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Washington Focus: In an interview with the Federal News Network, Melanie Pustay, Director of the Justice Department's Office of Information Policy, acknowledged that FOIA requests continued to rise in 2018 and suggested that artificial intelligence software developed for discovery purposes may be a promising way for agencies to get a handle on such increases. She told FNN's Jared Serbu that "those kinds of tools, I think, show real promise in the FOIA context by pre-processing records or grouping similar records together, which could then help speed up the actual review of the records for disclosability." She added that "it's hard to think that we'll ever get to a point where a machine – the software – could literally process the document for release. But if they can go part of the way there that will certainly make the process of the human review so much faster."

Ninth Circuit Panel Rejects Consultant Corollary

A split panel of the Ninth Circuit has roundly rejected the consultant corollary, finding it violates the inter- or intra-agency threshold of Exemption 5 (privileges) and is contrary to the concept of narrow interpretation of exemptions. Jorge Rojas, a candidate for a position with the Federal Aviation Administration as an air traffic controller was told by the agency that he was ineligible based on his performance on a screening test called the Biographical Assessment. The BA was developed in 2013 by Applied Psychological Techniques, Inc. (APTMetrics), a human resources consulting firm hired by the agency to review and recommend improvements to the agency's hiring process for air traffic controllers and was first used in 2014. In anticipation of litigation over its hiring practices, the FAA asked John Scott, Chief Operating Officer of APTMetrics, to create "summaries and explanations" of its validation work on the 2015 BA. Rojas took the BA in 2015 and was rejected as result of his performance on the test. Rojas then made a FOIA request for records regarding the empirical validation of the biographical assessment as noted in his rejection notification. The FAA denied Rojas request, claiming the material was privileged under the attorney work-product privilege. Rojas filed an administrative appeal. Thee agency decided it had incorrectly searched for the 2014 BA

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validation rather than the 2015 validation. After searching for the correct records, the agency again withheld them under Exemption 5, claiming the attorney work-product privilege. Rojas then filed suit and after the district court reviewed the three disputed documents *in camera*, it upheld the agency's privilege claim. Rojas then appealed to the Ninth Circuit.

The entire panel first agreed that the agency had failed to conduct an adequate search. Finding the agency's explanation of the search conclusory, the panel explained that "the documents the FAA located included summaries of the Air Traffic Control Specialist hiring process, the 2015 BA, and the validation process and results of the 2015 BA. But summaries by necessity summarize something else; there is no indication that there was any search conducted for underlying documents. Thus, though [the agency's] declaration establishes that appropriate employees were contacted and briefly describes the files that were discovered, it does not demonstrate that the FAA's search could reasonably be expected to produce the information requested. . ."

But on the question of whether the consultant corollary applied, the majority and the dissent parted ways. Writing for the majority, Judge Donald Molloy, a district court judge from the District of Montana sitting by designation, indicated that several other circuit courts had accepted the consultant corollary – treating communications of third-party consultants performing certain functions on behalf of a government agency as coming from the agency itself – as qualifying for Exemption 5 protection but that the Ninth Circuit had not yet addressed the issue. Rejecting the consultant corollary, Molloy noted that the district court concluded that the records created by APTMetrics "'constitute *inter*-agency memoranda created by a government agency.' The description of the documents as '*inter*-agency memoranda' is incorrect. APTMetrics is not a government agency." Molloy pointed out that "the consultant corollary contravenes Exemption 5's plain language" and added that "Exemption 5 protects only 'inter-*agency* or intra-*agency* memorandums or letters.' An agency. . . is defined as 'each authority of the Government of the United States, whether or not it is within or subject to review by another agency.' . . .A third-party consultant, then, is not an agency as that word is used in FOIA, generally, or Exemption 5, particularly." He noted that two other exemptions – Exemption 4 (confidential business information) and Exemption 8 (bank examination records) – specifically referenced third parties covered by the exemptions. Molloy observed that the consultant corollary also undermined the purposes of FOIA. He explained that "the consultant corollary allows the government to withhold more documents than contemplated by Exemption 5, contrary to FOIA's policy favoring disclosure and its mandate to interpret exemptions narrowly."

