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Washington Focus: The Reporters Committee filed a petition April 1 with Chief Judge Beryl Howell of the U.S. District Court for the District of Columbia asking her to lift the grand jury secrecy restrictions on any material in the Mueller report. Although Rule 6(e) on grand jury secrecy has long been recognized as qualifying under Exemption 3 (other statutes) to protect records that would reveal matters occurring before a grand jury, the restrictions can be waived by the court that oversaw the grand jury. Attorneys for the Reporters Committee told Howell that "the grand jury material the Attorney General has proposed to redact [in the Mueller report] is of unique public and historical significance." The attorneys added that "the grand jury material at issue cuts to the core of our democracy."

Court Finds Tweet Did Not Acknowledge CIA Payments to Syrian Rebels

One of the perhaps unexpected consequences of President Donald Trump's characteristic shoot-from-the-hip style of public pronouncements has been a surfeit of misleading statements the legal significance of which courts continue to wrestle in real time. Although Trump constantly says things in public that no previous President would ever have said aloud, trying to use his statements as the basis for public acknowledgement of anything has proven to be a much more difficult task than Trump critics might have expected. While courts have agreed that what Trump says or writes in public constitute public documents, judges have usually concluded that such statements have no credible factual basis on which they could be considered a public acknowledgment of the underlying substance of any of his pronouncements.

The most recent example comes in Judge Rudolph Contreras' ruling in a case brought by Buzzfeed journalist Jason Leopold alleging that Trump had acknowledged a covert CIA program to pay Syrian rebels in a tweet. Contreras noted that "because the Court finds that the President has not revealed the existence of a *CIA-led* program to arm Syrian revels, it grants the CIA's motion for summary judgment and denies Buzzfeed's cross-motion."

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Leopold's request was submitted to the CIA as a result of Trump's tweet and an interview with the *Wall Street Journal* in which he criticized a report a few days earlier in the *Washington Post* that the CIA was terminating a covert program to arm Syrian rebels fighting against the government of Bachar Al-Assad. In his tweet, he criticized the *Post* for getting the facts wrong, but in the *Wall Street Journal* interview he claimed that the program was terminated because weapons were being funneled to al-Qaida. In a discussion with Fox News national security reporter Catherine Herridge at the 2017 Aspen Security Forum, General Raymond Thomas, commander of the U.S. Special Operations Command, was asked about why the program was terminated. Based on Trump's statements, Leopold requested records about the program, arguing that it had now been publicly acknowledged. The CIA told Leopold that it would respond to the part of his request for records related to Trump's tweet, but that it was invoking a *Glomar* response neither confirming nor denying the existence of records as to whether the CIA had such a program under Exemption 1 (national security) and Exemption 3 (other statutes).

Contreras pointed out that the official acknowledgment test as laid out by the D.C. Circuit in *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990) required a plaintiff to show that disputed information was as specific as information previously disclosed, that the disputed information matched the information previously disclosed, and that the information had been made public through an official and documented disclosure. Leopold argued that the *Fitzgibbon* standard had been modified by *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), in which the D.C. Circuit had ruled that the CIA could not invoke a *Glomar* response because enough information had already been officially acknowledged that it was implausible for the agency to claim that it had no records on the subject of drones. While plaintiffs have argued that *ACLU* modified the *Fitzgibbon* test, it is probably more appropriate to say that *ACLU* created an exception to *Fitzgibbon* in the very limited circumstances involved.

Contreras recognized this distinction. He observed that "the reasoning of the *Fitzgibbon* line of cases and of *ACLU* is not necessarily at odds. *ACLU*'s admonition that an agency's *Glomar* response must be 'logical or plausible' and focus on reviewing the fiction of deniability from the perspective of a reasonable person did not displace *Fitzgibbon*'s three-part test, which the circuit has used in official acknowledgement cases since *ACLU*. Rather, having determined that the information sought had already been officially acknowledged, the circuit in *ACLU* found, applying the 'logical and plausible' standard under which all agency invocation of exemptions are reviewed, that the CIA had not met its burden to issue a *Glomar* response." He added that "*ACLU* made clear that records are also officially acknowledged when 'the substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist. In essence, while leaving intact the requirement that the information sought be as specific as, and match, the information disclosed, *ACLU* recognized that courts can infer such a disclosure when the statement does not explicitly disclose the information but leaves no doubt as to its existence."

Relying on *ACLU*, Leopold argued that Trump's statements, combined with Thomas's confirmation of the existence of the program, created an inference that because the program had been acknowledged it must have been run by the CIA because it was the only agency capable of doing so. Contreras indicated that this inference went too far. He pointed out that "Buzzfeed does not explain how the tweet reveals the existence of a *CIA* program of payments to Syrian rebels – nor can it." He noted that "without taking a position as to what program, if any, the tweet may have officially acknowledged, the Court agrees [that] the President's tweet did not mention the CIA or create any inference that such a program would be linked to or run by the CIA. The President might have acknowledged the existence of 'massive, dangerous, and wasteful' payments to Syrian rebels, but he did not mention from which branch of government such payments would have originated."

As has been the case in most previous litigation involving whether Trump's tweets actually are based on anything factual, Contreras indicated that "the President's characterization of the facts in the [*Washington*

Post] article as 'fabricated' negates any inference that can be drawn from it as to the source of the payments. Because the article asserts that the program was a CIA program, Buzzfeed assumes that the President acknowledged as much, and that his reference to fabricated facts in the article necessarily concerned the details of the program rather than its origin. The Court cannot make such an assumption. At most, the tweet revealed that multiple payments were made by the government to Syrian rebels, that the President ended those payments, and that the Washington Post incorrectly reported on the payments."

