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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: After 37 years at the Office of Information Policy, Melanie Pustay has announced she will retire. Pustay has served as executive director of OIP since 2007, when she replaced Dan Metcalfe. Before becoming executive director, Pustay served for eight years as deputy director. Earlier in her career with OIP, which was then named the Office of Information and Privacy, Pustay primarily oversaw Exemption 4 issues. In that role, she argued the Critical Mass case for the government when it was reheard en banc by the D.C. Circuit in 1992.

Court Finds Advocacy Group Failed to Show DOJ Bad Faith

Although the government bears the burden of showing that it properly processed a FOIA request sent to an agency, that its search was legally sufficient, and that any exemption claims are appropriate, courts frequently require sophisticated FOIA litigants to take into account bureaucratic delays or innocent errors on the part of agencies in considering whether agency conduct constitutes a deliberate attempt to evade or minimize the agency's statutory obligations or rather a good faith attempt to comply with those obligations. A recent example of the tensions that can occur in such clashes involves a FOIA request by American Oversight for written guidance given to U.S. District Attorney for the District of Utah John Huber by Department of Justice officials as part of former Attorney General Jeff Sessions' instructions that Huber conduct an investigation of certain issues related to the 2016 presidential election.

Before searching for such records, the Office of Information Policy contacted the Office of the Attorney General, the Office of the Deputy Attorney General, and eventually Huber himself, to inquire about the existence of written guidance. Initially, the consensus of the officials was that no written guidance existed because it had been conveyed orally. But when Huber was shown the reply brief DOJ intended to file in the case, he readily located a responsive email attachment. DOJ conducted a supplemental email search but found no other records. The agency then moved for summary judgment. For its part, however, American Oversight argued that the initial person-to-person search was

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conducted in bad faith and asked for limited discovery.

Huber's investigation was prompted by a 2017 request from 20 Republican members of the House Judiciary Committee, including then chair Rep. Bob Goodlatte (R-VA), that DOJ appoint a second special counsel to investigate the behavior of Hillary Clinton, Loretta Lynch, and James Comey during the 2016 presidential election campaign. The agency responded to Goodlatte's letter by indicating that it would make recommendations as to whether such an inquiry should be opened. A year later, American Oversight submitted four FOIA requests related to Goodlatte's request. Three of the requests were subsequently resolved – one request asked for records pertaining to the drafting of DOJ's response to Goodlatte, a second request asked for the identities of federal prosecutors tasked with evaluating the issues raised by Goodlatte, and a third related to any recusal issues brought up by Sessions' participation in the matter. By the time Judge Christopher Cooper ruled in the case, the only remaining request was for any guidance provided to federal prosecutors tasked with evaluating the issues in Goodlatte's letter as indicated in the agency's response letter. When Huber finally saw the agency's reply brief, he explained that Matthew Whitaker, then serving as Sessions' chief of staff, had emailed him guidance. Once OIP learned of the email, it conducted a supplementary search, but found no other responsive records. American Oversight argued that overlooking an obviously responsive email was a matter of bad faith on the part of the agency and that American Oversight should be granted limited discovery.

Cooper first addressed the issue of whether DOJ had acted in bad faith in initially indicating that any guidance had been communicated orally and not in writing and then admitted that written guidance existed that had been sent to Huber by Whitaker. American Oversight also emphasized that the agency had conveniently failed to provide the email until four days after Whitaker stepped down as acting Attorney General. Cooper found it difficult to conclude that the government had acted in bad faith. He pointed out that "rare is the case that compels a court to cast a skeptical eye on an agency's FOIA declarations – and this is not one of them. DOJ did an about face, to be sure. But the fact that an agency discovers an error in its earlier representations, and thereafter changes course, does not alone displace the good-faith presumption courts accord its declarations."

Cooper cited *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981), in which the D.C. Circuit found that an agency's admission that it subsequently found more responsive records spoke to an agency's fallibility rather than its mendacity, and a host of cases reaching the same conclusion, as supporting his ruling here. He explained that "the Court concludes that DOJ remains entitled to the presumption of good faith. At bottom, American Oversight has predicated its bad-faith argument on a single error in the first [OIP] declaration. The error was no doubt significant. And it may even raise some doubts about the sincerity of Mr. Whitaker's apparent belief that no guidance or directives had been reduced to record form, especially because Whitaker himself sent the email attaching the responsive document." He noted that "although the agency made a mistake, it has been forthright in acknowledging and correcting it, and other considerations undermine the suggestion that it has proceeded in bad faith."

American Oversight tried to distinguish the *Military Audit Project* decision as pertaining only to circumstances involving complex searches. Cooper rejected that argument, pointing out that "the very reason *Military Audit Project* held that an initial mistake could not doom an agency's declarations was because the Circuit wanted to encourage agencies to reflect and do better, not retreat into recalcitrance. A myopic focus on the reasonableness of the initial failures, divorced from the agency's remedial efforts to cure them, would erode that principle. . .To the contrary, an agency's declarations will almost always remain entitled to a presumption of good faith so long as the agency acknowledged error and corrects for it – which is what DOJ did in this case."

