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

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Washington Focus: Molly Parker, a reporter for the Southern Illinoisan, which is part of ProPublica's local reporting network, notes that a contract with Copper River Enterprise Services to manage the Department of Housing and Urban Development's FOIA processing system expired Jan. 7 during the government shut-down and has not yet been awarded to a new vendor. As a result, FOIA staff at HUD told Parker that they can no longer perform online redaction, which now needs to be done manually. Last year, HUD's Inspector General criticized the agency's tool for locating agency records and databases. HUD received 2,383 requests last year and currently has a backlog of more than 1,000 requests, up from 400 at the end of FY 2014. . .Steve Aftergood, editor of Secrecy News, reported recently that President Donald Trump criticized the public availability of certain audit and investigation reports by the Defense Department's Inspector General. Trump indicated at a Jan. 2 cabinet meeting that "we're fighting wars, and they're doing reports and releasing them to the public? Now, the public means the enemy. The enemy reads those reports; they study every line of it. Those reports should be private reports. Let him do a report, but they should be private reports and be locked up."

Court Finds Changes in EPA Policy Non-Justiciable Under FACA

Ruling in a case brought by a coalition of medical organizations led by Physicians for Social Responsibility alleging that the EPA violated the Federal Advisory Committee Act by instituting a new policy prohibiting individuals who have EPA grants from serving on any of the 22 EPA advisory committees, Judge Trevor McFadden has shown why FACA cases are so difficult to litigate because the debate over the meaning of basic concepts in the statute – particularly the concept that the membership on FACA committees should be fairly balanced – makes it virtually impossible for courts to develop workable standards that can be practically applied, often leading courts to conclude, as did McFadden in this case, that such challenges are so vague as to be non-justiciable.

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The coalition of medical groups brought suit alleging violations of FACA and the Administrative Procedure Act after the EPA announced that it was changing its policy for who could serve on an agency advisory committee by prohibiting any individuals who had EPA grants from serving on such committees. Two physicians who were plaintiffs in the suit currently had EPA grants and were thus directly impacted by the changes. Because the conflict of interest regulations promulgated by the Office of Government Ethics did not prohibit grantees from serving on advisory committees and, more particularly, because the EPA had not offered much of an explanation for its change in policy, the coalition of medical organizations challenged the changes as arbitrary and capricious. The coalition also argued that the policy change violated FACA's requirement that committee membership is "fairly balanced in terms of points of view represented and the functions to be performed by the advisory committee."

McFadden found that the physicians and their professional organizations had standing to bring the suit since they had alleged an actual injury – having to choose between serving on EPA advisory committees or continued funding of their EPA grants – and that the injury could possibly be redressed if McFadden ruled in favor of the plaintiffs. EPA argued that the medical coalition's challenge to its new policy was not within the zone of interests protected by the conflict of interest statutes and OGE regulations. McFadden disagreed, noting that "their interest in government service is congruent with the Government's interest in recruiting them to serve. Physicians' interests are not 'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'"

McFadden then turned to the substance of Physicians' challenge. He began by the noting that the conflict of interest statute and accompanying regulations "prohibits government employees, including special government employees, from participating in matters that will have a direct and predictable effect on their own financial interests or on the financial interests of close associates." He pointed out that OGE's regulations allowed grant recipients to serve on advisory committees as long as they did not participate in matters that could affect their financial interests or those of their employer. He noted that "but under EPA's Directive, grant recipients will not serve on its advisory committees, even on matters of general applicability."

Physicians argued that this additional restriction made EPA's directive incompatible with OGE regulations. McFadden disagreed. He explained that "the statute and OGE regulations prohibit government *employees* from participating in certain activities. The Directive, however, is a statement of EPA *policy*, explaining who EPA will consider for appointment to advisory committees. That someone *may* serve on an advisory committee without incurring liability under the conflict of interest statute does not dictate that an agency *must* appoint him as a member. While EPA clearly cannot appoint someone to an advisory committee that Section 208 prohibits, Section 208 does not require EPA to appoint anyone not otherwise excluded from the statute. In other words, Section 208 and the OGE regulations function as a floor, not a ceiling, for acceptable government service." McFadden pointed out that "the Directive is better understood as an appointment policy promulgated under the Administrator's broad appointment discretion. While this policy is guided by ethics concerns, it is distinct from the conflict of interest statute and OGE regulations."

Physicians also argued that the changes in EPA's policy restricting who could serve on advisory committees violated FACA as well because "the conflict of interest statute and OGE regulations constrain agency heads' appointment discretion." McFadden noted that "to say that certain individuals may serve is very different than saying that the rest must serve. Agency heads retain substantial discretion to determine membership on federal advisory committees. And if an agency selects advisory committee members under a higher ethical standard than what the conflict of interest statute and OGE regulations require, that is entirely compliant with FACA's requirement that committee members not be conflicted. So the conflict of interest statute and OGE regulations establish only a uniform ethical floor that agency heads may not dip below. They do not, however, constrain an agency's ability to appoint and retain individuals under a higher ethical

standard." He pointed out that "neither the conflict of interest statute nor OGE regulations dictate who agency heads *must* appoint or retain under the broad discretion afforded by FACA."