Contreras also rejected Leopold's claim that Trump's statement, combined with Thomas's statement, provided a sufficient inference that the CIA had been involved in the payments to Syrian rebels. Instead, he pointed out that "Buzzfeed strictly asks for documents relating to 'CIA payments.' Buzzfeed's request does not implicate any intelligence interest the CIA may have in any program run by other government components, so the Court cannot infer that documents responsive to Buzzfeed's request exist." (*Jason Leopold, et al. v. Central Intelligence Agency*, Civil Action No. 17-2176 (RC), U.S. District Court for the District of Columbia, Mar. 29)

Views from the States…

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

Iowa

The supreme court has ruled that the trial court did not err when it used its discretion to narrow the scope of records that the Cedar Rapids police were required to provide to Jerime and Bracken Mitchell in response to their discovery request for records concerning the shooting of Jerime Mitchell during a traffic altercation with police officer Lucas Jones that ended with Mitchell being paralyzed. Jones stopped Mitchell's car in the early morning of November 1, 2016 because of a broken rear license plate holder. Although Mitchell got out of his car, he apparently got back into his car and tried to drive off with Jones clinging to the open door. Jones was able to unholster his revolver and fired three shots before falling off. As a result, Mitchell was paralyzed from the neck down. The incident received widespread media attention and a grand jury was convened to review the incident, but no criminal charges were brought against Jones. Mitchell and his wife Bracken filed suit against Cedar Rapids, claiming the city was liable for Jones' actions. The Mitchells requested records pertaining to the investigation of the November 2016 incident as well as records pertaining to a 2015 incident in which Jones shot and killed another individual attempting to flee from a traffic stop when that individual brandished a handgun. That incident was also reviewed by the county attorney who declined to bring charges. In response to an offer by the Mitchells to accept records with personally-identifying information redacted, Cedar Rapids argued that none of the police investigative reports should be disclosed. The trial court ruled that records pertaining to the 2016 incident should be disclosed. Cedar Rapid then filed an interlocutory appeal to the supreme court. Cedar Rapids argued that the trial court had improperly relied on *Hawk Eye v. Jackson*, 521 N.W.2d 750 (Iowa 1994), in which the supreme court had found that the public interest in disclosure of investigative records concerning police shootings outweighed the police officer's personal privacy interest in cases in which the investigation was complete and there were no confidential sources involved. Instead, the City claimed that a later supreme court ruling – *ACLU Foundation of Iowa v. Atlantic Community School District*, 818 NW.2d 231 (Iowa 2012), in which the supreme court found that personnel records were categorically exempt, superseded *Hawk Eye*. The supreme court disagreed, noting that in *Atlantic Community School District* "the legislature has performed its own balancing and made

the policy choice to protect such records categorially. *Atlantic Community School District* did not overrule or even cite *Hawk Eye*, which remains good law for disputes over access to police investigative reports under section 22.7(5), a provision with its own legislatively prescribed balancing test." The supreme court found that the district court's disclosure order was appropriate, pointing out that "we hold that the police investigative reports at issue are not exempt from public disclosure under *Hawk Eye*. A protective order limiting disclosure to third parties would be pointless here when any member of the public could obtain the same reports through an open records request." (*Jerime and Bracken Mitchell v. City of Cedar Rapids, Iowa*, No. 18-0124, Iowa Supreme Court, Apr 5)

Michigan

A court of appeals has ruled that Emilee Buckmaster must pay the prescribed fee for obtaining her DMV records but that the Department of Motor Vehicles incorrectly denied her FOIA request for the records on the basis that they were not subject to FOIA. While the DMV allows individuals to look up their own driver's license records for an $11 fee, the records are also subject to a FOIA request. Buckmaster made a request for her own records and the DMV denied her request, telling her that the records were exempt but could be obtained through the look-up system for a fee. Buckmaster then filed suit. The trial court ruled that the DMV could not require Buckmaster to use its commercial look-up system nor to pay a fee. The agency appealed that decision to the court of appeals. The appeals court sided with the agency on the issue of fees. The appeals court noted that "the trial court erred by concluding that defendant could not require plaintiff to pay – in advance – the fee for the production of the motor vehicle records requested through FOIA." But the appeals court rejected the agency's claim that Buckmaster was required to use the commercial look-up service. The appeals court observed that "the plain language of the MVC provision only requires that, if a request for records is made through the commercial look-up service, it must be in the proper form. [The provision] does not mandate the use of the commercial look-up service." The appeals court pointed out that the statute allowed for making a FOIA request as an alternative way to get an individual's driver's license records. The appeals court observed that the MVC's claim that records had to be assessed through the commercial look-up service "would write the FOIA method for requesting motor vehicle records out of the MVC, as well as impose a detailed and technical requirements that do not comport with the purpose of the FOIA." The appeals court also faulted the agency for claiming that the records were exempt under FOIA. The appeals court indicated that "this case turns on the procedural requirements, not the FOIA exemptions. . .[D]efendant's reliance on the FOIA exemption in its FOIA denial letter was an improper characterization; the records are not exempt from disclosure and are obtainable if the proper procedure is followed." (*Emilee Kathryn Buckmaster v. Department of State*, No. 343931, Michigan Court of Appeals, Apr. 11)