Having found that DOJ acted in good faith, Cooper rejected American Oversight's request for discovery. He then proceeded to address American Oversight's challenges to the adequacy of the agency's search. American Oversight argued that DOJ's search was too limited because it was restricted to those agency officials who would have been most likely to have been in direct communication with Huber, neglecting to search those officials' staff. American Oversight seized on the fact that the agency had searched the emails of two of Sessions' assistants as evidence that the emails of other similar assistants should have been searched as well. Rejecting that claim, Cooper pointed out that the search of Sessions' two assistants "should not be fashioned into ammunition against the agency that requires it to search the records of still more assistants. The only sure consequence of accepting American Oversight's logic here would be to incentivize agencies to err on the side of under-inclusion in their searches. An agency would know that if it includes any *one* of a category of custodians, then it risks being forced to search *all* custodians belonging to the same category, regardless whether the agency believes the others possess responsive records."

American Oversight attacked the agency's claim that any communications with Huber had been oral and, Cooper pointed out that "the existence of *one* written record means that the Court should now disregard entirely representations by officials that *most* of their communications with Huber regarding his investigative focus would have occurred orally. The Court declines to take that leap." He explained that 'that the agency officials' representations that they spoke with Huber rather than issued written directives to him turned out to be definitively incorrect on *one* occasion does not mean that those representations were entirely inaccurate."

Rejecting American Oversight's claim that the agency had interpreted its request too narrow, Cooper emphasized that "American Oversight is one of the more sophisticated FOIA practitioners in this district, and the comparatively broader language it deployed in its Recusal and Drafting requests – using 'reflecting' and 'relating to' respectively – suggests it understands how to use different words to capture different categories of records. Although courts are to construe FOIA requests liberally, they must also give effect to an apparently deliberate decision to use different words for different requests." Speaking in defense of the agencies, Cooper noted that "if courts do not hold FOIA requesters to their word – especially sophisticated ones who have demonstrated an ability to manipulate language to either narrow or broaden a request – agencies will always have to err on the side of the broadest plausible interpretation, forcing them to do more work than even the requesters themselves may have wanted." (*American Oversight v. United States Department of Justice*, Civil Action No. 18-90319 (CRC), U.S. District Court for the District of Columbia, July 30)

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 Pierre Estalin Saint-Fleur is eligible for attorney's fees because he substantially prevailed in his suit for access to his personnel records against the County of Fresno. Saint-Fleur began working for the County in 1990 as a licensed mental health clinician. He took off four years from 2004-2008 to serve in the military national guard abroad. When he returned, he was investigated for his billing practices, which resulted in a refund of $3,681 to Medi-Cal. Saint-Fleur experienced other forms of workplace harassment and filed a federal action under the Uniformed Services Employment and Reemployment Rights Act, which was settled in December 2010. To make sure he would be able to retain his security clearance in

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the future, in 2012, Saint-Fleur requested access to the records pertaining to the County's investigation of his billing practices. The County told him that much of the information would be exempt under the personal privacy exemption of the California Public Records Act. Saint-Fleur then filed suit. The County claimed that Saint-Fleur already had the records as part of discovery in his federal case. After the County resisted further disclosure, the trial court ultimately forced it to produce the records. Saint-Fleur then filed for attorney's fees. The trial court ruled that Saint-Fleur was eligible for attorney's fees and the County appealed. The appeals court sided with the trial court. The appeals court noted that "in the end, the County withdrew its exemption claim and the trial court ordered it to produce the public records at issue. Pragmatically speaking, that outcome constituted a victory for plaintiff. . .Plaintiff got the relief he sought, and a reasonable inference exists that this relief resulted from or was caused by plaintiff's CPRA lawsuit." (*Pierre Estalin Saint-Fleur v. County of Fresno, et al.*, No. F075060, California Court of Appeal, Fifth District, July 15)

Connecticut

A trial court has ruled that the fact that Yale New Haven Hospital is an acute care treatment center open to the public and that its employees are potentially covered by workers' compensation statues is not enough to make it the functional equivalent of a public body for purposes of the Connecticut Freedom of Information Act. Eric Desmond requested records from Yale New Haven Hospital and when the hospital declined to respond based on its claim that it was not subject to FOIA, Desmond filed a complaint with the FOI Commission. After finding that 26 of 27 acute care facilities in the state were run by non-profit organizations, including Yale, and that Medicare reimbursements did not qualify as government funding, the FOI Commission sided with Yale. Desmond then filed suit. The trial court agreed with the Commission, noting that "the hospital was created to be a private charity and functions as a privately operated hospital. The funds it receives from the government are compensation for medical care services it provides to individuals who are insured by Medicare or Medicaid, and its tax exempt status does not render it the functional equivalent of a public agency. It is not subject to direct, pervasive or continuous regulatory control and its employees are not government employees." (*Eric Desmond v. Freedom of Information Commission and Yale New Haven Hospital*, No. HHB-CV-18-6042319-S, Connecticut Superior Court, July 2)

