Volume 45, Number 3
February 6, 2019

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: The Supreme Court has agreed to review an Exemption 4 (confidential business information) case involving whether disclosure of food stamp data would cause grocery stores substantial competitive harm. The underlying FOIA litigation was brought in South Dakota by the Argus Leader against the Department of Agriculture. The agency originally withheld the data – which shows non-identifiable totals for individual retailers – under Exemption 3 (other statutes). That claim was rejected by the Eighth Circuit. The agency then claimed the data was protected by Exemption 4, which was also rejected by the Eighth Circuit. While the agency decided not to appeal the case to the Supreme Court, the Food Marketing Institute filed a petition, which the Court accepted in January. In the case, now entitled Food Marketing Institute v. Argus Leader Media, No. 18-481, FMI argues that the substantial competitive harm test is too stringent. The Supreme Court may end up adopting the Critical Mass standard or something even more restrictive.

Court Finds Requester Failed to Challenge No Records Response

Judge Trevor McFadden has ruled that because Juan Luciano Machado Amadis failed to administratively appeal no records responses from the FBI and the DEA, instead adding the no records denials to his amended complaint, he failed to exhaust his administrative remedies for both requests and cannot now pursue them in court.

Amadis, a citizen of the Dominican Republic, was denied a visa three times by the Department of State because he had been arrested at the Santo Domingo Airport in 1980 for possession of 125 grams of cocaine. Insisting that he had not been arrested for possession, Amadis submitted FOIA requests to the Department of State, the FBI, and the DEA. The State Department located records concerning his visa revocation/denial and released 32 documents in full, nine documents in part, and withheld 12 documents in full. Amadis then submitted a FOIA request to the DEA for records concerning himself. Limiting its search to investigative records, the DEA found no responsive records. Amadis then submitted a request to the FBI for records about himself

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pertaining to any criminal or drug-trafficking related crimes. The FBI's search also came up empty. The agency also told Amadis that to the extent he was asking whether or not he was on the terrorist watchlist, the agency was issuing a *Glomar* response neither confirming nor denying the existence of records under Exemption 7(E) (investigative methods or techniques). Dissatisfied, Amadis then sent another six FOIA requests to the three agencies. His second series of FOIA requests to the DEA, the FBI, and the State Department asked for records pertaining to the processing of his earlier requests. In his third series of requests to the agencies, Amadis again asked the State Department for reasons why his visa was denied, and asked the FBI and the DEA for all records about himself, including emails.

Both the FBI and the DEA responded to Amadis' third series of FOIA requests within the 20-day statutory deadline, telling him that after conducting a search neither agency had found responsive records. McFadden pointed out that "both complied with Mr. Amadis's request and conducted a search, trying to 'gather and review' responsive documents. Both determined and communicated the scope of the records they intended to produce – none. And they explained the reason for the scope of their disclosure – they found no responsive records. The FBI also suggested that to whatever extent it may have responsive documents they were withheld under Exemption 7(E). Both agencies also told Mr. Amadis that he could appeal their adverse determinations. And because both agencies issued their determinations within 20 working days of receiving the requests, FOIA's administrative exhaustion requirements were triggered."

Amadis argued that the agencies' responses were not complete because they had both volunteered to conduct further searches if he provided more specific information, claiming that "the agencies' respective responses were not final 'determinations' under *CREW v. FEC*, 711 F. 3d 1180 (D.C. Cir. 2013)" and that he had therefore constructively exhausted his administrative remedies. McFadden disagreed. He noted that "when an agency informs a requester that it has complied with a request but has located no responsive records, that is a determination, and such a determination is susceptible to immediate administrative appeal. The agency is not 'simply deciding to decide later.'' It has rendered an adverse decision and given its basis therefor. FOIA requires no more to trigger the administrative exhaustion requirement."

