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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: In response to newly revised FOIA regulations at the EPA and the Department of the Interior allowing political appointees to review responses to FOIA requests before release, as well as the recent Supreme Court decision expanding the confidentiality of business-submitted records, Senate Judiciary chair Charles Grassley (R-IA) has indicated that he will support legislation curtailing both results. In a recent floor speech in the Senate, Grassley referenced both the revisions of the agencies' FOIA regulations and the Supreme Court decision and emphasized that "the public's work ought to be public. So, I'm working on legislation to address these developments and promote access to government records."

Court Finds Trump's Twitter Account Constitutes Public Forum

One of the things that has become obvious during his presidency is Donald Trump's inability to recognize that being President comes with limitations as well as powers. This inability to recognize these nuances has resulted in a sharp rebuke by the Second Circuit in ruling that Trump violated the First Amendment when he blocked critics from following his Twitter feed because he disagreed with them. Writing for the court, Circuit Court Judge Barrington Parker noted that "we conclude that the evidence of the official nature of the Account is overwhelming. We also conclude that once the President has chosen a platform and opened up its interactive space to millions of users and participants, he may not selectively exclude those whose views he disagrees with."

Trump's Twitter account predates his presidency and was established in March 2009. Parker pointed out that "no one disputes that before he became President the Account was a purely private one or that once he leaves office the Account will presumably revert to its private status. This litigation concerns what the Account is now." Parker described the account's current status, noting that "the public presentation of the Account and the webpage associated with it, bears all the trappings of an official, state-run account." He added that "moreover, the Account is one of the White House's main vehicles for conducting official business." Further, Parker explained that "we note that the National Archives, the agency

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of government responsible for maintaining the government's records, has concluded that the President's tweets are official records" under the Presidential Records Act.

In May and June 2017, Trump blocked a number of individuals who had followed his Twitter account, participated in back-and-forth responses, but whose responses were critical of Trump. When Trump blocked these individuals, Parker observed that the government conceded that "because they were blocked they are unable to view the President's tweets, to directly reply to these tweets, or to use the @realDonaldTrump webpage to view the comment threads associated with the President's tweets." In July 2017 the Knight First Amendment Institute filed suit on behalf of individuals who had been blocked from viewing, following, and responding to Trump's tweets. The district court found that "the defendants had created a public forum in the interactive space of the Account. . . [B]y blocking the Individual Plaintiffs' because of their expressed political views, the government had engaged in viewpoint discrimination."

Trump then appealed to the Second Circuit. While Trump initially argued that the Twitter account was private, the government abandoned that claim and settled instead on arguing that blocking his critics did not constitute state action. Parker explained that "the President contends that the Account is exclusively a vehicle for his own speech to which the Individual Plaintiffs have no right of access and to which the First Amendment does not apply. Secondarily, he argues that, in any event, the Account is not a public forum and that even if the Account were a public forum, blocking the Individual Plaintiffs did not prevent them from accessing the forum. The President further argues that, to the extent the Account is government-controlled, posts on it are government speech to which the First Amendment does not apply."

Parker proceeded to dismantle Trump's arguments. He pointed out that "no one disputes that the First Amendment restricts government regulations of private speech but does not regulate purely private speech. If in blocking, the President were acting in a governmental capacity, then he may not discriminate based on viewpoint among the private speech occurring in the Account's interactive space." The government also argued that it would not exercise continued control over the Twitter account once Trump left office. But Parker observed that "the fact that government control over property is temporary, or that the government does not 'own' the property in the sense that it holds title to the property, is not determinative of whether the property is in fact sufficiently controlled by the government to make it a forum for First Amendment purposes." Parker noted that "in sum, since he took office, the President has consistently used the Account as an important tool of governance and executive outreach. For these reasons, we conclude that the factors pointing to the public, non-private nature of the Account and its interactive features are overwhelming."

The government argued in response that since any Twitter user could choose to block users, Trump was doing nothing more than using one of the platform's features available to any user. Parker emphasized the constitutional difference between being a private citizen and President. Parker pointed out that "the fact that any Twitter user can block another account does not mean that the President somehow becomes a private person when he does so. Because the President acts in an official capacity when he tweets, we conclude that he acts in the same capacity when he blocks those who disagree with him. Here, a public official and his subordinates hold out and use a social media account open to the public as an official account for conducting official business. That account has interactive features open to the public, making public interaction a prominent feature of the account. These factors mean that the account is not private."

