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

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Washington Focus: In a scathing attack on the FOIA during a speech before the Federalist Society, Attorney General William Barr singled out the statute as a root cause of constant harassment for executive branch departments. Noting the essential unfairness of the statute's coverage, he pointed out that "there is no FOIA for Congress or the Courts. Yet Congress has happily created a regime that allows the public to seek whatever documents it wants from the Executive Branch at the same time that individual congressional committees spend their days trying to publicize the Executive's internal decisional process. That process cannot function properly if it is public, nor is it productive to have our government devoting enormous resources to squabbling about what becomes public and when, rather than doing the work of the people." Barr's remarks prompted criticism from open government advocates. Carrie Levine, a reporter at the Center for Public Integrity, noted that it was "worth adding to this that there is also no FOIA for the White House, which seems like an important context for Barr's statements here. It's a pretty big loophole when it comes to transparency and the executive branch."

Court Finds Subcontracting Plans Protected Under Customarily Confidential Standard

A federal court in California that had shown considerable sympathy towards attempts by the American Small Business League to force disclosure of more information about defense contractors' relationships with small business subcontractors has admitted how the impact of the Supreme Court's recent decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), in which the Court rejected the substantial competitive harm test in Exemption 4 (confidential business information) as the basis for assessing whether records were protected by the exemption, has made it nearly impossible for the ASBL to overcome the defense contractors' claims that the information was customarily considered confidential.

ASBL has litigated several times over the issue of whether defense contractors' small business subcontracting plans were protected under Exemption 4. Much of the focus

of the litigation has been on whether the defense contractors had shown that disclosure of information about subcontractors would likely cause substantial competitive harm. The district court judge had previously ruled that neither the Defense Contract Management Agency nor the individual contractors had shown that all the information pertaining to relationships with small business subcontractors met the substantial harm test. ASBL has continued to litigate and the current litigation involves Lockheed Martin, Sikorsky Aircraft, and GE Aviation Systems. Even after the *Argus Media Leader* decision was announced in June 2019, District Court Judge William Allsup awarded ASBL discovery on the issue of whether the companies actually treated information about subcontractor relationships as confidential. But now that discovery has been completed, Allsup has admitted that the contractors' confidentiality claims are appropriate under the new standard.

Allsup explained that in abandoning the substantial competitive test because it did not appear in the actual language of Exemption 4 the Supreme Court instead recognized a customarily confidential standard – that a submitter treated the information as confidential and did not publicly disclose it, and that the agency had provided an assurance that the information would be kept confidential. The Supreme Court noted that an agency's failure to provide an explicit or implicit assurance of confidentiality would likely be fatal to a submitter's confidentiality claim, but pointed out that in the circumstances present in *Food Marketing* the government had assured the submitters that it would honor confidentiality claims, that issue had been addressed. Allsup pointed out that "ultimately, the Supreme Court held that 'at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within the meaning of Exemption 4.'"

Allsup noted that "the 'bulk' of documents defendants seek to withhold are the companies' comprehensive subcontracting plans, program reports, and related correspondence. Defendants assert that these documents included 'granular details' about the companies' 'targeted small-business focused initiatives, goals broke out by program level, and the names of [their] suppliers and partners on strategic initiatives.'" However, Allsup observed that "as an initial matter, only information originating from the companies themselves can be considered information that they customarily and actually treat as private during their ordinary course of business. In the instant action, that means that *government assessments and evaluations cannot be considered 'confidential' information* for purposes of Exemption 4. This includes, for example, the government's evaluation of a contractor's compliance with regulatory requirements, ratings, assessments of a contractor report's accuracy, and recommendations. . .Such information *stemmed from the government*, not the companies. No one can reasonably argue that those evaluations by the government constituted information that belongs to the companies rather than the government. The information generated by the government must be disclosed."

Having indicated that government-generated information could not be considered confidential for purposes of Exemption 4, Allsup observed that "information originating from the *companies* may qualify as 'confidential' information under *Food Marketing*. Relevant here, the comprehensive subcontracting plans Lockheed and Sikorsky annually submitted to the government contained the companies' small-business subcontracting goals, in terms of percentage categories and actual dollars spent for that particular year. . . Because the Test Program required participants to monitor and report on their subcontract awards, Lockheed and Sikorsky also submitted reports – including summary subcontract reports, quarterly reports, and mentor-protégé semiannual reports – to the government."

Allsup then explained that "both Lockheed and Sikorsky swear that they customarily and actually kept all of the commercial information within the withheld documents confidential in the ordinary course of business. . . They used various methods to protect the information. . . When submitting the comprehensive subcontracting plans or reports, for example, the companies marked them with 'restrictive legends identifying

the information contained therein as proprietary and confidential'. . ." By contrast, Allsup pointed out that "at bottom, plaintiff simply has not pointed to particular facts demonstrating that the specific information within over 2,000 pages it seeks, in all of its granularity – including information related to how the companies intend to meet their subcontracting goals, which industries they plan to target and their strategy for such targeting, and their planned initiatives for promoting use of small businesses – was not customarily and actually kept private by the companies."

Allsup expressed sympathy for ASBL's plight. He pointed out that "under *Food Marketing*, it appears that defendants need merely invoke the magic words – 'customarily and actually kept confidential' – to prevail. And, unless plaintiff can show that the information is in fact publicly available or possibly point to other competitors who release the information, defendants can readily ward off disclosure." Offering a personal testimonial, Allsup noted that "the undersigned judge has learned in twenty-five year of practice and twenty years as a judge how prolifically companies claim confidentiality, including over documents that, once scrutinized, contain standard fare blather and even publicly available information." He lamented that "nevertheless, we are not writing on a clean slate. *Food Marketing* mandates this result."

