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Washington Focus: The Supreme Court heard oral arguments April 22 in Food Marketing Institute v. Argus Leader Media, a case challenging the substantial competitive harm test first developed in 1974 by the D.C. Circuit in National Parks v. Morton. Josh Gerstein of Politico noted that a majority of conservative justices appeared willing to abandon the test in favor of something more akin to the customarily confidential test from Critical Mass. Based on the Court's 2011 decision in Milner v. Dept of Navy, abandoning the D.C. Circuit's 25-year-old precedent recognizing a "high-2" circumvention prong in Exemption 2 because the plain language did not support such an interpretation, it also appeared that Associate Justice Elena Kagan would be willing to support the same result here with Exemption 4. Because the government did not appeal the Eighth Circuit ruling and, further, because Congress passed an Exemption 3 amendment potentially mooting the case, there were justiciability questions raised by Associate Justices Sonia Sotomayor and Stephen Breyer, but at least based on the oral argument itself, Chief Justice John Roberts appeared somewhat annoyed at their emphasis on the procedural issues.

Court Rejects FBI's Categorical Exemption Claims

Judge Dabney Friedrich, the most recent Trump-appointed judge on the U.S. District Court for the District of Columbia, has already shown that she can be occasionally highly critical of the government's processing of FOIA requests. Last year, she lambasted the IRS for withholding records about its FOIA policies in a case brought by University of Denver Law Professor Margaret Kwoka. Now, she has rejected the FBI's *Glomar* response neither confirming nor denying the existence of records in a case brought by the Electronic Frontier Foundation for records about the agency's use of Best Buy computer technicians as informants in cases involving possession of child pornography.

The case began as a result of the FBI's admission in *United States v. Rettenmaier*, a child pornography case brought in the Central District of California that a Best Buy employee at a data recovery facility in Brooks, Kentucky had discovered a suspicious image of a child while repairing Rettenmaier's

computer. The employee's supervisor alerted the FBI, triggering a criminal investigation that led to Rettenmaier's prosecution. The judge presiding over the case issued an order citing evidence about the FBI's cooperation with Best Buy employees. The agency ultimately revealed that it had used eight informants at Best Buy's Brooks, Kentucky data-recovery facility from 2007 through 2016 and named four of those informants. EFF requested records concerning policies for training conducted for Best Buy employees in the detection of child pornography on computers brought to Best Buy for repair. The FBI agreed to search for records acknowledged by their court filings, but it issued a *Glomar* response under **Exemption 7(E) (investigative methods or techniques)** for any other material about training or recruiting. The agency disclosed 14 pages in full and 151 pages in part and withheld 78 pages entirely. Besides Exemption 7(E), the agency withheld records under **Exemption 6 (invasion of privacy), Exemption 7(A) (interference with ongoing investigation or proceeding), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)**.

EFF's challenge focused on the appropriateness of the agency's *Glomar* response for documents unrelated to the *Rettenmaier* disclosures and redactions under Exemption 7(E), whether Exemption 7(C) protected the name of an individual convicted as a result of information obtained from the Kentucky Best Buy, and whether the agency had justified categorical withholdings under Exemption 6, Exemption 7(C, Exemption 7(D), and Exemption 7(E). EFF acknowledged that the records had been created for law enforcement purposes but argued that the FBI's use of computer technicians as informants was publicly known. Friedrich agreed that the agency had failed to justify its *Glomar* response as applied to all four parts of EFF's request, that it had justified its withholdings for records its processed, but that it had not justified its categorical withholding claims.

Friedrich pointed out that the FBI was concerned that "disclosing the existence of responsive documents would reveal whether the FBI uses computer technician informants at specific locations and how frequently it relies on such information." But Friedrich observed that "a *Glomar* response under exemption 7(E), however, is only appropriate where the mere *existence* of documents would risk circumvention of the law. Concerns about the precise *number* or *contents* of any responsive documents can be addressed through litigation about the scope of any withholdings and the level of detail that must be provided to justify those withholdings." Appling that standard here, Friedrich noted that "in this case, disclosing the mere existence – as opposed to the number or type – of any documents – would reveal little, if any, information about the nature of the frequency of the FBI's use of computer technician informants beyond what the FBI has already disclosed. . .Disclosing the existence of at least one additional document would merely confirm that the FBI has used an informant outside of the 2007-2016 timeframe – but possibly *only one* – at the Kentucky Best Buy. Such a disclosure would not reveal whether the FBI has enlisted informants from any other Best Buy or computer repair store. Nor would it reveal how frequently the FBI has developed established relationships with, or obtained evidence from, computer technician informants."

Likewise, Friedrich rejected the agency's claim that disclosure would embolden criminal activity. She pointed out that "to conclude otherwise would presume that criminals have no reason to believe that computer technicians ever cooperate with law enforcement agencies. That seems highly unlikely given that several states require computer technicians to report suspected child pornography to law enforcement agencies." She added that "to the extent disclosing the non-existence of responsive documents will encourage criminals to retain evidence, the disclosure will enhance, not diminish, law enforcement efforts to identify and prosecute computer crimes." However, she noted that her ruling was limited, explaining that "the Court expresses no view as to whether the FBI may legitimately assert a partial *Glomar* response to some aspects of EFF's request, perhaps even to entire categories of EFF's four-part request. The Court concludes only that the current partial *Glomar* response to the *entirety* of EFF's request is unjustified."

EFF argued that the FBI could not withhold information about its use of computer technicians as informants because such a technique was already well-known. Friedrich, however, found that the agency's withholdings were proper, noting that "revealing this information would reduce the effectiveness of using informants" and agreed with the agency that its segregability efforts were appropriate. She observed that "the record as a whole reveals that the FBI's explanation was detailed and sufficiently tailored."