Having found that Trump's Twitter account qualified as a public forum for First Amendment purposes during his presidency, Parker went on to consider his ability to restrict individual speech while participating in that public forum. The government argued that Trump's Twitter account was not a public forum, and that, even if it was a public forum the individuals has not been excluded from it. Further, the government argued that the if the account was controlled by the government, it constituted government speech not subject to First

Amendment restrictions. The government asserted that the only harm suffered by the blocked individuals was that they could not speak directly to Trump and under the First Amendment Trump was not required to listen to them. Parker indicated that the restriction went far beyond Trump's decision not to listen. He pointed out that "the speech restrictions at issue burden the Individual Plaintiffs' ability to converse on Twitter with other who may be speaking to or about the President. President Trump is only one of thousands of recipients of the messages the Individual Plaintiffs seek to communicate. While he is certainly not required to listen, once he opens up the interactive features of his account to the public at large he is not entitled to censor selected users because they express views with which he disagrees." The government claimed the individuals could still obtain some of the exchanges on Trump's account through other methods. But Parker observed that "when the government has discriminated against a speaker based on the speaker's viewpoint, the ability to engage in other speech does not cure that constitutional shortcoming."

The government also argued that Trump's tweets were government speech which were not protected by the First Amendment. Parker agreed that Trump's tweets qualified as government speech but indicated that the burden on First Amendment rights occurred when the plaintiffs were blocked from the interactive features of his account. Parker observed that "while the President's tweets can accurately be described as government speech, the retweets, replies, and likes of other users in response to his tweets are not government speech under any formulation." Finding that Trump had violated the plaintiffs' First Amendment rights, Parker pointed out that "in resolving this appeal, we remind the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less." (*Knight First Amendment Institute at Columbia University, et al. v. Donald J. Trump*, No. 18-1691, U.S. Court of Appeals for the Second Circuit, July 9)

Views from the States…

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

Maryland

A court of appeals has ruled that the Baltimore City Council did not violate the Open Meetings Act during its discussion of Transform Baltimore, the city's first major rezoning plan since 1971, but because several lunch meetings constituted technical violations of the statute, the trial court should consider awarding Joan Floyd the costs of her litigation alleging the violations. Floyd's suit claimed that the city had improperly denied her discovery using the legislative privilege, did not provide adequate online audio-visual recordings that would allow the public to understand the proceedings of various meetings, did not provide sufficient descriptions of the council's decisions, and improperly deliberated at four lunch meetings. The trial court ruled in favor of the city on all four counts. The appeals court agreed that Floyd's first three allegations did not constitute violations of the statute, but that technical violations did occur at the four lunch meetings. Addressing those meetings, the appeals court observed that "the purported notice does not comply with the requirements of the Act. And, it is undisputed that no minutes were kept or posted for the luncheon meeting at issue." However, the appeals court noted that "an action of a public body may be declared void only 'if the court finds that the public body *willfully failed* to comply' [with the relevant provision]." Sending the case back to the trial court for further proceedings, the appeals court pointed out that "to the extent that the trial court may have considered only a 'willful' violation actionable, a finding of willfulness would not be

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necessary to an award of counsel fees and litigation expenses." (*Joan Floyd v. Baltimore City Council, et al.*, No. 1687 Sept. Term, 2017, Maryland Court of Special Appeals, June 4)

Nebraska

A court of appeals has ruled that a series of meetings held by the Lower Loup Natural Resources District Programs/Project Committee recommending that a dam proposal supported by Mark Koch not be constructed did not violate the Open Meetings Act because the committee was a subcommittee not covered by the statute. Because Koch did not originally comply with the rules for providing information to the committee's staff to evaluate before scheduling an opportunity to speak before the committee, he was not allowed to speak until a second meeting the following month. He provided a presentation for the dam construction he favored, but because the project had been previously considered and rejected, the committee decided not to consider it again when put forward by Koch. Koch then filed suit, arguing that the committee meetings had violated the Open Meetings Act. The court of appeals explained that while public bodies were subject to the Open Meetings Act, meetings held by subcommittees of public bodies were not subject to the statute unless a quorum of the parent body was present at such a meeting. Rejecting Koch's claims, the appeals court noted that "because the record before this court now sufficiently establishes that the Committee qualifies as a subcommittee. . . and is therefore not a public body subject to the Open Meetings Act. . . it follows that the Committee cannot also be an advisory committee, which is specifically identified as a public body subject to the Open Meetings Act." (*Mark Allen Koch v. Lower Loup Resources District*, No. A-17-1257, Nebraska Court of Appeals, June 4)

