would provide terrorists with valuable insight into how the United States government, including its intelligence services, assesses the risk of attacks on chemical facilities in this country. . .[Further], such revelations would effectively identify 'de-tiered' facilities as 'soft targets' for terrorists."

Greenpeace emphasized that disclosure would foster the public interest in ensuring that the facilities followed the appropriate safety regulations. Greenpeace pointed out that "disclosure creates an incentive for

reductions, and more facilities will reduce their inventories of chemicals of interest, increasing safety." Kelly indicated that "these affidavits miss the mark. Exemption 7(F) merely requires the government to show 'a reasonable expectation of endangerment' if the records are released. It is not a 'balancing test' that requires the agency to weigh that danger against possible benefits of releasing the information. Therefore, DHS is not required to show that risks to human life and health from potential terrorist attacks outweigh the possibility that withholding the information might inhibit the development of best practices by the private sector."

Even Greenpeace's argument that much information about chemical facilities was already publicly available through the EPA and other agencies was turned against it. Kelly observed that "such information enriches, and does not merely repeat, the information already in the public domain. As Defendants persuasively claim, terrorists might combine these different sources of information to make better-informed decisions about what facilities to target." (*Greenpeace, Inc. v. Department of Homeland Security, et al.*, Civil Action No. 17-479 (TJK), U.S. District Court for the District of Columbia, May 1)

Discretionary Disclosures Do Not Waive CIA Exemption Claims

After sharply criticizing the CIA for failing to consider whether it waived any legitimate exemption claims by making discretionary email disclosures of classified information to three journalists, Judge Colleen McMahon has agreed with the CIA that its discretionary disclosures did not constitute a public disclosure for purposes of the public domain doctrine. *Wall Street Journal* reporter Adam Johnson requested the classified information disclosed by the CIA to *New York Times* reporter Scott Shane, *Washington Post* columnist David Ignatius, and *Wall Street Journal* reporter Siobhan Gorman. The CIA responded by disclosing the emails with the classified information redacted. When Johnson filed suit, the CIA argued that *Phillipi v. CIA,* 655 F.2d 1325 (D.C. Cir. 1981), recognized the CIA's ability to make discretionary disclosures without waiving exemption claims. McMahon found that a much more detailed examination of waiver was required before she could rule on the agency's motion for summary judgment. Because most of the case law developing the public domain doctrine originated from the D.C. Circuit, McMahon enlisted the assistance of the Government Accountability Project, Government Information Watch, National Security Counselors, the New Venture Fund, and the Project on Government Oversight to serve as *amici* to flesh out the legal arguments on the applicability of the public domain doctrine.

Johnson and the *amici* argued that the application of Exemption 1 (national security) and Exemption 3 (other statutes) that would normally protect classified information could be waived. They also pointed out that in most of the relevant case law "the disclosed information was conveyed to the authorized recipients either by telling it to them or by showing it to them. In no instance were the recipients able to retain permanent copies of exactly what was disclosed to them in their files. Here, by contrast, CIA deliberately sent the emails to selected reporter-recipients at their email addresses at three major newspapers. Nothing would have prevented the reporter-recipients of those emails from printing them out, sharing them on screen or in print form with others, and preserving them on their computers." Johnson and the *amici* observed that "it is a difference that makes a difference, because it created a 'permanent public record' of the disclosed information."

McMahon examined the line of cases that developed on the heels of the *Phillipi* decision, starting with *Ashfar v. Dept of State*, 702 F.2d 1125 (D.C. Cir. 1983), in which the D.C. Circuit ruled that it was the plaintiff's burden to show that the exact information being requested was already in the public domain. *Ashfar* was expanded in *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990) and *Public Citizen v. Dept of State*, 11 F.3d 198 (D.C. Cir. 1993), emphasizing that the information being sought had to be identical to that already in the public domain. In *Cottone v. Reno*, 193 F.3d 350 (D.C. Cir. 1999), the D.C. Circuit added another

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requirement – that the information exist in a "permanent public record." In *Students Against Genocide v. Dept of State*, 257 F.3d 828 (D.C. Cir. 2001), the D.C. Circuit rejected the plaintiffs' claim that a photograph shown to members of the United Nations entered the public domain. In *Muslim Advocates v. Dept of Justice*, 833 F. Supp. 2d 92 (D.D.C. 2011), Judge Emmet Sullivan ruled that DOJ did not waive the deliberative process privilege when it allowed civil liberties groups to review its Domestic Investigations and Operations Guide during a meeting. All copies were collected after the meeting was over. And in *Judicial Watch v. Dept of Defense*, 963 F. Supp. 2d 6 (D.D.C. 2013), Judge Rudolph Contreras found DOD did not waive exemption claims when it disclosed the identities of Navy Seals and CIA officers who had participated in the hunt for Osama bin Laden to the filmmakers of the movie "Zero Dark Thirty."

