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Washington Focus: Pat Wald, who served 20 years on the D.C. Circuit and was a staunch defender of open government rights during her tenure, died Jan. 12 at the age of 90. Wald was appointed to the D.C. Circuit by President Jimmy Carter in 1979, serving with other Carter appointments including Ruth Bader Ginsburg, Abner Mikva, and Harry Edwards. Among other decisions, Wald wrote the opinion in Oglesby v. Dept. of Army, one of the most-important and well-known procedural FOIA decisions. After she retired from the D.C. Circuit in 1999, she served for three years on the International Criminal Tribunal for the former Yugoslavia.

Court Rules Voluntary Change in Records Policy Moots FRA Claim

In a decision that illustrates that the Federal Records Act can be an effective tool in forcing recalcitrant agencies to abide by its record-keeping mandate, Judge James Boasberg has also acknowledged the FRA's enforceability limitations. Dismissing a case brought by CREW and PEER against the EPA challenging former Administrator Scott Pruitt's intentional failure to keep records of his decision-making, Boasberg indicated that once Pruitt was fired and the agency announced that it would no longer follow Pruitt's previous policy, the case became moot because the challenged action no longer existed. Although CREW and PEER argued that the agency could return to the old policy, Boasberg found that at this juncture there was no evidence that such an action was likely.

Based on news reports that Pruitt had taken extraordinary measures to ensure that a full record of his meetings and decisions did not exist, CREW and PEER filed suit under the FRA, arguing that Pruitt's intentional evasions violated the statute's requirement that agency decisions be memorialized. But Pruitt was fired during the litigation and the agency issued a new Interim Records Management Policy obligating itself to "document substantive decisions reached orally" and telling staff and contractors that the new policy "supersedes any prior policy to the extent such policy is inconsistent with this Interim Records Management Policy." The agency then asked

Boasberg to dismiss CREW and PEER's complaint because it had now complied with its FRA obligations.

Boasberg first noted that "Article III of the Constitution limits federal courts' jurisdiction to 'actual, ongoing controversies.' Two interrelated doctrines – standing and mootness – give life to this requirement. While standing probes 'the plaintiff's "concrete stake" at the outset of the litigation, mootness depends on whether the parties maintain a "continuing interest" in the litigation today.'. . . Simply put, a case is moot if 'the parties lack a legally cognizable interest in the outcome.'" Boasberg acknowledged that whether or not the agency's action was voluntary, rather than court-imposed, also played into his analysis here. He observed that "where there is doubt that this conduct even *can* moot the case, however, the Court thinks it prudent to address this threshold issue first. For if the acts are not capable of depriving the Court of jurisdiction, then it matters not whether Defendants can revert to their old ways. The action would remain live regardless."

Based on media reports, CREW and PEER's complaint alleged that Pruitt had instructed his staff not to create a written record on substantive matters and not to take notes during meetings. According to these reports, Pruitt himself issued instructions orally and refrained from using email. He also prohibited career staff from visiting the floor on which his political staff resided and avoided using his own telephone to make important calls so no record would exist in his call log. Boasberg pointed out that "Pruitt's embattled tenure at EPA, however, has come to an end, as he resigned on July 6, 2018. Whatever policies are now in place at the Agency, they no longer exist 'at his direction.' Someone else has taken over that authority – namely, Acting Administrator Andrew Wheeler. Given that Plaintiffs seek only forward-looking relief, this development undermines the remaining vitality of their claim." While CREW and PEER argued that their complaint alleged misconduct on the part of other EPA officials, Boasberg found that "the relevant facts focus almost exclusively on Pruitt. . . In fact, the Complaint does not even identify any other official of the Agency, nor is there a single relevant allegation that exists independent of Pruitt's conduct. On the contrary, the mentions of other EPA officials are best read as referring to Pruitt's staff acting at his direction."

Boasberg had previously found that CREW and PEER had alleged a policy or practice of failing to keep records that violated the FRA. But he pointed out now that "the Complaint lacks any allegation to support an inference that this policy or practice would continue, or exist apart from, the actions of Pruitt. Rather, it contains support for the opposite conclusion: CREW points out that Pruitt's conduct stood in stark contrast to that of 'every other administrator.' Wheeler now leads the EPA. This change raises, in the Court's mind, serious doubts about whether a case can proceed when the link between its claim for relief and the factual allegations that give rise to that plausible claim is severed." He observed that "because Plaintiffs' non-conclusory allegations of harm are inextricably tied to Pruitt's tenure at the Agency, and that tenure has now come to an end, so has the vitality of their claim."