Iowa

A court of appeals has ruled that invoices from a law firm representing the City of Bettendorf in a lawsuit pertaining to its sewer system through the Iowa Communities Assurance Pool are public records and that the trial court needs to determine if the records are privileged. Allen Diercks requested the records pertaining to the costs of the outside law firm from the City. The City declined to respond to the request, arguing the records belonged to the ICAP rather than the City itself. Diercks then filed suit. The trial court ruled in favor of the City. Diercks then appealed. The appeals court found that even if the invoices had been sent to the ICAP, the City was responsible for defending the suit and the invoices were in its constructive possession. The court of appeals pointed out that "ICAP is a risk pool and the City has expended public funds to join it. If ICAP was not providing a legal defense for the City, the City would still be required to defend against its liability. The public has an interest in knowing how public monies are being expended. Because we conclude ICAP is performing a government function by virtue of its contract with the City, as specifically applied to the facts of this case, its records are 'public records' subject to examination." Since the trial court had ruled in favor of the City on the basis that the invoices were not the City's public records, the appeals court remanded the case back to the trial court to determine if the invoices were privileged. (*Dr. Allen Diercks v. City of Bettendorf*, No. 18-1068, Iowa Court of Appeals, July 3)

New Jersey

Consolidating four appeals concerning access to student records, the supreme court has ruled that the New Jersey Pupil Records Act exempts all qualifying student records from disclosure under the Open Public Records Act and that even redacting identifying student information from specific records will not make them disclosable. The court pointed out that "to the extent that the disputed student records in these matters are protected from public disclosure by the NJPRA and its implementing regulations, those records are not subject to disclosure under OPRA." Rejecting the argument that redacted records could be disclosed, the supreme court observed that "to date, the Department of Education simply has not taken the regulatory steps necessary to provide that a 'student record' under [the NJPRA] loses its privacy protection if a school district redacts the documents. . . Accordingly, we concur with the Appellate Division's conclusion that [a provision of the NJPRA] does not support the contention that a 'student record' loses that status if it is redacted to remove personally identifiable information." (*L.R. v. Camden City Public School District, et al.*, No. 080333, New Jersey Supreme Court, July 17)

Pennsylvania

A court of appeals has ruled that the Office of Open Records did not err in finding that the Department of Health properly withheld identifying information about employees of clinics offering abortion services from a requester representing a pro-life organization, but that the Abortion Control Act did not provide similar anonymizing protections. In response to a request from Jean Crocco of the Pro-Life Action League, the Department of Health declined to provide personally-identifying information, citing both the personal security exception in the Right-to-Know-Law, as well as the Abortion Control Act. Crocco filed a complaint with OOR, which ruled in favor of the agency. Crocco then filed suit. Crocco argued that the agency failed to show that clinic employees' lives were endangered. But the appeals court noted that "the Court has not held that specified individuals must show they are the target of physical harm to prove this exception. The exception does not require each individual to allege the security risk disclosure poses to them personally." The court pointed out that the Abortion Control Act protected reports of abortions from disclosure. Thus, the court observed that "to the extent the information provided in a document other than an abortion report, such as the facility license applications Requester sought here, the Abortion Control Act does not protect it." (*Jean Crocco v. Pennsylvania Department of Health*, No. 1085 C.D. 2018, Pennsylvania Commonwealth Court, July 11)

The Federal Courts…

Judge Colleen Kollar-Kotelly has ruled that GSA failed to **conduct an adequate search** for emails exchanged between the White House and the agency pertaining to the decision to renovate FBI headquarters rather than relocate the agency to Springfield, Virginia. After CREW had filed suit based on the agency's failure to respond within the statutory time limits, the House Oversight Committee disclosed two emails responsive to CREW's request. On the same day the House Oversight Committee disclosed the emails, GSA told CREW that it had found no responsive records. The agency agreed to conduct a second search using terms and parameters suggested by CREW based on the language of the publicly disclosed emails. As a result of its second search, the agency located 52 pages of responsive records, but withheld them all under **Exemption 5 (privileges)**. Three months later, the agency decided to release redacted versions of the 25 pages that had been withheld under the presidential communications privilege. CREW questioned the adequacy of the agency's second search. The agency argued that CREW had narrowed its request by

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suggesting the search terms based on the two disclosed emails. The agency argued that case law existed suggesting that when sophisticated requesters agreed to modifications during litigation, they had consciously narrowed their request. Kollar-Kotelly found the three cases the agency had cited were not relevant in the circumstances here. She pointed out that "here, the parties never agreed to narrow the issues in a written status report filed with the Court. Instead, following the failure of Defendant's initial search, Plaintiff merely sent an email suggesting search terms and parameters to Defendant based on the emails which has been released by the House Oversight Committee." She observed that "Plaintiff's mere proposal of search terms and parameters was insufficient to narrow the scope of Plaintiff's formally-made FOIA request. However, even if the Court were to conclude that Plaintiff's FOIA request was implicitly narrowed by its search proposal, Defendant has still failed to explain why its narrowed search did not discover at least two of the emails which the House Oversight Committee had released." GSA argued that one of the emails had not been found because it had an OMB domain address rather than a White House address. Kollar-Kotelly rejected that claim, noting that "Plaintiff's search parameters referenced any 'White House/EOP email address.' The use of a forward slash indicates that Plaintiffs intended to include any White House *or* EOP email address." The agency claimed that its failure to locate all responsive records did not necessarily mean that its search was insufficient. Kollar-Kotelly pointed out that "Plaintiff presented Defendant with documents responsive to its FOIA request *prior* to Defendant's supplemental search. Despite knowing of the existence of these responsive records, Defendant's search did not locate the responsive records. . .Such a failure leads the Court to conclude that Defendant's search was not reasonably calculated to discover all documents responsive to Plaintiff's request." She ordered the agency to conduct a supplemental search and indicated that she would rule on the Exemption 5 claims after such a search had taken place. (*Citizens for Responsibility and Ethics in Washington v. General Services Administration*, Civil Action No. 18-2071 (CKK), U.S. District Court for the District of Columbia, July 29)