Reviewing the D.C. Circuit case law, McMahon observed that "the plaintiff must first demonstrate that he is seeking *exactly* the information that was previously disclosed to someone not ordinarily authorized to receive it." And "the plaintiff must also demonstrate that that precise information he seeks is in the 'public domain.'" She added that "moreover, courts have very narrowly construed what constituted the 'public domain,' thereby creating 'safe harbors' within which the [CIA] Director can carry out his statutory duty of protecting intelligence sources and methods via selective disclosure without fear of waiving his FOIA protection."

Johnson and the *amici* emphasized that the email disclosures here had created a permanent public record because the reporters were free to disclose the information to the public. McMahon expressed some sympathy to the argument but noted that "if the only way that information can be seen by the general public is by stealing it from an authorized recipient, logic dictates that the information is not available to the general public – it is not 'in the public domain.'" She indicated that even though the three reporters had the information there was no evidence that they intended to make it public. She pointed out that she "would be shocked if the three eminent news organizations whose employees received these emails did not fight tooth and nail against any effort to makes them public; and as I understand matters, the law is on their side. If that were not so, Johnson would not be asking the CIA to disclose the redacted information, he would be suing the *New York Times*, the *Washington Post*, and the *Wall Street Journal*." (*Adam Johnson v. Central Intelligence Agency*, Civil Action No. 17-1928 (CM), U.S. District Court for the Southern District of New York, April 26)

Views from the States…

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

California

A court of appeals has ruled that the *Los Angeles Times* is not collaterally estopped from recovering fees under the private attorney general's statute merely because the newspaper incurred litigation costs as a result of intervening in a reverse-PRA suit brought by the Pasadena Police Officers Association and two Pasadena police officers who shot and killed an individual who appeared to be fleeing from the scene of a robbery to block disclosure of an unredacted version of reports concerning the officers' actions. Responding to a 911 call claiming that the caller had been robbed at gunpoint by two individuals, Officer Matthew Griffin and Officer Jeffrey Newlen encountered Kendrec McDade, who began running when he saw the police. As a result, the officers fired at McDade, killing him. McDade did not have a gun; the 911 caller later admitted that the robbers were not armed. The incident spawned a number of investigations, as well as a civil suit brought by McDade's mother. No criminal charges were brought against the police officers and their separate internal

affairs investigations concluded that they did not violate police policy. The City retained the Office of Independent Review Group to conduct an independent review of the shooting. OIR prepared a 70-page report, which was requested by McDade's mother pursuant to the Public Records Act. Although the City indicated that it would release the OIR report with redactions of information covered by the personnel records exemption, Griffin, Newlen, and the PPOA filed a reverse-PRA action to block disclosure of the report. At that point, the *Times* filed a motion to intervene, which was granted. The trial court found a strong public interest in disclosure but agreed that the officers' personnel records information should be redacted. The trial court ordered disclosure of a redacted version of the report based on proposed redactions by the City and the PPOA. The *Times* and McDade's mother appealed and the appeals court ruled that the redactions were too broad. On remand, the trial court released five of the 14 previously redacted pages. The *Times* filed for $261,327 in attorney's fees for litigating as an intervenor, and another $89,000 for the time spent on post-remand issues, including its fee motion. The trial court found that because the City was always willing to release the report the *Times* had only prevailed against the City to the extent of the appeal and remand. The court recognized that the *Times* had prevailed against the PPOA but found that because of the *Pitchess* statutes protecting individuals who sued to protect their privacy rights from liability, the police union could not be held liable. Finding that the *Times*' efforts were duplicative of those of McDade's mother, the trial court reduced the *Times*' fee request by 50 percent for a total of $45,472. The appellate court found that the *Times* could recover fees from the PPOA. The court noted that "instead of examining the Times' purpose in bringing the lawsuit, which plainly served the public interest, the trial court credited the motivation of the individual police officers in opposing disclosure." The court observed that "regardless of the officers' personal motivation in filing a reverse-PRA suit, in so doing, the officers and the PPOA plainly attempted to restrict the public's right of access to police records." The court remanded the issue of the potential liability of the PPOA back to the trial court for determination. As to the fees available against the City, the court noted that "we agree that the Times' advocacy helped shape our prior opinion. But the overlapping nature of the Times' substantive legal arguments against both the City and the PPOA does not aid its argument here. The PRA only allows for recovery from the City." The court added that "the trial court found that the Times was the prevailing party against the City only for the narrow matter of fees incurred during appellate mandamus review and the subsequent hearings over additional unredactions. If there is *no* evidence to support a trial court's findings, then an abuse of discretion has occurred. We cannot say an abuse of discretion occurred here." (*Pasadena Police Officers Association, et al. v. City of Pasadena, et al.*, No. B275566, California Court of Appeal, Second District, Division 1, Apr. 12)