Molloy then traced the origins of the consultant corollary. He pointed out that the concept first appeared in a footnote in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), a case best-known for its holding that White House offices that did not primarily advise the President were subject to FOIA. The footnote in *Soucie* indicated that Exemption 5 applied to a document prepared by outside experts because "the Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity." Molloy observed, however, that "the court cited no authority for these propositions. Nor did it acknowledge, never mind reconcile, FOIA's text and purpose." *Soucie*'s holding was followed by the Fifth Circuit in *Wu v. National Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972) and *Hoover v. Dept of Interior*, 611 F.2d 1132 (5th Cir. 1980), as well as *Ryan v. Dept of Justice*, 617 F.2d 781 (D.C. Cir. 1980).

In its most recent decision on Exemption 5, *Dept of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), the Supreme Court acknowledged the existence of the consultant corollary but did not adopt it. Instead, the Court noted that the term "intra-agency" in Exemption 5 is not "purely conclusory" and warned that there is "no textual justification for draining the first condition of independent vitality." The Court held that the consultant corollary did not apply when a third-party's interests were

adverse to those of the agency. Molloy pointed out that "*Klamath*, then appears to instruct that courts should be more rigorous in analyzing whether an outside party's records satisfy Exemption 5's threshold 'intra-agency' requirement before analyzing whether the records are privileged." Since *Klamath*, both the Fourth Circuit and the Tenth Circuit have recognized the consultant corollary, while the Sixth Circuit in *Lucaj v. FBI*, 852 F.3d 541 (6th Cir. 2017) decisively rejected it because the disputed records did not qualify as agency records. While Molloy was not willing to go that far, he explained that "*Lucaj* provides a reasoned discussion of the interplay between the consultant corollary, the language of Exemption 5, and the purpose of FOIA. That is more than can be said of *Soucie* and its progeny." Refusing to adopt the consultant corollary, Molloy observed that "we are not convinced that the potential harm to the government warrants adopting the consultant corollary's broad reading of Exemption 5."

Circuit Court Judge Morgan Christen dissented, urging the court, like most other circuits, to adopt the consultant corollary. She noted that "by rejecting the consultant corollary, the majority gives the FOIA a truly capacious scope. After today, the fact that a document was prepared in anticipation of litigation by a government-retained consultant will present no barrier to anyone who wants to access it by filing a FOIA request." Here, Christen emphasized that Rojas was not entitled to the documents because they would not be available in discovery. She pointed out that "the resolution of Rojas's appeal should be straightforward: he is not entitled to the APTMetrics documents because the FAA's consultant prepared them at the FAA's request, and in anticipation of litigation." Christen argued that the majority had confused the broader concept of "agency records" with Exemption 5's threshold that records be either "inter- or intra-agency" records. She noted that "distinguishing between those two categories is simple if the consultant corollary is properly applied. Exemption 5 encompasses materials prepared in-house *or* by an agency's consultant, and the materials are either 'intra-' or 'inter-agency' depending on whether they are shared outside the agency."

Christen criticized the Sixth Circuit's holding in *Lucaj*, finding the case didn't really involve consultants at all. She also found the majority read too much into the *Klamath* decision. She noted that "*Klamath* is more a benediction of the consultant corollary than an indictment – after all, the question whether the corollary is correct is antecedent to whether it applies in a particular situation." (*Jorge Alejandro Rojas v. Federal Aviation Administration*, No. 17-55036, U.S. Court of Appeals for the Ninth Circuit, Apr. 24)