Judge Amit Mehta has ruled that a White House press release confirming that President Donald Trump had ordered declassification of 21 pages of the FISA surveillance warrant application on Carter Page constituted an official declassification of those pages and waived any **Exemption 1 (national security)** claim for those records. In response to litigation brought by the James Madison Project and *USA Today* reporter Brad Heath for records on the FISA warrant application for Page, the Department of Justice continued to argue that certain pages were still protected by Exemption 1 and Exemption 3 (other statutes). JMP and Heath argued that the White House press release constituted an official declassification of the documents, meaning Exemption 1 no longer applied. The agency argued that the press release did not constitute a declassification order and was only a statement by the press secretary. Mehta disagreed, noting that "the Release's use of the word 'direct' suggests that the President ordered the Department of Justice to declassify the pages. And, while it is true that the Press Release is a statement of the Press Secretary, and not the President, Defendant offers no reason to believe that the Press Release inaccurately conveys the President's 'directive.' Thus, contrary to what Defendant says, it would appear that the President did make 'his intentions clear. . .to declassify information.'" The agency also argued that a later Trump tweet suggested that he had not meant to declassify the records. But Mehta observed that "the tweet only injects ambiguity as to the President's intentions. The tweet does not identify the documents to which the President is referring, let alone refer to the Pages, and it leaves unclear whether the President rescinded the directive announced in the Press Release." He explained that "Defendant should have provided some clarification about what instructions the Department of Justice received concerning the 'declassification' of the Pages' contents. But none of the declarations submitted by Defendant even mention the Press Release. Therefore, on the present record, the court cannot find that Defendant's withholding of information from the Pages, was proper under FOIA Exemption 1." Alternatively, DOJ argued the withholdings were appropriate under **Exemption 7(D) (confidential sources)** and **Exemption 7(E) (investigative methods and techniques)**. Mehta concluded that under the circumstances those exemptions did not apply either. He pointed out that "why would the President order declassification of the

Pages, if the agency could still rely on other already-asserted exemptions to withhold the very same material? Such an order would not result in any additional public information. And it would not promote the 'transparency' that the Press Release identified as a reason for the President's action. The court cannot presume that the President's declassification order was meant to have no practical effect." (*James Madison Project, et al. v. United States Department of Justice*, Civil Action No. 17-00597 (APM), U.S. District Court for the District of Columbia, July 30)

Judge Rosemary Collyer has ruled that the Department of Homeland Security must disclose certain data elements from its Secure Communities database operated by U.S. Immigration and Customs Enforcement in response to FOIA requests from the Heartland Alliance for Human Needs & Human Rights. During its processing of NIJC's requests, the agency originally redacted location-identifying data. It later withdrew its exemption claim for the data and re-produced some documents that had been redacted. However, NIJC told Collyer that not all of the data had been disclosed. Finding that the agency had no further basis for withholding the data, she ordered the agency to disclose any remaining redacted data. NIJC also asked that the agency be required to disclose records in their native format as Excel spreadsheets. Collyer noted that 'DHS does not address this argument in its opposition to NIJC's motion and offers no explanation for why the records were not 'readily reproducible' in the native format. The Court will order DHS to re-produce the records included in the July 20, 2018 production in native format." Collyer also found that Originating Agency Identifier and Contributing Agency Identifier codes were not protected under **Exemption 7(E) (investigative methods and techniques)** since they were widely available on various internet sites. She pointed out that "DHS and ICE argue that disclosure might allow individuals to circumvent the law or access records, but the fact that the codes are publicly available on multiple websites, including those of federally-funded organizations, is 'contrary evidence' that refutes this concern. While withholdings under Exemption 7(E) must only meet a very low bar, the Court finds that release of the already publicly-available information under these FOIA requests might increase the risk of law violations or enable violators to escape detection." (*Heartland Alliance for Human Needs & Human Rights v. United States Department of Homeland Security, et al.*, Civil Action No. 16-211 (RMC), U.S. District Court for the District of Columbia, July 29)