McFadden indicated that Amadis had mischaracterized the agencies' willingness to conduct a further search if he provided more information. Instead, he observed that "an agency's offer to conduct an 'additional' search does not alter the final, appealable nature of its determination. Instead, it allows a requester an additional process that is not required by FOIA. But this courtesy offer to do more than FOIA requires does not vitiate the administrative exhaustion requirement. Conversely, an agency that does comply with FOIA's timelines does not forfeit its ability to invoke the administrative exhaustion requirement merely because it offered a requester more than he was legally entitled. To hold otherwise would discourage agencies from trying to accommodate FOIA requesters and pervert the intent of the FOIA."

McFadden noted that "even if a requester submits more information so that the agency can conduct another search, as Mr. Amadis did, the agency's original timely determination remains appealable. The requester has two options. If the requester wishes to submit more information, then he gets a second bite at the FOIA apple at the agency level. All the while he retains his ability to seek recourse through an agency appeal and may invoke that right at any time. This ability to appeal at any time ameliorates *CREW*'s concern that agencies might 'desire to keep FOIA requests bottled up in limbo for months or years on end.' If the requester is unsatisfied with the additional search, either procedurally or substantively, he has all that he needs to appeal. But Mr. Amadis seeks to create a third option by presumptively retreating to court. That door is shut."

As a result of a series of suits filed by researcher Ryan Shapiro and others for records concerning the FBI's FOIA processing notes, the FBI had begun to categorically withhold records pertaining to no records responses under Exemption 7(E) and the agency categorically denied Amadis' request for how the agency

concluded that it had no responsive records as well. Noting that Amadis did not actually challenge the policy but instead criticized the agency's decision to withhold all records, McFadden approved of the agency's categorical claim.

Amadis questioned the decision by the Office of Information Policy to treat his request for records memorializing or describing OIP's treatment of his appeals as not responsive. McFadden agreed with the agency's interpretation, noting that "Mr. Amadis's request to OIP was for 'all records. . . memorializing or describing OIP's processing of his two appeals.' He did not seek all records in his appeals files. Nor did he specifically request records about the DEA and the FBI's processing of his initial requests." He pointed out that "if OIP had created a list of the records it received from the FBI and the DEA while processing Mr. Amadis's appeals, that list would be responsive because it memorializes or describes OIP's processing of the appeal. But the listed records themselves memorialize or describe only the prior work by the FBI and the DEA, not OIP's processing of the appeal. OIP did not have to go outside the four corners of Mr. Amadis's specific request for material that evidenced OIP's work on processing his appeals."

McFadden upheld OIP's claim that attorneys' notes and recommendations contained in Blitz forms documenting OIP's handling of appeals were protected by the deliberative process privilege under **Exemption 5 (privileges)**. Amadis argued that because there were no further notations on the Blitz forms beyond those of the attorney who prepared each form they essentially constituted the agency's final decision. McFadden pointed out that "the supervisors may have simply agreed with their subordinates or disagreed without comment." He added that "that a supervisor has no comment does not undermine OIP's statement that the redacted boxes allow front-line attorneys to provide analysis and recommendations to senior reviewing attorneys leading up to the final adjudication of the appeal. Courts have recognized that when documents are created to provide legal advice, that further confirms that the records are deliberative." (*Juan Luciano Machado Amadis v. Department of Justice, et al.*, Civil Action No. 16-2230 (TNM), U.S. District Court for the District of Columbia, Jan. 31)

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 the trial court erred when it ordered an *in camera* inspection of emails that the City of Hemet claimed were protected by the attorney-client privilege. In response to a California Public Records Act request from a citizens' group opposed to a commercial development, the City told the group it would review 2,000 pages of emails for applicable exemptions. The City disclosed a CD with non-exempt emails and later provided a privilege log for those emails it claimed were exempt. The trial court found the privilege log was insufficient and ordered the City to provide the documents for an *in camera* inspection. The City appealed the trial court's order. The appeals court agreed that the trial court's *in camera* inspection order was inappropriate at this point. The court pointed out that "a bridge ties the CPRA discovery demands to discovery management under the Civil Discovery Act. [In a previous decision], the court concluded 'the right to discovery' nonetheless 'remains subject to the trial court's authority to manage [and limit] discovery' as required." The appeals court pointed out that "in this light, the trial court should not have ordered *in camera* review of the claimed exempt emails; absent sufficient information in the privilege log to

determine if attorney-client privilege applied, the trial court should have ordered supplemental privilege logs, and imposed appropriate sanctions as necessary if the petitioner continued to provide inadequate information." (*City of Hemet v. Superior Court of Riverside County; Concerned Citizens of Hemet, Real Party in Interest*, No. E071097, California Court of Appeal, Fourth District, Division 2, Feb. 6)