Florida

A court of appeals has ruled that there remain questions concerning whether the City of Port St. Lucie violated the Sunshine Law when it voted to dismiss the city manager in a meeting held only 21 hours after notice had been posted. Port St. Lucie Councilmember Ron Bowen asked City Attorney Roger Orr to informally poll the council members to see if there was sufficient support to fire City Manager Greg Oravec. Although Orr's poll showed insufficient support to fire him, Oravec decided to negotiate a settlement. The city council posted notice only 21 hours prior to its special meeting. Although the meeting was well-attended, Transparency for Florida filed suit, alleging that a combination of the informal polling and the short notice constituted a violation of the Sunshine Law. The trial court ruled in favor of the city council, finding that even if the city council had initially violated the Sunshine Law, it cured the violation by holding a public meeting at which Oravec's termination was ratified by the city council. The appeals court found there were still too many questions about whether the city council's actions cured any violation. The appeals court noted the "trial court correctly concluded that it could not definitively find that no Sunshine Law violation occurred." But the appeals court disagreed with the trial court as to whether the city council's subsequent meeting cured any violation. After reviewing a videotape of the meeting, the appeals court noted that "the separation agreement

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was not discussed at all at the meeting. . .As we review this record de novo, we conclude that there are disputed issues of fact as to whether the meeting on the separation agreement cured any Sunshine Law violation which may have occurred prior to the meeting in the formation of the separation agreement and termination of the city manager." The appeals court added that "there remains a disputed issue of fact as to whether the notice for *this* meeting was reasonable." (*Transparency for Florida v. City of Port St. Lucie*, No. 4D16-3976, Florida District Court of Appeal, Fourth District, Apr. 18)

New Jersey

A court of appeals has ruled that the College of New Jersey has not shown that an email related to a settlement agreement was privileged at the time that Libertarians for Transparent Government filed its Open Public Record Act request. LFTG filed a request for records concerning a settlement agreement. The TCNJ disclosed a copy of the signed agreement, but withheld an email written prior to the final signing, claiming it was privileged. The trial court ruled in favor of the TCNJ and LFTG appealed. The appeals court found TCNJ had not provided sufficient evidence to show the email was privileged. The appeals court noted that "without a full record of exactly what was withheld, the date of the withheld document, and the date the settlement was executed, it is impossible to determine whether TCNJ violated OPRA." Sending the case back to allow TCNJ to substantiate its claims, LFTG argued a remand would give TCNJ an unfair second chance to defend its OPRA claim. But the appeals court observed that "based upon the incomplete record, we cannot summarily compel disclosure of a document or documents that may be exempt from disclosure under OPRA." (*Libertarians for Transparent Government v. College of New Jersey*, No. A-1179-16T4, New Jersey Superior Court, Appellate Division, Apr. 12)

North Carolina

A court of appeals has ruled that the University of North Carolina at Chapel Hill does not have discretion to withhold records pertaining to student rape or sexual abuse charges that have been substantiated – an exception to the rule of non-disclosure under the Federal Educational Rights and Privacy Act – in response to a request made under the North Carolina Public Records Act. A coalition of North Carolina media organizations submitted requests for the records to UNC-CH. The University told the media requesters that it would not disclose the records. The media coalition sued. The trial court agreed that the University was required to disclose records that resulted in disciplinary action, but not records that had not resulted in disciplinary action. The media coalition then appealed. The appeals court reversed, noting that "FERPA's plain language does not condition an educational institution's compliance on requiring the exercise of discretion to determine whether to release disciplinary records that FERPA expressly exempts from non-disclosure, in the face of a public records request." The appeals court pointed out that the provision in FERPA allowing an educational institution to disclose records pursuant to a court order "makes no distinction between a judicial order that *requires* disclosure and an order that *authorizes* disclosure. If a court ordered an educational institution to release an exempt record [the statutory provision] does not indicate the institution would be in violation of FERPA by complying with a mandatory court order." (*DTH Media Corporation, et al. v. Carol L. Folt, et al.*, No. COA17-871, North Carolina Court of Appeals, Apr. 17)