A primary focus of Physicians' challenge to the EPA's changed policy was whether prohibiting grantees from serving on EPA advisory committees impermissibly infringed on FACA's requirement that membership of advisory committees be fairly balanced. But, as McFadden pointed out, there was little or no consensus in the FACA case law as to how courts could even assess whether or not an advisory committee was fairly balanced. In a per curiam decision that produced three different opinions, the D.C Circuit in *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C. Cir. 1989), looked at whether the fairly balanced provision was subject to judicial review. Circuit Court Judge Laurence Silberman found that it was non-justiciable because there were no objective standards by which to assess the term. Circuit Judge Harry Edwards found that the provision was subject to judicial review, but Circuit Court Judge Daniel Friedman, sitting by designation from the Federal Circuit, upheld the district court's ruling on the merits without addressing the issue of justiciability. Since that meant Silberman and Friedman constituted a majority, Silberman's views on non-justiciability carried more weight than did the contrary views of Edwards.

Although Physicians argued that the decision in *Microbiological* meant that the fair and balanced provisions in FACA were justiciable, McFadden indicated that subsequent FACA district court decisions had instead relied on Silberman's finding of non-justiciability. McFadden explained how difficult any balancing would be. He pointed out that 'weighing the qualifications of potential members for advisory committees requires this 'complicated balancing' and the statutes that establish EPA's advisory committees offer no meaningful standard for assessing whether the agency has selected the 'most qualified' potential member. For example, is a Medical Doctor a more qualified 'physician' than a Doctor of Osteopathic Medicine to serve on [an EPA advisory committee]? Is a cardiologist more qualified that a pulmonologist? There are virtually infinite metrics to assess potential members' relative qualifications and the statute offers no clues how to weigh them. The Court will not second guess EPA's exercise of its discretion in an area peculiarly within its expertise. Ultimately. Physicians' count [alleging violations of the fairly balanced provision in FACA] relies on 'statutory directives' that, even if they were explicit in the statute, would be non-justiciable."

McFadden found that the EPA had appropriately explained the reasons for its policy changes. He pointed out that "when an agency departs from its prior policy, it must display awareness that it is changing position, and it 'must show that there are good reasons for the new policy.' But it need not establish 'that the policy reasons for the new policy are *better* than the reason for the old one;' it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better. . ." (*Physicians for Social Responsibility, et al. v. Andrew R. Wheeler*, Civil Action No. 17-02742 (TNM), U.S. District Court for the District of Columbia, Feb. 12)

Views from the States…

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

Arizona

A court of appeals has ruled that the Arizona Corporation Commission conducted an adequate search for records requested by Warren Woodward since the paralegal who conducted the search was sufficiently

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familiar with the Corporation's records to conduct a reasonable search. Describing the search, the court of appeals noted that "the ACC sent several agency-wide email requests for responsive documents within two days after receipt. The paralegal also used email and file archiving software to conduct an electronic search of all ACC employees' emails. The affidavit includes the search terms and dates used and describes the work of others to respond to the request." Woodward also questioned the timing of some of the agency's filings. Rejecting that challenge, the court of appeals pointed out that "Woodward has failed to show that the court erred in relying on the filings made to conclude the ACC conducted 'an adequate search, reasonably calculated to uncover relevant documents of the request.'" (*Warren Woodward v. Arizona Corporation Commission*, No. 1 CA-CV-18-0297, Arizona Court of Appeals, Feb. 12)

Kentucky

The Attorney General's Office has ruled that an emergency regulation promulgated by the Finance and Administration Cabinet restricting the number of people who could enter the State Capital Building and the Capital Annex after normal business hours violates various state statutes, including the Kentucky Open Meetings Act. In response to a request by 32 members of the General Assembly for a ruling on the legality of the policy restricting access, the Attorney General pointed out that the regulation "gives agencies, the Commission of the Department for Facilities and Support, Kentucky State Police officers, and other listed individuals broad discretion to place limitations on public meetings. As a result, application of the emergency administrative regulation may violate the Open Meetings Act." The AG observed that the regulation also included potential restrictions on access "based on the causes advanced by groups or the reputation of the group itself." (Order No. OAG 19-001, Office of the Attorney General, Commonwealth of Kentucky, Feb. 7)

Louisiana

A court of appeals has ruled that the trial court did not err in finding that the New Orleans Bulldog Society, which advocates for dog welfare in New Orleans, substantially prevailed only on certain issues during its litigation against the Louisiana Society for the Prevention of Cruelty to Animals, although it increased the fee award from $5,000 to $10,000 after finding the trial court did not properly analyze the 10 factors used in assessing attorney's fees. NOBS originally requested records on the number of dogs euthanized annually by the City of New Orleans. The City Attorney's Office told NOBS that the City had a contract with LSPCA to provide services and that the public availability of records was limited to the reporting requirements under the agreement. NOBS then filed suit against LSCPA, arguing that it was performing a government function. The trial court sided with LSPCA but the court of appeals reversed, finding that LSCPA was subject to the Public Records Law because it was performing a government function. The case then went to the supreme court, which, while finding LSPCA was performing a government function, limited its public records access obligations to records pertaining to its work for the City. NOBS thn filed for $22,493 in attorney's fees plus $1,687 in costs. The trial court found NOBS has only prevailed on certain issues and awarded $5,000 in attorney's fees as well as the $1,687 in costs. NOBS appealed to the court of appeals, arguing that it had prevailed on the primary issue – that LSPCA was subject to the public records law. The appeals court agreed with the trial court that NOBS had prevailed only on certain issues. The court of appeals pointed out that "the object of NOBS's suit was access to *all* of the requested documents. NOBS was not successful in securing a judgment requiring that LSPCA to turn over *every* document requested, only those that were relevant to the LSPCA's 'discharge of its duties and responsibilities' as outlined in the [agreement] with the City. Thus, it cannot be said that NOBS was successful as to the 'object' of its suit." The court of appeals explained that "we agree NOBS only prevailed in part. However, we do find that the trial court abused its discretion in awarding only $5,000 in attorney's fees in light of the applicable factors. Therefore, based on our review of the factors, we find that the award for attorney's fees should be increased to $10,000." (*New Orleans Bulldog*