Allsup rejected ASBL's argument that an assurance of confidentiality must be explicit. But Allsup observed that "this order, however, does not find that Exemption 4 requires such written document or express assurances by the government. An implied assurance suffices." In discussing the level of assurance of confidentiality required, the Supreme Court in *Food Marketing* had referred approvingly to the discussion of confidentiality under Exemption 7(D) (confidential sources) in *Dept of Justice v. Landano*, 508 U.S. 165 (1993), in which the Court found that confidentiality could stem from either an explicit or implicit assurance of confidentiality. Allsup noted that "so too here. Such inference of assurance is reasonable where the context involved Lookheed and Sikorsky's voluntary participation in the Test Program and the DOD's increasing requests for more detailed commercial information."

Allsup also rejected ASBL's contention that the foreseeable harm standard that was applied to all exemptions under the FOIA Improvement Act of 2016 essentially restored the substantial harm standard. Allsup disagreed, noting that "ultimately, under *Food Marketing*, the plain and ordinary meaning of Exemption 4 indicates that the relevant interest is that of the information's *confidentiality* – that is, its private nature. Disclosure would necessarily destroy the private nature of the information, no matter the circumstance. This order may not use the FOIA amendment to circumvent the Supreme Court's rejection of *National Parks*'s reliance on the legislative history in determining the scope of the term 'confidential.'" (*American Small Business League v. United States Department of Defense, et al.*, Civil Action No. 18-01979 WHA, U.S. District Court for the Northern District of California, Nov. 24)

Views from the States

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

Maryland

The Court of Appeals has ruled that when a public body knowingly violates a provision of the Open Meetings Act, it has acted willfully for purposes of potential liability for its actions, including voiding the action taken. The case involved a closed meeting by the Taneytown City Council to consider whether it

should adopt a code of ethics, as well as a proposed charter amendment to allow removal of elected officials based on a referendum. Donald Frazier, then a member of the council, objected to both proposals. Frazier sent a letter through his attorney to each member of the council implying that he would sue the council if either proposal was adopted. The mayor and the other members of the council then held a closed meeting to discuss how to respond to Frazier's threat to sue. Since it made little sense for Frazier to attend a meeting addressing his potential litigation, he was not invited. Frazier's wife, Robin, and Katherine Adelaide showed up trying to attend the meeting. An administrative assistant told them the meeting was closed. The closed meeting included four of the five council members, one of whom participated by telephone. Although the OMA requires a public body to hold a public meeting before voting to go into executive session, the council did not do so under these circumstances. Robin Frazier then filed suit, alleging violations of the OMA and asking that the council's actions be voided. The trial court ruled that none of the alleged violations were willful, finding instead that they constituted technical violations that were unintentional. The Court of Special Appeals found that the city council did not have a quorum, but that the violation was harmless. However, the Court of Appeals rejected the notion that a knowing violation could ever be harmless. The Court of Appeals pointed out that "violations of those mandates are not 'technical' in nature; nor are they ever harmless. A violation may not cause specific demonstrable injury to individual members of the public, but it does necessarily clash with and detract from the public policy that the Legislature declared is 'essential to the maintenance of a democratic society'. . ." The appeals court explained that "willfulness, for OMA purposes, means a violation that is knowing and intentional. By 'intentional,' we mean deliberate – other than inadvertent – and by 'knowing' we mean knowledge that the act or omission violates a mandatory provision of OMA." Under that standard, the court of appeals found that the council's actions did not rise to the level requiring them to be voided. (*Robin Bartlett Frazier v. James McCarron*, No. 4 Sept. Term 2019, Maryland Court of Appeals, Nov. 20)

New York

A court of appeals has ruled that the Kings County District Attorney must disclose the final report pertaining to the exoneration of Jabbar Washington, whose conviction for murder during a 1995 robbery was vacated because the Conviction Review Unit failed to provide exculpatory evidence to Washington's attorneys, to the New York Times. After Kings County announced the exoneration of 24 people, the New York Times requested final reports for 18 individuals whose convictions had been vacated because of questions about CRU misconduct. The Kings County District Attorney denied the request, citing possible stigma to the individuals. Alternatively, the New York Times argued that the district attorney should disclose Washington's final report because he had provided a waiver to the newspaper. The Times filed an administrative appeal. The appeals officer upheld the exemption claim but agreed that the Times was entitled to Washington's final report because of his waiver. The Times filed suit. The trial court ruled that the final reports were sealed but agreed that Washington's waiver allowed the agency to disclose his final report. The Times appealed the trial court's decision. The court of appeals agreed with the trial court's ruling. The appeals court rejected the Times' argument that disclosure of the final reports would not be stigmatizing. Instead, it noted that "the mere vacatur of a conviction does not erase the stigmatizing nature of being subjected to the criminal justice process." The Times argued that disclosure of all the reports was in the public interest. However, the court pointed out that "the New York Times is not without a remedy to access the remaining reports – it may seek [statutory] waivers from each of the exonerated individuals to access their sealed records , precisely in the same manner it obtained a waiver from Washington. However, [the statutory provision] vests the right to unseal official records of a prosecution with the individual whose conviction was vacated. . ." The district attorney had asserted that part of Washington's report was protected by attorney work product. Sending the case back to the trial court, the appellate court agreed with the New York Times that the trial court was required to hold an *in camera* review to determine whether the exemption applied. (*In*

the Matter of New York Times Company v. District Attorney of Kings County, No. 2018-08763, New York Supreme Court, Appellate Division, Second Department, Nov. 20)

North Carolina

A court of appeals has ruled that the Department of Revenue conducted an adequate search for records, including emails, pertaining to a 2011 audit of Nicholas Ochsner, an investigative reporter for WBTV, the CBS affiliate in Charlotte, which yielded more than 13,000 records. After Ochsner filed suit, the parties entered into a memorandum of understanding establishing the agency's obligations for responding to Ochsner's request. Ochsner complained that there must have been more emails responsive to his request. The court of appeals disagreed, noting that "the law generally does not require a party to prove a negative, but here, both sides are placed in this position. Defendant has certified that certain personal text messages or emails do not exist, and Plaintiff asks Defendant to prove the negative: that certain personal text messages do not. If they do not exist, Defendant has certified under oath, Defendant cannot produce anything more to prove their nonexistence." (*Nicholas A. Ochsner v. North Carolina Department of Revenue*, No. COA18-1126, North Carolina Court of Appeals, Nov. 19)