But she rejected the agency's attempt to withhold records contained in four informant files categorically. She pointed out that "it is unclear, on this record, how these documents will reveal personal information about any of the informants, or why redactions of any personal identifying information will not protect any privacy interests to the extent they exist." Having rejected the agency's categorical claims, the agency alternatively claimed that certain information was protected by various subparts of Exemption 7. EFF argued that under *Maydak v. Dept of Justice*, 218 F.3d 760 (D.C. Cir. 2000), the agency had waived that argument by not asserting it previously. But Friedrich observed that "EFF confuses a failure to invoke an exemption at all with a failure to satisfy the FBI's burden to justify the application of an exemption." She pointed out that the FBI's affidavits had clearly identified the exemptions it claimed protected the withheld records. (*Electronic Frontier Foundation v. Department of Justice*, Civil Action No. 17-1039 (DLF), U.S. District Court for the District of Columbia, Apr. 17)

Views from the States…

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

Colorado

A court of appeals has ruled that the trial court erred in finding that the Board of Commissioners for Boulder County did not violate the Colorado Open Meetings Law when it went into closed session to discuss the construction of an affordable housing development at the Twin Lakes Open Space. Further, the appeals court found the Board violated the Colorado Open Records Act by withholding draft emails that did not fit within a narrow exemption for communications between elected officials, but that the Commission properly withheld other records because they were privileged. Kristin Bjornsen, a resident of Gunbarrel, requested records concerning the housing development project. The Board disclosed hundreds of pages of records but withheld some records under both COML and CORA. Bjornsen then filed suit. The trial court bifurcated the claims, ruling in favor of the Board on the issue of executive sessions but provided no analysis for its decision. The trial court then ruled against Bjornsen on the records access issues as well. Bjornsen appealed both rulings. Bjornsen argued that the Board frequently adjourned public meetings to go into executive session without the required statutory notice. The Board claimed that it did so only when it was "unavoidable" or "necessary." The appeals court found that the Board's failure to provide notice of closed sessions violated the COML. The Board cited *Colorado Highway Vehicle Coalition v. Colorado Boar of Parks and Outdoor Recreation*, 292 P.3d 1132 (Colo 2012) as supporting its claim that improper meetings could be cured by ratifying the action at a subsequent public meeting. The appeals court disagreed, noting that "defendants' affidavit did not establish that they cured any improperly convened executive session by discussing the subject matter of those sessions at a later meeting that was open to the public. Instead, the affidavit stated that after convening a non-COML-compliant executive session, the Board would merely retroactively notice it as the next public meeting. But under *Colorado Off-Highway Vehicle Coalition*, retroactive notice does not cure an improperly convened executive session." The Board also withheld drafts of an email that was eventually sent

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to the public. The appeals court found the draft did not qualify for the claimed exemption. The appeals court noted that "the drafts were not part of the correspondence of elected officials; there was no evidence that the elected county commissioners ever sent or received them." However, the appeals court found that a document entitled "Gunbarrel Zoning Notes" was properly withheld under the attorney-client privilege. (*Kristin Bjornsen v. Board of County Commissioners of Boulder County*, No. 18CA0033, Colorado Court of Appeals, Division VII, Apr. 25)

Massachusetts

The supreme judicial court has agreed that a single justice properly ruled that the Office of the Medical Examiner was not required to respond to Emory Snell's public records request for records concerning the murder of his wife for which Snell had been convicted. Snell had requested 27 categories of records from the Office of the Chief Medical Examiner. The OCME denied the request, claiming the records were exempt. Snell then complained to the supervisor of records. At their request, OCME provided responsive records to the supervisor of records for review. OCME told the supervisor of records that it did not have records responsive to many of the categories. After reviewing the records, the supervisor of records told OCME that records were not exempt solely because they were contained in a personnel file and instructed OCME to review its records, redact them where necessary and provide non-exempt records to Snell or an explanation of any exemption claims. When OCME failed to do so, Snell filed suit seeking to enforce the records' supervisor's letter. The single justice found that OCME had no obligation to comply. Upholding the single justice's ruling, the full court observed that "Snell made no showing that the OCME had a clear cut duty to produce any of the documents he was requesting or that the OCME was refusing to produce any record that was not exempt under the public records law. Nor is there any indication in the record that the OCME was refusing to comply with the supervisor's instructions." (*Emory G. Snell, Jr. v. Office of the Chief Medical Examiner*, No. SJC-11530, Massachusetts Supreme Judicial Court, Apr. 22)

Pennsylvania

A court of appeals has ruled that the Open Records Office properly upheld the Commission on Crime and Delinquency's decision to withheld non-identifying demographic information about crime victims because a provision in the Crime Victims Act provides for confidentially of all records related to the Victims Compensation Assistance Program. Matthew Feldman requested non-identifying information about the program's denial rates, including individuals' race/ethnicity, gender, age, zip code, and county of residence. After several discussions, the Commission provided Feldman with four separate charts – one of which listed claims that were denied and the reasons for denial, while the other three provided information about claims filed and paid but not claims denied. Feldman complained to OOR. Because the Commission then provided more aggregate data, OOR dismissed that portion of Feldman's complaint as moot. It also concluded that zip code information was confidential under the Crime Victims Act. Feldman then filed suit challenging OOR's decision. The appeals court concluded that all the records were exempt under the Crime Victims Act. The appeals court noted that "although the Commission believed that, pursuant to the [Right to Know Law] it was required to provide aggregate data on claimants, given the language of section 709 of the Crime Victims Act, it was not required to do so." The appeals court added that "demographic data submitted by claimants regarding their race/ethnicity, age, and/or gender qualifies as information obtained by the Commission during the processing of claims and information regarding the reason for denial qualifies as information produced during the processing or investigation of a claim; thus, the information must be kept confidential." The appeals court agreed with the Commission and OOR that zip code data was also protected. The appeals noted that "like demographic data, geographic data, such as zip codes, and counties of residence are obtained by the Commission during the processing of claims. Because section 709 of the Crime Victims Act requires that *all* information obtained during the processing of a claim shall remain confidential, the requested geographic data

is not subject to disclosure under the RTKL." (*Matthew Feldman v. Pennsylvania Commission on Crime and Delinquency*, No. 768 C.D. 2018, Pennsylvania Commonwealth Court, Apr. 18)