Pennsylvania

A court of appeals has ruled that while the Department of Health and various businesses selling medical marijuana provided sufficient evidence to show that certain information constituted trade secrets, neither DOH nor the medical marijuana suppliers showed that the constitutional right of privacy applied to identifying data. Wrapping up a challenge to the decision of the Office of Open Records requiring disclosure of six applications to sell medical marijuana under the recent Medical Marijuana Act to reporter Walter McKelvey, PennLive, and the Patriot-News, the appeals court rejected DOH's assertion that it should be allowed to supplement the record to claim new exemptions beyond those originally claimed by the applicants. The appeals court noted that "accepting additional evidence without cause essentially allows agencies to withhold records without legal grounds until reaching a [jurisdictional] court, undermining the presumption of openness that forms the foundations of the current [Right-to-Know Law]." Turning to the issue of whether the constitutional right of privacy applied, the court pointed out that "the record does not contain support for a reasonable subjective belief that residential addresses would be protected from disclosure. Notably, the application instructions do not list 'residential addresses' as confidential information, thus indicating the contrary." The court of appeals disagreed with OOR's finding that the facility security exemption did not apply. Instead, the court observed that "based on the risks inherent in this cash-based industry, disclosure of security measures and locations of surveillance systems presents a credible threat to physical security of facilities that amounts to more than mere speculation." While approving of the companies' trade secret claims, the appeals court rejected any further claim of competitive harm. The appeals court noted that" the fact that the medical marijuana industry is extremely competitive does not substantiate [one company's] extensive redaction here." (*Mission Pennsylvania, LLC v. Wallace McKelvey, et al.*, No. 185 C.D. 2018, et al., Pennsylvania Commonwealth Court, June 4)

A court of appeals has ruled that Real Alternatives, awarded a contract to provide alternatives to abortion, is performing a government function making it and its subcontractors providing those alternatives subject to the Right-to-Know Law. Equity Forward requested invoices from the Department of Human Services for

invoices from Real Alternatives for services provided. The agency told Equity Forward that it did not have any such invoices from Real Alternatives and submitted an affidavit from Real Alternatives president Kevin Bagatta explaining the company did not submit service providers' invoices to the agency. Equity Forward then filed a complaint with the Office of Open Records. OOR agreed that the agency did not have the records because its agreement with Real Alternatives did not require the company to provide such records to the agency. The court found OOR had erred in this respect, noting that "the OOR was required to determine whether the records sought directly relate to the performance of the governmental function. Relying on whether the documents were required to be provided by the contract is not the applicable framework the OOR should have utilized in determining whether the records are required to be disclosed." (*Equity Forward v. Department of Human Services*, No. 225 C.D. 2018, Pennsylvania Commonwealth Court, May 17)

A court of appeals has ruled that the Foundation for California University of Pennsylvania is subject to the Right-to-Know Act and that the foundation must disclose identifying records pertaining to a donation from the Manheim Corporation. The foundation argued that an exception allowed redaction of identifying information about individuals who made donations and that Manheim Corporation should be considered a "person" for purposes of the exemption. The court of appeals pointed out that the RTKL contained both the term "person" and the term "individual." However, the court noted that the Statutory Construction Act defined "an 'individual' [as] a 'natural person,' while the broader term 'person' includes both natural persons and other types of entities, such as corporations. Under these definitions, a corporation is a 'person,' but it is not an 'individual.' As Respondent points out, the General Assembly's use of those two terms in Section 708 was deliberate. Instances of the term 'individual' in that section obviously apply to natural persons only. . ." As a result, the appeals court concluded that Section 708 did not apply to corporations. (*California University of Pennsylvania v. Gideon Bradshaw*, No. 1491 C.D. 2018, Pennsylvania Commonwealth Court, May 31)