Boasberg acknowledged that CREW and PEER might have preferred that he order the agency to change its conduct based on their FRA complaint, but pointed out that EPA's own change in policy provided the relief that CREW and PEER were seeking. He noted that "the Court does not retain jurisdiction over an entire matter simply because Plaintiffs, if they were to prevail, might request some line edits to an already-issued curative email." He also rejected CREW and PEER's request that he oversee the agency's FRA compliance. Here, he explained that "the APA does not grant federal courts the authority to engage in pervasive oversight of an agency's compliance with the FRA," adding that "it is 'agency personnel, not the courts' who are tasked with rendering the day-to-day decisions mandated by the FRA."

In their second count, CREW and PEER asked Boasberg to order the agency to maintain a FRA-compliant policy that acknowledged and corrected the violations identified during Pruitt's tenure. Finding that the second count primarily reflected the allegations in the first count tied specifically to Pruitt, Boasberg pointed out that "never do they request that EPA implement any component of a program that it currently

lacks to give meaning to this requirement. Nor do they even point to a concrete deficiency in the Agency's program that would render its controls ineffective." He indicated that CREW and PEER's only allegation in this regard was the agency's failure to document decisions reached orally. But he observed that "because the Agency has now issued a superseding policy that (all appear to agree) remedies this deficiency, EPA has carried its burden of demonstrating that its action moots Count II."

Boasberg discussed whether voluntary cessation on the part of the agency was sufficient to conclude that the agency was unlikely to revert to its prior policy that violated the FRA. Boasberg found the EPA's voluntary change in policy qualified. He noted that "here, EPA has taken the affirmative step of revising its records-management policy, and the principal transgressor of proper record-keeping practices is no longer at the Agency. For EPA to resume its challenged conduct, therefore, it would have to decide to promulgate a new policy inconsistent with the FRA. In [its] declaration, the Agency affirms that it 'intends to maintain' the portion of the policy that was revised to address the Complaint's prior challenge. This is sufficient to carry Defendant's burden." CREW and PEER argued that their request for relief was broader than the change EPA made in its policy. Rejecting that claim, Boasberg noted that "in a challenge like this one, there is simply no lingering effect of a past violation when the only relief sought is prospective." (*Citizens for Responsibility and Ethics in Washington, et al. v. Andrew Wheeler, et al.*, Civil Action No. 18-406 (JEB), U.S. District Court for the District of Columbia, Jan. 10)

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 because the Los Angeles Police Department does not exercise constructive possession of a privately-run Vehicle Information Impound Center database it is not subject to the California Public Records Act. The database of impounded vehicles is created by data imputted by contractors hired by the City to cover various geographical areas. Based on earlier litigation brought by Colleen Flynn against the County of Los Angeles for similar ticketing data in which the court found the County's ability to access the data meant that it qualified as a public record, Cynthia Anderson-Barker requested vehicle impoundment data from the City. This time the court ruled in favor of the City, finding that while its contracts provided for access if needed, the City did not have custody or control of the data and did not exercise its right of access. The court of appeals found the current situation analogous to the circumstances in the U.S. Supreme Court's decision in *Forsham v. Harris*, 445 U.S. 169 (1980, in which the Court rejected the claim that data generated as part of a grant was subject to disclosure even though the agency had never exercised its right to access the data. Here, the appeals court noted that "as *Forsham* suggests, the City might have a duty under the CPRA to disclose any data it has actually extracted from the [databases], and then used for a governmental purpose. Anderson-Barker's CPRA request, however, is not limited in such a manner. Instead, she seeks disclosure of all information the [contractors] have entered into the [databases] regarding City-related impoundments based solely on the fact that the City has the authority to access that information. We agree with *Forsham*'s analysis, and conclude that, as with the FOIA, mere access to privately-held information is not sufficient to establish possession or control of that information." Anderson-Barker argued that the recent California Supreme Court decision in *City of San Jose v. Superior Court*, 389 P.3d 848 (2017), adopting the standard articulated by the Washington Supreme Court in finding that records

