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Washington Focus: The Supreme Court will hear oral arguments in Food Marketing Institute v. Argus Leader Media on April 22, an Exemption 4 case. Although the Supreme Court, in Chrysler v. Brown, 441 U.S. 281 (1979), upheld the right of business submitters to sue government agencies to block disclosure of confidential business information, the Court has never actually considered the meaning of Exemption 4 until now. In the underlying litigation, the U.S. District Court for the District of South Dakota and the Eighth Circuit ruled that FMI had not shown that disclosure of the amount food stores took in from food stamps would cause substantial competitive harm. FMI is asking the Court to abandon the National Parks test on competitive harm for something closer to the customarily confidential standard from Critical Mass. The law firm of Sheppard Mullin Richter & Hampton noted in a piece on what was at stake in the case that government contractors would clearly benefit from a favorable ruling. The law firm pointed out that "government contractors could gain a significant advantage in having their information more broadly protected from disclosure to their competitors should the Supreme Court reject the National Parks test in favor of a plain meaning definition of 'confidential' as 'secret.'"

Court Sharply Criticizes Agency's Search, Exemption Claims

Occasionally a judge finds an agency so ill-prepared to support its summary judgment motion in court that it leaves an observer wondering why the agency left itself so exposed to criticism when either a more thorough search (or even a more detailed explanation of its search) and a more substantive explanation of its exemption claims would probably have persuaded the judge to grant the agency's motion. Even in such egregious circumstances, judges often seem reluctant to completely rule against the agency, frequently allowing agencies further chances to supplement their affidavits to appropriately justify the judge's concerns. Nevertheless, the almost casual approach often exhibited by Department of Justice attorneys representing agencies and the agencies themselves is often astounding.

The case involved a request from the New Orleans Workers' Center for Racial Justice and 11 individual plaintiffs for records concerning the Criminal Alien Removal Initiative run by U.S. Immigration and Customs Enforcement. The Center requested seven categories of records, each of which contained several subcategories. The agency decided that any responsive records would be maintained by the Office of Enforcement and Removal Operations and the Office of Principal Legal Advisor. ERO searched its headquarters, its Secure Communities and Enforcement office, its Field Operations Office, and its New Orleans Office. OPLA was not searched because it indicated that it had nothing to do with the CARI program. The agency disclosed 3,680 pages of documents, as well as spreadsheets of data.

ICE argued that its search was adequate although the request, while focusing on CARI, also referred to undefined programs that were similar to CARI. But Judge Reggie Walton noted that "the Court cannot conclude for several reasons that the Requester's shortcomings justify the scope of the search conducted by the defendants in this case. First, as the plaintiffs correctly note, the defendant failed to timely notify them of any perceived deficiencies in their Request in violation of the defendant's own FOIA regulations in effect at the time." Walton observed that "here, it is undisputed that the defendant did not notify the plaintiff at any point prior to the filing of this action that it believed the Request failed to reasonably describe the records sought or give the plaintiffs an opportunity to address such perceived failures. . .Given the defendant's failure to follow its own administrative process, the Court cannot conclude that any failure on the part of plaintiffs to reasonably describe the records sought supports the defendant's position that it is entitled to summary judgment as to the adequacy of its search." Beyond that, Walton pointed out that "the Court cannot conclude that the defendant's interpretation of the Request was reasonable." Noting that the D.C. Circuit had instructed agencies to interpret requests broadly, Walton observed that "the defendant appears to have ignored this instruction, as it has narrowly interpreted the Request as seeking only records related to CARI." He added that "the defendant's interpretation of the Request as excluding the non-CARI-specific information requested is plainly inconsistent with its obligation to 'construe a FOIA request liberally.'" Walton rejected ICE's claim that the request was unduly burdensome, noting that "the defendant's generic claims that the plaintiffs' Request is 'overly broad' are plainly insufficient to satisfy this burden."

Walton faulted the agency's decision to limit its search to one office. He pointed out that "plaintiffs have identified evidence demonstrating that the defendant 'had reason to know' that at least six other offices may possess responsive documents." Walton indicated that "given other evidence demonstrating that CARI is a nationwide initiative involving ERO's twenty-four field offices, the Court agrees with the plaintiff that 'it strains credulity for [the defendant] to assert that [the] ERO could implement. . .[CARI] without any involvement whatsoever of any ICE headquarters office.'" He also questioned ICE's failure to search its databases because such a search was too burdensome. He observed that "the defendant has failed to identify the specific electronic files or systems to which it is referring or describe in any detail what information they contain and how that information is stored and retrieved. Thus, the Court lacks sufficient information to assess the defendant's claim that a search for these records would require an unreasonably burdensome manual search." He added that "the defendant has failed to provide the Court with an estimate of the time or cost required for a manual search or the total number of files that would need to be searched." Walton noted that the Center had provided evidence that CARI arrests were tracked electronically, indicating that "defendant does not specifically respond to this evidence that it did in fact track electronically whether an arrest related to CARI."

Walton found the agency's search of its email accounts also fell short and indicated that email attachments to responsive emails should also be considered responsive to the request. He found the search terms – which were limited to CARI and Criminal Alien Removal Initiative – insufficient as well. He pointed out that "absent further explanation from the defendant as to why the terms 'CARI' and Criminal Alien

Removal Initiative' are sufficient to locate all responsive records, the Court cannot conclude that the use of these terms alone is adequate." However, Walton disagreed with the Center's contention that the failure of the agency to find certain records suggested that its search was insufficient.