Views from the States…

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

Connecticut

A trial court has ruled that Scott Parsons' suit against the FOI Commission must be dismissed because he did not serve the commission at its office but instead served only the attorney general. Parsons filed a complaint with the FOI Commission, arguing that the Bantam Fire Company had violated the Freedom of Information Act. After the commission ruled against him, Parsons filed suit. In reviewing the court filings, the judge had questions as to whether the commission had been properly served. After concluding that the commission had not been served, the court ordered Parsons' suit dismissed. The court observed that "the failure to serve the commission in accordance with [the statute] deprives this court of subject matter jurisdiction." The court added that "indeed, given the absence of an appearance on behalf of the commission, there is no evidence that the commission ever received notice of any sort concerning the pendency of this

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appeal." (*Scott Parsons v. Freedom of Information Commission*, No. HHB-CV-1186047762S, Connecticut Superior Court, Judicial District of New Britain, Apr. 23)

Illinois

A trial court has ruled that the Schaumburg Police Department properly redacted personally identifying information from reports of traffic accidents for a two-week period in response to a request from the Mancini Law Group. Mancini argued that a provision of the motor vehicle code requiring police to provide full accident reports to the Department of Transportation suggested that such information was not considered confidential for purposes of FOIA. The trial court disagreed with Mancini's interpretation, noting that "this Court construes this language as prohibiting the officer or law enforcement agency from refusing to provide the reports or the information contained therein to the Department of Transportation or the Secretary of State on the basis of confidentiality." Schaumburg redacted all personally identifying information from the reports under the privacy exemptions, including birthdates. Although Mancini had asked for birthdates, by the time the court ruled, the law firm had dropped its demand for birthdates but challenged the withholding of insurance policy information. The court found the insurance policy information was protected as well. The court noted that "disclosure of an individual's insurance policy number would constitute an unwarranted invasion of the individual's personal privacy." Mancini claimed that the Illinois Supreme Court ruling in *Lieber v. Board of Trustees of Southern Illinois University* (1997), in which the court found that the university could not withhold information about students to Lieber when it made such information available to others, applied here because the insurance policy information was made available to LexisNexis. But the court found *Lieber* distinguishable from the circumstances in this case, pointing out that " in *Lieber*, the university *selectively* and voluntarily disclosed the disputed requested information to other third parties on a routine basis, while here, there is no evidence of the Department voluntarily or selectively releasing such information previously requested by Mancini to other third parties. Rather, any disclosure by the Village is to comply with Illinois law. Specifically, the Village is statutorily mandated to provide similar information, namely un-redacted incident reports to LexisNexis to comply with the Vehicle Code's mandatory reporting requirements. The Court finds that this disclosure to LexisNexis does not rise to the level of selective, voluntary disclosure articulated in *Lieber* and thus does not find any waiver of the asserted exemptions by the Village." (*Mancini Law Group, P.C. v. Schaumburg Police Department*, No. 2017 CH 13881, Cook County, Illinois Circuit Court, Apr. 29)

Kentucky

A court of appeals has ruled that the Energy and Environment Cabinet's appeal of a trial court's adverse ruling in a case brought by Concerned Citizens of Estill County is not a final appealable order until the trial court rules on CCEC's attorney's fees request. CCEC filed two open records act requests with EEC for records concerning a decision pertaining to a landfill in Estill County. Both requests were denied because the agency considered the records preliminary. CCEC filed complaints with the Office of the Attorney General, which upheld the agency's decision in both cases. CCEC then filed suit and the trial court ruled in its favor. More than 10 days later, CCEC filed a motion with the trial court for attorney's fees. EEC appealed the decision before CCEC's attorney's fees motion had been ruled upon. EEC argued that the trial court's ruling was a final appealable order. The court of appeals disagreed. It noted that "even without its [later] motion, CCEC's statutory claim for attorney's fees remained pending at the time the EEC filed its notice of appeal. Although the [trial] court's summary judgment motion could have been made final and appealable had the C.R. 54.02 recitations been included, it remained an interlocutory order in the absence of those recitations." (*Energy and Environmental Cabinet v. Concerned Citizens of Estill County, Inc.*, No. 2017-CA-001893-MR, Kentucky Court of Appeals, Apr. 26)