Judge Royce Lamberth has ruled that the CIA cannot claim that only the portion of a 1993 six-page daily intelligence report discussing Pablo Escobar's activities is responsive to the Institute for Policy Studies' FOIA request and that the remainder of the report can be withheld because it is non-responsive. In the aftermath of the D.C Circuit's decision in *American Immigration Lawyers Association v. Executive Office for Immigration Review (AILA)*, 830 F.3d 667 (D.C. Cir. 2016), in which the court ruled that agencies could only withhold records based on an exemption claim and not because the agency contended they were non-responsive to the request, agencies have begun to divide traditional records into multiple records so that the smaller portions can be claimed as non-responsive. Lamberth noted that here "the government slices the definition of 'record' too thinly." He pointed out that "the *AILA* court concluded 'an individual sentence within a paragraph' could never 'be conceived of as a distinct, non-responsive "record."' He explained that "here, the government proposes carving pages into individual paragraphs and sentences. That contravenes not only the Justice Department's guidance, but *AILA* itself." Lamberth also noted this was a dramatic departure from agency practice. He observed that "throughout this litigation – which pre- and post-dates *AILA* – the government has failed to consistently explain when a document constitutes a single record and when it should be splintered into several. At the moment, the government wants to account for relevant information before mincing it into different records. But that puts the cart before the horse. § 552 requires identifying records based on responsiveness alone, regardless of what else the record contains. And it doubles back on how the government defined these records in its pre-*AILA Vaughn* indices, which treated composite intelligence reports

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as one record, not multiple. This midstream attempt to move the goalposts only underscores the weakness of the government's position. The government cannot retroactively rehash the meaning of 'record' to skirt *AILA*." Lamberth pointed out "here, the government dices these briefing summaries into discrete paragraphs and sentences in a way that disregards their original form and function. . .A daily or weekly intelligence summary – itself just a few pages long – is an unlikely candidate for piecemeal consumption." Lamberth acknowledged that requiring agencies to provide admittedly non-responsive information "saddles their evermore-burdened FOIA offices with busywork, delays responses for other FOIA requesters, and distracts subject matter experts from their primary mission." He concluded that "but those are problems for Congress. Bound by § 552's text and *AILA*'s holding, the Court will grant IPS's cross-motion for partial summary judgment and deny CIA's." (*Institute for Policy Studies v. United States Central Intelligence Agency*, Civil Action No. 06-960, U.S. District Court for the District of Columbia, July 31)

A federal court in New York has rejected requests by both the Department of State and the Department of Defense that it reconsider its order requiring both agencies to process requests from the Open Society Justice Initiative concerning the killing of journalist Jamil Khashoggi at a rate of 5,000 pages a month. The State Department originally located 63,000 potentially responsive records and requested the court set a 300-page-a-month pace, while OSJI originally suggested a processing rate of 7,500 pages a month. Instead, Judge Paul Engelmayer settled on 5,000 pages a month. After supplementing its argument, State requested Engelmayer reduce the rate to 3,000 pages a month, arguing that the agency had now identified 288,000 pages of potentially responsive records. Emphasizing the public interest in the records, Engelmayer explained that "on the pace ordered by the Court, review of [288,000 records] would take just under five years to review." He pointed out that review of the volume of records would take eight years to complete at the rate of 3,000 pages a month urged by State. Engelmayer indicated that ongoing negotiations with OSJI would likely reduce the number of records to review. He noted that "the term 'practicable' must be read in the context of FOIA's aims to provide timely information on government activities to the public." He chastised the Defense Department for its inability to use eDiscovery tools that would likely speed up its processing of records. Ordering DOD to process 5,000 pages a month as well, he observed that "DOD's decision to thus far deny itself the technologic capacity to seed its review cannot dictate the Court's assessment of the review pace that is 'practicable' under FOIA." (*Open Society Justice Initiative v. Central Intelligence Agency, et al.*, Civil Action No. 19-234 (PAE), U.S. District Court for the Southern District of New York, Aug. 6)

Judge Christopher Cooper has ruled that the Department of Education has not justified its redactions in resolution letters issued by the Office of Civil Rights of investigations of whether school districts are adequately responding to sexual assault complaints from students. BuzzFeed requested resolution letters sent to 14 separate school districts across the country. The agency redacted the letters under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. BuzzFeed agreed that some of the information was properly subject to those exemptions but argued that the agency's redactions were too heavy-handed. After reviewing the letters *in camera*, Cooper largely agreed. Cooper noted that since BuzzFeed acknowledged that the letters were compiled for law enforcement purposes he would evaluate them under the lower standard of Exemption 7(C) only. He noted that "while some of the redactions are appropriate, others are improperly broad." He explained that "for example, the resolution letters to the Imagine Prep School in Arizona and Adams County School District 12 in Colorado, both prepared by an official at OCR Denver, were minimally redacted and appear to appropriately balance the privacy interests of individuals involved with the public's interest in learning how OCR responded to the determination complaint and what its investigation found." He pointed out that "on the other hand, the letters to East St. Louis, Illinois School District 189 and the Baraboo School District in Wisconsin, for example, -- both redacted by an official in OCR's Chicago office – have pages-long redactions. These redactions hide

details too general to allow for identification of individuals involved, including information abut the investigation that is not Personally Identifiable Information at all." He indicated that "if revealed, these details would illuminate OCR's work but would not risk identifying those involved in the underlying incidents." Sending the case back to the agency to narrow its redactions where necessary, Cooper observed that "BuzzFeed (and the public) has a right to examine how OCR is conducting these sensitive investigations. Exemption 6 and 7(C) call for careful balancing when redacting information, demanding a scalpel rather than a buzzsaw." (*BuzzFeed Inc. v. U.S. Department of Education*, Civil Action 18-01535 (CRC), U.S. District Court for the District of Columbia, Aug. 7)