The agency withheld a number of records under Exemption 5 (privileges). Walton criticized many of the agency's deliberative process privilege claims, finding that many of them were undercut by the agency's lack of detailed explanations. The agency withheld personally-identifying information under both Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records). Walton noted that while redactions made under Exemption 7(C) appeared in context to relate to law enforcement records, the agency's descriptions were far too vague. He pointed out that "to the extent that the defendant seeks to continue to withhold the redacted information contained in these records pursuant to Exemption 7(C), it must supplement its *Vaughn* Index too provide the information necessary for the Court to determine wh3ther these records satisfy that exemption's requirements." He found the agency's claims under Exemption 6 to be equally wanting. Rejecting the agency's categorical approach to withholding personally-identifying information, Walton observed that "while public disclosure of a government employee's access to certain information could pose a real risk of harassment, the existence or extent of such a risk necessarily depends on the sensitivity of the information to which the individual has access and the extent of that access. However, the defendant has failed to provide any detail regarding the 'official law enforcement investigation information' at issue or the nature of the government employees' access to that information." Walton acknowledged that the agency's burden of proof to show that records were protected under Exemption 7(E) (investigative methods or techniques) was low but indicated that ICE had not adequately supported those claims. Walton pointed out that "absent any meaningful description of the information withheld or the 'databases' or 'systems' to which the withheld information would allegedly permit access, the Court is unable to say that any such risk is 'self-evident.'" (*New Orleans Workers' Center for Racial Justice, et al. v. United States Immigration & Customs Enforcement*, Civil Action No. 15-431 (RBW), U.S. District Court for the District of Columbia, Mar. 4)

Views from the States…

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

Alabama

The supreme court has ruled that the board of the Public Education Employees' Health Insurance Program violated the Open Meetings Act when it held a closed morning session ostensibly for training board members and discussed premium increases for teachers that were adopted during the board's afternoon open meeting. Although the board intended the morning session to be a closed training session for board members, the session strayed into a discussion of whether premiums should be increased or whether the board should instead rely on money from a trust fund to make up its deficit. During the discussion, several board members posed questions. In the afternoon session, the premium increase was approved. Sheila Remington, president of the Alabama Education Association, filed suit, alleging that the board had improperly discussed the premium increases during its closed session and that those discussions had influenced its decision to approve the increase during the afternoon open session. At its next open meeting six months later, the board voted to rescind the premium increase. Eight months later, the trial court ruled in Remington's favor, finding that the closed session had violated the Open Meetings Act. The board then appealed to the supreme court. While the

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appeal was pending, the board met again and approved a new premium structure. Before the supreme court, the board argued that the changes in the premium structure mooted Remington's request for injunctive relief. The supreme court agreed with the board on this point, noting that "to the extent the [trial] court ordered injunctive relief, it is clear that, beginning May 1, 2018 and going forward, any controversy was no longer present after the Board voted during an open meeting to reduce the premium rates effective May 1, 2018. Thus, the need for injunctive relief occurring on or after May 1, 2018, is now moot." But the supreme court agreed that the board had violated the Open Meetings Act by discussing the premium increase during the closed session. The board argued that the morning meeting was properly closed under an exception covering training. The supreme court noted that "we cannot conclude that the morning session was merely a 'training program.' It is clear that the staff presentation regarding the same matters that would be considered for a vote later in the day and that included proposals to increase insurance premiums, does not fall within the 'training program' exception." The supreme court also rejected the board's claim that no deliberations took place during the closed session. The supreme court pointed out that "it is well settled law that a question, by itself, may be posed to persuade others to lean one way or another." (*Sarah S. Swindle, et al. v. Sheila Hocutt Remington*, No. 1161044, Alabama Supreme Court, Mar. 8)

North Dakota

The supreme court has ruled that Riley Kuntz's open records act suit against the State of North Dakota for delaying its release of a memorandum of understanding between the State and the FBI allowing the FBI access to the State's drivers' license database may continue because the State has failed to show that it made attempts to rectify the harm to Kuntz from its delay in disclosing the MOU. After Kuntz requested records on the agreement, various state agencies denied his request. He then made a federal FOIA request to the General Accounting Office. GAO confirmed to Kuntz that the agreement existed but said it would not disclose records originating from another agency. Kuntz then submitted a request to the Attorney General asking him to find the agency was in non-compliance with the open records act. The Attorney General responded that agencies did not violate the statute when they responded that Kuntz's request was not specific enough for them to locate the record. Kuntz then filed suit. Kuntz complained that the Attorney General's practice of providing unsigned affidavits by mail was improper. The trial court upheld the policy and the supreme court agreed that the practice was appropriate. However, the supreme court found the trial court erred in dismissing Kuntz's claim under the open records act. The supreme court pointed out that the open records act required that "a violation be 'corrected' *and* that no person be 'prejudiced or harmed' by the violation." The supreme court observed that "while an unreasonably delayed disclosure that does not cause prejudice or harm may be 'corrected' by belatedly disclosing the requested document, for purposes of the [statute], the remedies for a violation remain available when an unreasonable delay causes the requester prejudice or harm. In other words, for a requester to access this section's remedies, when an unreasonable delay in providing records causes the requester prejudice or harm, the violation cannot be corrected by merely providing the records. Correcting an unreasonable delay would necessarily require also 'correcting' any actual prejudice or harm, if possible." (*Riley S. Kuntz v. State of North Dakota, et al.*, No. 20180135, Supreme Court of North Dakota, Feb. 21)