New Mexico

A court of appeals has ruled that the trial court did not err in finding that the Town of Edgewood and the New Mexico Department of Public Safety were liable for Erin Noli's attorney's fees because they ignored their obligation to respond to Noli's request within the statutory time limits. Noli's husband was killed in an officer-involved shooting. She requested records from both Edgewood and DPS pertaining to their investigation of the shooting. She was told that until the investigation was completed Edgewood and DPS considered all the records exempt. More than a year later, but six months after Noli had filed suit for failure to disclose the records. the district attorney decided not to charge the police officer and Edgewood and DPS disclosed the records. The trial court found that during that time Edgewood and DPS had failed to review the records to determine if any of them could be disclosed. Based on that finding, the trial court ruled that Noli was eligible for attorney's fees. Although the agencies claimed that Noli's request was too burdensome, the appeals court found that the primary reason for the delay was the district attorney's instruction not to process

the records until the investigation was completed. The appeals court observed that "once the information was gathered and transcribed, there was no impediment to redacting and releasing all nonexempt information in a timely manner." The appeals court added that "by failing to evaluate which records were exempt and which were not, Defendants failed to meet their burden to demonstrate compliance with the statute" and that such a finding made Noli eligible for attorney's fees. (*Erin Noli v. New Mexico Department of Public Safety, et al.*, No. A-1-CA-35981, New Mexico Court of Appeals, Mar. 19)

The Federal Courts…

Judge Amy Berman Jackson has ruled that the Department of Health and Human Services and OMB improperly recategorized records as **non-responsive** to requests from American Oversight concerning potential regulatory action by the agencies pertaining to the Affordable Care Act and any communications between the agencies and members of Congress or their staff pertaining to potential administrative action related to implementation of the ACA. She also rejected the agencies' claim that the congressional communications were protected by **Exemption 5 (privileges)** because they were essentially acting as consultants to the agencies. In her recent decision in *Judge Rotenberng Educational Center, Inc. v. Food and Drug Administration* 2019 WL 1296957, Judge Beryl Howell had dealt with a similar problem when the FDA recategorized records that had previously been considered a single record into multiple records to avoid the non-responsiveness issue that had arisen as a result of the D.C. Circuit's ruling in *American Immigration Lawyers Association v. Executive Office for Immigration Review (AILA)*, 830 F.3d 667 (D.C. Cir. 2016), in which the D.C. Circuit ruled that agencies could not redact information solely because they deemed it non-responsive but instead could only withhold information based on an exemption claim. Here, Jackson explained that "it appears that what is deemed 'responsive to the request' should dictate what constitutes the record." She pointed out that "rather than treating entire email chains as a 'record,' defendants took a narrower approach and defined a 'record' to be each individual email in the chain 'based on whether the author was an official at one of the agencies.' The practical effect of this approach is that when an agency employee replied to an email emanating from Congress and the previous exchanges were included in the response, defendant redacted from the thread any email that was authored by Congress on the grounds that it was a 'non-responsive record.' Defendants insist that their approach is justified because plaintiff's request 'sought only emails from *the agencies*, not emails from Congress or back-and-forth exchanges between Congress and the agencies'. . ." Jackson called the agency's approach "unduly literal and stingy" and added that "while plaintiff could have been more clear in framing its request, it is commonly understood that an email chain operates as a single record." Jackson observed that "the prior messages received from Congress not only appear physically within the agencies' outgoing emails, but they were incorporated into the agencies' communications. Whether that was a conscious or subconscious choice is irrelevant; what matters is that the emails sent by agency personnel did in fact contain the prior exchange with Congressional staff." The agencies argued that in *Ryan v. Dept of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the D.C. Circuit had found that congressional input that had been requested by the agency qualified under the specific circumstances as part of the agency's deliberative process. But Jackson pointed out that *Ryan* predated by 20 years the Supreme Court's decision in *Dept of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), the Court's most recent Exemption 5 decision, in which the Court ruled that outside parties did not qualify under the consultant corollary if they had interests potentially adverse to those of the agency. Applied to the facts of this case, Jackson noted that "since *Klamath*, the D.C. Circuit has consistently reiterated the principle that the outside consultant must be a neutral party who is not representing its own interests." She explained that "it appears that the law in this Circuit does require that outside consultants 'lack an independent interest.'"

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(*American Oversight v. U.S. Department of Health and Human Services, et al.*, Civil Action No. 17-1448 (ABJ), U.S. District Court for the District of Columbia, Mar. 30)

A federal court in New York has ruled that the Department of Homeland Security must disclose most of the records related to its "super-recommendations memorandum" pertaining to the closure of the Etowah County Detention Center in Alabama because it represents the agency's final decision of the review of the facility's operations. The Adelante Alabama Worker Center, the Detention Watch Network, and the Greater Birmingham Ministries requested the memo after it was referred to in a 2015 annual report to Congress prepared by the Office for Civil Rights and Liberties. The congressional report described the super-recommendations memo on the Etowah County Detention Center as recommending that "ICE develop a comprehensive plan to address the deficiencies at the facility, address the issues raised in complaints opened since the 2012 site visit, and either transition the facility to the 2011 Performance Based National Standards or cease use of the facility." The plaintiffs requested records pertaining to the super-recommendation memo. The agency located five pages but withheld them all under **Exemption 5 (privileges)**. The plaintiffs filed an administrative appeal and the request was remanded for a better explanation of the Exemption 5 claim. After the agency failed to respond, the plaintiffs filed suit. The agency disclosed 127 pages with considerable redactions. The disclosed records included the super-recommendation memo, four 2012 expert reports, and other related records. The plaintiffs did not challenge the adequacy of the search but did question the agency's Exemption 5 and **Exemption 6 (invasion of privacy)** claims. Judge Gregory Woods indicated that there was a conflict between the agency's claim that the super-recommendations memo was protected by the deliberative process privilege and the identification of the memo's recommendations in the agency's report to Congress. Deciding to review the five-page memo *in camera*, Woods observed that "it is difficult to imagine what more palpable evidence than the CRCL's official report to Congress Plaintiff could possibly be expected to point to" as evidence that the agency had made a decision. Woods also questioned whether or not the agency had withheld records that contained standards and methodologies that had been adopted as the agency's policy. He instructed the agency to re-review the expert reports and to disclose any severable material that constituted adopted policy or working of DHS and/or U.S. Immigration and Customs Enforcement. While the agency argued that any factual material in the expert reports reflected their deliberations, Woods pointed out that in *Mapother v. Dept of Justice*, 3 F. 3d 1533 (D.C. Cir. 1993), the D.C. Circuit had distinguished between the factual material used as part of a complex decision in an adjudicatory proceeding – which was typically deliberative – and factual material related to an investigative report prepared only to inform – which did not qualify as deliberative. Here, Woods found that most of the factual material was more akin to an investigative report. However, he recognized that other portions of the reports could qualify as pertaining to more complex decisions. As a result, he told the agency to re-review its claims and release material consistent with his opinion. The agency had withheld personally identifying information pertaining to experts under Exemption 6, claiming that there was potential for harassment if their names were disclosed. Finding that the experts' minimal privacy interests were outweighed by the public interest in disclosure, Wood observed that "the difference between a mere potential 'increase in the possibility' of harassment and the likelihood of harassment is the difference between a 'real' threat and speculation." He pointed out that "as the identity of the Experts and their professional backgrounds are relevant to evaluating CRCL's functionality, as well as how the CRCL is spending taxpayer funds, disclosure here would further the 'core purpose of the FOIA, which is [to] contribute significantly to public understanding of the operations or activities of the government.'" (*Adelante Alabama Worker Center, et al. v. United States Department of Homeland Security*, Civil Action No. 17-0557-GHW, U.S. District Court for the Southern District of New York, Mar. 26)