New York

A court of appeals has ruled that unusual incident, use of force, and inmate behavioral reports do not constitute personnel records for purpose of the personnel files exemption in the Freedom of Information Law. Prisoners' Legal Services of New York requested the records, which the Department of Corrections and Community Supervision withheld, claiming they were personnel records used to evaluate employees. Prisoners' Legal Services then filed suit. The trial court upheld the agency's position and Prisoners' Legal Services appealed. The appeals court reversed, siding with Prisoners' Legal Services. The appeals court noted that "given their factual nature and that each is written by a witness or witnesses with knowledge of the underlying facility event, we find unusual incident reports, use of force reports and misbehavior reports to be more akin to arrest reports, stop reports, summonses, accident reports, and body-worn camera footage, none of which is quintessentially 'personnel records.'" The appeals court pointed out that the information was used for other purposes besides evaluating employees. The appeals court observed that "while it is relevant that unusual incident reports and use of force reports may be used in employee performance evaluations, that factor alone is not determinative. Otherwise, any employee work product or record documenting an employee's on-duty actions would classify as a personnel record with the justification that it could be used to evaluate work performance and would, thus, result in a situation in which the exception swallows the rule." (*In the Matter of Prisoners' Legal Services of New York v. New York State Department of Corrections and Community Supervision, et al.*, No. 526659, New York Supreme Court, Appellate Division, Third Department, May 2)

The Federal Courts…

In the most recent case involving allegations that the EPA has a **policy or practice** of improperly rejecting FOIA requests, Judge Timothy Kelly has ruled that American Oversight has not shown that the agency has a policy of rejecting FOIA requests solely because they do not provide a subject matter or keyword for search purposes. American Oversight submitted several requests for records concerning former administrator Scott Pruitt's internal communications, communications with outside parties, and communications with Congress. Six days later, the agency emailed American Oversight indicating that the requests did not adequately describe the records sought and that the agency needed more clarification. American Oversight responded by telling the agency that it believed the requests were sufficiently described to allow a search. Several weeks later, the agency denied the requests because they did not reasonably describe the records sought. American Oversight filed a consolidated administrative appeal, but then filed suit before the agency responded to its appeal. American Oversight challenged the agency's decision to deny the requests because they were insufficiently described but added a claim that the agency had a policy or practice of routinely denying requests solely on the basis that the records were not sufficiently described. The parties agreed to search parameters for the requests and the EPA produced responsive records as a result. The only claim left was American Oversight's policy or practice of "unlawfully refusing to process a proper FOIA request because it does not provide a keyword or search term." The agency contended that "even if any of American Oversight's requests did adequately describe the records sought, [the EPA's] responses were based on individualized assessments of the request, and not the result of a broader policy or practice that violates FOIA." Kelly pointed out that "American Oversight must demonstrate that the unlawful FOIA policy described is in fact a policy 'adopted, endorsed, or implemented' by the EPA." He found American Oversight had failed to do so here. He noted that "indeed, the EPA's responses to the several FOIA requests identified by American Oversight in its complaint show a practice not of categorically denying any request that lacks keywords or subject matters, but of seeking clarification of requests that the EPA has concluded for various reasons – many of which appear to have been justified – as not reasonably described." Kelly was puzzled as