The Federal Courts…

Judge Christopher Cooper has ruled that the General Services Administration has failed to show that records pertaining to the appraised value of the FBI's Headquarters Building in Washington are protected by **Exemption 5 (privileges)**. In a case brought by CREW to find out more about the agency's decision not to relocate the FBI Headquarters, he began by noting that the Findings & Determination document prepared by GSA "is plainly not predecisional" because it had been prepared by senior agency officials. He explained that

"totally missing from the document are the hallmarks of predecisional give-and-take. Such as a recommendation to take a particular course of action or a weighing of alternatives. The F&D instead contains exactly what its title suggests it contains: The agency's determination and the findings that support that support that determination. The document is announcing what the agency *is* doing (and why), not arguing for what it *should* be doing." He pointed out that "all signs indicate that its purpose was 'to support a decision already made.' One need not look beyond the document's title – 'Findings and Determination' – and its date – July 10, 2017, the same day GSA decided to cancel the swap-relocation project – to discern that the document explains a decision already made rather than discusses one still in the works." Cooper found GSA's attempts to characterize the F&D as part of a larger ongoing deliberation on renovating the FBI's headquarters unconvincing. He noted that "if the agency believed that canceling the swap-relocation project was distinct from renovating the current facility, that suggests that the agency does not lump together the various proposals to achieve the FBI's goal of a larger, more modern, and more secure headquarters – but instead treats each means to achieving that end as a discrete proposal to be approved or declined." He observed that "the fact that an alternative plan could be put forward later on does not render predecisional the decision to call off the swap-relocation plan." GSA also suggested that disclosure could cause harm to its bargaining position when pursuing plans for the FBI Headquarters Project. Cooper, however, noted that "that may be true, but it does not rebut CREW's argument that the F&D is post-decisional and therefore not properly protected under Exemption 5." (*Citizens for Responsibility and Ethics in Washington v. United States General Services Administration*, Civil Action No. 18-377 (CRC), U.S. District Court for the District of Columbia, Mar. 5)

Amy Berman Jackson has ruled that the public interest in knowing the identities of three individuals named in emails pertaining to the creation of the Presidential Advisory Commission on Election Integrity outweighs their *de minimis* privacy interests under **Exemption 6 (invasion of privacy)** and should be disclosed in response to a FOIA request from the Campaign Legal Center. CLC submitted a request to the Office of Information Policy in February 2017, shortly after President Donald Trump had made allegations of massive voter fraud. The Commission was created by Executive Order in May 2017 and disbanded in January 2018 after 44 states had refused to provide the requested data on voter registration. OIP completed its search for records responsive to CLC's request, locating six pages, including an email chain, which was redacted under Exemption 6. CLC filed an administrative appeal, which was denied. After CLC filed suit, OIP reconsidered its withholding and released the names of two individuals identified in the email chain – Hans von Spakovsky, who authored the original email and was identified as the Manager for the Election Law Reform Initiative at the Heritage Foundation, and Ed Haden, identified as a private attorney who previously worked for former Sen. Jeff Sessions (R-AL). In the email, von Spakovsky appeared to be lobbying for a position on the committee for himself and Haden. But OIP continued to argue that the others identified in the email chain had a privacy interest that outweighed any public interest in disclosure. Jackson agreed that based on D.C. Circuit precedent, the other individuals had more than a *de minimis* privacy interest, necessitating an exploration of the public interest in disclosure. OIP contended that since there was no evidence that von Spakosky's email was acted upon CLC had failed to show a sufficient public interest in disclosure. But Jackson pointed out that "but FOIA does not require the plaintiff to prove that the information was 'acted upon.' The operative question is whether disclosure would advance FOIA's purpose of helping members of the public stay informed about 'what their government is up to.'" She explained that "given the public interest in the formation of the Commission, and the fact that von Spakovsky's appointment followed the transmittal of the email, there is a public interest in knowing who he asked to weigh in that outweighs the individual's weak privacy interest in shielding that information." She found the public interest in disclosure also outweighed the minimal privacy interests of the other two individuals as well, noting that "the public has an interest in knowing who may have attempted to influence the appointment process, and whether the [unidentified individuals were] ultimately named a Commissioner or added to the Administration." The

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agency also withheld a notation on von Spakosky's travel plans under Exemption 6. Jackson agreed with the agency that this information was protected under Exemption 6, observing that "von Spakovsky has a privacy interest in his personal travel plans and disclosure of his schedule or destination would reveal nothing about the Government's operations." (*Campaign Legal Center v. United States Department of Justice*, Civil Action No. 18-0340 (ABJ), U.S. District Court for the District of Columbia, Mar. 15)