Judge Amy Berman Jackson has ruled that U.S. Citizenship and Immigration Services properly withheld the Assessment to Refer pertaining to Kaps Kapende and the Assessment to Grant Asylum pertaining

to Annie Kaseka under **Exemption 5 (privileges)**. Kapende and Kaseka, Congolese nationals, both applied for asylum after arriving in the United States. They were both interviewed by asylum officers. Kapende's request for asylum was denied, while Kaseka's request was granted. Catholic Charities filed FOIA requests on behalf of Kapende and Kaseka for the memos written by the asylum officers and related records. In response to its request for Kapende's records, USCIS disclosed 145 pages in full, 26 pages in part, and withheld 12 pages in full, citing Exemption 5. Catholic Charities filed an administrative appeal and the agency released an additional three pages of the asylum officer's Assessment to Refer which had initially been withheld in full. In response to Kaseka's request, the agency disclosed 378 pages in full, 25 pages in part, and withheld six pages in full. After Catholic Charities filed an administrative appeal, the agency released an additional two pages in part. Catholic Charities argued that the asylum officer's assessments were in practice final decisions. Jackson pointed out that the D.C. Circuit had found in *Abtew v. Dept of Homeland Security*, 808. F.3d 895 (D.C. Cir. 2015), that the assessment referrals were preliminary recommendations to superiors, not final decisions. Catholic Charites argued that the situation here was different than *Abtew* because the agency had changed its policy since *Abtew* was decided. But Jackson noted that "it is unclear what 'change' plaintiffs are referring to. The passages simply reiterate the argument that the initial assessment is a final decision, and that the Referral Notice is created by the asylum officer using a computer that contains 'boilerplate' language." She added that 'plaintiffs' conclusory and unsupported allegations are insufficient to rebut the agency's detailed declaration establishing that indeed no other human actions took place. . .[T]he agency subsequently issued a Referral Notice informing plaintiff of its final decision, and even that did not mark the end of the process. The case was then referred to an immigration judge for a final decision." Jackson pointed out that "the Assessment to Grant Asylum, like the Assessment to Refer, serves as a preliminary recommendation from the interviewing asylum officer to the supervisor. Because the Assessment to Grant Asylum is drafted prior to the final decision and it is an essential tool of the agency's decision-making process, it plainly falls within the deliberative process privilege. The initialed Assessment to Grant Asylum is not the final decision. The agency informs the applicant of its final decision by using a separate document known as an 'Asylum Approval Memo.' Plaintiffs have not put forth evidence that the asylum officer's preliminary assessment was expressly adopted or incorporated by reference in the Asylum Approval Memo." (*Kaps Kapende, et al. v. United States Department of Homeland Security*, Civil Action No. 18-1238 (ABJ), U.S District Court for the District of Columbia, Mar. 26)

Judge Timothy Kelly has ruled that the U.S. Army Corps of Engineers had an improper **policy or practice** of claiming that **Exemption 5 (privileges)** applied to pending Clean Water Act permit applications and then admitting its error and disclosing the records once the Missouri Coalition for the Environment filed suit. The Coalition told Kelly that at least six of its requests handled by either the St. Louis or Little Rock districts involved initial claims that portions of pending permit applications were protected by the deliberative process privilege that were dropped once MCE filed suit. The agency admitted its error but argued that these were isolated instances and did not constitute a policy or practice. However, Kelly found MCE's evidence overwhelming. He noted that "the Corps' record of repeated and almost identical FOIA violations leads to the unavoidable conclusion that its decisions resulted from a policy or practice to withhold materials in the application files of pending [CWA] permit applications, even if those materials were not inter- or intra-agency records. The Court cannot reasonably conclude that those decisions were isolated mistakes. And because, as the parties agree, withholding materials on that basis violates FOIA, the policy or practice is unlawful." Although the agency argued that the improper withholdings were mistakes and did not rise to the level of a policy or practice, Kelly indicated that the agency's declarations did not support that conclusion. He pointed out that "it is also telling that the Corps has provided *no examples* of times when it *did* release non-agency records in application files for pending [CWA] permits. If, as the Corps now claims, the improper withholdings under Exemption 5 were merely isolated mistakes, examples of times when it released the