The Federal Courts…

Judge Colleen Kollar-Kotelly has ruled the Center for Public Integrity is entitled to a **preliminary injunction** requiring the Department of Defense to provide **expedited processing** for its request for records concerning communications between DOD's comptroller and OMB pertaining to the withholding of military aid to Ukraine that has become the focus of the House impeachment proceedings into whether President Trump abused his presidential authority by holding up the release of the aid. CPI submitted requests to DOD and OMB for records concerning communications between the two agencies pertaining to the aid. CPI also requested expedited processing. Although OMB did not respond to CPI's request for expedited processing, DOD denied its request. CPI then filed suit to require the agency to expedite its request. DOD conducted a search and located 500 potentially responsive records. DOD told Kollar-Kotelly that it would be able to process and disclose the records by December 20, 2019. During a teleconference with the parties, Kollar-Kotelly asked DOD if it could process and disclose half the records by December 12 and disclose the rest by December 20. Since it was still uncertain how many documents would ultimately be responsive, DOD initially resisted Kollar-Kotelly's suggestion, arguing that a rolling disclosure would take longer. However, DOD ultimately concluded that 211 pages were responsive and agreed to disclose them on the time schedule suggested by Kollar-Kotelly. Kollar-Kotelly agreed with CPI that it was entitled to a preliminary injunction because it had shown a likelihood of succeeding on the merits. She pointed out that "plaintiff has shown a compelling need for obtaining the requested information in an expedited manner." She added that "additionally, Plaintiff has established an urgent need to obtain the information which concerns Federal Government activity. Plaintiff explained that the subject matter of the requested information – the White House's potential influence on the [Ukraine] funding – is of immediate concern to the American public due to the ongoing congressional hearings." She explained that "the value and import of the information requested by Plaintiff directly tied to the current, ongoing impeachment proceedings. The records sought by Plaintiff go to the core of the impeachment proceedings as alleged – whether or not President Trump and his administration withheld payments under [the law providing aid to Ukraine] in order to pressure Ukraine to conduct an investigation. As an impeachment proceeding has the potential to result in the removal of the President from office, the current impeachment proceedings are of the highest national concern." Observing that the D.C. Circuit pointed out in *Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1988), that

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"stale information is of little value," Kollar-Kotelly noted that "if the requested information is released after the impeachment proceedings conclude, the information may still be of historical value. However, for Plaintiff, the primary value of the information lies in its ability to inform the public of ongoing proceedings of national importance. . ." DOD argued that since the House impeachment proceedings had not yet concluded, they could not be called imminent. But Kollar-Kotelly pointed out that "the lack of a precise end-date for the impeachment proceedings is not detrimental to Plaintiff's claim of irreparable harm. The impeachment proceedings are ongoing. And, in order to ensure informed public participation in the proceedings, the public needs access to relevant information. As such, irreparable harm is already occurring each day the impeachment proceedings move forward without an informed public able to access relevant information." The fact that the Trump administration had already blocked disclosure to the House also weighed in her analysis. She pointed out that "absent an expedited response to Plaintiff's FOIA request, it is not clear to the Court that the public would otherwise have access to this relevant information. Congress has sought similar documents from both the DOD and the OMB through subpoenas. However, the White House has indicated that it has no intention of responding to these subpoenas due to White House concerns about the validity of the impeachment process. And, even if the DOD and the OMB were to provide the requested documents to the House of Representatives, there is no guarantee that such documents would be made public." Kollar-Kotelly then found that the burden of requiring DOD to respond more quickly was minimal in light of the fact that the number of responsive pages was small and the only concession required from the agency was to disclose the first 106 pages two weeks earlier than the agency's original completion date. Rejecting DOD's argument that other FOIA requesters would be impacted by requiring expedited processing for CPI's request, Kollar-Kotelly noted that "the hardship on other FOIA requesters is not a bar to relief. The grant of a preliminary injunction in this case will likely place Plaintiff's request ahead of others in Defendant's queues. However, the Court finds that the extraordinary circumstances presented in this case warrant such line-cutting." (*Center for Public Integrity v. United States Department Defense, et al.*, Civil Action No. 19-3265(CKK), U.S. District Court for the District of Columbia, Nov. 25)

Judge Carl Nichols has ruled that a **policy or practice** claim made by CREW and the Freedom from Religion Foundation challenging the Department of Housing and Urban Development's policy of immediately rejecting fee waiver requests may continue but that because the agency did not charge fees for the two requests submitted by both CREW and FFRF those allegations are now **moot**. Since the Trump administration began, HUD has revised its fee waiver policy to routinely deny fee waivers with little or no analysis. Further, it routinely ignores requests for inclusion in the preferential fee category for news media or educational institutions. To challenge these policy changes, CREW and FFRF submitted a series of FOIA requests, asking for a fee waiver and indicating that they qualified for the news media fee category. CREW and FFRF told HUD that as frequent requesters, they were likely to continue to make requests to HUD. After the agency denied CREW's fee waiver requests, CREW filed administrative appeals. The agency denied its appeals and told CREW that its request for inclusion in the new media fee category was not ripe for appeal. The agency also denied requests from FFRF for fee waiver and inclusion in the news media fee category. FFRF also appealed those decisions. The agency subsequently denied the appeals, explaining that one request would not shed light on agency operations and that FFRF had failed to show how it intended to disseminate information from its second request to the general public. CREW and FFRF filed suit jointly, challenging the fee waiver decisions and including a policy or practice claim. In responding to the four requests, HUD decided to waive all the fees. HUD argued that because it had waived the fees for all the requests, the entire suit was moot. CREW and FFRF argued that their four FOIA requests were not moot because the agency had not yet competed processing them. Noting that "there is less to this dispute than the Parties contend," Nichols pointed out that "HUD is correct that the plain language of the counts alleges no FOIA violation beyond a wrongful denial of fees and a failure to address CREW's claimed news media status. The Complaint does not allege a failure to produce documents in a timely fashion or improper withholding of documents under FOIA's