Judge Christopher Cooper has ruled that the FBI improperly narrowed a request from Judicial Watch for records concerning the assignment of former FBI Deputy Assistant Director Peter Strzok to work on Special Counsel Robert Mueller's investigation of Russian interference in the 2016 presidential election and his subsequent reassignment to Human Resources. In response to Judicial Watch's request, the FBI searched Strzok's email account for records containing the terms "assignment," "reassignment," and "appointment" in conjunction with the phrase "special counsel." This search yielded 19 responsive pages and attachments and the FBI disclosed 13 pages and withheld three entirely. Judicial Watch challenged the **adequacy of the agency's search**, arguing that its search was unreasonably narrow. Cooper agreed, pointing out that "this Court has noticed a pattern of. . .myopia plaguing FOIA reviewers in some of our federal agencies." Turning to the FBI's search in this case, Cooper noted that "here too, the FBI's search was overly cramped. Notwithstanding that Judicial Watch's requested referred to Mueller by name, the Bureau search only for the term 'special counsel.' But surely one would expect that Agent Strzok and other FBI personnel might use the Special Counsel's name – 'Mueller' – rather than his title when discussing Strzok's assignment to the Russian investigation, especially in informal emails. Another logical variation on 'special counsel' is its commonly used acronym 'SCO,' which appears to be used within the Special Counsel's Office itself, as reflected by the documents that the FBI uncovered and produced to Judicial Watch. Tellingly, the government used the acronym 'SCO' in its briefing in this case. The FBI's failure to search for these obvious synonyms and logical variations ran afoul of its obligation to construe FOIA requests liberally and conduct a search reasonably likely to produce all responsive documents." Cooper found the agency had improperly narrowed its search for emails by only searching Strzok's personal email account. Cooper observed that "surely, however, other people within the Bureau are likely to have discussed the assignment or reassignment via email without having shared those discussions with Strzok." Cooper pointed out that Strzok was a highly-regarded agent who had recently worked on two high-profile investigations. He noted that "common sense suggests that some of this discussion likely took place in emails exchanged by Agent Strzok's supervisors and other FBI officials involved in those decisions." Questioning the agency's decision to limit its search to Strzok's email account only, Cooper indicated that "because one would naturally expect others to have engaged in those communications, including without looping in Strzok, it was not reasonable (let alone eminently so) to search only Agent Strzok's emails." The FBI supported the adequacy of searching only Strzok's emails by explaining that it found no leads during its search that would have suggested a need to search elsewhere. But Cooper observed that "the purported absence of 'leads' in Agent Strzok's emails does not suggest the absence of other responsive emails: it comes as no surprise that colleagues who communicated with Strzok about the assignment might not indicate to him that they were communicating with others about the same topic." Cooper also found fault with the agency's decision not to search for text messages. Cooper noted that "the Court disagrees, at least with respect to Agent Strzok's documented use of text messages. Given that use, it strikes the Court as reasonably likely that he discussed his assignment to the Special Counsel's Office in text messages – which again is the standard for assessing an agency's selection of search locations." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 17-02682 (CRC), U.S. District Court for the District of Columbia, Mar. 11)

A federal court in New York has ruled that the public interest in knowing the identities of a U.S. Attorney and a supervisory Assistant U.S. Attorney whose consensual affair contributed to a hostile work

environment for other employees outweighs the privacy interest of the two individuals under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, but that another allegation of misconduct by the U.S. Attorney involving another employee that was unsubstantiated should remain protected. BuzzFeed requested a copy of the full Office of the Inspector General investigation report entitled "Findings of Misconduct by a Former United States Attorney for Having an Inappropriate Relationship with a Subordinate" after an investigative summary was posted on the OIG's website in May 2017. The agency disclosed the report with redactions under **Exemption 6 (invasion of privacy)** and Exemption 7(C). Judge Vernon Broderick indicated that since the records qualified under the more protective Exemption 7(C), he only needed to review whether the redactions were appropriate under the law enforcement privacy exemption. Broderick agreed with the agency that the U.S. Attorney and the supervisory AUSA had more than a *de minimis* privacy interest, but that BuzzFeed had shown a significant public interest in disclosure of their identities. He noted that both attorneys qualified as high-level officials, pointing out that "the Supervisory AUSA reasonably falls closer to a 'senior manager' in the hierarchical continuum." As to the degree of misconduct, Broderick observed that "the consequences of the wrongdoing directly impacted the work environment of the Office. Indeed, the actions of the U.S. Attorney and Supervisory AUSA led to the filing of complaints and could have led to lawsuits." While the government attempted to downplay the seriousness of the charges, Broderick pointed out that "the improper relationship was so open and obvious that it caused employees within the Office to feel powerless, embarrassed, and distracted, and resulted in a work environment that some described as unbearable and hostile." Broderick also found disclosure of the identities of the two attorneys would shed light on government operations and activities. He noted that "the information sought by Plaintiff would shed light on the misconduct of managerial-level employees, how that misconduct affected their abilities to fulfill their professional responsibilities, and the impact that misconduct had on the operation of the Office." He found that disclosure of the identities of the two attorneys was in the public interest. 9However, he rejected BuzzFeed's claim that identifying information about another allegation that the OIG found unsubstantiated should be disclosed as well. He noted that "Plaintiff has proffered no such evidence of negligence or impropriety by the OIG in investigating the additional allegations or preparing the Report beyond 'bare suspicion.'" (*BuzzFeed, Inc. v. U.S. Department of Justice*, Civil Action No. 17-7949 (VSB), U.S. District Court for the Southern District of New York, Mar. 11)