A court of appeals has ruled that communications shared by the Department of Community and Economic Development with a contractor hired to help implement an economic recovery plan for the City of Chester were properly withheld as privileged. Nolan Finnerty, a paralegal for the law firm of Conrad O'Brien P.C. requested records about the project. The department withheld 346 pages of emails, including ones that had been shared with the contractor. Finnerty complained to the Office of Open Records. OOR held that contractors could be included under the deliberative process privilege when they were consulting for a government agency. Finnerty then appealed to the court of appeals. Upholding OOR's decision finding that sharing emails with the contractors did not waive the privilege, the appeals court noted that "the withheld records contain communications between the Department [and the contractors] that were internal to the Department, and Requester does not otherwise challenge those communications as either not deliberative or predecisional." (*Nolan Finnerty v. Pennsylvania Department of Community and Economic Development*, No. 1090 C.D. 2018, Pennsylvania Commonwealth Court, Apr. 25)

The Federal Courts…

Judge Randolph Moss has ruled that the National Resources Defense Council has **standing** to challenge the EPA's policy of considering FOIA requests voluntarily withdrawn if the agency concludes that the request does not reasonably describe the records sought and the requester fails to respond to an EPA email asking for clarification within 10 days but that NRDC has not yet shown that such a policy can be remedied under FOIA. The NRDC submitted a request asking the agency for records concerning policies for removing information from existing agency websites. The EPA responded three months later, telling NRDC that its request did not sufficiently describe records and would be considered withdrawn if NRDC did not respond with clarification within 10 days. NRDC responded nine days later, arguing that its request was clear and that the agency did not have the statutory authority to unilaterally close requests for failure to respond within 10 days. NRDC then filed suit, challenging the agency's failure to respond to its request as well as its policy of closing requests. The EPA responded to the request to NRDC's satisfaction, but the organization continued its challenge to the agency's policy. Moss started by pointing out that to show standing NRDC had to show that it had suffered an injury-in-fact. The EPA argued that under the provision allowing for tolling of the 20-day response time once if an agency needed to contact the requester for clarification, a request was not deemed received until it reasonably described the records sought. Moss, however, observed that "if construed in this manner, it is unclear what work the tolling provision would perform: because § 552(a)(3) not only requires that the request 'reasonably describe' the records sought, but also requires compliance 'with published rules stating the time, place, fees (if any), and procedures to be followed' in seeking agency records, it is difficult to imagine what request for additional 'information' might trigger the tolling provision if the clock does not even begin to run until the requester has fully complied with § 552(a)(3)." Moss explained that NRDC was not basing its standing argument on the perceived inconsistencies with the tolling provisions but instead on the fact that the EPA policy of quickly closing FOIA requests it deemed insufficiently described the records sought forced the NRDC to expend its resources to respond within 10 days or risking having its request closed and being forced to submit a new one. Moss observed that "the NRDC contends that the EPA's threat to treat a FOIA request as 'voluntarily withdrawn' if the NRDC does not rapidly reply to the EPA's inquiry affects how the NRDC allocates its time and resources." The agency argued that while NRDC had the right to make a FOIA request, it was legally required to abide by the agency's regulations. Moss noted that "this contention assumes that the EPA is right on the merits." Moss found the NRDC qualified for Article III standing because

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it had shown an injury-in-fact, pointing out that "as the NRDC acknowledges, this burden is a 'modest one.' But Article III standing does not demand more, particularly where, as here, the plaintiff is the object of the challenged administrative action." Having found the NRDC qualified for standing, Moss indicated that "the Court is unpersuaded, at least on the current record, that it has shown enough to establish *statutory* standing or to obtain injunctive or similar relief." NRDC relied on *Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1988), and its progeny to assert a pattern or practice claim against the EPA. However, Moss pointed out that *Payne* and the cases following it were all based on allegations that the agency was improperly withholding records. Moss noted that "here, in contrast, the NRDC has not offered evidence that the EPA's 'voluntarily withdrawn' practice has, or is likely to, delay or deny the NRDC access to records that it sought or will seek." He added that the confusion inherent in the policy "could work to dissuade requesters – 'particularly less experienced requesters' – from pursuing their FOIA requests, from filing administrative appeals, or from filing suit. But the NRDC is a sophisticated requester, and it does not challenge the withholding of records as a result of the practice." Moss indicated that the NRDC needed to further develop its arguments. He pointed out that "until the parties have had the opportunity to address these questions –including the questions whether the Court has statutory jurisdiction to entertain the NRDC's policy or practice claim and whether injunctive or similar relief is appropriate in these circumstances – the Court cannot resolve this case." (*Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, Civil Action No. 17-1243 (RDM), U.S. District Court for the District of Columbia, Apr. 19)