permitted exemptions. For this reason and because HUD waived fees for the requests, Courts II-IV are moot. If HUD were to change its mind and charge fees for these requests, Plaintiffs would be entitled to resurrect their claims." Nichols also decided to dismiss CREW's claim for inclusion in the news media fee category since "that request either is outside the scope of the Complaint or overlaps with the illegal policy-or-practice allegation contained in Count I." Nichols then observed that the D.C. Circuit had recently ruled in *Judicial Watch v. Dept of Homeland Security*, 895 F.3d 770 (D.C. Cir. 2018), that the policy or pattern cause of action first identified in *Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1988), extended to violations of the statutory times limits as well. He noted that "here, Count I states a claim under *Payne*. CREW and FFRF allege that HUD 'is engaged in a policy and practice of violating the FOIA's fee waiver provisions by intentionally refusing to grant fee waivers to non-profit, public interest organizations that satisfy all the statutory and regulatory criteria. . .where disclosure of the requested documents is likely to cast the agency or HUD Secretary Ben Carson in a negative light.'" HUD argued that CREW and FFRF had not shown that the agency was acting in bad faith in denying fee waiver requests. But Nichols observed that "once again, that is a question for summary judgment. It may be the case that HUD engages in a good faith effort to exercise its authority over fee waivers; or perhaps it has a practice of denying every waiver request in the hope that requesters will abandon their efforts. But on a motion to dismiss, the question is merely whether the Complaint adequately alleges a persistent, willful policy of violating FOIA's commands. It does." (*Citizens for Responsibility and Ethics in Washington, et al. v. U.S. Department of Housing and Urban Development*, Civil Action No. 18-00114 (CJN), U.S. District Court for the District of Columbia, Nov. 25)

Judge James Boasberg has ruled that the FBI's ***Glomar* response** neither confirming nor denying the existence of records in response to Judicial Watch's request for records of communications between former FBI General Counsel James Baker and private attorney Michael Sussman, who had previously worked as an attorney at the Department of Justice, is improper because Baker publicly testified that the meeting took place during congressional testimony. Boasberg started by explaining that "here, the only discernible privacy interests implicated by revealing the existence of the requested records involve concealing Sussman's identity and his relationship to Baker. But any risk of invasion evaporated once Baker publicly testified that he had received documents from Sussman, as well as met with and spoken to him on multiple occasions in 2016." Boasberg added that "as the purported damage here has already come to pass, disclosure would not constitute 'an unwarranted invasion of personal privacy.' To the extent that any responsive documents may contain *specific details* that would cause injury or embarrassment beyond that already done, the FBI may, of course, seek to subsequently redact or withhold material, but it has shown no cognizable privacy interest in concealing these records' existence." The FBI argued that disclosure of the existence of records could cause Sussman embarrassment. However, Boasberg pointed out that "yet, Baker has already publicly disclosed Sussman's status as an informant." Boasberg observed that "having so disclosed, the Government cannot fall back on *Glomar*, refusing to confirm or deny whether records related to Sussman and Baker exist. That ship has already sailed. Even applying Exemption 7(C)'s more favorable standard for the FBI's withholding, Sussman has no *bona fide* privacy interest in concealing records memorializing his communications with Baker in 2016." Turning to balancing the interest between privacy and disclosure, Boasberg noted that "here, however, Defendant has identified no privacy interest adequate to justify its *Glomar* response. No balancing is thus necessary. Defendant must – at a minimum – confirm or deny whether the records Plaintiff is seeking exist. If they do, Defendant must either turn them over or explain the reasoning behind its withholding." (*Judicial Watch, Inc. v. Department of Justice*, Civil Action No. 19-573 (JEB), U.S. District Court for the District of Columbia. Nov. 26)