The Federal Courts…

Judge Amit Mehta has ruled that emails of the Trump transition team held by the General Services Administration and scheduled to be destroyed by statute, did not become **agency records** once they were retained and copied for use by the FBI during the investigation of Russian interference into the 2016 presidential election. After GSA retained the emails because portions were relevant to the Mueller investigation, Democracy Forward Foundation submitted a FOIA request for those transition team records that were made available to the investigation. GSA told DFF that the records were not agency records and, thus, were not subject to FOIA. After GSA denied DFF's administrative appeal, DFF filed suit, arguing that the records became agency records when they were preserved for use by the Special Counsel. DFF also argued that the four-factor test from *Burka v. Dept of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996) – the extent to which the agency intended to retain or relinquish control of the records, the ability of the agency to use or dispose of the records, the extent to which agency personnel read or relied on the records, and the degree to which the records were integrated into the agency's records system – applied. Mehta pointed out that the circumstances here were quite similar to those in *Cause of Action v. NARA*, 753 F. 3d 210 (D.C. Cir. 2014), in which the D.C. Circuit found that a non-FOIA congressional report on the financial crisis did not become subject to FOIA solely because it had been deposited with the National Archives and Records Administration. He observed that "indeed, like the National Archives, GSA here functioned mainly as a 'warehouse' for the transition team's electronic communications. It supplied a network to host and store records, but never intended to use and did use the records in any way." Mehta instead looked to first principles and after reviewing the creation and maintenance of the disputed records, noted that "there is nothing about the documents' content that would shed any light about GSA's operations or decision-making."

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Mehta cited *Wolfe v. Dept of Health and Human Services*, 711 F.2d 1077 (D.C. Cir. 1983), the only D.C. Circuit decision involving transition records – a report by the Reagan transition team about HHS which, after being disseminated, was never used further – as support for his conclusion here. He noted that "like the report, the emails were never integrated into GSA's records systems. Nor did GSA personnel read or rely on the records, except perhaps incidentally to carry out its network security function. Thus, GSA did not sufficiently 'control' the emails to qualify as 'agency records.'" Having satisfied himself that the records were not agency records, Mehta reviewed the applicability of the *Burka* factors anyway. DFF argued that GSA's decision to retain the records during the investigation showed an intent to control them. But Mehta observed that "it is a dubious proposition that the transition team had any right or ability to 'tale control of the records' once it became known that there was a law enforcement interest in them." DFF argued that GSA's decision to voluntarily retain the records implied an ability to use or dispose of them. Mehta disagreed, noting that "it cannot be that the decision to comply with a request by law enforcement to preserve records converts a record not otherwise subject to FOIA into one that is." (*Democracy Forward Foundation v. U.S. General Services Administration*, Civil Action No. 18-01037 (APM), U.S. District Court for the District of Columbia, July 2)

Resolving the remaining issues left over from his prior opinion, Judge Timothy Kelly has ruled that a memo prepared for former Attorney General Loretta Lynch containing talking points Lynch could use in responding to press inquiries about her meeting with former President Bill Clinton at the Phoenix airport during the 2016 presidential campaign is protected by **Exemption 5 (privileges)**. The American Center for Law and Justice requested records pertaining to the Clinton-Lynch meeting. The Department of Justice withheld a number of records under the deliberative process privilege, but Kelly found that the agency had not adequately justified its exemption claim for two records and ordered DOJ to provide further explanation. By the time Kelly ruled, DOJ had voluntarily disclosed one of the disputed records, leaving only a memo containing talking points for Lynch to use in responding to press inquiries. Kelly found that the remaining memo was protected by the deliberative process privilege as well. He pointed out that "like the other sets of talking points withheld by the Department, the attachment constitutes a recommendation by subordinates to their superior advising her how to respond to inquiries. It is, in that respect, both predecisional and deliberative, reflecting a part of the give-and-take between the drafter and the Attorney General leading up to her external interactions." ACLJ argued that there was no evidence that a superior had approved the memo's preparation. Kelly indicated he was puzzled about what superiors ACLJ was referring to. He noted that "to the extent that other intermediaries were involved before the Attorney General – and there is no indication from the record, including the results of the Department's search, that was the case – the recommended talking points would remain just that: recommendations to the Attorney General." ACLJ also claimed the memo likely mirrored Lynch's public statements as a result of the meeting, constituting official adoption of the memo's contents. Kelly disagreed, pointing out that "the Attorney General's ultimate reliance on the proposals from her subordinates – to the extent that occurred here – does not amount to such an express and unequivocal choice." ACLJ also challenged the agency's **segregability** analysis, arguing that "the Department must indicate the precise *proportion* of non-exempt information." Kelly, however, observed that "ACLJ never explains why that showing is necessary, or, more importantly, how it would help rebut the presumption afforded to the Department that the entire attachment was comprised of proposed talking points" protected by the deliberative process privilege. (*American Center for Law and Justice v. United States Department of Justice*, Civil Action No. 16-2188 (TJK), U.S. District Court for the District of Columbia, June 30)