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created by public employees while conducting public business on personal devices qualified as agency records, supported her claim of access to the database. The court disagreed, noting that "nothing in the Court's analysis or holding supports the view that an agency's contractual right to access a private entity's records qualifies as a form of 'possession' of those records within the meaning of [the CPRA]. Indeed, *City of San Jose* does not even address the issue of possession." (*Cynthia Anderson-Barker v. Superior Court of Los Angeles County*, No. B295391, California Court of Appeal, Second District, Division 7, Jan. 22)

Iowa

A court of appeals has ruled that a series of individual meetings with five members of the Board of Regents of the University of Iowa and Bruce Harreld, who at the time of the meetings was not a candidate for president of the University but was ultimately selected for the job, did not constitute serial meetings designed to evade the quorum requirements of the Iowa Open Meetings Act. At the time of the meetings, Harreld indicated an interest in learning more about the job but was not then a candidate. He met with five board members separately, all of whom provided him with information about the job and the university and Harreld provided information about himself. He ultimately applied for the job and was picked as one of four finalists by a 21-person search committee. The four finalists were interviewed in open session by the board of regents and Harreld was ultimately selected. Gerhild Krapf filed suit, arguing that the five meetings violated the Iowa Open Meetings Act. The trial court ruled against Krapf, who appealed. Krapf argued that serial meetings with a sub-majority in close proximity discussing the same topic constituted a serial meeting. Explaining Krapf's claim, the court indicated that "if a member of a five-person board of supervisors held an informal discussion with another supervisor on an issue and then immediately held another separate discussion with a different supervisor on the same issue, the discussions would qualify as a meeting under IOMA." Pointing out that Krapf's theory had previously been rejected in *Telegraph Herald v. City of Dubuque*, 375 N.W. 2d 529 (Iowa 1980), the court of appeals observed that "as in *Telegraph Herald*, the individual members of the board of regents met with Harreld in personal interviews. At the time of the interviews, Harreld was not a candidate for the open position. In these meetings, the members of the governmental body lacked the capacity and intent to deliberate and/or act in their official capacities, due to the lack of a majority of members being present at the gathering." (*Gerhild Krapf v. Bruce Rastetter, et al.*, No. 17-1745, Iowa Court of Appeals, Jan. 9)

Ohio

The supreme court has ruled that the Cuyahoga Community College Foundation, referred to as the Tri-C Foundation, is the functional equivalent of a public agency and that Tri-C must provide a copy of the speaking contract for actress Octavia Spencer's 2017 keynote address at a fund-raising luncheon. In response to a request for the contract from WJW-TV reporter William Sheil, Tri-C claimed that it was not subject to the Public Records Act. Sheil filed suit and the trial court agreed that Tri-C failed to meet all four factors identified by the supreme court in *Oriana House v. Montgomery*, in which the supreme court adopted Connecticut's functional equivalency standard because Sheil had not shown that Tri-C met *Oriana House*'s fourth factor that the entity had been created to evade the Public Records Act. The supreme court disagreed with the trial court's assessment, pointing out that "after examining all pertinent factors, including the Ohio Auditor's filing requirements for the Tri-C Foundation, and the numerous financial documents, we conclude that the evidence clearly and convincingly demonstrates that the Tri-C Foundation operates as the functional equivalent of a public entity." The supreme court also rejected Tri-C's claim that Spencer's speaking contract was a trade secret. Sheil argued that several of Spencer's speaking contracts were available online. The supreme court observed that "the essence of the information is known by individuals 'inside' and 'outside' of the business, [and] there is little savings to be recognized from further protection of the information, and others are able to easily duplicate and acquire the information." (*William B. Sheil v. John Horton*, No. 107329, Ohio Supreme Court, Dec. 20, 2018)

The supreme court has ruled that the exemption protecting the confidentiality of individuals involved in lethal injections applies only to the disclosure of information that could identify such an individual and that the Department of Rehabilitation and Correction applied the exemption too broadly in response to requests from the law firm of Hogan Lovells for records concerning current supplies of drugs used in administering lethal injections. DRC withheld letters requesting confidentiality for five companies, which were not protected by the exemption, arguing that the information was so inextricably intertwined with exempt information that disclosure would reveal exempt information as well. The supreme court noted that "Hogan Lovells has a clear legal right to access the sealed records identified [in one portion of DRC's log] with only the protected information redacted, i.e., the names, contact information, signatures, seals, and any other information in the records that identifies or could reasonably lead to the identification of an entity requesting confidentiality [under the exemption]." The supreme court found that Hogan Lovells had not shown that it was entitled to statutory damages but indicated that the law firm was entitled to attorney's fees, which would be determined on remand to the trial court. (*State ex rel. Hogan Lovells U.S., LLP, et al. v. Department of Rehabilitation and Correction*, No. 2016-1776, Ohio Supreme Court, Dec. 21, 2018)