A federal court in New York has ruled that the EPA has neither provided a sufficient explanation for why disclosure under **Exemption 5 (privileges)** would cause foreseeable harm nor for why it cannot **segregate** and disclose more non-exempt information. Agreeing with two recent decisions from district courts in the D.C. Circuit – *Judicial Watch v. Dept of Commerce*, 375 F. Supp. 3d 93 (D.D.C. 2019) and *Rosenberg v. Dept of Defense*, 342 F. Supp. 3d 62 (D.D.C. 2018) – finding that agencies had failed to articulate the foreseeable harm in disclosing information under Exemption 5 – the court indicated that "the EPA shall submit a supplemental *Vaughn* index that more specifically and particularly describes the Exemption 5-related interests that would be harmed by disclosure of the documents at issue." The court added that "a categorical approach to different types of documents may well be appropriate. But the EPA must provide more detail than it has here." The agency agreed that the Natural Resources Defense Council "raises colorable arguments that the EPA has withheld non-exempt factual information without adequately justifying its non-disclosure." The court ordered the agency to provide 10 documents selected by the NRDC for *in camera* review. (*Natural Resources Defense Council v. U.S. Environmental Protection Agency*, Civil Action No. 17-5928 (JMF), U.S. District Court for the Southern District of New York, July 25)

A federal court in Missouri has ruled that the Department of Justice has not yet shown that it **conducted an adequate search** for records concerning two 1988 fires in Kansas City that resulted in an explosion that killed six firefighters in response to FOIA requests from Bryan Sheppard, who, along with other members of his family, had been convicted in 1996 in federal court on arson charges. From 2007 through 2009, the *Kansas City Star*, published a series of investigative reports on the fires, suggesting government misconduct during the Sheppard trial. In 2008, the U.S. Attorney's Office for the Western District of Missouri asked DOJ to review the *Star*'s allegations. In 2011, the review concluded with a 20-page memorandum addressing the defendants' claims of innocence but did not re-review the investigation. The *Star* requested the report and the agency disclosed it with redactions under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)**. Bryan Sheppard also made a FOIA request through his attorney for records concerning the entire investigation. In response to Sheppard's request, the agency located 450 pages but disclosed only 38 pages, withholding the rest under the same three exemptions claimed in the *Star*'s FOIA, plus **Exemption 5 (privileges)**. Sheppard appealed the denial to OIP, which withheld the initial denial. In 2016, the Supreme Court held that its 2012 decision finding that mandatory life in prison for defendants under the age of 18 violated the Eighth Amendment applied retroactively. As a result, Sheppard, who was younger than 18 when convicted, was released as a result. In 2017, Sheppard filed suit challenging the agency's denial of his FOIA request. The court agreed with Sheppard that DOJ had not sufficiently justified the reasonableness of its search, noting that "due to the lack of information provided by the DOJ, the Court cannot determine whether its search was adequate." Sheppard argued that the agency had ignored his 13 privacy waivers granting him access to information about those individuals. Again, the court agreed with Sheppard, observing that "contrary to the DOJ's arguments, Sheppard, and any individual or entity seeking documents from the DOJ pursuant to FOIA,

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may provide privacy waivers executed by individuals whose names may be included in the requested records. Although thirteen executive privacy waivers have been provided to the DOJ, the records before the Court does not demonstrate the DOJ has reprocessed Sheppard's FOIA request." Having found the agency's affidavits insufficient to support its search claim, the court sent the case back to the agency for reprocessing before addressing any exemption claims. (*Bryan E. Sheppard v. United States Department of Justice*, Civil Action No. 17-010137-W-ODS, U.S. District Court for the Western District of Missouri, Aug. 6)

Judge Emmet Sullivan has ruled that the DEA properly withheld categories of records under **Exemption 7(E) (investigative methods and techniques)** in response to a request from EPIC for records concerning the agency's use of the Hemisphere surveillance program allowing participating agencies to access AT&T's database of phone calls. The DEA located 319 responsive documents. It released 39 in full, 176 in part, and withheld 104 in full under several exemptions. By the time Sullivan ruled, the only remaining issue was whether the agency could claim Exemption 7(E) for three categories of records. To justify its exemptions, Sullivan agreed to review an *ex parte in camera* affidavit. However, because the agency revised its exemption claims and disclosed more information, Sullivan pointed out that "in an abundance of caution, the Court will order the DEA to un-redact portions of its affidavit that are no longer sensitive in light of its new disclosures to EPIC." EPIC argued that Exemption 7(E) did not apply to names of law enforcement agencies that used Hemisphere because they were neither procedures nor techniques. Sullivan agreed in the abstract, but sided with the agency, noting that "the Court understands that the names themselves are not a technique, procedure or guideline, but with those names comes the knowledge of how the agency employs its procedures or techniques. In other words, to reveal the names of agencies would necessarily reveal information about the techniques and procedures for those particular law enforcement agency investigations." Having decided that the names of law enforcement agencies qualified as investigative techniques, Sullivan went on to find that disclosure of the names would risk circumvention of the law for purposes of Exemption 7(E). Sullivan explained that while the agency had not addressed the issue of **segregability**, his review of the records *in camera* persuaded him that "the government only withheld information that is exempt from disclosure. . ." (*Electronic Privacy Information Center v. United States Drug Enforcement Agency*, Civil Action No. 14-317 (EGS), U.S. District Court for the District of Columbia, Aug. 6)