A federal court in New York has ruled that the Department of State properly redacted two records pertaining to the cancellation of Transportation Secretary Elaine Chao's intended trip to China under **Exemption 5 (privileges)** in response to a request from New York *Times* reporter Eric Lipton. After learning that Chao was supposed to attend a transportation forum in Beijing in October 2017, Lipton requested

information about her planned trip. In April and May 2019, the State Department disclosed eight heavily redacted email chains that were part of two different families of emails. Several weeks later, the agency re-released some of the emails with additional information unredacted. The first email chain, addressing potential ethical issues, originated from Evan Felsing, a State Department official at the U.S. Embassy in Beijing and was sent to the Office of the Legal Advisor. State claimed that those heavily redacted emails were protected by both attorney-client privilege and the deliberative process privilege. The second family of emails were originated by Felsing's contact with Derek Kan, once of Chao's senior advisors, discussing who would be coming on the trip and the need for the ethics staff at both State and DOT to make sure any ethics issues were addressed. The State Department claimed that those emails were properly redacted under the deliberative process privilege. After reviewing both chains *in camera*, Judge Jed Rakoff agreed that they were properly redacted with two minor exceptions. He also indicated that he agreed with State that "there is a reasonable foreseeability of harm if the redacted material were to be disclosed." Finding that the attorney-client privilege applied to both chains, Rakoff noted that "as State explains the subsequent discussions in the second family 'contain confidential communications from State employees to a State attorney for the purpose of obtaining legal advice, confidential communications from a State attorney to a State employee providing legal advice, and communications between State attorneys reflecting the development of that legal advice.' The discussions in the first family do as well. The Court agrees with State's characterization of the redacted communications and it concludes that these redactions are not more extensive than necessary." (*New York Times Company and Eric Lipton v. United States Department of State*, Civil Action No. 19-645 (JSR), U.S. District Court for the Southern District of New York, July 9)

Judge James Boasberg has ruled that the IRS has not supported its *Glomar* response neither confirming nor denying the existence of records in the ongoing litigation between the Thomas and Beth Montgomery and the agency. After the IRS investigated their company, the Montgomerys sent a series of FOIA requests to the agency in an attempt to find out if someone had acted as a whistleblower in bringing their tax activities to the attention of the agency. The agency cited **Exemption 7(D) (confidential sources)** as the basis for declining to respond to some of their requests, but not for others relating to records from the agency's Whistleblower Office. However, the agency ultimately provided a *Glomar* response to the remaining requests. The Montgomerys argued that the agency's *Glomar* response was inappropriate because it did not cite an exemption as the basis for its claim. Boasberg agreed with the Montgomerys that this was fatal to the agency's *Glomar* defense. Boasberg pointed out that that his previous order required the agency "to disclose the results of its search or assert *Glomar*. But in giving Defendant those options, the Court was not preemptively sanctioning any *Glomar* response; it was, instead, explaining the scope of the agency's options under FOIA, which it has not yet lived up to. The IRS's obligation to justify its *Glomar* response thus remains." Boasberg indicated that while it was possible for the agency to sufficiently justify its *Glomar* response as it related to records about whistleblowers, it had not yet done so. He observed that the agency "has never adequately justified its *Glomar* response as to whistleblower-related records potentially responsive to [six of the Montgomerys' FOIA requests]; if it wants to invoke *Glomar* as to only 'whistleblower-related documents' it must explain publicly how it crafted such a category and why the category encompasses only documents that implicate an exemption." (*Thomas and Beth Montgomery v. Internal Revenue Service*, Civil Action No. 17-918 (JEB), U.S. District Court for the District of Columbia, July 8)