Wyoming

The supreme court has ruled that the Jackson Hole Airport Board is a public agency subject to the Wyoming Public Records Act. Wyoming Jet sent a letter to the Board requesting an opportunity to inspect documents pertaining to the Board's then pending decision to purchase Jackson Hole Aviation's assets and serve as the Airport's sole fixed-base operator pursuant to the Wyoming Public Records Act. The Airport Board denied the request, claiming it was not subject to the WPRA because it was governed solely by the Special District Public Records and Meetings Act and not the WRPA. Jet Wyoming filed suit and the trial court ruled in favor of the Airport Board. The supreme court reversed. The supreme court concluded that the Special District Act "defines neither the Board's record retention requirements nor its disclosure requirements. We instead interpret that Act as requiring that certain documents be readily accessible for public review and providing options for ensuring that review is possible." The supreme court pointed out that the Special District Act did not "define the Board's record retention requirements. Record retention is instead governed by a separate set of statutes. Those statutes define what constitutes a public record for retention purposes, and they specifically define them to include the records of any 'county, municipality, special district or other local entity.'" The supreme court observed that "we find it clear that what the legislature intended was that the Special District Act would ensure ready public access to a certain narrow set of copies of documents, while the WPRA would otherwise govern the covered entities' record disclosure requirements." The supreme court next looked at whether the Airport Board qualified as a political subdivision under the WPRA. The supreme court noted that "the Board was indisputably created to perform a public function. The joint powers agreement under which the Board operates gives it 'the authority and powers with respect to the Jackson Hole Airport as are granted in . . . the statutory authority of municipalities and counties to operate a local airport." The supreme court pointed out that to interpret the statutes so that the Board was not subject to the WPRA would be absurd. The court explained that "that would mean that if either Teton County or the Town of Jackson operated the Airport individually, their records would be subject to disclosure, but since they run it jointly, no disclosure obligation would exist. We can think of no policy justification or rational legislative purpose for such a result." (*Wyoming Jet Center, LLC v. Jackson Hole Airport Board*, No. S-18-0154, Wyoming Supreme Court, Jan. 15)