The Federal Courts…

Judge James Boasberg has ruled that while the FBI properly invoked a *Glomar* response neither confirming nor denying the existence of records on Donald Trump before he became President there may be a narrow category of records that relate to Trump's business interests that are not necessarily protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and would not qualify for *Glomar* protection. Reporter Jason Leopold, researcher Ryan Shapiro, and Shapiro's non-profit organization Property of the People requested FBI records on Trump before he became President, including any non-investigative records. The FBI issued a *Glomar* response. Leopold and Shapiro argued that the FBI had already disclosed a considerable amount of information about Trump's business interests and that such disclosures waived the agency's ability to withhold records related to those interests. The agency argued that its obligation to acknowledge records on Trump was limited only to those bits of information about Trump that had already been disclosed. Boasberg agreed, noting that "the 'specific information at issue' is whether the FBI might have 'additional records about Mr. Trump.' The public hasn't a clue on that question, and the Bureau is entitled to keep the answer a secret. The Court accordingly holds that the FBI has waived its *Glomar* response only with respect to those exact records previously released." Even though Leopold and Shapiro had asked for non-investigative records on Trump, the FBI contended it need not search for such records because the plaintiffs had not provided evidence that such records existed. But Boasberg observed that "contrary to Defendant's (uncited) assertions, there is no requirement that Plaintiffs provide *evidence* that such records exist." The FBI also argued that since the majority of its records pertained to law enforcement matters it would be unduly burdensome to search for non-investigative records. Boasberg rejected that claim, noting that "perhaps the Government can prove otherwise, but it does not appear 'unduly burdensome' to ask the agency to search for Donald Trump's name within the [Central Records System database] and see whether any personnel or administrative records surface." He indicated that "for now, though, it suffices to say that the FBI should construe Plaintiff's request as written – for 'any and all' records related to Donald Trump –or submit an affidavit explaining in greater detail why such a search would be unduly burdensome." As a general rule, Boasberg agreed with the FBI that any investigative records mentioning Trump would be protected by Exemption 7(C). Here, Leopold and Shapiro argued that Trump's privacy interest was diminished if the records related to Trump's business interests rather than his personal privacy interest. Noting that the public interest in overcoming a *Glomar* response was to reveal the actions of the government, Boasberg pointed out that "plaintiffs offer no evidence, however, that the Department might harbor some sort of grudge against the sitting President, or, critically, that any such feelings motivated an 'improper' performance of its statutory duties in the past." Boasberg explained that "Exemption 7(C) would not block a request for records relating to the Trump Organization, nor would it require the FBI to redact any mention of Trump's affiliation with that company." But he added that Leopold and Shapiro had already made requests for records about Trump's businesses and charities, but because the extent to which the FBI had disclosed records as a result of those requests was unclear, Boasberg ordered the FBI to provide supplementary affidavits. Leopold and Shapiro had pointed to the existence of a *Washington Post* article about Trump's Atlantic City casinos in which Trump revealed his relationship with Daniel Sullivan who he described as an FBI informant. Boasberg agreed with Leopold and Shapiro that the *Post* article may have waived the FBI's ability to protect those records through a *Glomar* response. But he noted that the *Post* article was the subject of a separate request to the FBI and was not a part of the present litigation. (*Property of the People, et al. v. United States Department of Justice*, Civil Action No. 17-1193 (JEB), U.S. District Court for the District of Columbia, April 23)

Judge Ketanji Brown Jackson has ruled that pornographic materials recovered from Osama bin Laden's compound in Abbottabad, Pakistan during the 2011 U.S. raid that killed bin Laden would be contained in the CIA's operational files that are not subject to the search and review provisions of FOIA and that an exception for "special activities" contained in the CIA Information Act does not apply. In the aftermath of the raid, the press reported that an extensive collection of pornography was among the seized

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materials. Judicial Watch requested the pornographic records from the CIA. The CIA told Judicial Watch that if such records existed they would be in the agency's operational files which were not subject to FOIA. Judicial Watch challenged the agency's claim as to whether or not the pornographic materials would be in operational files, arguing that the records would fit into a "special activity" exception. After reviewing the evolution of the 1984 CIA Information Act, which was designed to alleviate the burden on the CIA to search and review records that were presumptively exempt, Jackson pointed out that the agency's affidavits detailed "the agency's procedures for designating operational files, and for maintaining the files to ensure that designation remains valid over time, and [the agency] also avers that those procedures were followed with respect to the particular operational files that are likely to contain the requested pornographic materials." She observed that "the agency need not actually *review* the files that are being described, since Judicial Watch has not made any showing to dispute the agency's contentions about the nature and content of the files. Indeed, requiring the CIA to reveal more than it already has about the contents of the operational files that [the agency] describes would undermine the very exemption that Congress has authorized the CIA to invoke in situations such as this." To the extent that Judicial Watch continued to claim that the records were not operational files, Jackson noted that "any argument that the requested pornographic materials do not fit the statute's definition of an 'operational file' misunderstands the statute: a challenge brought under section (f)(4) is a challenge to the designation of the *file in which the requested records are placed* as 'operational,' and is *not* a challenge to any individual records that are located in that file." Judicial Watch argued that the records fell within an exception for "special activities." Jackson rejected the claim, pointing out that "the statute also unambiguously provides that the CIA need only open its exempted operational files to 'search and review *for information concerning*' any special activity of the CIA, which, in this Court's view, precludes the application of the exception to require the agency to search for the pornographic materials requested here." She observed that 'to read the special activity exception more broadly would be to require the CIA to give up its ability to fend off burdensome FOIA requests in pursuit of records that actually do not shed any light on the United States government's role in the planning or execution of a covert intelligence operation, and are, in fact, entirely *incidental* to that operation." Analogizing the bin Laden records to personal records the CIA might have collected on Fidel Castro as part of the Bay of Pigs operation, Jackson explained that "the *relevant* public interest for the purpose of circumventing the CIA's special exemption from the FOIA's search and review obligations is the public's interest *in the activities of the United States government*, and *not* the public's freestanding interest in documents and information that reveal nothing about the preexisting circumstances of the target of the government's covert action." She added that "far from constituting information *about* the CIA's alleged special activity, the pornographic materials that Judicial Watch has requested pursuant to the FOIA are entirely incidental to it, such that the special activity exception does not apply to divest the CIA of the protection of the operational files exemption." (*Judicial Watch, Inc. v. Central Intelligence Agency*, Civil Action No. 16-449 (KBJ), U.S. District Court for the District of Columbia, April 19)