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to why the agency could not begin to search for records responsive to two of the three requests, but explained that "but that response, despite American Oversight's insistence, does not reveal that the determination resulted from a policy of refusing to process requests *solely because* they lack a keyword or subject matter." Rejecting American Oversight's allegations of a policy or practice of denying requests that did not include keywords, Kelly observed that "at best, the record presents inconsistent case-by-case applications of the requirement that a request reasonably describe the records sought to requests for email records." Kelly indicated that FOIA sometimes required agencies and requesters to discuss the parameters of requests and explained that "such discussions, as this action makes clear, may not always prove successful, and clarification may not always be necessary or warranted. As noted, however, those discussions will necessarily be context-specific, and that will likewise lead to context-specific grounds for denial. And for that very reason, they are generally ill-suited to the type of policy-or-practice claim that American Oversight brings here." (*American Oversight v. United States Environmental Protection Agency*, Civil Action No. 18-364 (TJK), U.S. District Court for the District of Columbia, Apr. 29)

A federal court in New York has ruled that the Department of Homeland Security and OMB have not shown that they conducted **adequate searches** for records requested by the Brennan Center for Justice concerning the voter integrity commission created and then disbanded by President Trump, particularly compared to the search conducted by the Department of Justice, and, further, that because two DOJ employees used their personal email accounts to discuss issues pertaining to the commission, the agency must conduct a further search of personal email accounts. The Brennan Center sent eight requests to DHS, DOJ, OMB, and the General Services Administration for records pertaining to the commission's goals and activities. DOJ conducted keyword searches broadly describing the commission's goals while OMB and DHS limited their searches to keywords describing the commission itself. DOJ concluded that while two employees had used personal email accounts both employees had provided copies of any such emails. GSA, by contrast, told the Brennan Center that since its policy was to require employees to conduct public business using their government email accounts they would not search for emails that might have originated on personal email accounts. Judge Alvin Hellerstein agreed with the Brennan Center that the agencies' searches had fallen short. He noted that "the contrast between the overly narrow search terms used by DHS and OMB, and those employed by the other agencies responding to essentially the same requests, is marked, and make clear the unreasonableness of DHS' and OMB's approach. DHS and OMB fail to explain why terms as obvious as those employed by sister agencies were not used. With blinkers on, the world can't fully be seen." While both DOJ attorneys had forwarded their personal emails to the agency, it took one of them 80 days to do so. Hellerstein observed that "evidence of a record on a personal account is sufficient to raise a question of compliance with recordkeeping obligations, rendering the presumption of compliance inapplicable." He pointed out that "in an environment of widespread use of personal devices for official work, there is danger of an incentive to shunt critical and sensitive communication away from official channels and out of public scrutiny, with decisions to forward the communications to official repositories postponable at the whim of the public official. The practice is inconsistent with 'the citizen's right to be informed about what their government is up to,' the very purpose of FOIA." The agencies reflexively argued that searching personal email accounts would be too burdensome because it would involve hundreds or thousands of email accounts. Hellerstein rejected the claim, noting that "this is not the case, and is not what Plaintiffs seek. Plaintiffs' requests are limited to two people, plus requests by the records custodians to relevant persons in their departments to search for, and forward, responsive private communications on matters relating to the Commission's business. Plaintiffs' requests are reasonable and are not barred by presumptions." (*Brennan Center for Justice at New York University School of Law, et al. v. U.S. Department of Justice, et al.*, Civil Action No. 17-6335 (AKH), U.S. District Court for the Southern District of New York, Apr. 30)