The Federal Courts…

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Judge Rudolph Contreras has ruled that the FBI has not yet shown that it conducted an **adequate search** for emails that were part of its investigation of the 2001 mailing of anthrax spores to the offices of Sen. Patrick Leahy (D-VT) and Sen. Tom Daschle (D-SD), as well as news organizations in New York and Florida, which resulted in the deaths of five people, and that to assess the agency's claim that an interim report prepared four years before the agency concluded its investigation is protected by the deliberative process privilege under **Exemption 5 (privileges)** Contreras will need to conduct an *in camera* review of 38 pages. After a years-long investigation, the FBI concluded that Dr. Bruce Ivins, a scientist at the U.S. Army Medical Research Institute of Infectious Diseases, had been responsible for the attacks. But before Ivins could be indicted, he committed suicide. The FBI formally closed its investigation without charging anyone and issued a 96-page Investigative Summary outlining its findings. Historian and researcher Kenneth Dillon, who was skeptical that Ivins had been involved at all, submitted two FOIA requests to the FBI. The first request was for evidence that Dillon believed was in the FBI's possession – particularly emails Ivins sent or received and certain notebooks belonging to Ivins. The second request asked for 38 pages from the FBI's Interim Major Case Summary, a 2,000-page report produced in 2006, four years before it concluded its investigation. Dillon asked for the 22- page table of contents and the 16 pages that discussed Ivins. In response to Dillon's first request, the agency disclosed seven pages of emails and 98 pages of notebook material. In response to Dillon's second request, the agency claimed the entire 2000-page report was protected by the deliberative process privilege. Dillon challenged the adequacy of the agency's search for his first request, focusing on the fact that there were other emails Dillon believed had been sent to Mara Linscott, Ivins' assistant, identified during the investigation that had not been produced. Contreras mentioned several reasons why the emails might not have been located. He pointed out that "it is thus possible that Dillon is mistaken in believing that Linscott was the recipient – which would have made the emails non-responsive and explain why they were not produced." Another possibility was that the emails were in the possession of the U.S. Postal Inspection Service, which had worked with the FBI during its investigation. Contreras noted that "but for our purposes here, employees of the USPIS and FBI served together on the task force that spent years investigating the anthrax attacks and [the agency's second declaration] stated that it 'is FBI policy to import *all* records into the investigative case file.' The Court cannot help but wonder, then, whether the FBI possessed certain USPIS-obtained records, or whether the FBI and USPIS had some record-sharing system in place with respect to the anthrax investigation." A third possibility was that the emails had been destroyed or returned. Contreras found this unlikely, observing that "given the importance of the investigation, one would not expect the investigative files to be subject to a routine document retention policy with a short destruction date. And even if they were subject to such a policy, the investigation had only been closed for five years when Dillon submitted his FOIA request." Noting that "the burden is ultimately on DOJ to show that its search was adequate," Contreras ordered the agency to address Dillon's evidence within 30 days. He observed that "the Court does not expect a definitive explanation for why the emails were not located or were not responsive – though one would certainly be welcomed. What is important is that DOJ actually respond to the evidence Dillon has presented. If DOJ meaningfully engages with that evidence in a way that assures the Court that it has acted in good faith, the Court will enter judgment in its favor." Contreras indicated that he was skeptical that all 2,000 pages of the FBI's interim report qualified under the deliberative process privilege. He explained that "the easiest way for the Court to determine whether the IMCS is the product of such a process is to look at the requested excerpts." He indicated that "if, after reviewing the excerpts, the Court concludes that the deliberative process privilege applies to the pages in their entirety, the Court will enter judgment in favor of DOJ. If, on the other hand, the Court concludes that the excerpts include reasonably segregable non-privileged information, the Court will permit the parties to renew their motions for summary judgment based on the other FOIA exemptions that DOJ has preserved in the alternative." (*Kenneth J. Dillon v. U.S. Department of Justice*, Civil Action No. 17-1716 (RC), U.S. District Court for the District of Columbia, Jan. 17)

Judge James Boasberg has ruled that the IRS properly invoked a *Glomar* response neither confirming nor denying the existence of records in response to requests from Thomas and Beth Montgomery for records pertaining to how their various partnerships came to the agency's attention, based on **Exemption 7(D) (confidential sources)**. In the mid-2000s, the IRS disallowed certain tax losses and issued certain tax penalties against partnerships associated with the Montgomerys. After several years of litigation, the parties came to a global settlement agreement. The Montgomerys then filed a number of FOIA requests attempting to find out more about why the agency decided to investigate them. In an earlier decision, Boasberg told the IRS to conduct a further search pertaining to five of the Montgomerys' requests and agreed with the agency that Exemption 7(D) could form the basis for a *Glomar* response. The Montgomerys challenged the agency's use of *in camera* declarations to justify its *Glomar* response. Boasberg pointed out that "where that very explanation may reveal information protected by a FOIA exemption, like here, it can be provided to the Court via *in camera* declarations and paired with a *Glomar* response." He explained that "*in camera* declarations, properly understood, thus *safeguard* plaintiffs' rights to government records, at least in this context. Were the Court, as Plaintiffs wish, to refuse to grant Defendant leave to file declarations *in camera* and responsive documents were to exist, the Court could not confirm that the records' disclosure would in fact implicate a FOIA exemption. . .It would simply have to take the Government at its word that this is the case. By reviewing such *in camera* materials, conversely, the Court can closely evaluate the Government's reasoning and then order as much of the materials released as is consistent with the exemption the agency has invoked. Such a procedure is assuredly second best to a full-throated debate about the specific records in question. But that is why such declarations may be relied on only in the rare circumstances like here, where such debate would 'reveal precisely the information that the agency seeks to withhold.'" The Montgomerys suggested that the agency could not be trusted. Boasberg responded by noting that "to the extent Plaintiffs think *any* declaration must be *entirely* public because of the agency's alleged misconduct, the Court disagrees. It has not observed here the sort of bad-faith conduct Plaintiffs allege the IRS committed several years ago and has seen nothing to make it question the veracity of the declarations in this case." The Montgomerys argued that the agency statement that there was no confidential source involved in the case against Thomas Montgomery constituted a public acknowledgement on the part of the agency. Boasberg rejected the claim, noting that "there may have been a source reporting on conduct or persons outside the scope of [the litigation pertaining to the Montgomerys' tax penalties]. Or it is possible that someone might be a confidential source within the meaning of Exemption 7(D) but not have been considered an informant or whistleblower in the investigations that were the subject of prior litigation – perhaps because the IRS did not rely upon their information." Upholding the agency's use of Exemption 7(D), Boasberg pointed out that "there are some circumstances in which the divulging of the existence of a confidential source will also reveal that source's identity. Those circumstances, as the IRS explains, obtain here." (*Thomas and Beth Montgomery v. Internal Revenue Service*, Civil Action No. 17-918 (JEB), U.S. District Court for the District of Columbia, Jan. 10)