Judge Rosemary Collyer has ruled that the Department of the Treasury conducted an **adequate search** for records using keywords referring to a carbon tax and, except for a handful of emails, properly withheld records under **Exemption 5 (privileges)**. The Competitive Enterprise Institute submitted two requests to Treasury for emails referring to a carbon tax, asking the agency to search the Office of Environment and Energy and the Office of Legislative Affairs. The agency searched Environment and Energy and located 4,163 pages of responsive records. Its search of Legislative Affairs returned no other non-duplicative records. The agency disclosed 2,464 pages and withheld 1,699 pages. CEI argued that it was unrealistic that Legislative Affairs had no records of its own. But Collyer noted that "CEI fails to present evidence sufficient

to establish bad faith on the part of the agency. The operative question in not whether further records conceivably exist, or whether other possible search avenues were unavailable, but whether Treasury's searches were 'reasonably calculated to uncover all relevant documents.' CEI identifies no evidence that suggests that any records were intentionally withheld, that the files of likely records custodians were not searched, or that any responsive records held by Legislative Affairs were not duplicative of those found at Environment and Energy." In challenging the applicability of Exemption 5, CEI argued that since Treasury had no authority to tax carbon any discussions it had could not be covered by Exemption 5. Collyer disagreed, noting that "Treasury's authority *vel non* to impose a carbon tax is not nearly as clear. Agency deliberations may be necessary to determine whether it has authority to promulgate a particular tax or policy. Even if CEI correctly describes Treasury's authority, the need for staff to speak candidly and confidentially is perhaps more important when the discussion concerns unmapped and unexplored terrain at the border of agency authority." Collyer pointed out that "for the most part Treasury's *Vaughn* Index provided sufficient information to allow the Court to find that it properly claimed applicability of Exemption 5." She added that "the Court can determine that the records are appropriately withheld under Exemption 5 without further information about the particular policy proposals at issue." However, Collyer questioned the applicability of Exemption 5 to records referred to as "media-related withholdings." She indicated that "the lack of substantive detail in the *Vaughn* Index prevents the Court from assessing what 'deliberative process' was taking place. Not every discussion by agency staff that touches on agency matters is protected by Exemption 5; if that were the case, Exemption 5 could conceivably cover almost any internal agency communication." (*Competitive Enterprise Institute v. United States Department of the Treasury*, Civil Action No. 12-1838-RMC, U.S. District Court for the District of Columbia, April 2)

Judge James Boasberg has wrapped up unnecessarily prolonged litigation brought by James Negley to determine the amount of information the FBI maintained on him because of his small role in the Unabomber investigation. In 1995, Negley asked a librarian at the University of California at Chico to provide him a copy of the Unabomber's manifesto that had been published in the *Washington Post*. Instead, the librarian called the FBI's UNABOM Hot Line and reported Negley. The FBI interviewed Negley, who was quickly exonerated. But Negley litigated four FOIA requests between1999 and 2009 in his effort to determine the extent of the records the FBI maintained on him. The agency initially disclosed 46 pages, but he ultimately received more than 2,300 pages, primarily dealing with his FOIA litigation. The case before Boasberg specifically requested records about a notation on a 2002 FAX transmission sheet that seemed to indicate that there were 500,000 pages responsive to his request. The agency tracked down the cover sheet and disclosed it to Negley but was unable to satisfactorily explain to Negley the meaning of the 500,000-page reference. The FBI explained that the 500,000-page reference referred to the total estimated pages in a file maintained by the San Francisco field office about the Unabomber investigation. Boasberg sympathized with Negley's skepticism that a massive nationwide investigation would only have compiled 500,000 pages, but the FBI pointed out that with more sophisticated record management technology the agency now estimated the file contained 1.4 million pages. Despite his doubts about the size of the file, Boasberg observed that "the only question the Court must ask is whether, pursuant to Negley's Fourth FOIA Request, the FBI has properly identified the 'file referenced' in 'a facsimile cover sheet sent. . .on January 22, 2002.' On review, it is obvious that the agency has found the elephant Negley has been hunting, and the agency's inconsistencies in describing the file's content do not cast doubt on that conclsion." The FBI told Negley it was willing to disclose the whole file at the rate of 500 pages per month, which Boasberg pointed out would take some 80 years. Since Negley was 70, Boasberg noted that "while it agrees such a pace may well be a non-starter for an elderly patient, the D.C. Circuit has recently given its seal of approval to the Government's standard 'interim release policy,' which provides for 'processing requests in 500-page increments.'" Applying that policy to Negley's request, Boasberg observed that "Negley merely wants to satisfy his curiosity about the UNABOM

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investigation and any potential connection to himself. The Court therefore agrees with the agency's assessment that its 'standard rate of 500 pages per month' would be appropriate were Negley to seek release of such documents." (*James Lutcher Negley v. U.S. Department of Justice*, Civil Action No. 15-1004 (JEB), U.S. District Court for the District of Columbia, April 3)