A federal court in New York has ruled that a series of tweets by President Donald Trump alleging that his campaign was spied on by the Obama administration, comments he made in a follow-up interview with Tucker Carlson of Fox News, and comments made by then White House Press Secretary Sean Spicer explaining Trump's claims are not sufficient to constitute a public acknowledgment that illegal surveillance took place. Gizmodo Media Group submitted a FOIA request to the National Security Division at the Department of Justice for records concerning FISA-approved surveillance of the Trump campaign, claiming that Trump's tweets and comments constituted public acknowledgment of the surveillance. NSD issued a *Glomar* response neither confirming nor denying the existence of records. Based on the subsequent declassification of a memo prepared by then-House Intelligence Committee Chair Devin Nunes (R-CA) confirming the existence of a FISA warrant to surveil Carter Page, the agency disclosed information based on that acknowledgment. Judge Denise Cote pointed out that in the Second Circuit the official acknowledgment test stemmed from *Wilson v. CIA*, 586 F.3d 171 (2nd Cir. 2009), largely tracking *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990), and finding that information was officially disclosed only if it was as specific as the information previously released, matched the information previously released, and was made public through an official documented disclosure. But in *New York Times v. Dept of Justice*, 756 F.3d 100 (2nd Cir. 2014), the Second Circuit had questioned the rigidity of the *Wilson* test, noting that "such a requirement would make little sense. A FOIA requester would have little need for undisclosed information, if it had to match precisely information previously disclosed." Applying these tests to the FOIA request here, Cote explained that part of Gizmodo's request pertained to information that had now been publicly acknowledged through the Nunes memo and had to be disclosed. But she indicated that Trump's tweets did not constitute public acknowledgment for other parts of Gizmodo's request. She pointed out that "while official statements need not name any additional individuals or otherwise reveal a person's identity to render a Glomar response inappropriate, the statements must more concretely indicate the existence of the specific records sought in order to satisfy the *Wilson* test. With the disclosure that surveillance did occur of Page, who worked with the Trump Campaign, and with the disclosure that candidate Trump was not the target of such surveillance, thee is no bar to the Government invoking a Glomar response with respect to a FOIA request seeking records of surveillance of all other individuals associated with the Trump Campaign in 2016." (*Gizmodo Media Group, LLC v. Department of Justice*, Civil Action No, 17-3566 (DLC), U.S. District Court for the Southern District of New York, Apr. 3)

A court in New York has ruled that the public interest in learning about the quality of medical care provided pretrial detainees in the custody of the U.S. Marshals Service outweighs any personal privacy interest in either **Exemption 6 (invasion of privacy)** or **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Investigative reporter Seth Freed Wessler submitted requests regarding the confinement for federal pretrial detainees held in state, local and private prison facilities with which the agency contracted. Wessler filed suit and the parties agreed to have the court rule on the threshold issue of whether Exemption 6 and Exemption 7(C) applied categorically to protect medical records of detainees. To bolster his argument for disclosure, Wessler told the court that he had received similar information through requests to the Bureau of Prisons, which allowed him access to medical files of prisoners. Wessler indicated that by consulting with a team of doctors, he had been able to establish that 25 of 103 deaths for which BOP provided complete medical files led to premature death. The court agreed with the agency that prisoners' families also had a cognizable privacy right in the records. But the court noted that "however, the evidence in this action to date – which is so far unrebutted – is that Wessler's past reporting on medical neglect in prisons, the families of the deceased have 'expressed gratitude' when Wessler 'contacted them in the process of investigating and/or before publishing stories about their relative.'" The court observed that "here there is a significant – perhaps even compelling – public interest served by disclosure of these medical records which strongly offsets the 'moderate privacy interest' protected by Exemption 7(C)." The court indicated that "while the fact that the BOP – not USMS – voluntarily released its full medical records to Wessler does not waive USMS's right to seek to withhold them, it is certainly relevant that the BOP did not view these types of records as exempt from disclosure under FOIA." Rejecting the agency's claim that the public interest was diminished because the records Wessler was seeking concerned non-federal operations, the court pointed out that "that blinks at the entire point of this exercise. The asserted purpose of Wessler's reporting is to determine whether USMS failed to do what it is required to do – monitor the care provided to the detainees in these state, local, and private facilities. That is a core responsibility of USMS, as set forth on USMS's own website." (*Seth Freed Wessler v. United States Department of Justice and United States Marshals Service*, Civil Action No.17-976 (SHS), U.S. District Court for the Southern District of New York, Apr. 10)

Judge Beryl Howell has ruled that filmmaker Laura Poitras is not entitled to **attorney's fees** for her FOIA litigation against the Department of Homeland Security to find out why she was subjected to secondary security screening for every international flight she took to the United States, as well as several international and domestic flights. In total, Poitras was detained for secondary screening more than 50 times over a six-year period. She requested records concerning why she was detained so frequently from DHS. She made FOIA requests to the FBI and the Office of the National Director of Intelligence as well. After the agencies failed to respond to her requests, Poitras filed suit. The FBI located 350 pages, releasing one page in full, 262 pages in part, and withholding 87 pages. Customs and Border Protection released 492 pages from its TECS database, and 220 pages in its Automated Targeting System database. CBP later became aware that its New York office had records related to a 2010 incident at JFK International Airport and ultimately disclosed 223 redacted pages. However, CBP withheld 3,182 pages in full. The Transportation Safety Administration disclosed 21 pages with redactions. Poitras challenged only the adequacy of CBP's search and the appropriateness of the FBI's Exemption 5 (privileges) and Exemption 7 (law enforcement records) claims. Before Howell was assigned the case, the original district court judge found that the agencies' search and exemption claims were insufficiently supported and ordered the agencies to supplement their affidavits. After Howell was assigned to the case, she reviewed the agencies' supplemental affidavits and ruled in their favor. The agencies conceded that Poitras was eligible for fees but argued that she was not entitled to them. Howell first reviewed the public interest in Poitras' request. She agreed that there was some public interest here because of "the plaintiff's