Pennsylvania

A court of appeals has ruled that the Office of Open Records erred when it declined to conduct a balancing test to determine if information pertaining to the county of residence for employees of the Office of Administration was protected by a constitutional right of privacy. In response to a request from Simon Campbell for identifying information about the Office's employees, OA referred Campbell to a government website and told him that after balancing the employee's constitutional privacy interest against the public right of access it had determined that disclosure of employees' counties of residence and date of birth information would violate their constitutional right of privacy. Campbell complained to OOR, which concluded that while date of birth information was protected by the constitutional right of privacy, disclosure of information about the county of residence would not constitute a violation of privacy. OA filed an appeal. The appeals court agreed with OA that prior supreme court decisions recognizing a constitutional right of privacy required a balancing test before identifying information could be disclosed. Because OOR had not done so, it had committed legal error. In finding that the county of residence information was constitutionally protected, the appeals court pointed out that "we perceive no public benefit or interest in disclosing the requested counties of residence of Commonwealth employees and Requester has asserted none." The appeals court observed that "the requested disclosure of information about the counties of residence of Commonwealth employees is not closely related to the official duties of the Commonwealth employees and does not provide insight into their official actions." (*Governor's Office of Administration v. Simon Campbell*, No. 103 C.D. 2017, Pennsylvania Commonwealth Court, Jan. 24)

Washington

A court of appeals has ruled that the City of Langley failed to conduct an adequate search for records related to Eric Hood which may have been part of records left behind by former mayor Fred McCarthy. When McCarthy's term ended, he left six boxes of records and his city-issued laptop in his office to comply with the public records act. Hood requested an opportunity to inspect and review McCarthy's records. The City allowed him to do so with supervision but declined to allow him to search McCarthy's laptop. However, the City's records custodian told Hood that the City had supplied all electronic records that referenced Hood. Hood filed suit and the trial court ruled in favor of the City. Hood then filed an appeal. The court of appeals found the most of the City's actions were appropriate but questioned whether that City had searched all its electronic records. The appeals court also found a dispute existed as to whether Hood had narrowed his request to include only records referencing his interactions with the City. Sending the case back to the trial court, the appeals court observed that "given the disputed evidence, the trial court erred in granting summary judgment on whether the City violated the PRA by failing to produce McCarthy's electronic calendars." (*Eric Hood v. City of Langley*, No. 77433-6-I, Washington Court of Appeals, Division 1, Jan. 28)

Wisconsin

A court of appeals has ruled that the Kemper Center Inc., which operates a property owned by Kenosha County on what was formerly a girls' school, is not a quasi-governmental entity subject to the Wisconsin Public Records Act. Annette Flynn requested records from the Kemper Center and was told it was not subject to the Public Records Act. Flynn filed suit and the trial court ruled in her favor, finding that the Kemper Center was primarily supported by rents paid to Kenosha County. The Kemper Center appealed and

the appellate court reversed, finding that the Kemper Center did not meet any of the factors considered in assessing whether an entity is the functional equivalent to a public agency. Instead the appeals court noted that "if Kemper Center, Inc. was to vacate the premises, the County would have some obligation to assume its duties and operations or, at a minimum, would choose to do so. Neither of these results necessarily follows, either as a matter of logic, law, or from the summary judgment record." The appeals court concluded that "under the circumstances here, the revenue generated by Kemper Center, Inc.'s use of Kemper Park is not properly treated as a 'subsidy' by the County and therefore the bulk of Kemper Center Inc.'s funding comes from non-County sources. Kemper Center, Inc.'s functions are not clearly public or private in nature. Rather, its purposes are commonly achieved by both public and private entities. Kemper Center, Inc. does not appear to the public as an arm of County government, nor does the County wield any significant degree of control over Kemper Center, Inc's operations." (*State of Wisconsin, et rel. Annette Flynn v. Kemper Center, Inc.*, No. 2017AP1897, Wisconsin Court of Appeals, Jan. 29)