In another of his long-running FOIA suits, Judge James Boasberg has ruled that EOUSA properly redacted 14 pages pertaining to allegations of misconduct against former Assistant U.S. Attorney Clay Wheeler under **Exemption 5 (privileges)** in response to FOIA requests from Gregory Bartko, who was convicted of securities fraud. Bartko submitted numerous FOIA requests to the Department of Justice as well

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as the SEC. His primary challenge was that because Wheeler, who had served in a supervisory capacity in the U.S. Attorney's Office for the Eastern District of North Carolina, had been accused of prosecutorial misconduct in other cases he probably acted inappropriately in Bartko's case. While agreeing with Bartko on a number of procedural issues, Boasberg ultimately upheld the agencies' processing of Bartko's requests. After his case was remanded by the D.C. Circuit, EOUSA reprocessed some records and continued to claim that its redactions were proper under the deliberative process privilege. Bartko argued that the government misconduct exception applied here. Boasberg indicated that he had already rejected that argument in his previous opinion. He noted that "the Court has already held that these *exact* documents, from this *exact* request, contain no discussion that manifest any such misconduct." Boasberg also found that EOUSA had adequately accounted for the total number of pages it had disclosed. He observed that 'while EOUSA wins no awards for bureaucratic efficiency, it nonetheless has met its production burden with regard to this FOIA request." (*Gregory Bartko v. United States Department of Justice, et al.*, Civil Action No. 17-781 (JEB), U.S. District Court for the District of Columbia, June 9)

Judge Christopher Cooper has ruled that the FBI and the Secret Service properly responded to requests from prisoner Donovan Davis for records about himself. The FBI located 149 potentially responsive records and disclosed 72 pages. The Secret Service initially told Davis that it had an external hard drive it had taken from Davis as part of a 2009 grand jury subpoena and that his wife could retrieve it. She did so, but after she had it tested by a forensic expert, she was told that the hard drive had been wiped clean sometime after the agency received Davis' FOIA request. However, the agency also found 228 pages, disclosing 74 in full and 154 with redactions. The Secret Service also withheld an additional 79 pages entirely. Davis challenged the agency's **search**. One of his contentions was that the because the FBI's record indexing system was designed to meet the agency's needs, it was likely to retrieve only records described in his request and not those records that might be related but not specifically described. Cooper rejected the notion out-of-hand. He pointed out that "that would be self-defeating. If an agent needed to locate a case file, he too must conduct an index search of the CRS; had he indexed the file improperly the first time around, or perhaps had another FBI official done so, the agent would be out of luck." He observed that "on top of its poor logic, Davis's theory is belied by the search returns themselves. If Davis were right that the Bureau attempts to 'game' FOIA by indexing records in a manner that requires insider knowledge to locate later on, how can he explain the 150-some responsive pages turned up by the search conducted in this case?" noting that "the Service's declaration [explaining its search] is not nearly as detailed as the FBI's," Cooper indicated that "moreover, as was true of the FBI, the Secret Service's search bore substantial fruit. It ultimately produced to Davis 228 pages of responsive records and withheld in full another 79 responsive pages. While the efficacy of one search does not rule out the possibility that another search might be even more fruitful, it does provide evidence that the Service took a reasonable approach to unearthing records relating to its investigation of Davis." Cooper approved the agencies' withholdings under **Exemption 3 (other statutes)**, where the FBI relied on the Bank Secrecy Act and the Secret Service claimed Rule 6(e) on grand jury secrecy. Davis argued that the FBI had improperly claimed **Exemption 7(D) (confidential sources)** because according to Davis, some sources had proven unreliable. Cooper pointed out, however, that "the rationale underpinning the confidential source exemption is implicated even when the source's information proves useless." Davis also faulted the Secret Service for wiping clean his external hard drive, arguing that doing so had destroyed records responsive to his request. But Cooper agreed with the agency's claim that Davis had requested records created or compiled by the agency during its investigation of him, not his own records the agency had seized during the investigation. Cooper observed that "there is no reason to think that a hard drive owned by Davis and seized by the Service would contain such records. Because the hard drive does not fall within Davis's request, he cannot show that the Service 'intentionally transferred or destroyed a document after it had been requested under FOIA.'" (*Donovan Davis, Jr. v. Federal Bureau of Investigation*, Civil Action No. 18-0086 (CRC), U.S. District Court

for the District of Columbia, July 3)