A federal court in California has ruled that there remains a factual dispute on whether or not information contained in a small-business subcontracting plan submitted to the Department of Defense by GE in protected by **Exemption 4 (confidential business information)** which may require the court to hold a trial on the issue. Ruling in the latest of a series of suits brought by the American Small Business League seeking small-business subcontracting plans submitted by large defense contractors, the court also found that the plans were not protected by the Procurement Integrity Act, which the agency argued qualified under **Exemption 3 (other statutes)**. The court also found that records submitted by Sikorsky during the first round of litigation over the disclosure of small-business subcontracting plans were protected by **Exemption 5 (privileges)**, specifically the common interest doctrine. In 2013, ASBL filed suit to obtain Sikorsky's 2013 small-business subcontracting plan. That case went to the Ninth Circuit and was remanded, resulting in Sikorsky's plan being disclosed in 2018 over the company's objection. The current litigation involved a request by ASBL for GE's 2014 plan. The agency withheld records under Exemption 3, Exemption 4, Exemption 5, and Exemption 6 (invasion of privacy). ASBL challenged the agency's exemption claims as well as the **adequacy of the search**. ASBL argued that the search was inadequate because the agency found some records months after its initial disclosure. Approving the search, District Court Judge William Alsup noted that "here, the government readily acknowledged certain missing documents once notified by plaintiff and promptly took steps to address the errors, including voluntarily redoing its search for documents from custodians located within the United States Attorney's Office. . ." The agency redacted records pertaining to Sikorsky's actual subcontracting

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performance and compliance as "source selection information" under the PIA, which protects source selection information before a contract is awarded. Alsup rejected that claim, pointing out that "the details of [Sikorsky's] actual subcontracting performance and compliance relate to contracts *already* awarded to [Sikorsky]." He observed that "the government's broad assertion that it can withhold redacted information effectively *ad infinitum* however, eviscerates any distinction between *pre*- and *post*-award of a contract – a distinction the PIA clearly contemplates – thereby rendering the statutory language 'before the award' meaningless." Turning to Exemption 4, Alsup, pointing to the conflict between the agency and ASBL on the issue of whether disclosure would cause competitive harm, noted that "issues of material fact exist as to Exemption 4. . . [T]he parties have submitted competing declarations as to whether disclosure of requested information would cause competitive harm" and added that "additionally, the parties have submitted competing declarations as to whether disclosure would impede the government's information-gathering ability." Alsup did nothing more than deny the parties' summary judgment motions but without any likelihood of an informal settlement he will probably need to hold a trial on the issue. Citing the Fourth Circuit's decision in *Hunton & Williams v. Dept of Justice*, 590 F. 3 272 (4th Cir. 2010), in which the Fourth Circuit found that once DOJ intervened on the side of RIM, which manufactured the BlackBerry, to defend against a patent infringement claim any discussions between DOJ and RIM were privileged by the common interest doctrine, Alsup found the common interest doctrine applied here as well to protect discussions between DOD and Sikorsky on the issue of whether its information was protected by Exemption 4. In finding *Hunton* persuasive, Alsup rejected a more recent holding in *Lucaj v. FBI*, 852 F.3d 541 (6th Cir. 2017), in which the Sixth Circuit rejected DOJ's claim that an international agreement to honor requests for assistance in law enforcement matters was protected by the common interest doctrine. But Alsup pointed out that the agency had to show the existence of a joint defense agreement before it could claim the privilege in this case. (*American Small Business League v. Department of Defense and Department of Justice*, Civil Action No. 18-01979-WHA, U.S. District Court for the Northern District of California, Mar. 8)

A federal court in New York has ruled that the Department of State has justified most of its **Exemption 5 (privileges)** claims concerning records on off-the-record briefings conducted by agency officials but that the agency has failed to conduct an **adequate search** for transcripts of briefings created by other governmental departments that involved State Department personnel. In response to NYU journalism professor Charles Seife's request for records pertaining to off-the record briefings, State provided transcripts of briefings created by the State Department but not those produced by other agencies under circumstances in which State participated but was not the lead agency. The State Department searched its database of stenographers' files and located and disclosed 452 transcripts. But the agency had no obvious repository for transcripts created by other agencies. The agency decided to search the email account of the Deputy Director of the Bureau of Public Affairs Office of Press Relations, explaining that she subscribed to White House and Defense Department releases but only kept the White House releases. The search located two transcripts. The court found this search was too limited, noting that "there is no reason to presume that the Deputy Director's email account was even indicative, let alone panoptic, of the other PA/PSR employees' accounts – nor has any evidence been presented suggesting that to be the case." Ordering the agency to conduct a more detailed search, the court indicated that "a 'reasonably calculated' search might, for example, include a search of all the current PA/PSR employees who were employed during the period" covered by the request. In its prior opinion, the court found that the agency's *Vaughn* descriptions of various deliberative process claims were insufficient. Reviewing those claims again in light of the agency's supplemental affidavits, the court agreed that court agreed that emails; talking points, anticipated questions and proposed answers, and draft open statements; and draft rollout schedules were protected by the deliberative process privilege. The court rejected a handful of claims made by the agency, including one in which the agency said that it was uncertain whether a draft edit had been accepted. The court noted that "the State Department has indicated that these documents are 'not in final form,' however, that, alone, is insufficient to demonstrate that these documents reflect

continuing deliberations as to evolving policy." The State Department continued to withhold the identities of three briefers who were still working for government under **Exemption 6 (invasion of privacy)**, although it had released the identities of briefers who were no longer working for the government. The court found that "the public's interest in the disclosure of the remaining withheld identities is diminished, while the serious privacy concerns at issue remain palpable." (*Charles Seife v. United States Department of State*, Civil Action No. 16-7140-GHW, U.S. District Court for the Southern District of New York, Mar. 6)