The Federal Courts…

Ruling on largely the same issues that faced Judge Amit Mehta in his decision several months ago, Judge Trevor McFadden has ruled that the U.S. Forest Service properly withheld records from the Story of Stuff Project pertaining to Nestle's use of spring waters in the San Bernardino National Forest under **Exemption 4 (confidential business information), Exemption 5 (privileges)**, and **Exemption 9 (data pertaining to wells)**, but has rejected the agency's claim that identifying information about Nestle employees is protected by **Exemption 6 (invasion of privacy)**. While Mehta concluded the Forest Service had supported its exemption claims, he also found that the 1999 disclosure by the state of California of a report prepared by Dames & Moore describing the infrastructure of bore holes in the San Bernardino National Forest raised questions as to whether information Nestle claimed was proprietary had actually been made public. This time, McFadden, relying primarily on the same affidavits prepared by Nestle and provided by the agency, found the agency had shown that the information was protected by Exemption 4, Exemption 5, and Exemption 9. The agency located 465 emails, 869 photographs, six spreadsheets, five videos, and 3,218 pages of responsive documents, disclosing more 3,076 pages with redactions. Noting that "for reasons known only to the Project, it brought another case based on virtually identical FOIA requests in this district last year," McFadden found the majority of the agency's exemption claims were appropriate. Turning to the issue of whether or not the Dames & Moore report had waived the confidentiality of Nestle's infrastructure data, McFadden, like Mehta earlier, pointed out that Nestle argued that a 2003 wildfire had completely destroyed the infrastructure as it existed in 1999. Mehta had expressed concerns about what impact the wildfire might have had on underground bore holes, but McFadden took the position that the Project bore the burden of proving that the Dames & Moore report data was still valid, and they had not done so. He pointed out that "the Project's assertion that withheld information cannot be more detailed than the Dames & Moore report is incorrect. . .It is plausible that Nestle has confidential diagrams of its operation featuring greater precision and accuracy than those created by Dames & Moore twenty years ago." The Project also argued that Nestle had not shown that disclosure of the withheld information would cause substantial competitive harm, particularly since it was relevant only to Strawberry Creek in the San Bernardino National Forest. McFadden disagreed. He observed that "[Nestle'] declaration does not suggest that Nestle's physical infrastructure alone constitutes an internal business process. Rather, [it] states that the withheld information includes descriptions of a 'system' the company uses to evaluate, develop, and operationalize the physical infrastructure. Rival firms could use these illustrations of planned infrastructure projects, inventory information, and related data to improve their own evaluation and development procedures." He added that "more broadly, the Project offers no support for its contention that Nestle's infrastructure, systems and methodologies apply only to Strawberry Creek. It is not

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unreasonable to believe that other companies could apply this information to locations with similar characteristics." McFadden upheld the agency's claims that some records were privileged. In response to one Project assertion that some information was not deliberative, he pointed out that "that a document may have a section titled 'Existing Conditions' does not prove that the information within that section is not deliberative." Although Mehta has put aside consideration of Exemption 9 after questioning the confidentiality of underground information, McFadden considered the agency's Exemption 9 claims. The Project argued that bore holes did not qualify as wells for purposes of Exemption 9, citing a definition used by the FDA suggesting that bore holes were different than wells. McFadden disagreed, noting that the FDA reference did not "establish that a borehole is not a well for purposes of Exemption 9. Instead, they differentiate between two types of water based on how each is collected. And they fit with [dictionary] definitions [that] a borehole is a 'drilled' or 'made' well, rather than a naturally occurring well." Citing the D.C. Circuit's decision in *AquaAlliance v. Bureau of Reclamation*, 856 F. 3d 101 (D.C. Cir. 2017), he indicated there the D.C. Circuit had found that Exemption 9's definition of wells did not exclude water wells. McFadden rejected the agency's use of Exemption 6 to protect information about Nestle employees. He pointed out that "information 'connected with professional relationships' does not [qualify]." He added that "the public's interest in disclosure outweighs these privacy interests. Nestle employees and consultants prepared reports to aid the Forest Service in making its permit renewal decision about publicly owned forest lands. The public has a plausible interest in evaluating these individuals' qualifications." (*Story of Stuff Project v. United States Forest Service*, Civil Action No. 18-00170 (TNM), U.S. District Court for the District of Columbia, Feb. 4)