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application files for pending permits should abound. But the Corps offers none." The agency also urged Kelly to judge the handful of mistakes in the two districts separately. Instead, Kelly noted that "a plaintiff need not proffer instances of an alleged policy or practice in every single Corps district to show that a policy or practice exists." He added that "if anything, the fact that MCE received unlawful responses from two different Corps districts only further evidences that the Corps maintained a policy or practice and that the decisions to withhold the records at issue were not isolated mistakes." Kelly declined MCE's request for injunctive relief, pointing out that "even if an agency maintains an unlawful policy or practice such that a FOIA plaintiff is entitled to declaratory relief, the heightened remedy of injunctive relief is not necessarily appropriate." He found that the agency had recognized that its policy was incorrect and taken steps to release such records in the future. (*Missouri Coalition for the Environment v. United States Army Corps of Engineers*, Civil Action No. 18-663 (TJK), U.S. District Court for the District of Columbia, Mar. 28)

Judge Amy Berman Jackson has ruled that the EPA properly withheld 67 records under **Exemption 5 (privileges)** after finding that they qualified under the consultant corollary, that the agency had determined that factual material was inextricably intertwined with deliberative material, and that the agency had also concluded that information could not be **segregated** and released. The Center for Biological Diversity filed a FOIA request for records concerning the agency's decision to revise its aquatic life water quality criteria for cadmium. The agency contracted with Great Lakes Environmental Center to help with its review. After identifying 654 responsive records, the agency disclosed 287 records in full, 87 in part, and withheld 280 records entirely CBD eventually narrowed its challenge to 67 records that had been withheld under the deliberative process privilege, arguing primarily that based on GLEN's website it is "clear that the organization represents the interests of the regulated community" and were adverse to those of the agency, meaning that records shared with the contractor did not qualify for the privilege. Jackson disagreed, noting that GLEN had signed a conflict of interest certification requiring it to report to the agency if it had any conflict of interest regarding the water quality criteria for cadmium. She pointed out that "because there is no indication in the records that GLEN represented its own interests, or outside interests, *during* its consulting work for EPA, and there is no evidence of bad faith, the Court finds that the agency's detailed declarations justify withholding its deliberative communications with GLEN under Exemption 5." CBD argued that much of the information included scientific data, research and statistical figures that were purely factual and not deliberative. Again, Jackson disagreed with CBD's claim that factual data could not be deliberative. She observed that "these documents also contain draft responses to public comments and work planning discussions. The limited factual information that appears in these documents is selected, organized, and presented in such a way that requires 'the exercise of discretion and judgment calls,' and does not amount to an 'essentially technical' recitation of scientific data or other facts." Jackson added that "while the ultimate decision must be grounded in science, that does not mean that there is no place in the decision-making process for discretion and judgment calls. . .The facts that appeared in the documents were inextricably intertwined with the deliberative discussions and process itself." CBD also faulted the agency for its failure to segregate and disclose non-exempt information. Finding the agency had conducted an adequate segregability analysis, Jackson indicated that "the *Vaughn* Index supplied by EPA provides a document-by-document justification for each of the 67 records in dispute, describing the deliberative processes involved and justifying the agency's position that no reasonably segregable material could be released." (*Center for Biological Diversity v. United States Environmental Protection Agency*, Civil Action No. 17-1270 (ABJ), U.S. District Court for the District of Columbia, Mar. 27)

Judge Randolph Moss has ruled that Alexander Matthews, a federal prisoner convicted on wire and bank fraud, did not **waive** his right to file a FOIA suit as part of his plea agreement with the government. Although plea agreements waiving rights to pursue any litigation related to an individual's conviction have

become commonplace, the D.C. Circuit, in *Price v. Dept of Justice*, 865 F.3d 676 (D.C. Cir. 2017), essentially found they were unenforceable and could not be used as the basis for dismissing a FOIA suit. After Matthews sent a request to the FBI for records concerning himself, motivated by the fact that Assistant U.S. Attorney Ryan Faulconer from the Eastern District of Virginia had falsely represented in Matthews' petition alleging ineffective counsel that no earlier plea order had ever been presented to Matthews' attorney, the agency processed 671 pages, released 35 pages in full, 272 pages in part, and withheld 364 pages in full under **Exemption 3 (other statutes), Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods or techniques)**. Matthews then filed suit. Because Matthews had not challenged the adequacy of the agency's search, Moss moved directly to a consideration of the agency's exemption claims. Moss found that the agency had properly withheld information under Rule 6(e) on grand jury secrecy and that its Exemption 5 claims were appropriate as well. While he agreed that the FBI was a law enforcement agency, he rejected the agency's attempt to withhold personally identifying information in a 197 file that dealt with Matthews' claim against the FBI under the Federal Torts Claim Act. Moss noted that "the FBI argues that the 197 file still comprises law enforcement records for purposes of Exemption 7 because 'it was compiled by a law enforcement agency in preparation of defending its law enforcement actions, and it contains discussions of law enforcement actions. The Court is unpersuaded." As a result, Moss found the FBI was required to substantiate its claims under Exemption 6. Here, Moss observed, that the agency's affidavit "spells out the harms each category of individuals could suffer if their identities were disclosed, it does not offer any details about which categories of individuals appeared in the 197 file, or the types of records from which the names and identifying information were redacted. Absent this basic information, the Court cannot ascertain whether the release of these names and identifying information would compromise a 'substantial' privacy interest." Moss concluded that seven informants were not protected under Exemption 7(D). He noted that the agency had not provided enough information "to show that each of these seven sources were similarly situated. Although the Court is sensitive to the FBI's concern about ensuring these individuals' safety, the agency must provide *some* particularized justification with respect to *each* source." He upheld the agency's Exemption 7(E) claims, noting that "the FBI has logically connected each of its withholdings to a reasonable expectation of risk that the law might be circumvented if the information were disclosed." The FBI had located some additional records relating specifically to Matthews' conviction. For these, the agency claimed that Matthews had waived any right to access these records because of his plea agreement. Moss pointed out that in *Price*, the D.C. Circuit had ruled that plea agreements did not waive the rights of the convicted to request records under FOIA unless there was a countervailing criminal justice interest. Here, he pointed out that "because the FBI has failed to substantiate – on the particular facts of this case – that the enforcement of Matthews' FOIA waiver would further a legitimate criminal interest that outweighs Matthews' interest in accessing records related to his prosecution, the Court concludes that the agency is not entitled to withhold those documents on the basis of Matthews' FOIA waiver." (*Alexander Otis Matthews v. Federal Bureau of Investigation*, Civil Action No. 15-469 (RDM), U.S. District Court for the District of Columbia, Mar. 31)