Society v. Louisiana Society for the Prevention of Cruelty to Animals, No. 2018-CA-0519, Louisiana Court of appeals, Fourth Circuit, Feb. 6)

Michigan

A court of appeals has ruled that Tom Lambert, president of Michigan Open Carry, cannot use a FOIA request to force the Michigan State Police Department to provide a more specific list of expenditures of fees collected under the Concealed Pistol Licensing Act because the State Police properly pointed him to its website that contained reports required under the statute. Frustrated by the lack of publicly available data on expenditures, Lambert filed a FOIA request for such data. The agency referred him to its website that contained the reports required under the statute. Dissatisfied, Lambert filed suit, arguing that the State Police had not provided him the information he requested. The trial court sided with the State Police, noting that the agency had provided Lambert with the responsive records that existed and pointing out that Lambert's real complaint was that he disagreed with the agency's interpretation of what was required under the CPLA. Lambert then appealed. The court of appeals noted that "we agree with the trial court and conclude that the Department sufficiently granted the FOIA request." The appeals court pointed out that "the Department furnished this list, which plaintiff believed was deficient. However, [his] view that the 'list' is not in compliance with another statute does not render the Department's action a violation of FOIA." Lambert argued that he was requesting information that was different than what was contained in the report. But the appeals court observed that "to the extent that plaintiff desired different information, [he] failed to sufficiently describe the information [he] was seeking. Under FOIA, a 'request need not specifically describe the records containing the sought information; rather, a request for information contained in the records will suffice.' However, it must be sufficient to enable the public body to find the public record and identify the documents. In this case, plaintiff's request was sufficient to enable the Department to provide a link to its CPL reports where it published information required by [the statute]. If plaintiff desired more specific information, such as 'line-by-line' or 'dollar-by-dollar' records, [he] could have made [his] FOIA request more specific." (*Michigan Open Carry, Inc. v. Department of State Police*, No. 344936, Michigan Court of Appeals, Feb. 7)

New Mexico

Ruling in a case involving bulk access to real property records, a court of appeals has found that access to property records maintained by Lea County is controlled by the Recording Act because that statute is more specific than the Inspection of Public Records Act. The case was brought by TexasFile, a data vendor that provides access to property records in Texas and neighboring states. TexasFile sent a request for electronic access to Lea County's property records, claiming they were subject to the IPRA. Lea County told TexasFile that it had not digitized its records because of privacy concerns but could make the records available in hard copy for $40,000 and could provide an index for an additional $7,000. In response to TexasFile's suit, Lea County argued that the company did not have standing to bring suit under the IPRA because its request had not been denied and further argued that the Recording Act controlled the public availability of property records. The court of appeals noted that "when this kind of conflict arises as a result of a public records request, we look to the statute most specifically addressing the 'type of record' sought to determine the custodians' obligation in responding. In this case, there is not dispute that TexasFile sought all of the County's real property image and index records, and as TexasFile concedes, the Recording Act establishes a scheme for the filing, recording, and inspection of these records. . .IPRA creates no similarly specific scheme for real property records and, indeed, makes no reference to real property records at all. In light of the breadth and depth of treatment given real property records in the Recording Act and the absence of the same in IPRA, principles of statutory construction counsel that the Recording Act's production provisions govern the

County's obligation in responding to TexasFile's request." (*TexasFile LLC v. Board of Commissioner of the County of Lea*, No. A-1-CA-34919, New Mexico Court of Appeals, Feb. 12)

Washington

A court of appeals has ruled that Pierce County properly claimed that 461 pages of completely redacted records pertaining to the County's litigation in *Nissen v. Pierce County*, in which the supreme court ruled that records pertaining to public business were public records even when maintained on personal devices, were exempt under the attorney work product privilege and did not have to be disclosed to the Washington Coalition for Open Government. WCOG sent an email request to Pierce County for all the records pertaining to the *Nissen* litigation and asked the County to respond by email or internet transfer. Pierce County declined to respond by email, telling WCOG that providing the records in hard copy allowed the County to confirm delivery. The County provided records with redactions, including pages that were totally blank, and charged $88. WCOG argued that the County had waived privileges for many of the records that had been shared with other parties, particularly former Pierce County prosecutor Mark Lindquist, whose use of a personal cell phone to conduct public business was the crucial factor in the case. Rejecting the claim, the court noted that "because the County, Lindquist, and other amicus groups were similarly aligned on the matter or common interest in the *Nissen* litigation, the County had a reasonable expectation of confidentiality in sharing its work product with the amicus groups and Lindquist." WCOG argued that Lindquist had a conflict of interest with the County because he had intervened in the litigation. The appeal court disagreed, pointing out that WCOG provides no authority to support its assertion that Lindquist became an adverse party to the County simply because he personally intervened in the *Nissen* litigation." (*Washington Coalition for Open Government v. Pierce County*, No. 50718-8-II, Washington Court of Appeals, Division 2, Feb. 20)