Judge Reggie Walton has ruled that the FBI **conducted an adequate search** for records pertaining to Larry Welenc even though there was originally some concern that the agency had responded to the wrong request. Welenc requested records from the FBI's Las Vegas office pertaining to Nancy Schuster and Special Agent Brescia, including the second page of a letter to Brescia. The agency denied the request as to the missing letter, claiming its Central Records System was not set up to retrieve specific documents. Welenc then requested records about himself with reference to Brescia, Schuster, and Special Agent Nina Roseberry. The agency located 279 records pertaining to a 1998 FOIA request and subsequent suit filed by Welenc. The agency disclosed 186 pages in full, and 42 pages in part, citing **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. It also withheld 40 pages as duplicates. Welenc filed an administrative appeal. The Office of Information Policy upheld the FBI's processing of the request and told Welenc that additional pages had been referred to EOUSA and the Criminal Division for direct response to Welenc. Welenc argued that the agency's search was inadequate because it had processed the wrong request. However, after reviewing the record, Walton agreed with the FBI that it had processed Welenc's request for records about himself in relation to the named FBI employees in the Las Vegas office and that it had located and processed records responsive to his request. Welenc argued that Exemption 5 did not apply because no legal privileges were involved, and the records would provide exculpatory information about his criminal convictions. But Walton noted that "even if information in the withheld records exonerates the plaintiff as he speculates it would, the FBI need not disclose it if a FOIA exemption applies. A FOIA action is not a criminal case, and a FOIA requester has no constitutionally protected right to exculpatory evidence as would a criminal defendant." Walton found that names and identifying information were protected by Exemption 6. Welenc argued that the agency had failed to consider the **segregability** of the heavily redacted records. Walton observed that "he does not argue or point to evidence in the record to rebut the 'presumption that [the FBI] complied with the obligation to disclose reasonably segregable material.'" (*Larry Welenc v. Department of Justice, et al.*, Civil Action No. 17-0766 (RBW), U.S. District Court for the District of Columbia, July 8)

Judge Rudolph Contreras has once again rejected Jack Jordan's attempts to argue that he was entitled to an email sent by an official at DynCorp that contained privileged information and became part of the record of an administrative law judge at the Department of Labor after finding that none of Jordan's multiple challenges for reconsideration under Rule 60 of the Rules for Civil Procedure entitled him to relief. Jordan represented his wife in a Defense Base Act suit against DynCorp International. During that litigation, Jordan learned of the existence of two emails that had become part of the DOL proceeding. He requested the emails under FOIA and while Contreras found that one of the emails was not covered by the attorney-client privilege, he ruled that the other email was privileged. Jordan appealed to the D.C. Circuit, which summarily upheld Contreras' ruling. Jordan then filed suit in the Western District of Missouri as well, arguing that the emails should be turned over. That judge agreed with Contreras' original ruling and dismissed Jordan's attempt to relitigate the issues in the Western District of Missouri. The judge also dismissed Jordan's motion for reconsideration, finding he presented no new evidence supporting the motion. Now, Contreras, while entertaining a slightly different approach under Rule 60, which allows a party to be relieved from summary judgment, has reached the same conclusion. One of Jordan's primary contentions was that the D.C. Circuit had actually ruled that the emails were not privileged because the emailer's request for legal advice contained nothing more than disjointed words that would have minimal or no information content. Contreras, however, pointed out that "this is not what the Circuit held. . .The Circuit did not find that the request for privilege consisted of disjointed words without information content, but rather held that disclosing parts of the email that demonstrate its privileged nature would constitute the disclosure of disjointed words without information

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content." (*Jack Jordan v. U.S. Department of Labor*, Civil Action No. 16-1868 (RC), U.S. District Court for the District of Columbia, July 1)