Judge Beryl Howell has ruled that the EPA has now shown that it conducted an **adequate search** for records in response to two requests from the Center for Biological Diversity concerning EPA addenda issued in February and September 2014 assessing the risk of using the pesticide Enlist Duo on endangered species in 16 states and that the agency has now justified **Exemption 5 (privileges)** claims for 80 remaining disputed records and appropriately considered the **segregability** of non-exempt information. In her previous ruling, Howell had found that the EPA had not shown why it limited the cut-off date of the search, why it searched the records of only 13 custodians, and what types of records had been included in the search. She also indicated that the agency had failed to sufficiently justify its deliberative process and attorney-client privilege

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claims. As a result, Howell sent the case back to the agency to clarify those problems. This time, Howell concluded that the agency had provided adequate justification. Howell noted that CBD had waived any claim that the agency's search terms were too narrow because the agency had told CBD that it intended to use the same search terms and CBD had not objected. Further, she agreed with the agency's explanation that only certain employees were likely to have relevant responsive records while others were merely copied on emails circulated throughout the Office of Pesticides. She pointed out that "clearly, the identification of relevant personnel does not automatically transform these individuals into relevant *custodians* whose records should necessarily have been searched, as the plaintiff would have it." CBD questioned why EPA technical staff needed legal advice so often. But Howell observed that "consultation by EPA staff with EPA attorneys about their legal obligations under the ESA and FIFRA, or other applicable statutes and regulations, is both expected and necessary, not mysterious." Because the agency was required to use the best scientific evidence available in making determinations under the ESA, CBD also questioned whether much of the data was factual and not deliberative. However, Howell noted that "multiple decisions contribute to formulating what data to collect and how, and the relevant analytical tests to conduct and under what conditions, to reach a decision under ESA's section 7(a)(2)." On the issue of segregability, Howell found the agency had properly considered segregability as to the withheld emails and draft responses to comments. But she ordered the agency to reconsider a PowerPoint presentation after finding that parts of it were likely factual. (*Center for Biological Diversity v. U.S. Environmental Protection Agency*, Civil Action No. 16-175 (BAH), U.S. District Court for the District of Columbia, Mar. 27)

A federal court in California has ruled that the requirement in Section 402 of the Patriot Act mandating the government to provide declassified versions of certain Foreign Intelligence Surveillance Act Court opinions does not provide an enforceable right under the FOIA allowing requesters to force the government to conduct the necessary declassification review in response to a FOIA request. EFF submitted requests to the Department of Justice pertaining to allegations that the government intelligence agencies were requiring vendors like Apple to provide access to encrypted cellphone data. To explore the issue, EFF requested FISC opinions interpreting certain specific provisions of the Patriot Act. The agency located 79 opinions, released 73 of them in part or in full, but withheld six opinions under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. EFF argued that the declassification requirement in Section 402 meant that to invoke the exemptions it had to go through a declassification review. Ruling in favor of the government's argument that EFF did not have **standing** to enforce Section 402, Judge Haywood Gilliam analogized the situation to *Minier v. CIA*, 88 F. 3d 796 (9th Cir. 1996), in which the Ninth Circuit rejected the claim that the disclosure standards under the JFK Assassination Records Act could be enforced through a FOIA request. Gilliam noted that "absent clear evidence that Congress intended Section 402 to be applied when reviewing FOIA exemptions, the Court will not impute such an intent to hybridize two statutory schemes." He also pointed out the difference between the statutory schemes – the FOIA exemptions applied where disclosure would harm an interest protected by the exemptions while "the unclassified summaries, by contrast, require a statement by the Attorney General that summarizes the actual construction or interpretation of a law and the description of the context, which are not required under FOIA. The Court agrees with Defendant that using FOIA to enforce Section 402 would require the Court to impose remedies outside of FOIA's requirements." Turning to the exemptions, Gilliam found DOJ had shown that the six opinions were protected under both exemptions. He indicated that the agency's affidavit "does not attempt to categorize distinct information into a single general justification, but gives thorough explanations demonstrating how national security could be compromised if the information is disclosed." (*Electronic Frontier Foundation v. United States Department of Justice*, Civil Action No. 16-02041-HSG, U.S. District Court for the Northern District of California, Mar. 26)