A federal court in New York has ruled that the Department of Treasury conducted an **adequate search** for records concerning Sheryl Sandberg when she served as chief of staff to then Secretary of the Treasury Lawrence Summers from 1996-2000 and has accepted the agency's explanation that Sandberg's emails were no longer accessible because of the agency's transition to a new email system in 2000. Independent journalists Alyona Minkovski and Matthew Stoller submitted a detailed request for Sandberg's records, focusing on various specific topics and individuals. The agency decided to search for Sandberg's emails during her time at Treasury, emails of current and former Treasury Secretaries listed in the request, and electronic records in the Office of the Secretary and Chief of Staff while Sandberg was working at the agency. Because it had transitioned to a new system in 2000, the agency discovered that "the majority of legacy emails sent or received prior to that time and Ms. Sandberg's entire email account were no longer maintained by Treasury and were not accessible in any form." The agency searched available emails for Treasury Secretaries listed in the request. The agency also did a keyword search using Sandberg's name, Facebook, and her book "Lean In." The agency found only one document that seemed related to the request, disclosing the record with redactions. Minkovski and Stoller argued that the agency had not shown that it searched the offices most likely to contain responsive records. The court rejected this claim, noting that "Plaintiffs' speculation, without more, is insufficient to undermine the adequacy of the Treasury's searches. [The agency's] declaration, which is presumed to have been made in good faith, provides non-suspect reasons for the methods used by the Treasury, and Plaintiffs' mere speculation is not enough to show that the Treasury acted in bad faith." The court agreed that the agency's search terms were appropriate. The court indicated that "an agency is not required to conduct every possible search and 'need not knock down every search design advanced by every requester.' Rather, it is an agency's 'burden to show that its search efforts were reasonably and logically organized to uncover relevant documents.'" Minkovski and Stoller contended that Treasury had not provided sufficient evidence to show that Treasury had properly destroyed its records or transferred them to the National Archives and Records Administration. The agency pointed out that all of Sandberg's records were more than 15 years old and, as a result, would have been transferred to NARA. The court observed that "moreover, the Treasury represents that, if it possessed any responsive document, it would have located it, and presumably the document would have been produced or the Treasury would have claimed an exemption under FOIA. Plaintiffs fail to provide any evidence contrary to the Treasury's representations." (*Alyona Minkovski and Matthew Stoller v. United States Department of Treasury*, Civil Action No. 18-1034 (MKB), U.S. District Court for the Eastern District of New York, Apr. 27)

A federal court in California has ruled that the FBI properly redacted personally identifying information under **Exemption 7 (C) (invasion of privacy concerning law enforcement records)** from the warrant used to seize and search a laptop computer belonging to former Rep. Anthony Weiner (D-NY) because it might contain emails sent to Huma Abedin, who was then Weiner's spouse, relevant to the agency's investigation of Hillary Clinton's use of a private email server while she was Secretary of State in response to Randol Schoenberg's FOIA request. After Schoenberg's request for the unredacted search warrant had been denied and he had filed suit, a magistrate judge in the Southern District of New York granted the application of the government to unseal the warrant materials with three redactions – the name of an FBI Supervisory Special Agent who signed the search warrant application, the name of a Special Agent who was listed as being present when the SSA made an inventory following the execution of the search warrant, and Abedin's personal Yahoo email address. Schoenberg's suit then focused solely on the propriety of whether the three redactions were proper. Schoenberg argued that the SSA had acted improperly by initiating the search warrant in the first place so close to the 2016 Presidential election, indicating that a subsequent IG investigation had questioned the SSA's conduct. The court found Schoenberg was reading too much into the IG's findings. The court pointed out that "the IG Report does not establish misconduct by the SSA. To the contrary, after closely scrutinizing the actions surrounding the warrant and determining that the decisions of several FBI officials

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warranted some criticism, the Inspector General issued the IG Report. It did not identify any misconduct by the SSA either in his preparation of the warrant application or otherwise." The court rejected Schoenberg's claim that disclosure of the SSA's name was in the public interest. The court noted that "there is already substantial public information about the *actions* of the SSA. Plaintiff seeks the release of the name of the SSA. Thus, its release would only 'shed light on the agency's performance' or 'let citizens know what their government is up to' if it would lead to further public scrutiny of those actions through direct contact of the SSA by Plaintiff, the media or others. . . [A]ny such public benefit is 'inextricably intertwined' with the invasion of the SSA's privacy and thus insufficient to justify disclosure." Schoenberg contended that Abedin's email address had already been inadvertently disclosed by the State Department. Rejecting that claim, the court noted that "even if the State Department had decided to affirmatively reveal certain information, that would not 'diminish' the 'ability' of another agency, i.e, the FBI, to refuse disclosure pursuant to its application of a FOIA Exemption." (*E. Randol Schoenberg v. Federal Bureau of Investigation*, Civil Action No. 18-01738-JAK-AGR, U.S. District Court for the Central District of California, Apr. 29)