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notoriety and that the FOIA requests might reasonably have been viewed as likely to shed light on regulation of air travel, a topic of broader public interest. . ." Howell pointed out that "plaintiff's FOIA requests could have been expected to illuminate why someone is designated for 'Secondary Security Screening Selection,' whether the plaintiff's persistent detentions were related to suspicions that she had advance knowledge of a 2004 attack in Iraq that led to the death of an American soldier, or whether the regular stops were connected to the plaintiff's professional work. All three of these possibilities are of public concern." Citing *Tax Analysts v. Dept of Justice*, 965 F.2d 1092 (D.C. Cir. 1992), Howell observed that "importantly, the D.C. Circuit has disclaimed any automatic rule that a news organization can have no self-interest for making a FOIA request. Journalists, like anyone else, can act with self-interest. Indeed, here, irrespective of her profession, the plaintiff's FOIA requests patently were self-interested." Howell explained that "through her FOIA requests, the plaintiff discovered why she had been stopped at the border for six years. From the beginning, that was the motivation behind her FOIA requests. Nothing is wrong with self-interested FOIA requests, they just are less likely to result in an award of attorney's fees. Consequently, [the personal interest] factor counsels against attorney's fees." Poitras argued that the agencies had been unreasonable by failing to respond to her requests within a reasonable amount of time. While Howell found that "CBP's withholdings come closest to unreasonable," she added that "for the remainder, the withholdings were perfectly reasonable." Finding that only the public interest factor favored Poitras's claim for an award, Howell indicated that "on balance, then the plaintiff has not demonstrated an entitlement to an attorneys' fees award." (*Laura Poitras v. Department of Homeland Security, et al.*, Civil Action No. 15-1091 (BAH), U.S. District Court for the District of Columbia, Apr. 11)

A federal court in Alabama was faced with some of the same concerns that informed Howell's analysis in the Poitras case in ruling that Joseph Siegelman, the son of former Alabama Governor Don Siegelman, whose bid for re-election ended when he lost the Democratic primary because of allegations of corruption by the U.S. Attorney in Alabama and was subsequently prosecuted and convicted, is entitled to **attorney's fees** for his suit that forced the Office of Professional Responsibility to disclose the factual portions of its report pertaining to alleged prosecutorial misconduct by the U.S. Attorney. Siegelman requested the 157-page report. The agency withheld the entire report, claiming Exemption 5 (privileges), Exemption 6 (invasion of privacy), and Exemption 7(C) (invasion of privacy concerning law enforcement records). OPR's decision was upheld on appeal. Siegelman then filed suit and asked the court to conduct an *in camera* review. As a result of its *in camera* inspection, the court concluded that 34 pages could be disclosed with redactions. OPR disclosed the redacted pages and Siegelman filed a motion for attorney's fees. The court found that Siegelman was eligible for fees, pointing out that "this litigation caused OPR to make a good faith effort to search through the ROI and determine whether information in the ROI should be disclosed." The court added that "OPR produced information from those 34 pages only after the Court issued a show cause order." The court noted that the subject matter of the report was clearly implicated the public interest. The court pointed out that "it is 'relatively easy' for Mr. Siegelman to demonstrate the 'potential public value' of the FOIA request even though the released portions of the ROI may reveal little." Recognizing that Siegelman had a personal interest in the records, the court observed that "Mr. Siegelman's efforts seem to stem from mixed motives. He and his family certainly have a private interest in the ROI, but Mr. Siegelman fairly points out that the public also has a legitimate interest in OPR's investigation of conduct that led OPR to conclude that 'some employees had exercised poor judgment with respect to discrete issues' in the Siegelman prosecution. Thus, Mr. Siegelman's pursuit of the ROI 'is likely to add to the fund of information that citizens may use in making vital political choices.'" The court concluded that OPR's denial of the request had no reasonable basis in law. The court pointed out that "OPR should have conducted a segregability analysis in response to [Siegelman's] FOIA request and should have disclosed the reasonably segregable portions of the report – at a minimum the pages that OPR produced [a year later]. OPR's decision to withhold most of the ROI was reasonable and was based

in the law, but it was not reasonable for OPR to delay a segregability analysis until after Mr. Siegelman filed his lawsuit." Calling Siegelman's fee request "excessive," the court indicated that "under the circumstances, Mr. Siegelman is entitled to a modest award of fees and costs." The court told the parties to confer and agree to an acceptable award. (*Joseph Siegelman v. United States Department of Justice, Office of Professional Responsibility*, Civil Action No. 16-00083-MHH, U.S. District Court for the Northern District of Alabama, Apr. 8)