The D.C. Circuit has ruled that the district court erred when it dismissed all of the section (a)(2) **affirmative disclosure** claims made by People for the Ethical Treatment of Animals and a coalition of animal rights organizations challenging the decision of the Animal and Plant Health Inspection Service to remove and repost reports required by the Animal Welfare Act to address concerns that the original reports provided too much personally-identifying information about small family businesses. In response to APHIS's actions, PETA and the other animal rights organizations filed suit, arguing that the policy violated section (a)(2) of FOIA requiring agencies to make publicly available certain types of records. The district court found that APHIS's removal and reposting of the reports was a one-time policy and that there was no likelihood that the agency would do so again in the future. The district court also did not address PETA's challenge to the agency's exemption claims for the reposted materials, finding that PETA's complaint did not include those redactions. On these points, the D.C. Circuit disagreed with the district court. Addressing the issue of whether or not PETA had challenged the redactions in the reposted material, the D.C. Circuit noted that "PETA alleges that 'defendants' decision to remove from APHIS's website the *information* that is required to be affirmatively disclosed. . .violates FOIA,' and its 'actions in removing such *information*. . .injure Plaintiffs by denying them immediate access to such records.' We read the complaint as demanding an order requiring USDA to repost documents in their *original, pre-takedown form*." The court added that "we thus remand to the district court to take up plaintiffs' objections to new redactions from the reposted records on the merits." The D.C. Circuit found that APHIS had not sufficiently justified its claims that it would not take down such information in the future. The court pointed out that "neither the USDA's letter, nor the representations in its briefing or at oral argument exhibits this level of clarity about inspection reports and entity lists." But the D.C. Circuit indicated that the agency could remedy the situation, observing that 'a declaration by (or on behalf of) USDA officials that the agency intends to post documents in the inspection reports and entity list categories on an ongoing basis will moot PETA's claims." (*People for the Ethical Treatment of Animals, et al. v. United States Department of Agriculture and Animal and Plant Health Inspection Service*, No. 18-5074, U.S. Court of Appeals for the District of Columbia Circuit, Mar. 15)

Judge Timothy Kelly has ruled that the Department of State properly issued a *Glomar* response neither confirming nor denying the existence of records in response to a request from Judicial Watch for records made available to former UN Ambassador Samantha Powers pertaining to the intelligence community's assessment that Russia interfered with the 2016 presidential election, citing both **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Kelly agreed that the agency had shown that disclosure of the existence or nonexistence of records on the intelligence community's assessment that Russia had interfered in the 2016 presidential election was likely to cause harm to the national security. He pointed out that "unless State relied on a *Glomar* response here, multiple FOIA requests aimed at different senior government officials could end up allowing 'an adversary to map out which of these government officials had responsive records. In other words, a U.S. adversary could potentially piece together key classified information about how the United States government conducts counterintelligence efforts based on responses to FOIA requests like this one.' This is, as State argues, a version of the 'mosaic' theory, which courts have long upheld as a basis for nondisclosure in the national security context." Judicial Watch argued that Powers did not have a known

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intelligence function. Kelly found the claim unconvincing, noting that he had no basis "to question the reasons this Cabinet-level official at State may have had to request this intelligence." He also rejected Judicial Watch's claim that the assessment pertaining to Russia was well-known because of media reports. He pointed out that "these reports do not cast doubt on State's asserted reasons why a *Glomar* response is necessary to protect sensitive intelligence interest from harm to the national security. Nor do they necessitate any response from State, since doing so would reveal the type of information its *Glomar* claim is intended to forestall." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 18-300 (TJK), U.S. District Court for the District of Columbia, Mar. 13)

A federal court in New York has ruled that the FBI conducted an **adequate search** for records concerning former Fox News head Roger Ailes even though it did not locate records pertaining to an ongoing Department of Justice investigation of Fox for its settlement payments for multiple charges of sexual harassment while Ailes was at Fox. Gizmodo Media requested records on Ailes after he died, specifically identifying the investigation of Fox for its payments as one area of interest. The FBI conducted a search of its Central Records System index and its Universal Index and located 147 pages under Ailes' name. After Gizmodo filed suit, the FBI conducted a second search using its Sentinel system, finding another three files consisting of 31 additional pages. The agency disclosed 113 pages and withheld the rest under various exemptions. Gizmodo did not challenge the agency's exemption claims but questioned the adequacy of its search, arguing that searching only under Ailes' name was insufficient. The FBI claimed that any records about Ailes would have been cross-referenced under his name. The court agreed with Gizmodo that its request was broader than just records on Ailes, including records about the ongoing investigation of Fox. But the court found that searching under Ailes' name would have likely produced any records on DOJ's investigation of Fox, noting that "given the prominence of Ailes in that investigation, a search of reference entries in CRS using Roger Ailes' name is 'reasonably calculated to discover' documents relating to the Fox News investigation." The court rejected Gizmodo's claim that *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885 (D.C. Cir. 1995), in which the D.C. Circuit held that the agency had to search more broadly for records on H. Ross Perot, was applicable. The court observed that the *Nation* decision "does not state that, where a repository of records *can* be index-searched, the government must do more than an index search to have conducted an adequate search. Here, the CRS can be index-searched, and neither party has identified any collection of files that the FBI did not search because it could not do so via an index search." (*Gizmodo Media Group, LLC v. Federal Bureau of Investigation*, Civil Action No. 17-5814 (ER), U.S. District Court for the Southern District of New York,
Mar. 5)