The Federal Courts…

A federal court in New York has ruled that the public availability of leaked State Department cables pertaining to Iraq on WikiLeaks does not **waive** the agency's ability to continue to withhold portions of the cables under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. The law firm of Osen LLC submitted a FOIA request to the Department of State for six identified cables. Osen submitted a second FOIA request for 36 identified cables. The State Department located 40 of the 42 requested cables and released 11 in full and 29 with redactions. Osen filed suit, arguing that because the cables were publicly available on WikiLeaks, the agency had waived its ability to claim they were confidential. During the litigation, State re-released 15 documents, removing some of the prior redactions. Judge Jed Rakoff explained that under *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009), an official disclosure occurs only if it is as specific as the information previously released, matches the information previously disclosed, and was made through an official documented disclosure. Osen argued that State had officially acknowledged the disclosures on WikiLeaks in a 2010 press statement and in the 2011 Information Review Task Force Report issued by the Department of Defense. Finding that neither statement was specific enough to constitute an official disclosure, Rakoff pointed out that "the *Wilson* test is a difficult fit for Osen's argument, which is not that the government has officially disclosed the information in the cables, but that, by acknowledging that the unauthorized publication of government documents on WikiLeaks occurred, the government has converted all leaked document available on WikiLeaks into official disclosures." He added that "acknowledging the existence and scope of a leak does not have the same effect as officially disclosing leaked information. As long as the information itself has not been officially disclosed, the justification for the distinction between unofficially and officially disclosed information remains. Holding otherwise would be tantamount to forcing the government to make an official disclosure of any leaked information if it wanted to acknowledge and investigate the leak." Osen

argued that other State and Defense Department documents provided some of the information. Rakoff observed that "while the Second Circuit has clarified that the 'matching requirement' does not 'require absolute identity' this does not imply that any overlap in information satisfies the matching requirement or that courts should not consider the specific nuances and contexts of the documents being compared." Osen also challenged the State Department's Exemption 1 claim that disclosure could harm national security, particularly in light of the public availability of the cables on WikiLeaks. However, Rakoff pointed out that "in this case, State's submissions clearly and plausibly outline why the harms it traces from official disclosure of the redacted information remains a risk despite any unofficial disclosures." Osen claimed that under Exemption 3 the agency was required to identify the sources and methods that would be harmed by disclosure. Rakoff disagreed, noting instead that "State is not required to explain further what 'sources or methods' are at issue, and the Court finds that the material falls within the relevant statutes." (*Osen LLC v. United States Department of State*, Civil Action No. 18-6070 (JSR), U.S. District Court for the Southern District of New York, Feb. 6)

Judge John Bates has ruled that the FBI properly limited its response to FOIA requests from Richard Winn, a neurosurgeon who served as chairman of the Department of Neurological Surgery at the University of Washington School of Medicine from 1983 to 2002 and who pled guilty to obstructing the FBI's investigation into possible Medicare and Medicaid fraud for medical services performed by the department's faculty, to records about Winn himself, even though Winn subsequently asked the agency to expand the **scope of his request** to encompass the entire investigation and not just his role in it. Winn made his first FOIA request to the FBI in 2015 to obtain records about himself to use in writing his memoirs. He suggested several possible locations and provided Form DOJ-361 certifying his identity. Four months later, the FBI told Winn that it had located 4,000 potentially responsive pages and that its response would be delayed because of the volume and the need to consult with field offices. After eight months without hearing from the agency, Winn submitted a second FOIA request for his FBI records but added that he was "seeking any and all files related to the investigation of the University of Washington School of Medicine in Seattle, WA. . .beginning in 1990" and explained that he had "made the same request" one year prior. Still not having heard from the agency a year later, Winn submitted a third request requesting his records and again emphasizing his interest in records pertaining to the FBI's investigation of the University of Washington School of Medicine. Two months later, Winn filed suit. The FBI searched for records and located its investigative file pertaining to the School of Medicine investigation. The file pertained to the agency's investigation of Winn but also included information about other suspects in the investigation. The FBI only processed 915 records about Winn. The agency disclosed 691 records in full or in part and withheld 296 pages in full under **Exemption 3 (other statutes), Exemption 7 (law enforcement records)** and **Exemption 6 (invasion of privacy).** Winn did not challenge the agency's search or its exemption claims but argued that he had requested the entire investigative file and that the agency had improperly narrowed his request by processing only those records pertaining to him. Alternatively, he contended that the agency had failed to release all reasonably **segregable** non-exempt information. Winn argued that "although his first FOIA request in March 2015 only described 'his own FBI files,'. . .he later clarified in his subsequent two FOIA requests that he was requesting *all* files relating to the University of Washington School of Medicine investigation" and that his counsel told DOJ in November 2017 and January 2018 that Winn's requests were for all of the investigative records. Indicating that agencies were required to interpret FOIA request liberally, Bates pointed out that "here, Winn's requests were clear: he sought his 'own FBI files.' In his initial request, Winn never mentioned the University of Washington investigation and stated only that he sought his own files. Then, in 2016, he asserted that he was making 'the *same* request' as he had the prior year." Pointing out that Winn had included the FBI's form for certifying his identity, which, Bates observed, "suggested that he was seeking only his own records." Bates noted that "although he stated in his 2016 and 2017 requests that he was 'seeking any and all files related to the