A federal court in Pennsylvania has ruled that the National Transportation Safety Board conducted an **adequate search** for records pertaining to seven airplane crash investigations requested by the Wolk Law Firm, representing the families of various crash victims, including the parents of Mark Goldstein, and that the agency properly withheld records under **Exemption 3 (other statutes), Exemption 4 (confidential business information), Exemption 5 (privileges)**, and **Exemption 6 (invasion of privacy)**, and although the agency had no obligation to provide further records pertaining to the aircraft involved in the Goldstein crash since the plane had been sent to a salvage company in Dallas, because the agency did not claim any exemptions for records related to the wreckage, it must disclose chain-of-custody or similar records in its files pertaining to the wreckage. A passenger on the crash that killed Mark Goldstein had taken a cell phone video during the incident. The NTSB withheld the record under Exemption 3, citing 49 U.S.C. § 1114(c)(1), prohibiting the NTSB from disclosing any cockpit video recording of an accident. Wolk argued that the video was subject to discovery if relevant. The court initially found that § 1114(c)(1) clearly qualified as a prohibition to disclosure under Exemption 3. But the court was skeptical that § 1114(c)(1)'s prohibition extended to cell phones. The agency relied on *CIA v. Sims*, 471 U.S. 159 (1985), and *Aronson v. IRS*, 973 F.2d 962 (1st Cir. 1992), to support its claim that agencies had leeway to reasonably interpret Exemption 3 statutes, but the court noted that other circuits had disagreed with the holding in *Aronson* and that there was no Third Circuit precedent. The court explained that "the NTSB's deference argument requires the Court to parse the command of conducting *de novo* review to mean only part of the agency's decision is reviewed rather than the matter as a whole" and added that "the Court is not confident that such parsing is the appropriate default mode of analysis." Nevertheless, the court agreed with the agency, pointing out that "what is important is the prohibition on disclosure of recordings made of the cockpit; the manner of recording is immaterial." The court found that the agency properly withheld records under the deliberative process privilege. Rejecting Wolk's argument that some discussions did not result in decisions, the court explained that "it is of no moment that the process may not result in an adjudication or the adoption of a policy; rather, the deliberative process is at work, has yet to be completed, and will likely result in the issuance of a report with recommendations." The court indicated that the privacy rights of victims outweighed any public interest. The court noted that "the documents reveal little-to-nothing at all about the agency's activities and conduct, rather the documents concern medical issues and medical opinions." The court acknowledged that since the NTSB no longer had the wreckage from the Goldstein crash "one cannot produce that which one does not have." But the court indicated that "to the extent the NTSB at some time did have the wreckage pieces, the NTSB must have prepared chain of custody records, and such records could be produced." (*Wolk Law Firm, et al. v. United States of America National Transportation Safety Board*, Civil Action No. 16-05632, U.S. District Court for the Eastern District of Pennsylvania, Apr. 9)

Judge Trevor McFadden has ruled that the Assassination Archives and Research Center is neither eligible nor entitled to **attorney's fees** for its litigation against the CIA for disclosure of a report the agency prepared on the attempted assassination of Adolph Hitler as part of its consideration of potentially assassinating Fidel Castro because the organization did not substantially prevail. After AARC filed suit, the agency disclosed a document entitled "Propagandist's Guide to Communist Dissensions" and five related

records. Because the documents had been disclosed during litigation, AARC filed a motion for $103,358 in fees. The motion was referred to Magistrate Judge Michael Harvey, who recommended that the motion be denied. AARC objected to Harvey's recommendation, arguing that the court should abandon the four-factor test from the 1974 Senate Report because it did not follow the plain language of the statute. AARC argued that Harvey had underestimated the public interest in the disclosure of the report on the attempt to assassinate Hitler because it was more broadly part of the historic record concerning President Kennedy's assassination. McFadden agreed that "a plot to assassinate a foreign leader such as Castro is a matter of potential public value. Even so, information about a never-implemented assassination plan that Congress investigated 40 years ago is only marginally 'likely to add to the fund of information that citizens may use in making vital political choices.' While there is some potential public value in information about a Castro assassination attempt, it is not strong." McFadden also pointed out that most of the document had already been disclosed. The CIA argued that AARC received a private benefit by avoiding the need to search for the document in the National Archives. Harvey had concluded that the alleged benefit of not having to go to NARA did not weigh in favor of or against awarding attorney's fees and McFadden agreed. AARC argued that under the D.C. Circuit's holding in *Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007) it would be unreasonable for the CIA to refer a request for Kennedy assassination records to NARA without conducting a search itself. In this case, however, McFadden pointed out that the agency only referred AARC to NARA for records it no longer had in its possession. The CIA then conducted three searches before its final disclosure in the case. He explained that "the reasonableness of the CIA's conduct is also evidenced by the fact that after extensive searching, the agency turned up only a single document, not a deluge of responsive records. That the CIA found the needle after searching the haystack a third time does not alter the Court's prior opinion that the agency met its burden to establish a systematic good faith search effort." In its last decision resolving the attorney's fees question remaining in *Morley v. CIA*, 894 F.3d 389 (D.C. Cir. 2018), the D.C. Circuit concluded that the district court had acted reasonably by putting all of its emphasis on the fourth factor of the test – whether the agency had a reasonable basis in law – to deny Morley's fee request. Here, McFadden noted that "the first three factors may weigh in Assassination Archives' favor, but only slightly. In contract, the fourth factor weighs strongly in the CIA's favor." He observed that "after sifting the four factors and the evidence, the Court finds the fourth factor carries the most weight here, with its strong finding in favor of the CIA." AARC also argued that the four-factor test should be abandoned because it was contrary to the statutory language. McFadden pointed out that both former D.C. Circuit Judge Brett Kavanaugh and Senior Circuit Court Judge A. Raymond Randolph had strongly argued for abandoning the four-factor test, but indicated that "if the D.C. Circuit is moving away from the four-factor test, it is not necessarily headed towards a test helpful to Assassination Archives. . .In any case, this Court cannot overturn the four-factor test. It is bound by the test 'until either the Circuit, sitting en banc, or the Supreme Court, overrules it.'" (*Assassination Archives and Research Center, Inc. v. Central Intelligence Agency*, Civil Action No. 17-00160 (TNM), U.S. District Court for the District of Columbia, Apr. 4)