The D.C. Circuit has ruled that EPIC does not have **standing** to challenge the Department of Commerce's failure to prepare a privacy impact statement, required by the E-Government Act, after it announced its plan to include a citizenship question on the 2020 Census. After Secretary Wilbur Ross announced the inclusion of the citizenship question, EPIC filed suit under the Administrative Procedure Act and the Declaratory Judgment Act to force Commerce to prepare a privacy impact statement. The district court dismissed EPIC's challenge after finding that the E-Government Act only required an agency to prepare an assessment of the privacy impacts of a proposed information collection once an agency *initiated* such a collection and that in this case Commerce had not yet taken steps to initiate the collection of information under the citizenship question. EPIC then appealed to the D.C. Circuit. The D.C. Circuit started by indicating that in its previous litigation to force the Trump administration's voter integrity commission to prepare a PIA, the appeals court had ruled that EPIC could not show organizational standing to make such a challenge. Without organizational standing as a potential source of jurisdiction, EPIC was left to show that associational standing provided the necessary jurisdiction. To establish an associational harm, EPIC needed to show that its membership had suffered a privacy injury or an informational injury. Writing for the court, Senior Circuit Court Judge David Sentelle rejected EPIC's claim of a privacy injury, noting that "to plausibly show a privacy injury, EPIC must allege harm that is distinct from a simple failure to comply with the procedural requirements of § 208. In the privacy context, such harm would ordinarily flow from the disclosure of private information. Since EPIC has not shown how a delayed PIA would lead to a harmful disclosure, its privacy injury fails." Sentelle found EPIC failed to show an informational injury as well. He pointed out that "because the lack of information itself is not the harm that Congress sought to prevent through § 208, EPIC must show how the lack of a timely PIA caused its members to suffer the kind of harm that Congress did intend to prevent: harm to individual privacy. However, EPIC cannot allege an imminent privacy harm without assuming the independent violation of other laws [protecting the privacy of census information] by the Census Bureau. This is too speculative to support standing." (*Electronic Privacy Information Center v. United States Department of Commerce*, No. 19-5031, U.S. Court of Appeals for the District of Columbia Circuit, June 28)

Judge James Boasberg has ruled that the Social Security Administration properly responded to William Powell's FOIA/PA requests for records on his social security earnings. Powell requested the agency search several databases. The agency located Powell's earnings information but did not find any non-earning information pertaining to Powell. Powell challenged the agency's search. Boasberg agreed with the agency that it had conducted an **adequate search**. He noted that the agency's declaration was "reasonably detailed, as it provides a description of the locations searched and the search terms used, along with the reasoning behind such decisions. The affidavit also explains that any limitations on the search were not due to SSA noncooperation, but rather a result of Powell's confusing and patently impossible requests." Boasberg added that "as SSA's affidavit unequivocally attests that it searched all files likely to contain responsive information, the search is facially adequate." (*William E. Powell v. Social Security Administration*, Civil Action No. 19-44 (JEB), U.S. District Court for the District of Columbia, July 5)

Judge Trevor McFadden has ruled that the U.S. Marshals Service has not yet shown that it **conducted an adequate search** or that it properly withheld information under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** or **Exemption 7(E) (investigative methods or techniques)** in processing two requests from Angel Pichardo-Martinez for his medical records and the agency's interactions

with the Late County Jail and the Community Association in Youngstown, Ohio. The agency told McFadden that it was unaware of Pichardo-Martinez's FOIA requests until he filed suit. Because his requests were attached to his complaint, the agency agreed to process them and disclosed 51 records with redactions. McFadden pointed out that Pichardo-Martinez has filed two documents with his complaint, neither of which responded to the agency's legal arguments. McFadden observed that he was required to determine whether or not the agency had provided sufficient evidence to carry its burden of proof on summary judgment. Here, he found the agency had not carried its burden. He noted that "all that is known of the Service's search for records responsive to Mr. Pichardo-Martinez's FOIA requests is that staff at the Eastern District of Pennsylvania Office conducted it. At a minimum, the agency must 'specify "what records were searched, by whom and through what process."' The Service failed to do so." Denying the agency's motion for summary judgment, McFadden pointed out that the agency had also failed to explain how the records qualified as law enforcement records under Exemption 7 (law enforcement). (*Angel Pichardo-Martinez v. United States Marshals Service*, Civil Action No. 18-2674 (TNM), U.S. District Court for the District of Columbia, July 5)

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