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investigation of the University of Washington School of Medicine in Seattle, WA,' he first asserted the he was seeking just his own files. Hence, Winn only 'reasonably described' his own records, and clarified that he particularly sought his records relating to the investigation." Bates observed that "that Winn eventually informed the FBI that he actually intended to seek all records relating to the investigation, including those that do not pertain to him, does not change the scope of his requests. He only told the DOJ that he wanted the full investigative file after the FBI had searched for records responsive to his original requests and had begun to produce documents." Winn argued that the FBI failed to consider the segregability of the file by processing only those records mentioning Winn. Bates found Winn's real challenge here was to the adequacy of the agency's search, not to the segregibility of records. He pointed out that Winn "appears to challenge only the FBI's failure to review and release *non-responsive* records from the investigative file. But the FBI was not required to search for, process, or release records that were not responsive to Winn's request." (*H. Richard Winn v. U.S. Department of Justice*, Civil Action No. 17-833 (JDB), U.S. District Court for the District of Columbia, Feb. 6)

Judge Ketanji Brown Jackson has ruled that the FBI properly relied upon a classified *ex parte* affidavit to explain why 12 pages pertaining to encounters Eleanor Roosevelt had while she was working at the United Nations after World War II with Soviet officials who may have been intelligence officers were properly withheld under **Exemption 1 (national security)** and **Exemption 7(E) (investigative methods and techniques)**. Christopher Brick, project director and editor for the Eleanor Roosevelt Papers Project, submitted a FOIA request to the FBI for records pertaining to her that had not been disclosed in an earlier 1982 release. The FBI released 338 pages with redactions. Brick appealed only the withholding of the 12 pages. The FBI's decision was upheld by the Office of Information Policy. Brick filed suit and the FBI reprocessed the 12 documents and removed some redactions. But the FBI told Jackson that it could not provide a public explanation of the exemption claims, instead asking for permission to file a classified *ex parte* affidavit. After having reviewed the classified affidavit and the documents *in camera*, Jackson agreed that the documents were exempt and that the agency could not have provided more information publicly. Brick argued that the agency should have been able to provide some information about the investigative techniques used by the agency. Jackson disagreed, noting that "the Court will say that it has given full consideration to Brick's contentions about the government's ability to provide more details regarding the general nature of the methods and techniques at issue and the underlying law enforcement purposes, as well as Brick's deductions about the nature of the redacted information, and the Court finds based on its *in camera* review of the classified declaration and the unredacted records that the government's concerns about potentially harmful disclosure are justified. In other words, this Court agrees with the agency that this case presents a circumstance in which there is a risk of revelation of information that 'compromises legitimate secrecy interests.'" Jackson then found that the FBI's Exemption 3 claim citing the provision protecting sources and methods in the National Security Act was appropriate, as was the Exemption 7(E) claim. There, she pointed out that "in particular, the information at issue was compiled as part of an FBI national security investigation. Furthermore, it is apparent from these same documents that releasing any additional information would in fact disclose law enforcement techniques and procedures." (*Christopher Brick v. Department of Justice*, Civil Action No. 15-1246 (KBJ), U.S. District Court for the District of Columbia, Feb. 19)

Judge Colleen Kollar-Kotelly has ruled that the National Archives and Records Administration properly withheld records under **Exemption 1 (national security)** and **Exemption 3 (other statutes)** from researcher Katalin Kadar Lynn, who was writing a biography of Hungarian diplomat Tibor Eckhardt, concerning the operations of the Grombach Organization, a secret American intelligence operation which functioned between 1942 and 1955 and was led by U.S. Army Captain John Grombach, after consulting with the CIA. Lynn requested 10 classified documents totaling 733 pages. After consulting with the CIA, NARA

withheld the documents in full. Lynn then filed suit. Lynn argued that the 50-year declassification requirement applied to these records. Kollar-Kotelly explained that "documents are exempted from the 50-year declassification requirement if the records could 'clearly and demonstrably' reveal the identity of a confidential human source or intelligence source. Based on [the CIA's] declaration, at least some of the documents would fall under this exception to the 50-year declassification as at least nine of the requested documents contain detailed and identifying information about human sources." She pointed out that the CIA had also exempted information about recruitment methods for human sources from declassification in its 2012 Declassification Guide. Further, Kollar-Kotelly noted, the CIA claimed the documents could be withheld under the sources and methods protection contained in the National Security Act. Lynn cited two cases from the Southern District of New York questioning sources and methods claims by the CIA. However, Kollar-Kotelly found neither case persuasive. Ruling in favor of NARA, she noted that "given 'the special deference owed to agency affidavits on national security matters,' the Court is not prepared to find that Defendant was wrong to withhold the requested documents based solely on Plaintiff's unsupported suspicions and vague challenges." Turning to the issue of **segregability**, Kollar-Kotelly observed that "having reviewed the declaration by [the agency], the Court is satisfied that no reasonably segregable non-exempt information has been withheld," adding that "Plaintiff provides the Court with no reason to question the veracity of this declaration." (*Katalin Kadar Lynn v. National Archives and Records Administration*, Civil Action No. 18-587 (CKK), U.S. District Court for the District of Columbia, Feb. 7)