The D.C. Circuit has ruled that Judicial Watch waived its challenge to the district court's finding that Rule 84.9, protecting records being used in a court-ordered mediation, acted as an Exemption 3 statute for purposes of withholding records concerning settlement of the litigation between the Justice Department and the House Government Oversight and Reform Committee over the House Committee's attempt to enforce subpoenas issued during its investigation of the Fast and Furious operation. The district court initially ruled that Judge Amy Berman Jackson's comments in open court constituted a sealing order for the records. After Judicial Watch appealed that decisions, the D.C. Circuit remanded the case to give Jackson an opportunity to clarify her remarks. Jackson indicated that she had not intended for her comments to constitute a sealing order. DOJ then fell back on Rule 84.9 and the district court withheld the records on that basis. In a per curiam decision, the D.C. Circuit noted that "Judicial Watch does not challenge the district court's conclusion that Local Rule 84.9 prohibits the Department from disclosing documents under FOIA. In other words, Judicial Watch has waived its statutory argument under FOIA and proceeds solely on that Local Rule 84.9 does not apply to the documents it seeks." Explaining that Jackson had ordered the parties to participate in the court's formal mediation program, the D.C. Circuit observed that 'in this unique factual and procedural context, we conclude that the district court did not abuse its discretion in concluding that the documents Judicial Watch sought from the Department were 'made in connection with' the formal mediation [in the Fast and Furious litigation] under Local Rule 84.9." However, the D.C. Circuit emphasized the narrowness of its decision. It pointed out that "we are relying on Judicial Watch's failure to challenge whether a district court's collateral interpretation of Local Rule 84.9 can qualify as an exemption under FOIA. Thus, we explicitly reserve judgment on when (if ever) a district court's collateral interpretation of its local rules can serve as the basis of a FOIA exemption." (*Judicial Watch, Inc. v. United States Department of Justice*, No. 17-5229, U.S. Court of Appeals for the District of Columbia Circuit, April 11)

Judge Ketanji Brown Jackson has ruled that the FBI and EOUSA properly responded to Anthony Donato's FOIA requests concerning a plot to disrupt the incarceration of Dominick Cicale, a former captain in the Bonanno organized crime family, although EOUSA has not shown that it provided Donato his two hours of free search time and 100 pages of documents after rejecting his **fee waiver** request. But Jackson found that the Bureau of Prisons has so far has failed to show that it conducted an **adequate search** for records Donato requested from that agency. While incarcerated at the Metropolitan Correction Center in New York, Cicale ordered other inmates to "create mischief." He also allegedly spread a rumor that another crime figure had hired a correctional officer to kill him. Donato filed a series of FOIA requests for records about the alleged Cicale plot. He also requested from BOP, records concerning the factors the agency used in transferring him to various prisons. EOUSA located 55 boxes of potentially responsive records in the U.S. Attorney's Office for the Eastern District of New York. The agency told Donato that an additional 55 hours would be necessary to search those records and estimated a cost of $1,540. Donato then requested a fee waiver, which EOUSA denied. Donato appealed to the OIP, which upheld EOUSA's denial of a fee waiver but told the agency to provide Donato with two hours of free search time and 100 of records. The FBI refused to search for records on third parties and issued a *Glomar* response neither confirming nor denying the existence of records. Donato argued that the records had been made public during the trial, but the FBI rejected his public domain claim. BOP located 225 pages concerning the murder conspiracy and withheld them all. As to Donato's request for records about his prison placement, the agency ultimately located two documents, neither of which were the type of document Donato had requested. Finding Donato had not provided any evidence of a public

interest in disclosure of the FBI's records that would overcome its *Glomar* response, Jackson noted that "to prevail under the public domain doctrine, Donato must show that *the FBI* has acknowledged that *it* investigated Cicale's alleged scheme, and that it would be likely to have records about the plot, and Donato has done nothing to demonstrate any such acknowledgement by the FBI." In support of his request for a fee waiver from EOUSA, Donato indicated he had sent letters to several reporters and had also committed to disclose records on a website called "Access Legal Aide." Skeptical of Donato's ability to disseminate information through the website, Jackson pointed out that "Donato has not provided any details about the *reach* of the Access Legal Aide website; indeed, the sole detail that Donato has offered is a link to Access Legal Aide's purported website, yet as far as this Court can tell, the listed website either does not exist or is not actually publicly available. Consequently, whatever this publication might be, it is plainly not a sufficient means for Donato to disseminate any of the requested records." However, Jackson noted Donato was entitled to two hours of free search time and 100 pages of free records and ordered EOUSA to clarify whether it had provided that service to Donato. Jackson found BOP's responses to Donato's requests insufficient. She observed that "the statements that BOP has submitted themselves provide no basis whatsoever for any determination that BOP's searches for records were reasonable." (*Anthony Donato v. Executive Office for United States Attorneys, et al.*, Civil Action No. 16-0632 (KBJ), U.S. District Court for the District of Columbia, April 16)