A federal court in Florida has ruled that the Florida Federal Judicial Nominating Commission, created by Sen. Marco Rubio (R-FL) and then-Sen. Bill Nelson (D-FL) to provide input on federal judicial nominations, is not an **agency** for purposes of FOIA. Joshua Statton requested records from the Commission and when it failed to respond, he filed suit against the Commission and its director, Carlos Lopez-Cantera. The Commission argued from the beginning that it did not meet the statutory criteria to be considered an agency for purposes of the FOIA. The court agreed, noting that "the FFJNC was created by two Senators to assist them with their duties, but 'the fact that federal interests are implicated by the activities of the [FFJNC] does not transform [it] into a federal entity [as defined by] the APA.' Nor does the fact that the Senators created the FFJNC and appointed its members mean it is an authority of the federal government. Relatedly, the FFJNC was formed by the Senators on their own initiative; it was not established – or even authorized – by statute." Statton argued that the FFJNC was an agency because "it is an extension or an establishment in the executive branch. Statton contends that the FFJNC assists the President with his constitutional duty to nominate federal judges under the Appointments Clause." Rejecting Statton's claim, the court pointed out that "despite Statton's contention that the FFJNC assists the President, the FFNJC in fact assists the Senators who created it." (*Joshua Statton v. Florida Federal Judicial Nominating Commission, et al.*, Civil Action No. 19-485-T-33CPT, U.S. District Court for the Middle District of Florida, Apr. 22)

Judge Timothy Kelly has ruled that the CIA has not yet shown that it conducted an **adequate search** for records concerning Dan Hardway, Edwin Lopez, and G. Robert Blakey, former congressional staffers who worked on investigations in the 1970s pertaining to the assassinations of John F. Kennedy and Martin Luther King. The agency's search turned up only two records – non-disclosure agreements signed by Blakey when he worked for the House Select Committee on Assassinations. The agency told the court that it could not locate Office of Security files on Hardway, Lopez, and Blakey because they had since been destroyed. Hardway, Lopez, and Blakey argued that the search was inadequate because their FOIA request had asked the agency to provide documentation for record destruction claims. But Kelly pointed out that "that instruction did not, as Plaintiffs allege, require the CIA to undertake a separate search for potential records about the destruction of the records they requested." He added that "although agencies must construe FOIA requests liberally, FOIA does not permit plaintiffs to demand 'proof' that particular records they requested were destroyed, or otherwise dictate how defendants carry out searches for responsive records. Of course, if Plaintiffs now wish to submit a FOIA request for records about the destruction of their personal security files, they are free to do so." Kelly also rejected the requesters' claim that the JFK Assassination Records Act required the agency to maintain assassination-related records. He noted that "Plaintiffs' theory in this case that it would have been illegal for the CIA to destroy their personnel security files is based solely on their bald assertion – uninformed

by the actual contents of the records and inadequately explained in their briefing – that those records must have fallen within the JFK Act's definition of 'assassination records.' That speculation does not undermine the presumption of good faith to which agency declarations such as [these here] are entitled." Kelly, however, found that the CIA had not sufficiently explained its search of operational records. The agency had conducted a name search but had decided that the Directorate of Operations was unlikely to have any responsive records. Kelly found this explanation insufficient. Instead, he noted that the agency's affidavit "provides no other details, such as the record systems the CIA searched using those terms, why it selected those systems, and how those systems can be queried. And as for non-operational records about Plaintiffs, [the agency's affidavit] includes no description of the CIA's search methodology at all." Kelly found that the agency had properly redacted names of agency employees under Exemption 3 (other statutes). (*Dan Hardway, et al. v. Central Intelligence Agency*, Civil Action No. 17-1433 (TJK), U.S. District Court for the District of Columbia,
Apr. 28)