The D.C. Circuit has ruled that legal memoranda prepared by the Department of Defense and the CIA to support the legality of the government's raid in Pakistan that killed Osama bin Laden is protected by the presidential communications privilege under **Exemption 5 (privileges)**. In response to requests from Judicial Watch for records concerning the bin Laden operation, the agency located five memos memorializing the legal basis for such an attack and withheld them under the presidential communications privilege. Judicial Watch filed suit and the district court upheld the agencies' exemption claims. Judicial Watch then appealed to the D.C. Circuit. Writing for the court, Circuit Court Judge Judith Rogers observed that "the extraordinary decision confronting the President in considering whether to order a military strike on Osama bin Laden's compound in Pakistan cries out for confidentiality, and the district court's application of the presidential privilege rested on consideration of the appropriate factors." She pointed out that "the President and his immediate advisers solicited and received the advice of the top national security lawyers from the Department of Defense, CIA, and National Security Council relating to a potential military counterterrorism operation. The legal advice memorialized in each memorandum concerned that covert military operation and was shared only with the President and his closes advisers." She noted that "although the presidential communications privilege is a qualified privilege, subject to an adequate showing of need, FOIA requests cannot overcome the privilege because 'the particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure.'" Judicial Watch argued that it had only asked for the legal basis of the decision and there was never any indication that the authors of the memoranda had actually briefed the President or his advisors. Rogers pointed out that "to determine the applicability of the presidential communications privilege, the government's declarations did not need to be more specific about who gave the briefings or how those conducting the briefings obtained the analysis and advice they conveyed, or the relationship of the briefer to the authors, the President, and the President's senior advisors, or whether and how the results of the briefings were later conveyed to the authors of the memoranda. Even assuming such information would not be privileged, Judicial Watch fails to show why it would be needed to determine the applicability of the presidential communications privilege. It sufficed that the President and his top national security advisers 'solicited and received' the legal advice memorialized in the five memoranda sought by Judicial Watch." Rogers rejected Judicial Watch's claim that the memos represented secret law. She observed that "the materials Judicial Watch seeks do not constitute or establish 'law' in the sense of setting forth a

decision that binds subordinates or a regulated party. Rather, the materials document advice given up the chain to someone (the President) who then made a decision. The government's declaration explains that the advice contained in the memoranda was not an 'authorization to conduct a given activity, but, rather, one step in the Executive branch deliberations.'" (*Judicial Watch, Inc. v. United States Department of Defense and Central Intelligence Agency*, No. 18-5017, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 25)