A federal court in New York has ruled that the Department of Justice **conducted an adequate search** for records concerning speeches made by former U.S. Attorney for the Southern District of New York Preet Bharara and redacted some records under **Exemption 6 (invasion of privacy)** in response to a request from Louis Flores. The agency's search was conducted by the U.S. Attorney's Office for the Southern District of New York, which denied Flores' request for a fee waiver and assessed him $1,120 in fees. After Flores appealed the fee waiver decision to the Office of Information Policy, EOUSA agreed to waive fees. The agency ultimately disclosed more than 2,000 pages in several separate released. It redacted information under Exemption 5 (privileges) as well and withheld some records as non-responsive because they were duplicative. Flores challenged the agency's search, arguing that several speeches that Bharara was known to have delivered were not accounted for in the disclosed records. Addressing the allegation about the missing speeches, the court observed that "as to one of the three speeches – the Sarasota Springs speech – Department of Justice personnel indicated to the plaintiff before he this lawsuit that the speech was not covered by the Department's press and there was no transcript of the speech." Flores also claimed that the agency had failed to provide preparation notes for all Bharara's speeches. However, the court pointed out that the agency "did not provide the plaintiff with notes and drafts related to speeches that were not given, because the plaintiff did not request those materials." Flores argued that redactions under Exemption 6 were inappropriate because the exemption only covered information that was medical or personnel related. The court rejected that claim, noting that "Exemption (b)(6) is not so narrow." The court observed that "the defendant sufficiently explained why its

withholdings under exemption (b)(6) were justified, even if the withheld documents or portions of documents did not concern personnel or medical matters." (*Louis Flores v. United States Department of Justice*, Civil Action No. 17- 0036 (JGK), U.S. District Court for the Southern District of New York, Aug. 1)

Judge Royce Lamberth has ruled that the CIA, the Defense Intelligence Agency, and the Air Force all **conducted adequate searches** for records on the status of Captain Harry Moore, a downed Korean War pilot who may have become a prisoner of war. Moore was shot down over North Korea in June 1951. By the end of the Korean War, Moore was considered missing in action and presumed dead. In 2002, the Defense Department notified Moore's family that based on information produced by the U.S.-Russia Joint Commission on POW/MIAs there was a possibility that Moore survived the crash and was held as a prisoner of war. In 2012, DOD notified Moore's family that research was continuing at the Russian archives. In 2017, the Moore family, joined by the James Madison Project and investigative reporter Mark Sauter, filed FOIA requests to six agencies pertaining to Moore. After hearing nothing from any of the agencies, the requesters filed suit. Lamberth found that the CIA, DIA, the Air Force had now shown that they conducted adequate searches. Although DIA had not conducted a search because it concluded it was unlikely to have responsive records, Lamberth found its response sufficient. He noted that "here, defendants provided an affidavit detailing why a records search would likely be fruitless. Failing to go one step further and actually conduct this fruitless search does not establish inadequacy." Lamberth rejected the plaintiffs' claim that DIA could have more recent records even though the search for information on Moore's fate fell under the jurisdiction of the DOD's POW/MIA Accounting Agency. Instead, Lamberth pointed out that "DPAA is not responsible for the maintenance of records pertaining to DOD personnel designated as prisoners of war or missing in action prior to December 31, 1990. In fact, DOD Directive 5110.10 explicitly states that DPAA is responsible for accounting for DOD personnel from the Korean War. Because Capt. Moore served in the Korean War – and well before 1990 – there is no doubt that responsive records would be stored at DPAA, or possibly accessioned to the National Archives and Records Administration due to age. Furthermore, defendant provide another agency affidavit in their reply brief stating that any new requests for information on Korean War records are forwarded to DPAA." The plaintiffs also argued that DIA should have searched its FOIA database for referrals from other agencies. Lamberth disagreed, noting that "DIA's FOIA processing tool is not a 'system of records.' Instead, it is a case management tool and is therefore not searched for responsive FOIA records. Here, responsive records are likely to exist in DPAA. . .Consequently, if DIA searched is FOIA database, it is likely that any responsive records located would be duplicative of those located in a search of DPAA's system of records. . . An agency meets its FOIA obligations if it demonstrates that its search was 'reasonably calculated to uncover all relevant documents.'" Lamberth agreed that the Air Force's search was adequate. He noted that its search of the Air Force Historical Research Agency had uncovered 23,498 pages of responsive records, all of which were disclosed to the plaintiffs. The plaintiffs faulted the agency for failing to identify the keywords used in its search. The agency went ahead and did a second search using keywords supplied by the plaintiffs and found no further records. The plaintiffs challenged the CIA's search on the basis that the search did not uncover records the plaintiffs already had in their possession. Lamberth found this allegation was not sufficient to undermine the agency's search, observing that "regardless, an agency's search need only be reasonable." (*Mark Sauter, et al. v. Department of Defense, et al.*, Civil Action No. 17-1596, U.S. District Court for the District of Columbia, July 30)