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A federal court in California has ruled that the FBI has not shown that its *Glomar* response neither confirming nor denying the existence of records was justified in response to a FOIA request from the ACLU for records concerning the use and purchase of social media surveillance technologies. The agency indicated that its *Glomar* response was justified under **Exemption 7(E) (investigative methods or techniques)**. The FBI initially issued a *Glomar* response covering all five parts of the ACLU's request, but later modified that claim to cover only records concerning the purchase of such technologies. The ACLU argued that it was widely known that agencies used technologies for monitoring social media. Judge Edward Chen noted that "if *other* federal agencies have disclosed uses of social media monitoring in the immigration and transportation contexts, but the *FBI* has not, does that distinction matter for the purpose of assessing whether the technique is publicly known?" Both parties cited *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), in which the D.C. Circuit held that the CIA's *Glomar* response to the ACLU's request for records on the agency's intelligence interest in drone strikes was no longer tenable after President Obama and other senior officials had acknowledged such an involvement. Noting that *ACLU v. CIA* explained that an agency could not issue a *Glomar* response when its parent agency had previously disclosed the information, Chen pointed out that "*ACLU* does not suggest that the known use of a technique by one agency creates public knowledge of uses by a different agency, unless it is publicly known that the agency's *parent agency* utilizes that technique. Here, the FBI's parent agency is the Department of Justice, and the ACLU provides no evidence that it is publicly known that the Department of Justice utilizes the social media monitoring techniques in question." Although the ACLU provided evidence that the Department of Homeland Security and the Department of State had publicly acknowledged the use of social media monitoring technologies, it had not provided evidence that the Department of Justice had done so. As a result, Chen observed that "the Court finds that the weight of authority suggests that the ACLU cannot seek disclosure of the FBI's policies based on other agencies having disclosed their own policies, together with acknowledgement that they share information with the FBI." However, Chen then noted that "even if the FBI's use of social media monitoring in the contexts at use cannot be imputed from the conduct of other agencies, Exemption 7(E) does not protect disclosures of an *application* of a known technique to particular facts, as distinguished from disclosure of an unknown law enforcement technique." Here, Chen cited *Rosenfeld v. Dept of Justice*, 57 F.3d 803 (9th Cir. 1995) and *Hamdan v. Dept of Justice*, 797 F.3d 759 (9th Cir. 2015), to support that conclusion, noting that "Exemption 7(E) cannot be used to withhold information about a technique that is generally known to the public when what is at issue is a specific application of that technique to a specific context. Conversely, Exemption 7(E) does protect specific means by which an agency uses a technique where the general technique is known, but the specific means of employing that technique are not." Applying that standard here, Chen pointed out that "disclosure of social media surveillance – a well-known general technique – would not reveal the *specific means* of surveillance. Denying a *Glomar* response would only reveal in general the application of a known technique by the FBI to immigration- or transportation-related investigations. Merely requiring the FBI to answer whether there are documents of the kind requested would not, at this juncture, require the *disclosure* of those documents which might reveal specific tools or techniques utilized by the FBI." The FBI argued that requiring it to search for records could reveal the agency's lack of capacity if no records were found. Chen pointed out that "however, the language of Exemption 7(E) refers only to disclosure of techniques and procedures, and not to the lack of any such technique or procedure, and the Ninth Circuit has limited the application of 'risk of circumvention' of the law under Exemption 7(E) to guidelines, not techniques and procedures. Hence, it not clear whether Defendant's negative inference argument is cognizable under Exemption 7(E)." Ordering the agency to search for records, Chen observed that "even if the FBI were to disclose it has no records of purchasing or acquiring products or services used to surveil social media, that does not mean that the FBI has no tools at its disposal, as it could have developed such tools internally." (*American Civil Liberties Union Foundation, et al. v. U.S. Department of Justice, et al.*, Civil Action No. 19-00290-EMC, U.S. District Court for the Northern District of California, Nov. 18)

Judge Reggie Walton has ruled that while internet browsing histories for OMB Director Mick Mulvaney and Secretary of Agriculture Sonny Perdue met most of the four factors for qualifying as **agency records** established by the D.C. Circuit in *Burka v. Dept of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996), because they were not integrated into the agencies' filing systems as required under *Tax Analysts v. Dept of Justice*, 492 U.S. 136 (1989), they are not ultimately agency records. CoA Institute submitted FOIA requests to both OMB and the Department of Agriculture for the internet browsing histories of Mulvaney and Perdue. USDA told CoA Institute that Perdue's internet browsing history was not integrated into the agency's record system and that to disclose it would require creation of a record. CoA Institute filed an administrative appeal, which was denied. Since OMB failed to respond within the statutory time limit, CoA Institute filed suit against both agencies. The agencies asked Walton to dismiss the case under Rule 12(b)(6), arguing that Walton did not have subject-matter jurisdiction because the records were not agency records subject tot FOIA. Cause of Action Institute, however, pointed to a decision by Judge Ketanji Brown-Jackson in *Cause of Action Institute v. IRS*, 390 F. Supp. 3d 84 (D.D.C. 2019), in which Brown-Jackson ruled that an agency's allegation that records were not agency records was a substantive defense to be considered when ruling on the merits but was not a jurisdictional bar to hearing the case in the first place. Walton agreed with Brown-Jackson's decision, noting that "the question of whether the browsing histories at issue are records within the meaning of the FOIA 'pertains to the *merits* of[the plaintiff's] claim, rather than the Court's power to adjudicate the dispute and grant the requested relief. . .'" Walton decided to convert the agencies' motions to dismiss to motions for summary judgment. Walton proceeded to analyze whether the browsing histories qualified as agency records under the four-factor test developed in *Burka*. The first factor in *Burka* deals with the creator's intent to retain or relinquish control over the record. CoA Institute argued that the intent referred the agency while the agencies claimed the intent to control the record resided with the individual. Siding with CoA Institute, Walton noted that "the relevant inquiry with respect to the first *Burka* factor focuses on the *agency's* intent as the creator the document, rather than the individual employee's intent when generating the document in the course of his or her employment. The defendants do not cite, nor can the Court locate, any case law standing for the proposition that the intent factor articulated in *Burka* refers to the individual agency employee's subjective intent, as opposed to the intent of the agency." He added that "here, there is no suggestion that the defendants intended to relinquish control of the browsing histories." Turning to the second factor in *Burka*, the agency's ability to use and dispose of the records, Walton observed that "the second *Burka* factor weighs in favor of [CoA's] argument that the browsing histories are agency records. As to the defendants' ability to use the browsing histories, the defendants do not dispute that they have the ability to use the browsing histories." The third *Burka* factor deals with whether the agency read or relied upon the record. This factor, Walton found favored the agencies. The final *Burka* factor addresses the extent to which records are integrated into the agency's record system. Since the internet browsing histories resided on the agencies' computer systems, Walton agreed the fourth factor also weighed against the defendants. However, having found that the weight of the *Burka* factors was against the agencies, Walton concluded that *Tax Analysts* was ultimately controlling. He pointed out that "although some of the factors that comprise the *Burka* four-factor test weigh in favor of a finding that the browsing histories were under the defendants' control, because 'use is the decisive factor' pursuant to the *Tax Analysts* inquiry and defendants have demonstrated that they 'neither created nor referenced [the browsing histories] in the conduct of [their] official duties,' the [defendants] have not exercised the degree of control required to subject the document to disclosure under [the] FOIA.' Therefore, the *Tax Analysts* test compels the Court to conclude that the browsing records are not agency records and accordingly, the Court grants the defendants' motion for summary judgment." (*Cause of Action Institute v. White House Office of Management & Budget, et al.*, Civil Action No. 18-1508 (RBW), U.S. District Court for the District of Columbia, Nov. 15)