Judge Randolph Moss has ruled that the U.S. Postal Inspection Service properly withheld some records from Hassan Ali Pejouhesh in response to his request for records about his conviction and that Pejouhesh does not have **standing** to challenge the agency's records retention policy allowing the agency to destroy investigative records after litigation connected to an investigation is complete. The agency located 61 pages of responsive material. It released 23 pages with redactions under **Exemption 6 (invasion of privacy),** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and withheld 17 pages entirely under Exemptions 6 and 7(C) as well as **Exemption 7(E) (investigative methods or techniques)**. Pejouhesh filed an administrative appeal, arguing that the agency's search was inadequate because it did not find records that should have existed. The agency then told Pejouhesh that hard copy records had been destroyed once he exhausted the appeals of his conviction. Although Pejouhesh had failed to file an opposition to the agency's summary judgment motion, Moss nevertheless assessed the agency's claims on his behalf. Moss evaluated Pejouhesh's challenge to the agency's records retention policy as a **policy and practice** claim. Moss found Pejouhesh "has failed to otherwise explain how he has standing to seek injunctive or declaratory relief. With respect to any records Plaintiff sought that were not preserved, those records are gone, and neither an injunction nor a declaratory judgment can remedy that loss." Moss then found the agency had properly withheld records under Exemption 6 but indicated that there were problems with its withholdings under Exemption 7. He explained that on the present record "the Court cannot assess how Exemption 7(C) applies to the 'third party statements' that the Postal Service elected to withhold. To be sure, to the extent those statements disclose the names or other identifying information about witnesses, that information likely falls within the scope of the exemption, and it is also possible that everything contained in those statements could be used to identify a witness. It is also possible, however, that substantial portions of those statements do not raise any plausible privacy concern." As to the Exemption 7(E) claims, the agency claimed that the D.C. Circuit's decision in *Public Employees for Environmental Responsibility v. International Boundary and Water Commission ("PEER")*, 740 F. 3d 195 (D.C. Cir. 2014), brought up the question of whether the "risk of circumvention of the law" prong of Exemption 7(E) applied to "guidelines" or whether it also applies to "techniques and procedures." The agency suggested that a Second Circuit ruling properly interpreted the risk of circumvention prong to apply only to guidelines. But Moss indicated that "what the Postal Service fails to note, however, is that in the *PEER* case, the D.C. Circuit – after noting the split in authority – went on to say: 'This court has applied the "risk of circumvention of the law" requirement both to records containing guidelines and to *records containing techniques and procedures*.' That is the law of this Circuit, and this Court is bound to apply it." (*Hassan Ali Pejouhesh v. United States Postal Service*, Civil Action No. 17-1684 (RDM), U.S. District Court for the District of Columbia, Mar. 26)

In the most recent installment of a 12-year old FOIA suit brought by Gregg Bloche and Jonathan Marks for records concerning the role of medical professionals in the design and implementation of interrogation tactics in the early to mid-2000s, Judge Rudolph Contreras has ruled that some of the exemption claims made by the Department of the Navy, the Office of the Assistant Secretary of Defense for Health Affairs, and the Deputy General Counsel for Personnel and Health Policy are insufficiently supported to allow Contreras to rule for either party and that, as a result, he has ordered the agencies to provide the records for *in camera* inspection. Contreras was particularly focused on deliberative process privilege claims made under **Exemption 5 (privilege)**. He found that the agencies had sufficiently supported their privilege claims in most instances but found seven documents that required further review. One was a claim by Personnel and Health Policy that a signature page was deliberative. Contreras, however, pointed out that "to the contrary, it seems that a signature page would be the culmination of the policymaking effort, not part of the deliberations leading up to it." Contreras approved of the **segregability** analysis performed by the Navy and the Office of Health Affairs but rejected segregability claims made by Personnel and Health Policy as insufficient. He pointed out that "the agency instead asks the Court to infer that it has met its obligation based on the fact that it has

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released a large portion of its privileged documents in part. But the Court declines this invitation; courts typically require sworn declarations or affidavits to avoid such conjecture." Contreras upheld the agencies' claims under **Exemption 1 (national security)** but found that the Navy's claim under **Exemption 7(E) (investigative methods or techniques)** had not been sufficiently justified. He indicated that while he could easily envision that the records were compiled for law enforcement purposes, "the Court cannot be required to make such assumptions; the burden is on the Navy to establish the requisite nexus." Bloche and Marks challenged the agencies' claim that email domain names were protected under **Exemption 6 (invasion of privacy)**. Contreras was skeptical as well, noting that "perhaps, in some instances, an email domain could be so unique that it risked revealing the identity of the address holder, but Defendants have not even attempted to make such a showing here." Nevertheless, he allowed the agencies to provide further substantiation if they continued to press the Exemption 6 claim. (*M. Gregg Bloche and Jonathan H. Marks v. Department of Defense, et al.*, Civil Action No. 07-2050 (RC), U.S. District Court for the District of Columbia, Mar. 29)

Judge Tanya Chutkan has ruled that the CIA, the FBI, but not EOUSA, conducted an **adequate search** for records pertaining to the investigation of the 1993 World Trade Center bombing and properly withheld many of the records under a variety of exemptions from Ibrahim Elgabrowny, who was one of the individuals convicted as a result of the investigation. Elgabrowny submitted several requests to the FBI, including one for records on Ramzi Ahmad Yousef, considered the mastermind of the plot. The FBI issued a *Glomar* response neither confirming nor denying the existence of records but after Elgabrowny filed suit, the FBI withdrew its *Glomar* defense as to Yousef after deciding that the court records acknowledged that Yousef had been interviewed. In his request to the CIA, Elgabrowny asked for Exhibit C, a 1994 classified exhibit provided to the trial court, and records that mentioned Elgabrowny. The CIA primarily argued that it had no records responsive to Elgabrowny's request. Elgabrowny requested Exhibit C from EOUSA as well and asked the agency to search its field offices in the Southern District of New York. Elgabrowny challenged the adequacy of the FBI's search by referencing *Trentadue v. FBI*, a 2008 District of Utah decision about the 1995 Oklahoma City bombing finding that the FBI had failed to search for records in a certain location. But Chutkan noted that *Trentadue* had no relevance here. She pointed out that "here, there is no information indicating that the requested documents may have been misfiled or withheld from the case file. Moreover, a plaintiff's search preferences cannot dictate the reasonableness of the scope of an agency's FOIA search." Chutkan found EOUSA's search wanting. She pointed out that its affidavit "offers no other details regarding the search methodology or what sources were investigated. It follows that the court also has no information as to *why* these unidentified sources were searched as a result of the request. The search terms are not provided and cannot be inferred." Chutkan agreed with the CIA that Exhibit C was the only record Elgabrowny was seeking from the agency. The agency had withheld Exhibit C entirely, citing **Exemption 3 (other statutes)**. Elgabrowny argued that the agency had not shown that disclosure would cause harm to national security. Rejecting that claim, Chutkan noted that "the National Security Act does not require the CIA to find that disclosure would be expected to harm national security. Nevertheless, the court finds that revealing the information in Exhibit C could reasonably be expected to cause serious damage to national security." (*Ibrahim Elgabrowny v. Central Intelligence Agency, et al.*, Civil Action No. 17-00066 (TSC), U.S. District Court for the District of Columbia, Mar. 31)