The D.C. Circuit has once again underscored the importance of a **segregability** analysis in granting summary judgment to the government in FOIA litigation. The court's ruling came in a case brought by Bradley Waterman, a tax attorney who had been the subject of a professional misconduct complaint to the IRS's Office of Professional Responsibility by an IRS agent for unreasonably delaying disposition of a client's case before the IRS. OPR took no action, but informed Waterman that the administrative file would be kept for 25 years and could be taken into account in any future investigation. Waterman filed a FOIA request for the report and related records. The agency located 54 pages, released 30 pages in full and withheld 20 pages in full. The agency denied Waterman's administrative appeal and Waterman filed suit in district court. The district court upheld the agency's **Exemption 5 (privileges)** claim and rejected Waterman's request for an *in camera* review to determine if the agency had properly analyzed the segregability of the withheld documents. Waterman then appealed to the D.C. Circuit. The D.C. Circuit agreed with Waterman on the segregability issue. In a per curiam opinion, the D.C. Circuit noted that "the district court's opinion granting summary judgment mentions segregability only once, and then only in a passing description of an IRS declaration. It is true that the IRS employees who submitted declarations to the district court stated that they were familiar with the segregability requirement and 'attempted to release every reasonably segregable nonexempt portion of every responsive document.' The district court, however, did not adopt this declaration or otherwise refer to the requirement. The only relevant findings the court made were general in nature, concluding that 'all of the IRS's withholdings were permissible under FOIA.'" The D.C. Circuit observed that "this is insufficient. A district court 'clearly errs when it approves the government's withholding of information under the FOIA without making an *express* finding on segregability.' No such finding was made. 'While perhaps in theory we could conduct a further review in this court under our de novo standard, in the interest of efficiency we have long required the district court to make the first finding on the segregability question.' Because the 'district court approved withholding without such a finding, remand is required.' In making a segregability finding, the district court may find it necessary or appropriate to examine documents *in camera*." The D.C. Circuit remanded the case to the district court for further proceedings consistent with its opinion. (*Bradley S. Waterman v. Internal Revenue Service*, No. 18-5037, U.S. Court of Appeals for the District of Columbia Circuit, Feb. 5)

A federal court in Washington has ruled that a biological evaluation prepared for BP by a consultant is not protected by **Exemption 5 (privileges)**, although the court also found that the biological evaluation did not qualify as an **agency record** under FOIA. Friends of the Earth filed a request with the U.S. Army Corps of Engineers for records about the potential environmental impact of the North Wing Dock at the Cherry Point Refinery Marine Terminal, a second dock at the Terminal that BP was hoping to construct. BP hired a consultant that prepared a biological evaluation that the Corps reviewed and adopted. But the agency refused to disclose the biological evaluation to Friends of the Earth, claiming it was privileged under Exemption 5. The Corps argued that once it adopted BP's biological evaluation, it became the agency's decision as well. The agency also contended that the BP biological evaluation was protected under the consultant corollary because BP and the agency shared a common interest. The court pointed out that, regardless of being adopted by the Corps, the BP biological evaluation was not an agency record. The court explained that "the Corps has not identified a single case in which an agency's 'adoption' transforms a third-party document into a federal

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agency-created document. The March 2017 BE was created by a third-party consultant for BP, and BP – not the consultant – submitted the BE to the Corps. As a result, the March 2017 BE is not a federal agency document subject to exemption." The court then found that even if the record qualified as an agency record, it was not privileged because it was not pre-decisional but instead represented the agency's final decision. Further, the court noted that any privilege the agency could assert was waived because the document originated with BP, a third party. The court observed that "in this case, BP is a third party seeking a permit from the Corps, and it has received preferential treatment (i.e. advance disclosure of the March 2017 BE) relative to other members of the public. The interests of BP are inconsistent with Plaintiff's interest in disclosure and the outcome of the permitting process. As a result, the document is not protected by Exemption 5 because it has already 'seen the light of day.'" (*Friends of the Earth v. U.S. Army Corps of Engineers*, Civil Action No. 18-677-TSZ, U.S. District Court for the Western District of Washington, Jan. 30)