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A federal court in New York has ruled that the Executive Office for Immigration Review **conducted an adequate search** for records reflecting non-emergency motions filed in challenges to removal orders after it provided evidence that such motions are not tracked in its Case Access System for EOIR (CASE) and could only be located by conducting a search of hard-copy records located in multiple offices, but not for records related to training materials. The American Immigration Council and the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law submitted two requests to EOIR for data related to both emergency and non-emergency motions to stay removal filed with motions to reopen or motions to reconsider. The first request was for fiscal years 2015 through 2018, while the second request covered the period of 2008 through 2014. The requests also asked for training materials on how to deal with motions to reconsider or reopen removal proceedings. EOIR made seven separate disclosures. The only remaining issues were how to locate the non-emergency motions as well as the existence of training materials. The agency argued that the only way to find such motions was to search hard-copy files, which was too burdensome. The requesters, however, urged the court to require the agency to look for responsive records in the CASE database. Judge Denise Cote, noted, however, that "as stated in numerous declarations submitted by the agency, non-emergency stays are not tracked in CASE. Although the Comments tab in CASE may contain a 'notation,' notations are 'infrequent' and 'not routine practice. . .[T]he information sought by the plaintiffs with respect to non-emergency stays – dates the motions to stay and underlying motions to reopen or motions to reconsider were filed and decided, to outcomes of those motions, and whether changed circumstances formed the basis of those outcomes – would not be recorded in the Comments tab in CASE. Thus, a search of CASE would not uncover records responsive to the plaintiffs' request." Turning to the issue of training materials, Cote found the agency had not adequately explained it search. She pointed out that "the EOIR is correct that the adequacy of an agency's search is measured by its methods, not its results. The problem here is just that. Short of stating *who* it asked to search for responsive records, the EOIR has not explained *how*, *i.e.*, by what method, those searches were undertaken." (*American Immigration Council, et al. v. Executive Office for Immigration Review*, Civil Action No. 19-1835 (DLC), U.S. District Court for the Southern District of New York, Nov. 15)

Judge Tanya Chutkan has ruled that Grant Smith, founder of the Institute for Research: Middle East Policy, failed to show that letters allegedly written to Israel by former Presidents Bill Clinton and George W. Bush pertaining to the Nuclear Non-Proliferation Treaty have been publicly acknowledged. Smith submitted FOIA requests to the Clinton and Bush Presidential Libraries for the letters, which he insisted must exist. The National Archives and Records Administration issued a *Glomar* response neither confirming nor denying the existence of records. Smith claimed the alleged letters were improperly classified and that John Laster, Director of the Presidential Materials Division at NARA, was not a proper classification authority. Bush had invoked his 12-year privilege claims, including properly classified information, under the Presidential Records Act when he left office and Chutkan pointed out that in Bush's case those claims did not expire until January 2021. Because Bush's claims had not yet expired, Chutkan noted that "the document sought, a letter sent from President Bush during his presidency to a foreign state regarding foreign policy, satisfies the definition of presidential records under the PRA. Because the requested material is a presidential record and the twelve-year restriction period is still in place, the PRA precludes judicial review of the Archivist's determination restricting access to the document sought." Turning to Smith's claim that Laster was not a properly classification authority, Chutkan observed that "though the basis for Smith's assertion is unclear, the court assumes that it rests on the language in the PRA repeatedly referring to 'the Archivist.' Pursuant to this section, NARA issued a policy directive delegating authority to administer restrictions on presidential records to the Director of the Presidential Materials Division. Given the policy directive's delegation, Laster is properly authorized to impose presidential restrictions under the PRA." As to the alleged Clinton letter, Chutkan indicated that NARA's *Glomar* response was appropriate under **Exemption 1 (national security)**. She pointed out that "the detail in [NARA's declaration] is enough to support a *Glomar* response." She added

that "because [NARA's declaration] logically and plausibly supports NARA's conclusion 'that acknowledging the mere existence of the responsive records would disclose exempt information,' NARA has met its burden of showing that exemption1 protects the information sought from disclosure." Smith argued that statements made by Henry Kissinger in 1969 when he was National Security Advisor to President Richard Nixon, a 2016 statement by President Barack Obama, and a 2018 article in the *New Yorker* discussing how Israel's possession of nuclear-weapon technology was one of the world's worst kept secrets, as evidence that the U.S. had dealt with Israel on nuclear proliferation issues. Chutkan found none of the statements constituted official acknowledgment of Israel's possession of nuclear-weapon technology. She noted that "because neither the Kissinger memorandum nor President Obama's 2016 remarks 'necessarily match' the information that Smith requests, and *The New Yorker* is not an official disclosure, Smith fails to show any official acknowledgment of an Israel nuclear letter signed by President Clinton." (*Grant F. Smith v. United States National Archives and Records Administration*, Civil Action No. 18-2048 (TSC), U.S. District Court for the District of Columbia, Nov. 27)