A federal court in New York has ruled that while the FDA's **Exemption 4 (confidential business information)** claims should be held in abeyance until the Supreme Court rules in *Food Marketing Institute v. Argus Leader Media*, the substantial competitive harm case before the Court this term, certain records withheld by the FDA on behalf of Sarepta Therapeutics should be disclosed because the information is already in the public domain. The case involved a request by journalist Charles Seife for records pertaining to the testing and approval of Exondys 51, a drug for the treatment of Duchenne Muscular Dystrophy, a rare

neurological disease. In processing Seife's request, the agency located 35,000 pages of records and claimed that many of them were protected by Exemption 4. Deciding to wait until the Supreme Court's ruling, the court nevertheless found that some information had already been made public and no longer qualified for Exemption 4 protection. Based on a representative sample, the court agreed with Seife that the error rate in withholding information already in the public domain was more than 50 percent. The court observed that "it would be foolhardy to conclude that the problems found in the sample submitted to the Court are not likely to be found in the other documents. It follows that Sarepta and the FDA should, while the Court waits a Supreme Court decision in *Food Marketing Institute*, be required to revisit their redactions to the rest of the documents." (*Charles Seife v. Food and Drug Administration, et al.*, Civil Action No. 17-3960 (JMF), U.S. District Court for the Southern District of New York, Mar. 27)

Judge Dabney Friedrich has ruled that the Executive Office for U.S. Attorneys has not yet shown that records it withheld from prisoner David Williams were protected either by a court sealing order or **Exemption 3 (other statutes)**. Williams was convicted of mail fraud and other crimes. Nearly 10 years later, he filed a request with EOUSA for records pertaining to his conviction. Williams filed suit after the agency failed to respond. The agency then disclosed 528 pages in full, 30 pages in part, and withheld 249 pages in full. Williams argued that the agency was required to identify those portions of the records that pertained to potentially exculpatory evidence. Friedrich disagreed, noting that while Williams was free to request all records related to his case including "any *Brady, Giglio*, or Jencks Act material the government may have, but [FOIA] does not require EOUSA to identify the materials as such." The agency had withheld 10 records solely because they had been sealed by the court. Friedrich found that explanation wanting and pointed out that under *Morgan v. Dept of Justice*, 923 F.2d 195 (D.C. Cir. 1991), "the mere existence of a court seal is, without more, insufficient to justify nondisclosure under FOIA." She then found the agency's *Vaughn* index insufficient to supports its claim that 148 pages of grand jury records were properly withheld under Rule 6(e) on grand jury secrecy. She pointed out that "although EOUSA has listed a few documents withheld under Exemption 3 and Rule 6(e) in its *Vaughn* index, it has not suggested that these documents are representative of the more than 100 pages of documents withheld." Friedrich found the agency's claims under **Exemption 5 (privileges)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** were appropriate. However, she indicated that the agency had not yet shown that information withheld under **Exemption 6 (invasion of privacy)** and 7(C) could not be segregated and disclosed. She observed that "it is not clear whether the exempt information in these documents is 'inextricably intertwined' with the nonexempt information, and thus whether redactions are appropriate." (*David Williams v. Executive Office for U.S. Attorneys*, Civil Action No. 18-0019 (DLF), U.S. District Court for the District of Columbia, Mar. 25)

A federal court in New York has ruled that the FBI did not **waive** its ability to claim **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods or techniques)** when it shared information about Saro Spadaro with the Anguilla Police Force. Spadaro claimed that the agency's decision to disclose more records until its Exemption 7(E) claims applied only to a remaining 40 records suggested bad faith. Spadaro also argued that the agency's misconduct constituted a waiver of exemptions. Showing its frustration at the way Spardaro's attorney had argued that case, the court noted that "these efforts reflect the tactics that Plaintiff's counsel has used throughout this litigation; rather than engage directly with the government's detailed affidavits and straightforward legal arguments, Plaintiff's counsel makes broad allegations without citation to apposite authority. And Plaintiff's bald assertions that the government has submitted only 'vague and sweeping attempts at justification' is belied by the government's supplemental submissions themselves, which reflect a good-faith effort to comply with the requirements of FOIA." Spardaro argued that the letter to the Anguilla Police Force waived all exemptions. Rejecting the claim, the court noted that "a broad subject-

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matter waiver doctrine would defeat the entire purpose of the deliberative process privilege; government actors must be able to discuss a subject in a 'predecisional' and 'deliberative' manner without fear that disclosure of their final decision will waive privilege as to all precursor communications." (*Saro Spadaro v. United States Customs and Border Protection, et al.*, Civil Action No. 16-16 (RJS), U.S. District Court for the Southern District of New York, Mar. 26)