The D.C. Circuit has upheld a district court's ruling finding that the IRS conducted an **adequate search** for records concerning the basis for its claim that Frank and Jehan Agrama failed to report an ownership interest in an Egyptian corporation between 1982-2004 and that it properly withheld records under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. The Agramas claimed that they had no such ownership, and both filed separate FOIA requests with the IRS for records on which the agency's claims were based. The agency found responsive records and disclosed some of them, including a translation of an 83-page report prepared by investigator Gabriella Chersicla for the Italian government. At the district court, the agency provided an *ex parte* affidavit to the judge to explain its reasons for citing Exemption 7(A). The Agramas attacked the district court's acceptance of the *ex parte* affidavit. The D.C. Circuit, however, noted that "it is true that FOIA only expressly authorizes district courts to conduct an *in camera* review of withheld documents, but we have held that federal courts in FOIA cases have the inherent authority to accept

other kinds of materials *ex parte*." The Agramas also argued that once the IRS had established the Chersicla report as the basis for its claims it should have expanded its search to the IRS's Tax Attaché in Italy. The D.C. Circuit noted that "agencies are not, however, 'required to speculate about potential leads.' Here, based on detailed public and *ex parte* declarations that describe the scope and nature of the IRS's search for responsive documents, we are satisfied that the agency made its search" in good faith. The agency withheld four records under Exemption 7(A). Finding the agency had properly claimed the exemption, the D.C. Circuit rejected the Agramas' claim that the fact that the agency had informed them of their tax liability suggested that the investigation had been completed. But the D.C. Circuit pointed out that "even if the investigation has progressed to the point that the IRS can assert Agrama needs to file a particular form, this does nothing to rebut or undermine the IRS's declaration that the investigation remains active." *(Jehan Agrama v. Internal Revenue Service*, No. 17-5270, and *Frank Agrama v. Internal Revenue Service*, No. 17-5256, U.S. Court of Appeals for the District of Columbia, Apr. 19)

In his most recent ruling on *pro se* litigant Gregory Bartko's quest for records that undermine his conviction for security and wire fraud, Judge James Boasberg has ruled that while the Bureau of Prisons has shown that it conducted an **adequate search** for records, EOUSA has not. Bartko submitted a request to EOUSA for records of communications of 17 named individuals at the U.S. Attorney's Office for the Eastern District of North Carolina in relation to three specific cases – his own, and those of co-defendants John Colvin and Scott Hollenbeck. Bartko sent a similar request to BOP for records of communications related to Hollenbeck's cooperation as a government witness, including visitation records of two attorneys from the USAO-EDNC, as well as named FBI and IRS agents. EOUSA released 90 records in full and 20 pages in part. It withheld 43 pages in full under several exemptions. In response to Bartko's request to BOP, the agency conducted a search and found no records. Bartko challenged the adequacy of EOUSA's search, particularly why its search of archived emails yielded responsive records as far back as 2009 although the agency told Bartko that that email archives only went back three years. EOUSA tried to explain the discrepancy by suggesting that the older emails were found in a search of hard copy records at EDNC. However, Boasberg pointed out that "yet neither the brief nor the declaration to which it cites actually says that the older emails were found in the boxes. As a result, the Court is left with either an ambiguity or a contradiction with the stated three-year archive rule." He told the agency to either conduct a further electronic search outside the three-year window or explain that it found the older emails during its search of the hard-copy records. Boasberg agreed that 43 pages contained information concerning criminal conduct that was protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. He noted that "the defendants referenced in the withheld documents maintain a significant privacy interest in the potentially embarrassing particulars of their plea negotiations and specified malfeasance." (*Gregory Bartko v. United States Department of Justice, et al.*, Civil Action No. 17-781 (JEB), U.S. District Court for the District of Columbia, Apr. 11)

A federal court in Missouri has ruled that the Department of Labor properly responded to Jack Jordan's request for a copy of an administrative judge's decision by providing a PDF containing a scanned copy of the decision. Jordan requested the decision as an "unlocked PDF." The agency referred him to the PDF file on its website, which was publicly available and not password protected. Jordan challenged that decision and subsequently characterized the term "unlocked PDF" as being a record created either by Microsoft Word or a non-scanned PDF that was not password protected. The court pointed out that "even when liberally construing his FOIA request, the DOL could not have known Plaintiff sought the type of PDF format he later detailed. Furthermore, Plaintiff cannot expand his FOIA request and/or modify the requested format when appealing the DOL's denial or in his lawsuit when he did not request this more particular PDF

format in his initial FOIA request." Jordan also argued that his request for copies of signed letters included drafts as well. But the court observed that "while the draft letters in Word were not sent to Plaintiff in response to his FOIA request, the final, signed copies of the letters were sent to Plaintiff. The DOL did not violate the FOIA when it sent Plaintiff the responsive letters in PDF format, which was one of the [two] formats requested by him and was also the format in which the DOL maintained the letters sent to Plaintiff." (*Jack Jordan v. U.S. Department of Labor*, Civil Action No. 18-06129-SJ-ODS, U.S. District Court for the Western District of Missouri, Apr. 9)