Judge John Bates has ruled that because Mitchell Stein's appeals in the Ninth and Eleventh Circuit pertaining to his conviction and sentencing for securities and wire fraud connected to his work at Heart Tronics, Inc., a medical device company, are still pending, the SEC may still claim **Exemption 7(A) (ongoing law enforcement investigation or proceeding)** until those appeals are resolved. As part of the government's investigation of Heart Tronics, Stein was convicted in the Southern District of Florida. Stein appealed his conviction to the Eleventh Circuit, which affirmed the conviction but remanded his case to the district court for resentencing. After resentencing, Stein once again appealed to the Eleventh Circuit, where his appeal is still pending. Stein was also found liable in a civil enforcement action brought by the SEC in California. He appealed that decision to the Ninth Circuit and asked the Ninth Circuit to stay his petition until his Eleventh Circuit appeal was resolved. In 2015, Stein submitted a FOIA request to the SEC for the privilege log in the Heart Tronics litigation and information relating to the investigation of individuals whose identities Stein was accused of fabricating to further his alleged crimes. The SEC withheld the privilege log under Exemption 7(A) and told Stein that the information about fabricated individuals had already been disclosed to him. Stein filed an administrative appeal but after his appeal was denied he filed suit. In an earlier ruling, Bates found the privilege log was protected by Exemption 7(A) but noted that the agency had not yet shown that it searched two hard-drives and a number of boxes of hard-copy documents for information about fabricated individuals. Because the Ninth Circuit had now affirmed the district court's decision in the civil case, Stein challenged the continuing validity of the agency's Exemption 7(A) claim. Bates ruled that the Exemption 7(A) claim could continue. He noted that "because the potential for interference remains even when a case is on appeal, the SEC is permitted to withhold law enforcement records 'until all reasonably foreseeable proceedings stemming from that investigation are closed.' Here, it is undisputed that the SEC's civil enforcement action in *Heart Tronics* remains ongoing in the Ninth Circuit. And although Stein contends that the SEC failed to show how disclosure would interfere with the civil proceeding, the Court determined the agency met that burden in its previous opinion." Bates found that the Eleventh Circuit appeal also qualified as an ongoing proceeding for purposes of Exemption 7(A). He pointed out that "because the SEC's civil case and the United States' criminal case are predicated on virtually identical alleged conduct – and indeed may have been developed along 'parallel' investigations using documents 'shared under mutual access agreements' – disclosure of the relevant privilege log documents reasonably could be expected to interfere with the civil proceedings. . ." He

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added that "should Stein succeed in vacating and ultimately reversing his conviction, there is therefore a possibility that the civil judgment in *Heart Tronics* will be partially vacated, generating further litigation." Bates then addressed the agency's search for information about fabricated individuals. Stein argued that the agency had not shown that it searched scanned documents from 21 boxes. Finding the agency's search was adequate, Bates noted that "it is undisputed that the SEC searched those same boxes in responsive records located therein." (*Mitchell J. Stein v. U.S. Securities and Exchange Commission*, Civil Action No. 15-1560 (JDB), U.S. District Court for the District of Columbia, Feb. 19)

Judge Randolph Moss has ruled that while Richard Edelman is eligible for **attorney's fees** because he substantially prevailed on several issues during his FOIA litigation against the SEC he is not entitled to fees because there was no public interest in the records he sought, and the agency had a reasonable basis in law for resisting disclosure. Edelman, a blogger whose website was devoted to the Empire State Realty Trust, which owns the Empire State Building, submitted six FOIA requests to the SEC for records concerning filings by the ERST to the SEC, any communications with Malkin Holdings, a company advocating for conversion of the Empire State Building's ownership structure, and any consumer complaints pertaining to the conversion attempt. Edelman filed suit after the agency failed to respond to five of his requests. In his first ruling in the case, Moss agreed with the agency that it had conducted an adequate search and properly withheld parts of six documents under Exemption 5 (privileges). But Moss ruled against the agency in finding that it had interpreted Edelman's request for consumer complaints too narrowly, that it had not shown that attorney's notes were categorically exempt under Exemption 5, and that he could not determine if a single document was properly redacted under Exemption 5. In his second ruling, Moss agreed with the agency's search for consumer complaints but was unable to resolve whether the agency had properly redacted personally-identifying information from 70 consumer complaints based on Edelman's claim that those individuals had publicly identified themselves in some way as ESRT investors. The third time around, Moss found that the agency had properly disclosed 34 complaints but redacted the names of 31 complainants. Edelman then filed a motion for $100,000 in attorney's fees and costs. Moss found Edelman was eligible for fees. He noted that "the Court's 'judicial order' in *Edelman I* afforded Edelman tangible 'relief' in the form of agency records that he would not have obtained without filing suit, and Edelman, accordingly, 'has substantially prevailed' in this litigation." But he then pointed out that none of the four factors used by courts in assessing entitlement to attorney's fees – public interest in disclosure, personal interest, commercial interest, and reasonableness of the agency's legal position – favored granting Edelman's fee request. Edelman argued that his request forced the agency to disclose thousands of previously undisclosed records. Moss observed, however, that "to the extent that Edelman means that his requests yielded a public benefit because they caused the SEC to produce a large quantity of records, Edelman confuses the 'eligibility' and 'entitlement' inquiries." He added that "the *potential value* of the records sought is a wholly distinct inquiry from the *actual quantity* of records actually received." Moss explained that "the Court does not doubt that a request for records relating to the SEC's review of a transaction might, at times, reveal records of significant public interest. But the Court cannot discern on the present record what that interest might have been in this case, and Edelman's 'bare allegation that [his] request bears a nexus to a matter of public concern does not automatically mean that a public benefit [was] present.'" The SEC indicated that Edelman's family had an ownership interest in the ESRT, but Moss noted that "the relevant question, however, is whether that financial interest is enough to give Edelman an independent basis for seeking the information despite the potential costs of the FOIA litigation." In this case, Moss found that Edelman's personal or commercial interest did not weigh substantially against an award. Moss then reviewed the issues on which Edelman had prevailed. He indicated that the agency's position was not unreasonable as to any of them, even the issue of categorically withholding attorneys' notes. Here, Moss pointed out that "to the contrary, as the Court wrote in *Edelman I*, 'it is an open question within this circuit whether notes taken by individual agency employees in the course of their official duties are 'agency records' subject to FOIA." Moss concluded that "none of the four entitlement factors 'is dispositive.' Here, however,

the fourth factor weighes against awarding fees, and the remaining three factors tip, if at all, modestly in the same direction. As a result, the Court finds that an award of fees is not 'necessary to implement FOIA' and that the cost of litigating a case like this one would not 'dissuade' a FOIA applicant 'who has been denied information from invoking [her] right to judicial review.'" (*Richard Edelman v. Securities and Exchange Commission*, Civil Action No. 14-1140 (RDM), U.S. District Court for the District of Columbia, Feb. 12)