A federal court in New York has ruled that U.S. Immigration and Customs Enforcement is liable for **attorney's fees** incurred by the Detention Watch Network and the Center for Constitutional Rights for opposing efforts by two private prison contractors to appeal an adverse ruling in FOIA litigation pertaining to the number of beds available in detention centers. In response to FOIA requests submitted by the Detention Watch Network and the Center for Constitutional Rights, ICE initially took the position that much of the information was protected by **Exemption 4 (confidential business information)**. The court found that unit prices, bed-day rates, and staffing plans were not protected by Exemption 4 and ordered that data disclosed. The agency told the court that it was considering whether or not to appeal. The two contractors – GEO and CoreCivic – requested leave to intervene. The agency told the plaintiffs that it did not plan to appeal and GEO and CoreCivic were given permission to appeal to the Second Circuit. Detention Watch Network and the Center for Constitutional Rights argued that the contractors did not have **standing** to pursue an appeal. The Second Circuit ruled in favor of the requesters. GEO then filed a petition for certiorari to the Supreme Court and the Detention Watch Network and the Center for Constitutional Rights filed an opposition. The Supreme Court denied GEO's petition. ICE agreed to pay $220,000 in attorney's fees for the litigation in the district court. Detention Watch Network and the Center for Constitutional Rights then filed a motion to recover attorney's fees incurred in challenging the contractors' appeal to the Second Circuit and the Supreme Court. The government argued that it was not liable for the fees incurred in the appellate litigation because it was not a party to that litigation. The court disagreed, noting that "the plain language of FOIA's fee-shifting provision is clear – this Court 'may assess *against the United States* reasonable attorney fees and other litigation costs reasonably incurred in *any case under [FOIA]* in which the complainant has substantially prevailed.'" The court pointed out that "plaintiffs brought this case under FOIA to compel the Government to produce records pertaining to ICE's detention bed quota. On appeal, Plaintiffs asserted that GEO and CoreCivic lacked standing under FOIA to pursue the appeal. Throughout the proceedings, this case was and is a FOIA action. Nothing in the statutory language confines its reach to parts actively litigated by or against the United States." The court indicated that "FOIA's goals are better served by reimbursing Plaintiffs for reasonable fees and costs incurred on appeal, particularly when Plaintiffs were appellees and prevailed in the district court. To do otherwise would discourage FOIA plaintiffs with meritorious cases from pursuing FOIA information critical to promoting an informed citizenry and holding agencies publicly accountable." The court pointed out that "the Government's interests did not diametrically diverge from those of Defendant-Intervenors. The Government chose not to appeal *after* GEO and CoreCivic had requested to intervene, and the Government did not oppose the intervention. Because the Government did not acquiesce to Plaintiffs' claims during the pendency of the appeals – and indeed stood by while Defendant-Intervenors sought to defend the Government's actions on appeal – Plaintiff's appellate work 'was made necessary by the [Government'] opposition.'" (*Detention Watch Network, et al. v. United States Immigration and Customs Enforcement, et al.*, Civil Action No. 14-583 (LGS), U.S. District Court for the Southern District of New York, Feb. 5)

Judge Randolph Moss has ruled that the FBI conducted an **adequate search** and properly withheld records under **Exemption 7(D) (confidential sources)** from Michael Spataro, who had been convicted in 2006 in the Eastern District of New York of conspiracy to commit murder, after the FBI completed remediation of records that had been damaged by Hurricane Sandy. In an earlier ruling in the case, Moss had upheld the FBI's search except for those records that were still subject to remediation and had declined to rule on the agency's exemption claims until the remediation process had been completed. With the remediation process complete, Moss now upheld the agency's search. Spataro's only challenge to the search of the remediated records was to question whether the agency had conducted an appropriate **segregability** analysis. Finding that Spartaro's claims of bad faith were nothing more than speculation, Moss accepted the FBI's segregability claim. Both the FBI and DEA withheld records under Exemption 7(D). Although Spataro had not challenged either agency's claim, Moss assessed their validity anyway. The FBI had withheld the names of several informants that were given explicit assurances of confidentiality while the DEA had withheld an informant's name under an implied assurance of confidentiality. Moss approved both applications. (*Michael Spataro v. Department of Justice*, Civil Action No. 14-198 (RDM), U.S. District Court for the District of Columbia, Jan. 25)