Judge Timothy Kelly has ruled that the Executive Office for U.S. Attorneys has not shown that **Exemption 3 (other statutes)** protects the dates on which a grand jury's term was extended because it does not reveal anything about matters that occurred before the grand jury. Ifeanyichukwu Abakporo, a federal prisoner convicted of mortgage fraud, requested records showing the date on which the term of the grand jury in the Southern District of New York that indicted him was extended. The agency denied his request, citing Rule 6(e) on grand jury secrecy. Abakporo filed an administrative appeal, which was denied. He then filed suit. In court, the agency continued to argue that the dates were protected under Rule 6(e). Kelly found no reason to assume that the dates would reveal anything about matters occurring before the grand jury. He pointed out that "the records and information at issue appear to concern the grand jury's administrative procedures, as opposed to the substance of any specific investigation. As a result, it is hard to see how those materials would tend to reveal information [about the workings of the grand jury]. This is all the more so because the government has already disclosed that the relevant grand jury was 'empaneled on or about September 22, 2011, for an 18-month term and that its term was extended for three additional six-month terms,

for a total term of 36 months.' The specific dates the grand jury's term was extended, and any related court orders doing so, would appear to reveal little beyond that already-public information." He added that the agency's affidavit "does not describe how disclosing the information at issue would pierce the cloak of secrecy, or why doing so would reveal secret grand-jury information to Abakporo." The agency argued that the D.C. Circuit had ruled in *Murphy v. Executive Office for U.S. Attorneys*, 789 F.3d 204 (D.C. Cir. 2015), that information revealing when a specific grand jury was empaneled was protected by Rule 6(e) because Murphy could use the information to reverse-engineer when certain witnesses appeared before the grand jury. Kelly found *Murphy* inapplicable, pointing out that "the information at issue is not specific to Abakporo's case, so there does not appear to be a risk that it would tend to reveal anything about the complexity, scope, focus or direction of any distinct investigation." (*Ifeanyichukwu Abakporo v. Executive Office for United States Attorneys*, Civil Action No. 18-846 (TJK), U.S. District Court for the District of Columbia, Mar. 5)

A federal court in Maryland has issued two separate decisions in resolving FOIA litigation brought by former FEMA FOIA Officer Terry Cochran, challenging whether the agency conducted an **adequate search** for Cochran's security clearance and medical leave records. In response to Cochran's FOIA request for records pertaining to her security clearance, the agency disclosed 37 pages. The agency disclosed 96 pages in response to her request for records related to her family and medical leave. Cochran challenged the agency's search in both instances, arguing that the agency had failed to produce certain records that should exist. Cochran claimed she had not received any records indicating that her security clearance had been closed. The agency explained that when an employee resigns, his or her security clearance is not closed but deactivated so the agency had no records showing that Cochran's security clearance had been closed. The court pointed out that "plaintiff has failed to demonstrate that the documentation she seeks actually exists. She provided no support for her assertion that FEMC 'must' have the document in its possession." Turning to her request for medical leave records, Cochran claimed the agency had failed to provide records of treatment she had received as well as an EEO complaint. But the court found that Cochran's allegations of existing records did not undercut the adequacy of the agency's search. The court noted that "in light of the FOIA procedure and production outlined in the [agency's declaration] the record amply demonstrates that FEMA has met its FOIA obligations here." (*Terry Cochran v. Department of Homeland Security, Federal Emergency Management Agency*, Civil Action No. 18-00201-ELH, U.S. District Court for the District of Maryland, Mar. 5 and Mar. 11)

A federal court in New Mexico has ruled that the Department of Labor properly withheld records concerning Eddie Beagles' complaint against his former employer, the New Mexico Department of Workforce Solutions. The agency disclosed 80 pages with redactions and withheld 18 pages entirely under **Exemption 4 (confidential business information), Exemption 5 (privileges), Exemption 6 (invasion of privacy)** and several subparts of **Exemption 7 (law enforcement records)**. The agency also told Beagles that it would need to send some records for predisclosure notification. Beagles filed an administrative appeal, requesting the records subject to predisclosure notification. The agency disclosed seven pages in response to Beagles' administrative appeal. Beagle filed suit, arguing that the agency should disclose the 18 pages it had withheld in full. The court agreed with the agency that Beagles had **failed to exhaust his administrative remedies** as to the rest of the withheld records because his administrative appeal only requested access to those records that were part of the agency's predisclosure notification process. The court further found that prudential considerations pertaining to jurisdiction counseled in favor of a finding that Beagles had failed to exhaust his administrative remedies by limiting his appeal to the predisclosure notification records. The court upheld the agency's Exemption 6 claims and agreed that Beagles had not substantially prevailed in the case. (*Eddie*