The D.C. Circuit has ruled that the Environmental Defense Fund has **standing** to challenge the EPA's revisions in its toxic chemical inventory reporting requirements under the Toxic Substances Control Act allowing processors to continue to claim confidentiality for chemical identities even though they may not be the legal successor in interest but that EDF has only shown that the agency's decision to forego collection of information concerning whether chemicals can be reversed-engineered if their confidential components were made public qualified as arbitrary and capricious under the Administrative Procedure Act. Writing for the court, Circuit Court Judge Patricia Millard explained that "when an application to maintain confidential treatment is received, the EPA must independently determine whether confidentiality is warranted. To that end, Congress directed the EPA, to 'promulgate a rule that establishes a plan to review all claims to protect the specific chemical identities,' asserted as confidential" and pointed out that "here, Environmental Defense claims that the Control Act requires disclosure to it (and the public at large) of chemical identities that the Inventory Rule will keep secret." The EPA argued that EDF did not have standing because it had not shown the revisions would affect it. Millard pointed out, however, since EDF's claim was based on an informational injury the quality of the information collected was crucial. She observed that "substantiation questions are the EPA's tool for gathering the information it uses to evaluate confidentiality claims. They are, in other words, an indispensable procedural step in the agency's confidentiality determination." EDF made a series of claims pertaining to the revisions, but the D.C. Circuit only accepted its challenge to the agency's decision to forego collecting information pertaining to whether chemical identities could be reverse-engineered, Millard noted that "what the Inventory Rule actually does is *decline* altogether to 'secure answers' substantiating a company's 'assertion' that its chemical product cannot be reverse engineered." She added that "yet the EPA's Rule offers no sensible explanation at all for that gap in substantiation, nor does it even acknowledge the consequence of its omission. This error is fatal." By contrast, the D.C. Circuit found the EPA's decision to allow processors to continue to claim confidentiality for chemicals even if they were not legal successors in interest was reasonable. She observed that "nothing in the statutory text requires drawing an impermeable line there. The EPA reasonably concluded that the claimant's corporate genealogy is beside the point." (*Environmental Defense Fund v. Environmental Protection Agency, et al.*, No. 17-1201, U.S. Court of Appeals for the District of Columbia Circuit, Apr. 26)

Judge Ketanji Brown Jackson has ruled that the National Security Agency conducted an **adequate search** and properly invoked a *Glomar* response neither confirming nor denying the existence of records in response to a request from Callen Willis, citing **Exemption 1 (national security)** and **Exemption 3 (other statutes)** as the basis for its *Glomar* response. Willis requested information related to her employment at a

cancer research center, an MCAT exam that she took in 2015, a period of hospitalization she endured in 2015, and prior FOIA litigation involving Willis. The agency responded with a *Glomar* response. Willis appealed and the agency agreed to reconsider the request as one for her personnel records. Under that interpretation, the agency searched its affiliate-related Privacy Act systems but found no responsive records. Willis then filed suit. Jackson agreed with the agency that its search was adequate and that both Exemption 1 and Exemption 3 protected any records. Jackson explained that "this Court concludes that NSA's *Glomar* response to Willis's records request is logically and plausibly rooted in national security concerns regarding the revelation of classified information (i.e., NSA's intelligence collection efforts, when FOIA requests such as these are viewed collectively) and, therefore, to the extent that Willis's request sought NSA intelligence information about herself, NSA's response does not violate the FOIA or the Privacy Act." Turning to Exemption 3, she noted that "the Court accepts the agency's statements in this regard, and it finds that NSA has established that the agency's Exemption 3 *Glomar* response does not violate the FOIA or the Privacy Act." (*Callen Willis v. National Security Agency*, Civil Action No. 17-2038 (KBJ), U.S. District Court for the District of Columbia, Apr. 30)