A federal court in Colorado has ruled that Rocky Mountain Wild has **failed to state a claim** for relief pertaining to its FOIA suit against the Bureau of Land Management since the agency has now responded and there is no evidence of a **policy or practice** on the part of the agency to delay processing the organization's FOIA requests. Rocky Mountain Wild submitted a FOIA request for records concerning the agency's proposed March 2018 oil and gas leasing of specified parcels. The agency took a 10-day extension and after 30 days provided an interim response of 140 pages. Three weeks later, BLM disclosed a final response containing 1,595 pages. Rocky Mountain Wild then filed suit, claiming that the agency had missed the statutory deadline, that the agency's behavior required referral to the Office of Special Counsel for sanctions, and that the agency had a policy or practice of failing to respond to requests on time. Rocky Mountain Wild argued that its first claim that the agency had missed its statutory deadline was made to establish constructive exhaustion of remedies. However, the court pointed out that "BLM does not argue that Rocky Mountain Wild

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failed to exhaust administrative remedies, and in any event an *allegation* that establishes constructive exhaustion is not a *claim for relief*, any more than an allegation to establish federal subject matter jurisdiction is a claim for relief." The court pointed out that BLM had mooted Rocky Mountain Wild's timeliness claim by completing its request. The court observed that "BLM went through the normal FOIA process (albeit more slowly than Rocky Mountain Wild would prefer), issued a final determination, and closed the FOIA request. If this Court later determines that BLM improperly withheld documents, it would mean that BLM's 'final determination' was incomplete, but not any less final from the agency's perspective. FOIA requests are not deemed open indefinitely until a court approves the agency's response." The court then pointed out that while Rocky Mountain Wild could ask the court to refer the agency to the Office of Special Counsel for a determination as to whether the agency's behavior should be sanctioned, under FOIA such a process was not available until the court determined that the plaintiff had substantially prevailed and awarded attorney's fees. Dismissing the sanctions claim, the court noted that "a cause of action that cannot be resolved until after judgment is essentially a contradiction in terms. The Court accordingly agrees with BLM that a request for a Special Counsel referral is a remedy, not a cause of action." The court rejected Rocky Mountain Wild's claim that the agency had a policy or practice of misallocating resources that slowed down its ability to respond to FOIA requests, or purposely prolonging responses to prevent public interest groups from meeting public comment deadlines. (*Rocky Mountain Wild v. United States Bureau of Land Management*, Civil Action No. 18-0314-WJM-STV, U.S. District Court for the District of Colorado, Jan. 16)