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Beagles v. U.S. Department of Labor, Wage and Hour Division, Civil Action No. 16-506-KG/CG, U.S. district Court for the District of New Mexico, Mar. 7)

Judge Trevor McFadden has ruled that the Executive Office for U.S. Attorneys properly responded to prisoner Durrell Jackson for records concerning search warrants for a package delivered in Waterloo, Iowa which was part of his prosecution and conviction. In response to Jackson's request, EOUSA located 93 pages and disclosed 91 pages with redactions under **Exemption 6 (invasion of privacy)**. While Jackson challenged the **adequacy of the agency's search**, McFadden pointed out that Jackson's only complaint was that the agency did not find the search warrant. Upholding the agency's search, McFadden noted that "Mr. Jackson offers no reason not to accord EOUSA's supporting declarations the customary 'presumption of good faith,' and he fails to rebut these declarations with anything more than purely speculative claims about the existence and discoverability of other documents. And an agency that neither possesses nor controls responsive records does not violate FOIA by failing to release them." The agency withheld identifying information about third parties under Exemption 6. Finding the agency's redactions appropriate, McFadden observed that "balancing [the individuals' privacy] interest against the public's interest in disclosure is simple. . .[Jackson] identifies no public interest, compelling or otherwise, why such third-party information should be disclosed." (*Durrell K. Jackson v. Executive Office for United States Attorneys*, Civil Action No. 17-02208 (TNM), U.S. District Court for the District of Columbia, Mar. 5)

A federal court in Missouri has ruled that Jack Jordan's request that the court overturn a previous ruling against him in the U.S. District Court for the District of Columbia pertaining to his FOIA requests to the Department of Labor should be denied. Jordan submitted two FOIA requests to the Department of Labor – one for letters sent by the Office of the Administrative Law Judges to Jordan and the other for emails sent by employees of DynCorp International with the subject line "WPS – next steps & action.'" DOL asked the court to dismiss the case, arguing it was duplicative of litigation Jordan brought in U.S. district court in Washington, D.C. in which Judge Rudolph Contreras ruled in favor of the agency. The court agreed with the agency that Jordan's suit should be dismissed. The court noted that "plaintiff has not demonstrated he did not have a fair opportunity to argue the issues in the D.C. District Court, or this Court, and he has not shown that granting his motions is necessary to correct a significant error." (*Jack Jordan v. U.S. Department of Labor*, Civil Acton No. 18-06129-SJ-ODS, U.S. District Court for the Western District of Missouri, Mar. 11)

A federal court in Connecticut has ruled that the Department of Veterans Affairs properly withheld the identity on an individual who alleged that he was threatened by John Pinnicchia under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Pinnicchia was suspended with pay pending an investigation of the charges. The police investigated the incident and Pinnicchia was exonerated but his accuser was not identified. Pinnicchia made a request for the police report. The VA provided a copy of the report with redactions, including the accuser's identity. Pinnicchia argued that the investigation involved only a workplace incident involving government workers and that there was no inherent privacy interest in the records. The court rejected Pinnicchia's claim that disclosure would be in the public interest. Instead, the court noted that "the unredacted information already informed Mr. Pinnicchia of what 'the government was up to;' it was investigating this complaint about his alleged conduct, a complaint ultimately dismissed in his favor. As a result, Mr. Pinnicchia's request is not a matter of public interest in the activities of government, but rather a personal one, an interest that does not further the public's interest when weighed against the countervailing privacy interests at issue." (*John Pinnicchia v. U.S. Department of Veterans Affairs*, Civil Action No. 17-2139 (VAB), U.S. District Court for the District of Connecticut, Mar. 13)

A federal court in Florida has ruled that the magistrate judge erred in finding that the U.S. Army had justified its withholding claims in a *Vaughn* index prepared in litigation bought by Jason Sartori. Judge M. Casey Rodgers initially assigned Sartori's case to a magistrate judge to assess the adequacy of the agency's exemption claims. Rodgers noted however, that he found "two instances where U.S. Army failed to provide an explanation for withholding information under 5 U.S.C. § 552(b)(5). Therefore, the Magistrate Judge's finding was clearly erroneous, and U.S. Army is directed to file an updated *Vaughn* index that addresses these deficiencies. In addition, U.S. Army's *Vaughn* index, even when considered with its declaration, does not provide the Court with an adequate factual basis to determine whether many of the other exemptions claimed under § 552(b)(5) were properly invoked. Specifically, U.S. Army has claimed numerous § 552(b)(5) exemptions without providing sufficiently detailed justifications." The court added that "the index is also insufficient because U.S. Army, despite claiming that multiple exemptions apply to individual index entries, does not specify which portions of the relevant documents each exemption applies to or whether a claimed exemption applies to the entire document. Without this information, the Court cannot adequately determine whether all reasonably segregable non-exempt information has been disclosed." (*Jason Sartori v. United States Army*, Civil Action No. 17-679-MCR-EMT, U.S. District Court for the Northern District of Florida, Mar. 9)

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