Judge Dabney Friedrich has ruled that while the Department of Commerce is required to provide a privacy impact assessment pursuant to the E-Government Act for its proposed citizenship question for the 2020 Census the agency is not required to prepare a PIA until it actually takes the step of collecting the information, which would occur when the 2020 Census questionnaires were mailed. Although Friedrich noted that the inclusion of such a question had already been temporarily blocked by a district court judge in the Southern District of New York based on constitutional grounds, EPIC brought suit challenging the agency's failure to assess the privacy impact of such a question. Friedrich acknowledged that the agency was required to prepare such an assessment but found that the statutory language tied preparation of a PIA to the initiation of an information collection by an agency and Commerce had not yet reached that point and, thus, was not yet required to prepare a PIA. EPIC argued that the term initiation suggested that the agency was required to do a privacy impact assessment once it committed itself to an information collection. Noting that the dictionary definition of "initiate" referred to "begin" or "commence," Friedrich explained that Commerce and the Bureau of Census "have not yet gone so far. While Secretary Ross decided to collect citizenship information – and announced that decision in a letter that the parties agree constitutes final agency action – the defendants have yet to actually begin obtaining, soliciting, or requiring the disclosure of any citizenship data. Those actions will not occur until the Bureau mails its first set of questionnaires to the public in January 2020." Friedrich pointed out that "the defendants have never argued that the agency must actually 'collect' – that is, obtain or receive – information to have initiated a new collection of information under § 208 [of the E-Government Act]. They acknowledge that. . . 'soliciting' or 'requiring the disclosure' of citizenship data – here, by mailing Census questionnaires – would require a PIA even if no information has been obtained in response." EPIC asserted that "allowing agencies to wait until after deciding to collect information to conduct and publish a PIA would frustrate the purpose of the E-Government Act's privacy provisions." Pointing out that privacy impact assessments were only one of 11 purposes identified in the statute, Friedrich observed that "importantly, § 208 is not a general privacy law; nor is it meant to minimize the collection of personal information. Rather, its express purpose is 'to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government.' Congress's focus on ensuring 'protections' when agencies 'implement' electronic Government shows that § 208 's provisions – including the requirement to prepare PIAs – were not meant to discourage agencies from collecting personal information but rather to ensure that they have sufficient protections in place before they do. It is no surprise, then, that Congress would require agencies to prepare PIAs only before they actually begin to gather, store, and potentially share personal information." (*Electronic Privacy Information Center v. U.S. Department of Commerce*, Civil Action No. 18-2711 (DLF), U.S. District Court for the District of Columbia, Feb. 8)

Judge Colleen Kollar-Kotelly has ruled that the Bureau of Prisons properly responded to a request submitted by Isaac Allen, a federal prisoner who had been convicted of identity theft and tax fraud, for records pertaining to why he lost his privileges to use the Trusted Fund Limited Inmate Computer System. BOP located two special investigative services reports, totaling 11 pages. The agency disclosed two pages in full, seven pages in part, and withheld two pages in full. The last page of the first report indicated the report had four attachments, none of which were in the file. The agency decided to search another SIS file at FCC Coleman, where the incident had taken place. The agency conducted a search at FCC Coleman and located all

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four attachments, consisting of 131 additional pages. The agency disclosed a three-page threat assessment checklist in full and the remainder of the records with redactions made under **Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(E) (investigative methods and techniques)**, and **Exemption 7(F) (harm to a person)**. Allen challenged the **adequacy of the search**, arguing that the agency had failed to originally locate the four attachments. However, Kollar-Kotelly noted that "based on the declarant's explanation that records pertaining to an inmate routinely are maintained in his central file, it is reasonable for BOP staff to have searched the central file for records responsive to plaintiff's FOIA request. The fact that the attachments to the SIS Report were not found in plaintiff's central file does not undermine the reasonableness of the decision to search the central file initially." She pointed out that "defendant accomplished what plaintiff himself demanded – that BOP locate and release the attachments to the SIS Report. If anything, the belated release of the SIS Report's attachments suggests a good faith effort to locate and release records responsive to plaintiff's FOIA request." Allen argued that the SIS Report was not a law enforcement record but instead just monitored his computer activity. Kollar-Kotelly disagreed, noting that "plaintiff is not simply a private individual whose activities are being monitored by a law enforcement agency. Rather, plaintiff is a federal prisoner whose offense of conviction included identity theft. Even if denying plaintiff [computer] access required extra monitoring of his activities, it is apparent that BOP engages in a law enforcement function when it takes steps to detect or prevent criminal conduct by an inmate, particularly an inmate whose incarceration did not deter him from filing fraudulent tax returns and instructing his fellow inmates to do so." The agency withheld some identifying information under Exemption 7(F), including Central Inmate Monitoring information. Kollar-Kotelly noted that "BOP properly withholds under Exemption 7(F) identifying information about individuals who involved themselves in plaintiff's schemes and who cooperated with or were subjects of the SIS investigation." But she indicated that "with respect to CIM information, however, BOP does not demonstrate adequately that its release poses a risk to any individual's life or physical safety." (*Isaac Kelvin Allen v. Federal Bureau of Prisons*, Civil Action No. 16-0708 (CKK), U.S. District Court for the District of Columbia, Feb. 8)