Judge Beryl Howell has ruled that EOUSA and the FBI conducted **adequate searches** for records pertaining to Steven Blakeney and his criminal conviction in the Eastern District of Missouri, that the agencies properly withheld records under several exemptions, and that the FBI acted appropriately when it refused to provide Blakeney with further records after he failed to pay the agreed upon costs. EOUSA disclosed 242 pages in full, 144 pages with redactions, and withheld 59 pages under **Exemption 5 (privileges), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The FBI identified 3,104 pages, 130 photos, 15 videos, and eight audio recordings and agreed to process them at a rate of 500 pages a month. However, after disclosing records for four months, the FBI stopped providing records because Blakeney had failed to pay for previous disclosures. The FBI and Blakeney's counsel agreed that Blakeney would pay the costs he owed and then once again the FBI would begin releasing responsive records at a rate of 500 pages a month to begin 15 days after receiving payment. Blakeney made no further payments and the FBI did not send any more records. Howell found that EOUSA's search was adequate. She noted that "EOUSA's thorough search targeted responsive records, applying 'search terms and personal identifiers,' such as the plaintiff's name, the criminal case number identified in the plaintiff's FOIA request, and the plaintiff's 'date of birth and social security number.' Accordingly, EOUSA has adequately explained 'in reasonable detail the scope and method of the search conducted,' which 'suffices to demonstrate compliance with the obligations imposed by the FOIA.'" She also found EOUSA had appropriately claimed Exemption 5, Exemption 6, and Exemption 7(C). She rejected Blakeney's request that she conduct an *in camera* review, noting that "in the instant case, EOUSA submitted a declaration and a *Vaughn* index, demonstrating that the agency properly applied Exemption 5 to withhold material, and, thus, an *in camera* review of the disputed records is not necessary." She added that "based on EOUSA's *Vaughn* Index and declaration, EOUSA has demonstrated that all reasonably segregable material has been produced." Howell found that Blakeney's failure to pay the assessed costs constituted a **failure to exhaust his administrative remedies**. She observed that "the plaintiff's nonpayment, for months, has frozen the FBI's ability to make progress on his FOIA claim, and the case will continue to sit idly on the Court's docket until whatever time the plaintiff decided to pay the FBI, should he choose to pay. Moreover, by withholding payment from the FBI and simultaneously litigating here, the plaintiff asks for judicial intervention prematurely since the FBI's response to the plaintiff's FOIA request cannot be fully assessed until the agency has 'a fair opportunity to resolve' the plaintiff's FOIA issues 'prior to being ushered into litigation.'" (*Steven Blakeney v. Federal Bureau of Investigation, et al.*, Civil Action No. 17-2288 (BAH), U.S. District Court for the District of Columbia, Feb. 5)

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Judge Amy Berman Jackson has ruled that EOUSA conducted an **adequate search** for records pertaining to Marcelo Sandoval, particularly concerning allegations that he was member of the Mexican Mafia. Sandoval also requested records from the U.S. Attorney's Office for the Central District of Illinois. After conducting a search, both EOUSA and CDIL found no responsive records. Sandoval filed suit and in an earlier ruling, Jackson found that the agencies' searches were deficient and ordered the agencies to provide a better explanation of their searches and to release any segregable material. Jackson observed that the agencies' original declarations "did not inspire confidence that the agencies conducted searches that were reasonably calculated to uncover relevant documents" and pointed out that the she found three deficiencies in the agencies' searches – failure to indicate whether Sandoval's three requests had been consolidated into one request, failure to explain the specific locations that were searched, and failure to explain the search for electronic records. Now, Jackson pointed out that "defendant has now cured these deficiencies." Jackson found the agency had now indicated that Sandoval's three requests were consolidated into one request, that the FOIA liaison at CDIL had searched all responsive records, and had listed the search terms used. Jackson noted that 'while defendants' supplemental declaration could have provided more details regarding the systems searched and why they were searched, the Court finds that the search conducted by defendant meets the standard of reasonableness required." She observed that "moreover, considering the broad nature of plaintiff's document request, defendants' search of all physical and electronic files retained by all employees of the U.S. Attorney's Office in question, using terms that included the plaintiff's first and last names, was 'reasonably calculated to discovery the requested documents.'" (*Marcelo Sandoval v. U.S. Department of Justice, et al.*, Civil Action No. 16-1013 (ABJ), U.S. District Court for the District of Columbia, Jan. 24)