Judge Amy Berman Jackson has ruled that the Brennan Center for Justice is entitled to **attorney's fees** in its suit against the Department of Homeland Security, but in awarding $10,765 she has deducted $4,000 from its fee request because the request was too high. The Brennan Center requested records from U.S. Immigration and Customs Enforcement concerning the number of times immigration proceedings were closed on national security grounds. ICE originally told the Brennan Center that the records were in the possession of the Executive Office for Immigration Review, which is part of the Department of Justice, and closed the request. The Brennan Center filed an administrative appeal, arguing that, while it had submitted a FOIA request to EOIR separately, it had intended to request related records from ICE as well. On remand from the appeal, ICE agreed to conduct a search. It located 106 responsive pages and 93 pages were withheld in full while 13 pages were produced in full. Subsequently, ICE made a final response, disclosing 27 additional pages with redactions under Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records). The Brennan Center filed an administrative appeal of that decision, resulting in another search. The agency found no more responsive records. The Brennan Center appealed once again, but then filed suit before its fourth appeal was decided. Jackson issued an order adopting the parties' proposed schedule and the parties prepared summary judgment motions. However, the Brennan Center then decided not to pursue its challenge to the agency's records production and asked for attorney's fees. DHS accepted that the Brennan Center was entitled to attorney's fees but questioned whether the fee amount was appropriate. Jackson rejected the agency's claim that the Brennan Center had not sufficiently documented its hours, noting that "the time entries are sufficiently detailed to permit the government to 'make an informed determination as to the merits of the application,' and to enable the Court to 'make an accurate and equitable award.'" While the Brennan Center admitted that it had mistakenly included an entry for 0.4 hours and agreed to remove $241 from its fee request, it defended another entry as appropriate. Jackson agreed, pointing out that "the other isolated mistake does not call into question the overall accuracy of plaintiff's time records." Jackson agreed with the agency that the Brennan Center had requested too many hours for reviewing documents, reducing the request $5,135 by $2,000. She explained that 'even if this exercise was an important step in assessing litigation strategy, plaintiff would have reviewed the records it received in any event." She also reduced the Brennan Center's $4,334 request for arguing the attorney's fees motion by $2,000, observing that "this would be more than half of the total to be awarded for the litigation,

which the Court finds to be a disproportionately large amount." (*Brennan Center for Justice v. Department of Homeland Security*, Civil Action No. 16-1609 (ABJ), U.S. District Court for the District of Columbia, Jan. 22)

Judge Trevor McFadden has ruled that the IRS did not violate the **Privacy Act** when it disclosed IRS attorney Dinh Tran's performance appraisal to the Washington, D.C. field office of Division Counsel, Small Business/Self Employed because the agency had a need to know the contents of Tran's performance appraisal to evaluate her request for a detail. Tran was an attorney in the IRS Office of Professional Responsibility. She asked to be detailed to SB/SE. Her detail request was handled by Bruce Meneely, deputy counsel at SB/SE. Meneely contacted Stephen Whitlock, Tran's supervisor at OPR and asked for a copy of Tran's resume and her most recent performance appraisal. The resume and performance appraisals were reviewed by other SB/SE attorneys who recommended against Tran's request after finding she did not have the requisite litigation skillset. However, Tran accepted a detail to another division. Tran then filed suit against the IRS, alleging that the disclosure of her performance appraisal without her consent violated the Privacy Act. The agency argued that the disclosure was permitted under either the routine use exception or the need to know exception. McFadden rejected the agency's claim that the disclosure was a permitted routine use but agreed that the need to know exception applied. The agency claimed the disclosure came under a routine use allowing the agency to disclose personnel records to a prospective employer for hiring purposes. The problem here, McFadden noted, was that "the Treasury has not shown how it may qualify simultaneously as a current employer and a 'prospective employer' under [the system of records notice] and it has cited no caselaw to support its position. Just as a hungry child may not have his cake and eat it too, so an agency may not employ someone and also be her prospective employer." Claiming this definition was too narrow, the agency pointed out that it was considering whether to engage Tran's services in a position within the agency. But McFadden observed that "it was already true that the Treasury had engaged Ms. Tran's services for wages, and the Treasury has not established that a detail qualifies as a *new* hiring action. Nor has it meaningfully addressed Ms. Tran's argument that details are distinct from hiring actions." The agency also argued the disclosure fit under another routine use exception that would result in a benefit for Tran. McFadden disagreed, noting that "the Treasury, however, has not shown that a work detail fits within this narrower universe of benefits contemplated by the [system of records notice]." McFadden found the agency's need-to-know claim right on target. He pointed out that "agencies often invoke the 'need-to-know' exception when they release records for a disciplinary investigation. But it equally applies to a detail decision. Both are decisions about whether an employee is fit for a position within the agency or can perform certain duties. Both are triggered by the employee's actions, not supervisory caprice." Tran argued that while front-line supervisors may have had a need to access her performance appraisal, Meneely was too removed to qualify as having a need to know. McFadden observed that "while Mr. Meneely may have deferred to his front-line managers about the specific skillsets that the detailee would need, he still would need to confirm that Ms. Tran had at least a fully satisfactory rating on her performance appraisal under SB/SE's policy."" (*Dinh Tran v. Department of Treasury*, Civil Action No. 17-02601 (TNM), U.S. District Court for the District of Columbia, Jan. 14)

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City: ________________________ State:_____________________ Zip Code: __________________