Judge Christopher Cooper has ruled that because EOUSA has not stated that it searched in all locations reasonably like to contain responsive records it has not yet shown that it **conducted an adequate search** for records in response to Vincent Krocka's FOIA request for transcripts and other records related to his 2008 conviction for trying to extort his ex-wife and witness tampering. In processing Krocka's request, the agency located 787 pages, withholding 231 pages. After Krocka filed suit, the agency located 11 additional discs containing recorded jail calls. The agency withheld eight of the discs. Krocka challenged the completeness of the agency's search. Cooper found that "the agency fails to specify something: whether these transcripts were the only transcripts in its possession or whether were others that were withhold pursuant to the public-records policy. If the former, the agency's representations are 'accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.'" Cooper explained that he would "reserve judgment on the adequacy of EOUSA's search pending submission of a supplemental declaration indicating whether the agency searched *all* files and locations likely containing responsive records." The agency withheld the jail calls and letters received by individuals during Krocka's trial under **Exemption 7(D) (confidential sources)**. Krocka argued that the people with whom he had spoken in jail had waived their privacy interest. Cooper observed that "but Krocka's focus on third parties is misplaced. The government avers that it was the local sheriff's office and jail that 'provided the recorded jail calls to federal enforcement authorities based upon an assurance that the records calls would not be disseminated further.' The D.C. Circuit has concluded that investigative information shared by local law enforcement 'with the FBI on the understanding that the FBI would not disclose it to the public, particularly because to do so might reveal the identity of sources' was properly withheld under Exemption 7(D)." Cooper agreed that the letter writers also expected confidentiality. He noted that "the Court has little doubt that the authors of these letters provided information to the AUSA under an implied assurance of confidentiality. Mr.

Krocka was charged with and convicted of witness tampering and sending threatening and extortionate communications, crimes which by definition expose cooperating witnesses to a risk of retaliation and violence." He found that the grand jury transcripts were properly withheld **Exemption 3 (other statutes)** relying on Ruel 6(e) on grand jury secrecy. Cooper pointed out that "these materials clearly would 'tend to reveal some secret aspect' of the grand jury's investigation: the transcripts would reveal the identities of witnesses and the substance of their testimony, and the exhibits and filings would reveal the strategy and directions of the investigation." Krocka argued that because he had paid $295 in estimated costs to process his request, the agency had breached its contract with him by failing to respond in full. Cooper rejected the claim, noting that "instead of forming a binding contract, the letter simply clarified for Krocka the requirements he would need to meet – providing in advance the approximate cost of duplication under federal law – in order for the agency to respond to his FOIA request." (*Vincent J. Krocka v. Executive Office for United States Attorneys, et al.*, Civil Action No. 17-2171-CRC, U.S. District Court for the District of Columbia, Feb. 19)

A federal court in Wisconsin has ruled that the U.S. Postal Service failed to show that disclosure of non-identifying Internet log usage by maintenance department employees at the agency's Processing and Distribution Center in Madison would be a violation of **Exemption 6 (invasion of privacy)**. Kenneth Curran, an electronic maintenance employee at the Center, filed a complaint alleging fraud and abuse by fellow employees who frequently slept on the job or used government computers for non-work-related Internet use. His allegations were investigated by the Inspector General in 2016. OIG found that employees were misusing government computers and recommended better monitoring of employees. The Center agreed to develop an observation log to observe employee behavior at random intervals. Curran alleged that misconduct continued unchecked. He filed a FOIA request asking for the Internet usage logs. The agency denied the request, citing **Exemption 2 (internal practices and procedures)** and Exemption 6. When Curran filed an administrative appeal, the agency dropped its reliance on Exemption 2 but continued to rely on its Exemption 6 claim. Curran then filed suit. The court reviewed one Internet usage log containing 858 pages. The agency argued that because the logs showed non-work-related usage they were not agency records. The court disagreed, noting that the logs "are clearly created by USPS and were subject to its control at the time of Curran's FOIA request. Curran's request for the production of records related to non-work-related internet searches (as opposed to work-related searches) does not somehow render the records something other than 'agency records.'" The court then pointed out that "the employees' privacy interests are substantially diminished if all personal identifying information can be redacted from the records." The court added that "if all personal identifying information is redacted, it would be extremely difficult for a member of the public to link the specific searches to a specific employee." The court observed that "the public has a valid interest in confirming that management at the Madison Processing and Distribution Center is taking corrective action to ensure that maintenance employees are no longer abusing their internet privileges." The court ordered the agency to disclose the supervisor observation logs as well, noting that "the observation logs generally describe what is occurring in the maintenance hallway and [computer room] at random intervals throughout the workday, and do not reveal any personal or intimate information." However, the court agreed with the agency that disclosure of an unrelated investigation of a maintenance manager would constitute an invasion of privacy. (*Kenneth P. Curran v. United States Postal Service*, Civil Action No. 18-88, U.S. District Court for the Eastern District of Wisconsin, Feb. 6)

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