The Third Circuit has ruled the district court did not err in accepting the FBI's categorical **Exemption 7(A) (interference with ongoing investigation or proceeding)** claims to withhold records in response to a request from Daniel "Tokyo" Gatson concerning himself and his confederates in the James Bond Gang pertaining to his indictment on transporting stolen property over state lines. After the FBI declined to disclose

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more than 1750 pages of responsive records on the basis of Exemption 7(A), Gatson filed suit in the District of New Jersey. The district court there sided with the agency and Gatson appealed, arguing that the agency's use of a categorical claim under Exemption 7(A) was inappropriate. The Third Circuit initially dealt with a procedural matter, noting that a *Vaughn* index was generally not required under Exemption 7(A). Instead, the court observed that "the defendant may submit a public affidavit describing in sufficient detail the categories of records withheld and the bases for the withholding. That is what the FBI did here." In its affidavit explaining its Exemption 7(A) claims, the FBI 12 types of categories of records it was withholding. Finding these descriptions sufficient, the Third Circuit pointed out that "those categories, either facially or through detailed explanation, plainly provided the District Court with ample information to assess the applicability of Exemption 7(A), including an inquiry as to whether disclosure would interfere with the then-pending criminal prosecution of Gatson." (*Daniel Gatson v. Federal Bureau of Investigation*, No. 17-3122, U.S. Court of Appeals for the Third Circuit, July 31)

A federal court in Washington has ruled that U.S. Immigration and Customs Enforcement has not yet shown that it **conducted an adequate search** for records in response to three related requests submitted by Maria Mora-Villalpando, who was arrested by ICE in Seattle after protesting against the Trump administration's new immigration policies after she publicly-identified herself as an undocumented migrant. Mora-Villalpando's first request asked for her own records, while the other two requests asked for records pertaining to agency policies for targeting immigrants who protested the changes. U.S. Citizenship and Immigration Services responded to Mora-Villalpando's request for records on herself by disclosing her Alien file. ICE disclosed nearly one thousand pages in response to Mora-Villalpando's requests. She challenged the adequacy of the agency's search, focusing on its failure to search field offices in other locations besides Seattle. The court found that the agency had searched other locations, including several agency databases. The court pointed out that "the [Deputy Field Office Director in the Seattle] was assigned to search for responsive records. However, the DFOD was not the only officer assigned in the Seattle [Enforcement and Removal Operations] Field Office to search for records responsive to Ms. Mora-Villalpando's request." Mora-Villalpando argued that ICE's claim that certain databases could only be searched by personal identifiers was belied by several Privacy Act systems of records notices that suggested the databases could be searched by other terms as well. The court rejected that claim as it pertained to the agency's CARIER database but agreed as to its EDMS and [Office of Principal Legal Advisor] databases. The court observed that "OPLA performed a search limited to variation of Ms. Mora-Villalpando's name, which rendered the response applicable to her First Request only. Defendant fail to explain why they so limited their search and did not search the OPLA databases using any of the key words provided in Ms. Mora-Villalpando's Second Request. . . . In this instance, the court concludes that ICE has not produced a 'reasonably detailed, nonconclusory affidavit' concerning its search of the OPLA databases and so fails to demonstrate that it conducted a reasonable search." (*Maria Mora-Villalpando v. U.S. Immigration and Customs Enforcement, et al.*, Civil Action No. 18-0655JLR, U.S. District Court for the Western District of Washington, July 29)

Judge Christopher Cooper has ruled that both the FBI and the CIA properly responded to David Steven Braun's FOIA requests for records about himself based on his belief that the lack of economic success experienced by him and his father before him were directly related to government surveillance. Both agencies told Braun that they found no records, but both agencies also invoked a *Glomar* response neither confirming nor denying the existence of records where Braun's requests potentially encompassed either national security or law enforcement records. Braun challenged the **adequacy of the agencies' searches**, arguing that records must exist to explain his and his father's economic misfortune. Braun argued that the agencies' *Glomar* responses implied that records must exist or the agencies would not have resorted to the neither-confirm-nor-deny responses. Cooper, however, disagreed. He noted that 'otherwise, a *Glomar* response would do no good

at all. Braun's proposed approach of providing denials where no relevant records exist would render *Glomar* responses useless, making them *de facto* admissions that records exist. Consequently, while frustrating for Braun, agencies must issue *Glomar* responses when searches implicate protected material." Explaining the FBI's use of *Glomar* in response to whether or not Braun was on the terrorist watchlist, Cooper referenced *Kalu v. IRS*, 159 F. Supp. 3d 16 (D.D.C. 2016), in which Judge James Boasberg approved of the government's use of a *Glomar* response under the same circumstances. Commenting on Braun's case, Cooper noted that "the FBI cannot reveal if Braun is on its watch list without giving away information that might tip off those on the watch list or aid those who seek to avoid being placed on it. Should the FBI abandon its 'even-handed *Glomar* response,' and provide Braun with a specific answer to his request, it would risk placing 'more information [regarding the watch list] in the public domain from which individuals could inductively piece together' FBI enforcement guidelines with the aim of circumventing the law." (*David Steven Braun v. Federal Bureau of Investigation, et al.*, Civil Action No. 18-2145 (CRC), U.S. District Court for the District of Columbia, July 25)

Editor's Note: *Access Reports* will take a summer break. Volume 45, Number 17 will be dated September 4, 2019.

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