Judge Trevor McFadden has ruled that the CIA properly responded to Daniel DeFraia's requests for records concerning contracts between the agency and Bruce Jessen and James Mitchell, two contractors who were involved in developing the agency's detainee interrogation program, and five categories of records that were cited in the Senate Select Committee on Intelligence report on the interrogation program. Although DeFraia argued the CIA had improperly narrowed the scope of his request concerning the contracts with Jessen and Mitchell, McFadden pointed out that as a result of negotiations the parties had narrowed the scope of that request to include only the contracts themselves, which the CIA had then disclosed. Finding the parties had properly narrowed the scope of the request, McFadden observed that "because Mr. DeFraia has already narrowed the scope of his FOIA request, his assertion that the CIA failed 'to follow-up on clear leads indicating the existence of additional agency records' must fail. Mr. DeFraia points to five sets of documents referenced in the CIA contracts, which he says are illustrative of 'obvious indications that the CIA omitted responsive records.' But none of those documents constitute a contract – or part of a contract – that the CIA has failed to produce." He added that "Mr. DeFraia also thinks these deliverables [mentioned in the contracts] should have been produced. But deliverables are the fruit of an obligation, not obligation creators themselves, and therefore distinct from the contract as such." DeFraia also argued that the CIA should have provided further information pertaining to his request for citations in the Senate report. McFadden disagreed, noting that "Mr. DeFraia would have the CIA produce information that was *not* specifically cited in the footnotes, undertaking 'follow-up actions to locate the relevant files associated with the Justification [cited in the footnotes]. But to look for information not cited would go beyond the request, which sought 'all emails, letters, and reports, and other sources of information *cited* in' three specific footnotes. . . By giving him documents 'cited in' the footnote, the CIA gave Mr. DeFraia exactly what he requested." (*Daniel Charles DeFraia v. Central Intelligence Agency*, Civil Action No. 16-01862 (TNM), U.S. District Court for the District of Columbia, April 30)

A federal court in California has ruled that while the Justice Department's Office of the Attorney General conducted an **adequate search** for records concerning Vinton Frost, uncovering no responsive records, but that the FBI, which located 87 pages, 40 of which were duplicates, disclosing three pages entirely and 37 pages with redactions for the names of third parties and FBI staff, failed to show that its search was

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adequate. Frost challenged the adequacy of the search for both components. Although Frost argued that a staffer at the Office of Information Policy told him that the office was waiting on permission to search two computers, OIP's search found no records. Frost claimed the search was insufficient, but the court noted that the OIP affidavit explained that "a search request inquiry was sent to *all* OAG staff and that the responses led OIP to conclude that responsive records were likely to be found only in the email of one individual at OAG. As the Court finds nothing in the record that suggests OIP's conclusion was not based on a reasonable inquiry conducted in good faith, it rejected Plaintiff's assertion that the search was inadequate because OIP searched only the email of a single individual." The FBI only located responsive records after Frost filed suit. The court pointed out that "the FBI offers no explanation for limiting its search to main file records and does not provide an affidavit attesting that the choice was based on a determination that such a search was reasonably likely to locate responsive records. Instead, the limited search appears to have been based on a policy of waiting until a FOIA requester initiates litigation to search cross-references. As the obligations imposed on agencies under FOIA do not change when litigation is initiated, this policy appears to conflict with the FBI's obligations under FOIA." Acknowledging that the tardiness of a search is not relevant if an adequate search was eventually conducted, the court nevertheless found that the agency's explanation of its search was insufficient. The court observed that "it does not address whether documents that may have been generated by the San Francisco Filed Office *about* Plaintiff would have been uncovered by its search." The court added that the agency's affidavit did not indicate whether the FBI had asked the staff of its San Francisco field office "to determine whether any of them were likely to have responsive documents, what form such documents might take or where they might be stored." As a result, the court ordered the FBI to supplement its affidavits. (*Vinton P. Frost v. United States Department of Justice*, Civil Action No. 17-01240-JCS, U.S. District Court for the Northern District of California, April 4)

A federal court in Maryland has ruled that the National Security Agency properly denied Artem Igoshev's request for records concerning the positioning of various NSA surveillance satellites under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Igoshev, a Russian national, submitted his request in Russian. The agency responded that even confirming the existence of the information was classified. Igoshev sent a letter in response to the agency's decision, again in Russian, which the agency interpreted as an appeal. The NSA then denied Igoshev's appeal. The court found that the agency's affidavits explaining that disclosure of the information would harm national security were sufficient. The court pointed out that "plaintiff's speculation that some of the information he seeks may pertain to inactive 'targets' is irrelevant. In my view, the [agency's] Declaration is sufficiently specific and nonconclusory, and therefore I shall not 'conduct a detailed inquiry to decide whether it agrees with the agency's opinions.'" Igoshev argued that because he was allegedly tortured the principle of *jus cogens* overcame any legitimate exemptions. Rejecting his claim, the court noted that "plaintiff's cause may be a sympathetic one, but he is not unique in this respect. The invocation of *jus cogens* cannot alter the text of FOIA, which contains the applicable exemptions." (*Artem Igoshev v. National Security Agency/Central Security Service*, Civil Action No. ELH-17-1363, U.S. District Court for the District of Maryland, May 1)

The Third Circuit has ruled that the IRS and the General Services Administration conducted an **adequate search** for records about Mark Jackson, particularly relating to his unsuccessful application for a job as an IRS revenue agent. The two agencies disclosed 174 pages. Jackson argued that the agencies had failed to process his request under the **Privacy Act** as well as FOIA. Instead, the Third Circuit noted that "the amended declarations made clear that the defendants did not limit their searches, or withhold documents, on the basis that they were responding to only a FOIA request." Jackson claimed the agencies should have redacted information about a criminal charge that was pending at the time of his application but was subsequently dropped. The Third Circuit rejected the claim, noting that "although Jackson asserts that the