Judge John Bates has ruled that the Centers for Medicare & Medicaid Services has not yet shown that it conducted an adequate **segregability analysis** to justify all of it claims made under **Exemption 5 (privileges)**. Democracy Forward Foundation submitted a FOIA request for records concerning the agency's decision-making as to the agency's Affordable Care Act outreach efforts, including its use of the consulting firms Weber Shandwick and Powell Tate. The agency disclosed records in two tranches of documents. For its first response, the agency reviewed 2,278 pages. The agency released 975 pages in full, withheld 998 pages in full, and 405 pages in part. In its second response, the agency reviewed 762 pages, releasing 70 pages in full, withholding 581 pages in full, and 174 pages were withheld in part. DFF challenged the agency's exemption claims made under the deliberative process privilege for three categories of documents – a final report, attachments from a July 2017 meeting, and communications with a subcontractor. Bates found that all three qualified for the consultant corollary exception, extending the deliberative process privilege to consultants where they have no self-interest. Bates rejected DFF's allegations that there was no specific decision referenced in the final report and, further, it constituted the agency's final action and was not pre-decisional. However, he agreed with DFF that CMS had not shown that it conducted an adequate segregability analysis. Bates pointed out that "FOIA requires agencies to 'take reasonable steps necessary to segregate and release nonexempt information.'" He noted that "here, CMS has done too little to demonstrate to the Court that it has adequately analyzed the Final Report for segregable information." He added that "the Court has no way to evaluate, based on the current record, whether any portions of the Final Report fall into. . .other non-exempt categories." As to the meeting attachments, Bates observed that "the *Vaughn* indexes as to the attachments are again silent on segregability, and the declarations contain nothing more than conclusory assertions that no portions of the attachments are reasonably segregable. These sorts of bare assertions will not do where it is the *agency's* burden to show that it has complied with its FOIA obligations." Bates agreed with DFF that the agency had failed to show whether the consultant corollary applied to an unidentified individual who had been included on emails. However, since DFF had provided no evidence that the unidentified individual was not a consultant, Bates sent the issue back so that both parties could further brief the issue. (*Democracy Forward Foundation v. Centers for Medicare & Medicaid Services*, Civil Action No. 18-635 (JDB), U.S. District Court for the District of Columbia, Nov. 27)

A federal court in Louisiana has ruled that the National Transportation Safety Board **waived** its privilege to withhold records about a helicopter crash in Hawaii that killed the pilot and four passengers because it shared the records with Eurocopter and Turbomeca, the manufacturers of the helicopter, and Blue Hawaiian Helicopters, the operator of the helicopter. Tony Jobe, an attorney representing one of the families

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of the victims, requested records about the NTSB investigation after it had been completed. The agency searched through more than 13,000 pages but chose to disclose only 4,000 of them to Jobe. Of the 8,000 pages withheld by the NTSB, 2,349 pages were withheld under **Exemption 5 (privileges)**. To narrow the scope of the records withheld by the agency, Jobe submitted a second FOIA request asking for only the on-scene phase of the investigation. In response, however, the agency informed Jobe that it had already sent him all non-exempt records in response to his first request. To avoid litigation, the agency re-reviewed the 2,349 pages withheld under Exemption 5 but released only an additional 159 pages. After Jobe filed suit, the agency provided a *Vaughn* index containing 215 documents the agency believed were responsive to Jobe's two requests. The court accepted the agency's *Vaughn* index as the basis for its decision. The court found that under *Dept of Interior v. Klamath Water Users Protection Association*, 532 U.S. 1 (2001), Eurocopter and Turbomeca did not qualify for the deliberative process privilege because their interests were adverse to those of the agency. The court noted that "as participants in the NTSB's investigation, Eurocopter and Turbomeca demonstrate the epitome of 'self-interested' individuals." The court added that "both Eurocopter and Turbomeca received a significant benefit here." The court found that while records that were shared only within the agency qualified for the deliberative process privilege, similar types of documents that were shared with outside parties lost any privilege claim because they did not meet the inter- or intra-agency record threshold. (*Tony B. Jobe v. National Transportation Safety Board*, Civil Action No. 18-10547, U.S. District Court for the Eastern District of Louisiana, Nov. 18)

Judge Royce Lamberth has awarded the Mattachine Society, a public interest group advocating for gay rights, $178,448.91 in attorney's fees and costs for its litigation against the FBI for records pertaining to the creation and implementation of Executive Order 10450 during the Eisenhower administration, allowing agencies to investigate and terminate federal employees on suspicion of homosexuality. In response to the Mattachine Society's request, the FBI located 861 pages and withheld 846 pages. The Mattachine Society filed suit, arguing that the three search terms used by the agency were inadequate. Lamberth agreed, ordering subsequent searches. He also found that some of the agency's redactions were improper. The Mattachine Society subsequently filed a motion for attorney's fees. The FBI argued that the Mattachine Society was not entitled to attorney's fees because Lamberth had upheld some of its redactions. But Lamberth pointed out that "the Court, however, did not need to find that every single redaction was improper in order for Mattachine to be entitled to fees, as FOIA's requirement is not that a complainant prevailed on 100% of the issues presented – FOIA requires only that a complainant 'substantially prevailed.' That is precisely what happened here." Lamberth then assessed the four factors used in determining a plaintiff's entitlement to fees – the public interest in disclosure, the commercial interest of the requester, the personal interest of the requester, and whether the agency had a reasonable basis in law. He observed that the FBI acknowledged the public interest in the records was significant and pointed out that "even though only a modest amount of information was disclosed, this factor still turns in favor of Mattachine – it is the public value of the *request* that courts evaluate for significance, not the actual *results* of the search." He indicated that the FBI did not contest the commercial or personal interest of the Mattachine Society in requesting the records, but explained that "in this case, Mattachine received no commercial gain from its FOIA request. On the contrary, its interest in the information is very much aligned with the public's interest in the information." The FBI argued that its initial limited search did not demonstrate bad faith. Lamberth noted that "this may be true, but those decisions also do not demonstrate reasonableness. Essentially, although the FBI prevailed on some issues raised during summary judgment, many of its actions during the initial search were unreasonable." The Mattachine Society was represented *pro bono* by the law firm of McDermott Will & Emery. Lamberth explained that "it is worth mentioning that even though McDermott performed its work for Mattachine *pro bono*, that is not a bar to recovering attorneys' fees, as courts frequently award costs and fees in *pro bono* cases." An issue that is frequently litigated in attorney's fees cases is which matrix to use to calculate fees. The government has always supported using the USAO Matrix, which has lower hourly rates, while plaintiffs usually advocate for