Judge Reggie Walton has ruled that a settlement agreement that Jon Rogers signed with the IRS to resolve a civil forfeiture action against him prohibits him from pursuing litigation related to the forfeiture action, including FOIA litigation. Rogers had already litigated the agency's refusal to provide all responsive records in district court in Ohio and the Sixth Circuit. However, he filed suit against EOUSA in the D.C. Circuit district court that included claims under FOIA and the Privacy Act. The agency argued that the settlement agreement acted as a bar against any related litigation. Rogers pointed to the D.C. Circuit's ruling in *Price v. Dept Justice Attorney Office*, 865 F.3d 676 (D.C. Cir. 2017), in which the court found that plea agreements resolving criminal charges did not waive the individual's right to pursue FOIA litigation, as evidence that such broad agreements did not bar such litigation. Walton ultimately disagreed, distinguishing Rogers' settlement agreement from a plea agreement. He noted that "no published opinion, to the Court's knowledge, has found that the *Price* holding applies to civil settlement agreements. Rather, even though decided before *Price*, other members of this Court have upheld the waiver of FOIA rights in the context of civil settlement agreements." Rogers argued that the Office of Information Policy implicitly waived the settlement agreement when it remanded Rogers' request on appeal. But Walton pointed out that "nowhere in the 2016 decision does the OIP expressly indicate that it was remanding the plaintiff's FOIA request because it found that the defendant had waived the terms of the Settlement Agreement. Therefore, the Court concludes that the purported waiver by the OIP was not made in the 'unmistakable terms' required for a valid waiver by a sovereign authority." Rogers also argued that the doctrine of collateral estoppel prevented the government from enforcing the settlement agreement. Walton, however, observed that "the plaintiff cannot demonstrate that 'an "injustice" will result if the defendant is not estopped from withholding these materials' because the plaintiff has not demonstrated that he is entitled to the requested documents, and therefore the defendant's withholding of the request documents is 'of no consequence.'" (*Jon R. Rogers v. Executive Office for United States Attorneys*, Civil Action No. 18-454 (RBW), U.S. District Court for the District of Columbia, Apr. 9)

A federal court in California has ruled that the Department of Justice and the IRS properly responded to Roderic Mack Wright's FOIA request for records about the agencies' 2007 investigation of his business dealings. DOJ's Tax Division located two files pertaining to the investigation. It disclosed five pages and referred 70 pages to the IRS for processing. The IRS withheld the 70 pages under Exemption 3 (other statutes), citing Rule 6(e) on grand jury secrecy. Wright filed suit but only challenged the agency's withholding under **Exemption 6 (invasion of privacy)**. Wright argued that he already knew the identities of the redacted names. But the court pointed out that "the fact that Wight may already know these individuals' names is irrelevant – as the Tax Division correctly points out, the question is whether disclosure of their names and identifying information to the public would violate their privacy." Wright also argued that some designations as exempt material were not made until after he submitted his FOIA request. The court pointed out that "of course they were. While it's conceivable that some document designations are made on a rolling basis, many document designations are not made until a member of the public submits a request for production that requires the agency to consider whether a specific document should be released to the public. That a designation is made after a FOIA request is irrelevant to whether the document is exempt or not." (*Roderic*

Mack Wright v. United States Department of Justice, et al., Civil Action No. 17-1451-LAB (MDD), U.S. District Court for the Southern District of California, Apr. 4)

Judge Tanya Chutkan has ruled that prisoner Richard Rose failed to show that the Bureau of Alcohol, Tobacco and Firearms received his FOIA requests for gun trace information about a specific revolver. It was not until Rose filed suit, that ATF became aware of his requests. After searching its database of FOIA requests it located no record of any request from Rose. Acknowledging the agency's obligation to respond to FOIA requests, Chutkan noted that "if the agency receives no FOIA request, or one that does not comply with its published rules, it 'has no reason to search or produce records.'" Rose had sent his two requests to ATF's National Tracing Center in West Virginia at two different addresses, one of which no longer existed. Rose argued that the agency should have searched its database to locate requests he submitted in 2009 and 2010. Rejecting that notion, Chutkan observed that "the complaint does not mention any other FOIA requests, much less one from 2009. . ." She concluded that "Defendant has no obligation to fulfill under the FOIA and is entitled to judgment as a matter of law." (*Richard W. Rose v. U.S. Department of Justice*, Civil Action No. 18-2199 (TSC), U.S. District Court for the District of Columbia, Apr. 15)

A federal court in Wisconsin has ruled that the National Security Division at the Department of Justice and the Passport Office at the Department of State properly responded to two unrelated requests submitted by Frederick Kriemelmeyer. Kriemelmeyer sent a request to the National Security Division for records concerning whether an IRS agent, an Assistant U.S. Attorney, and a federal magistrate judge had registered as foreign agents under the Foreign Agents Registration Act. Information specialist Arnetta Mallory processed Kriemelmeyer's request, telling him that she could find no responsive records. Kriemelmeyer filed suit, arguing that the agency's search was inadequate and that it should have told him earlier that he could search for the information himself on a publicly available database. Finding that the agency's affidavit sufficiently explained its search, the court dismissed Kriemelmeyer's claim that the agency had an obligation to tell him earlier about its public database, noting that "this argument does not undermine defendant's evidence and does not support an independent claim under the Freedom of Information Act." Kriemelmeyer had sent a request to the Chicago Passport Office for records the agency relied upon in denying him a passport. The agency responded that Kriemelmeyer needed to provide authentication of his identity before his request would be processed. Kriemelmeyer failed to provide the required information and the agency did not process his request. Dismissing Kriemelmeyer's suit, the court pointed out that "he concedes that he had ample opportunity to submit identification that complied with defendant's requirements but failed to do so. Because plaintiff's request did not comply with department rules, defendant has no obligation under [FOIA] to provide documents responsive to plaintiff's request." (*Frederick George Kriemelmeyer v. U.S. Department of State, Chicago Passport Agency*, Civil Action No. 18-148-bbc, and *Frederick George Kriemelmeyer v. Arnetta Mallory*, Civil Action No. 18-48-bbc, U.S. District Court for the Western District of Wisconsin, Apr. 18)

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