'derogatory information was not assessed or used'. . .he does not dispute that the information is accurate." (*Mark Jackson v. United States General Services Administration, et al.*, No. 17-2847, U.S. Court of Appeals for the Third Circuit, April 13)

Judge Emmet Sullivan has ruled that he does not have **jurisdiction** over Derek Jarvis' FOIA suit against the Department of Housing and Urban Development because there is no evidence that the agency actually received his two requests. Jarvis requested information about himself, particularly in relation to complaints he had made since 2006 against his landlords. Three months later, he wrote another letter to the agency complaining that it had not yet responded to his original request. Jarvis then filed suit. The agency told Sullivan that it was unaware of Jarvis' requests until he filed suit and that a subsequent search of its records did not turn up the specific requests that were the subject of Jarvis' suit. Jarvis contended that HUD was conspiring against him, but Sullivan explained that "the fact that plaintiff mailed his FOIA requests does not impose any obligation on HUD. 'Rather, the *receipt* of a request by the agency is the legally significant event that triggers the commencement of the FOIA request and that enables a requester, such as plaintiff, who is dissatisfied with the agency response to seek recourse from federal courts.'" Dismissing the case, Sullivan observed that "plaintiff does not demonstrate HUD's receipt of his FOIA requests, and 'without any showing that the agency received the requests, the agency has no obligation to respond to them.'" (*Derek N. Jarvis v. United States Department of Housing and Urban Development*, Civil Action No. 17-1806 (EGS), U.S. District Court for the District of Columbia, April 24)

Judge Emmet Sullivan has ruled that the Social Security Administration properly responded to Derek Jarvis' two requests for records about the influence of race on SSA disability adjudications, but as to one of the requests, he rejected the agency's claim that Jarvis **failed to exhaust his administrative remedies**. The agency responded to Jarvis' request by telling him he needed to submit it to its Seabrook, Maryland office. Rejecting that response, Sullivan noted that the agency "neither cited a regulation nor explained in a declaration that a requester is *required* to direct a FOIA request to that location, or to any other local SSA office. Nor did SSA's response provide instructions for filing an administrative appeal, as FOIA requires. Furthermore, plaintiff's failure to direct his request to the Seabrook, Maryland office did not dissuade SSA from providing a substantive response to [his] request. . ." Nevertheless, Sullivan ruled in favor of the agency, finding that it had released medical records to Jarvis rather than the statistical data he requested. Sullivan concluded that since Jarvis has failed to appeal the denial of his second request the agency had shown that he did not exhaust his administrative remedies. Sullivan indicated that since the agency did not maintain records on the effect of race or immigration status on its decisions, it did not have any agency records. (*Derek N. Jarvis v. Commissioner, Social Security Administration*, Civil Action No. 17-1813 (EGS), U.S. District Court for the District of Columbia, April 23)

Judge Beryl Howell has ruled that 11 sealed grand jury dockets from the Clinton impeachment investigation should be disclosed with some redactions because the public interest in disclosure outweighs the personal privacy concerns and the only opposition to disclosure came from the Department of Justice. CNN reporter Katelyn Polantz asked the D.C. district court to unseal seven dockets pertaining to the Starr investigation that resulted in former President Bill Clinton's impeachment and subsequent Senate trial. Clinton was asked for any objections and he identified another four sealed dockets and indicated that he had no objections to unsealing all 11 dockets. Granting the unsealing request, Howell pointed out that "the district court's inherent authority to disclose grand jury proceedings is apparent from both the court's supervisory authority over grand juries and the plain text of Rule 6(e) [on grand jury secrecy]." She explained that "the

text of the Rule imposes a rule of secrecy on an enumerated list of people [prohibiting] the disclosure of 'matters occurring before the grand jury," by grand jurors, interpreters, court reporters, and government attorneys, but observed that "the district court is notably absent from this list of the persons bound by Rule 6(e)'s prohibition on disclosure." Although DOJ argued that grand jury records should not be disclosed except where an "extreme public interest" existed, Howell indicated that "the Court agrees with CNN. Given the voluminous grand jury materials already disclosed in the Starr Report, however, even under its 'narrow view,' DOJ also concurs with unsealing significant portions of these sealed dockets." After reviewing the contents of the dockets, Howell noted that all 11 sealed dockets contained two identical documents pertaining to a separate non-related judicial misconduct complaint in which an outside attorney investigating the charges sought access to the sealed dockets under Rule 6(e). Finding these specific documents should remain sealed, Howell pointed out that "these documents have never been made publicly available. The additional need for secrecy is furthered by the weak connection between these documents and the documents that are the targets of CNN's unsealing request. . ." (*In re Application to Unseal Dockets Related to the Independent Counsel's 1998 Investigation of President Clinton*, Misc. No. 18-00019 (BAH), U.S. District Court for the District of Columbia, April 16)