the *Laffey* Matrix, which contains higher hourly rates. Lamberth chose the *Laffey* Matrix, specifically because a recent D.C. Circuit decision, *DL v. District of Columbia*, 924 F.3d 585 (D.C. Cir. 2019), had rejected the USAO Matrix as not being representative of the relevant class of attorneys. Lamberth indicated that the Mattachine Society had explained that under the somewhat more generous Lodestar Method for calculating fees, its fee request would result in a $193,772 award. But, Lamberth observed that "the highest amount Mattachine requests is $178,134 under the *Laffey* Matrix. The Court will not award Mattachine more than it asks for and finds that the *Laffey* Matrix appropriately values McDermott's services." (*Mattachine Society v. United States Department of Justice*, Civil Action No. 16-773-RCL, U.S. District Court for the District of Columbia, Nov. 27)

Judge James Boasberg has ruled that the Department of Justice properly withheld emails between former Assistant Attorney General Laney Breuer and employees from his former law firm Covington & Burling under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)** or because the agency determined they were not **agency records**. Summer Shaw, the attorney for Timothy Blixseth, an investor whose Yellowstone Mountain Club ski resort ended up in bankruptcy after Blixseth misappropriated $209 million of the $375 million loan from Credit Suisse to secure funding to develop the property to pay off his personal debts, requested the records on the theory that Breuer somehow was involved in Blixseth's financial problems because a potential criminal investigation of his ex-wife was abruptly terminated while Breuer was in charge of the Criminal Division at DOJ during the Obama administration. In response to Shaw's request for all emails to or from Covington & Burling's domain name, DOJ reviewed approximately 2,760 pages, producing 228 pages in full, 435 pages in part, and withholding 61 pages. The agency also determined that 1,714 pages were duplicates and classified 307 pages as non-agency records. Shaw challenged only the agency's redactions under Exemption 6 and its decision that some records did not qualify as agency records. Boasberg cited *Media Research Center v. Dept of Justice*, 818F. Supp. 2d 131 (D.D.C. 2011), in which the court found that emails between then Solicitor General Elena Kagan and the Executive Office of the President pertaining to her nomination to the Supreme Court were personal in nature and did not qualify as agency records, as supporting his conclusion here pertaining to Breuer's emails. Boasberg pointed out that "Breuer, in fact, had been a long-time Covington attorney before he joined DOJ, and it is unsurprising that he would remain in close contact with his former colleagues on purely personal matters. With no reason to doubt [the agency's] assertions, the Court has little trouble concluding that these pages were created and used for the purely personal objective of corresponding with friends and former colleagues in matters entirely unrelated to DOJ activities or Blixseth." Upholding the agency's Exemption 6 claims, Boasberg rejected Shaw's claims that Blixseth had been unfairly targeted because of DOJ intervention after an alleged meeting. Boasberg pointed out that "from this unfounded theory, Plaintiff believes that Breuer's DOJ emails from 2009-2013 to 'cov.com' – years *before* the unconfirmed meeting with unknown attendees – include information of such significant public interest that the privacy interests in the withheld and redacted information under Exemption 6 is overcome. This Court is not remotely convinced." (*Summer Shaw v. United States Department of Justice*, Civil Action No. 18-593 (JEB), U.S. District Court for the District of Columbia, Nov. 19)

A federal court in New York has ruled that Makuhari Media's objections to the FBI's final action in its litigation to enforce its FOIA request should be dismissed because they were not filed within the 28 days provided for filing a motion to alter or amend the judgment under either Rule 59 or Rule 60. After Makutari Media filed suit, the court ruled in favor of both parties on some issues but ordered the FBI to disclose identifying information for two individuals in documents responsive to Makutari Media' request. Makutari Media filed a motion for reconsideration. The FBI opposed the motion and the court denied the motion because Makutari Media had provided no new evidence that would justify reconsideration. Makutari Media

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wrote to the court a month later, arguing that the FBI had not complied with its disclosure obligations. The dispute was then referred to a magistrate judge for resolution. The magistrate judge agreed with the FBI that Makutari Media had provided no new evidence supporting its motion to reconsider. The magistrate judge explained that "since the FBI's supplemental production took place on July 5, 2019, twelve days before the entry of judgment, plaintiff does not point to any 'newly discovered evidence' that could not have been discovered by August 14, 2019, twenty-eight days after judgment was entered." (*Makuhari Media, LLC v. Federal Bureau of Investigation*, Civil Action No. 17-5363, U.S. District Court for the Eastern District of New York, Nov. 22)

A federal court in Missouri has dismissed a motion to reconsider filed by Ferissa Talley, who filed suit against the Department of Labor as a third-party surrogate for Jack Jordan, an attorney representing his wife in a Defense contracting dispute, after finding no basis for her motions to reconsider the court's decision to stay the case. Jordan had already litigated the issue of whether emails sent from Dynacorp were privileged after they became part of the record before an administrative law judge. Jordan lost his first case in the D.C. Circuit and then lost his subsequent litigation under his own name in the Eighth Circuit. Nothing but persistent, however, he then commenced litigation by using third-party requesters like Talley. Finding that Talley had not shown that her case should be reconsidered, the court pointed out that "plaintiff's motion to reconsider does not seek to correct manifest errors of law or fact and does not present newly discovered evidence." But the court explained that "staying this matter will conserve the parties' and the judiciary's time and resources in that the same issues and arguments will not have to be relitigated while awaiting a decision from the Eighth Circuit." (*Ferissa Talley v. U.S. Department of Labor*, Civil Action No. 19-00493-CV-W-ODS, U.S. District Court for the Western District of Missouri, Nov. 18)

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