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Washington Focus: Two veterans in the House have introduced legislation to force the Department of Veterans Affairs to speed up its responses to FOIA requests, many of which come from veterans or advocacy groups. Rep. Gil Cisneros (D-CA) and Rep. Max Rose (D-NY) introduced the VA FOIA Reform Act of 2020 (H.R. 7163). The bill would require the Department of Veterans Affairs to fix its IT issues and reduce its backlog of FOIA requests by 75 percent within three years. The bill also provides for OGIS to review the VA's response time. In a statement introducing the legislation, Rose noted that "we've never let outdated technology and a lack of resources stand in the way of our military accomplishing its mission, so we shouldn't let it stand in the way of the VA serving those soldiers with transparency and accountability once they come home."

Courts Question Confidential Nature of Company Submitted Information

When the Supreme Court agreed to hear *Food Marketing Institute v. Argus Leader Media*, specifically challenging whether the substantial competitive harm test first developed in 1974 by the D.C. Circuit in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) was supported by the plain language of Exemption 4 (confidential business information), many FOIA observers assumed that if the Supreme Court threw out the substantial harm test it would be considerably easier for business submitters to persuade agencies to withhold such information because it was customarily treated as confidential. However, while the Supreme Court's decision last year in *Food Marketing Institute v. Argus Media Leader*, 139 S. Ct. 2356 (2019), concluded that the substantial competitive harm test was not supported by the plain language of Exemption 4, the decision failed to resolve a host of other unanswered issues about what constituted commercial information and what elements were required to establish confidentiality.

Two recent decisions from the Northern District of California illustrate some of the hurdles that agencies still face in convincing courts that records are both commercial and confidential for purposes of Exemption 4. While both cases

focus on the confidentiality of records, they also deal with aspects of what constitutes commercial information.

The first case involved FOIA requests from Jennifer Gollan, a reporter for the Center for Investigative Reporting, to the Occupational Health and Safety Administration for records contained on OSHA Forms 300, 300A, and 301 pertaining to the reporting of workplace injuries and illnesses. OSHA's search yielded 237,000 potentially responsive records. OSHA initially decided to withhold all the records on the basis of Exemption 7(E) (investigative methods or techniques), but after Gollan filed an administrative appeal of that denial claim, the agency invoked Exemption 4 instead.

The agency claimed that the information was confidential because in the 2014 rulemaking process, employers and trade groups contended that they considered such information to constitute confidential commercial information. But Magistrate Judge Donna Ryu pointed out that "as *Food Marketing* makes clear, the court must examine whether the information actually is kept and treated as confidential, not whether the submitter considers it to be so. *Food Marketing* involved store-level Supplemental Nutrition Assistance Program (SNAP) data. The court concluded that the information was confidential within the meaning of Exemption 4 because the owners of the SNAP data customarily kept and treated the information as confidential." Ryu noted that "in contrast, here, the rulemaking comments relied upon by [the Department of Labor] reflect the owners' subjective view of the nature of the information, which is not the test for confidentiality under *Food Marketing*. The comments do not speak to how the owners keep and treat the Form 300A information; instead, they focus on the reasons why the owners oppose the release of the information. Therefore, the comments are minimally probative." Further, the Form 300As were required to be posted where employees could see them. This, Ryu observed, meant that "there are no restrictions on further dissemination of Form 300A information. . .Therefore, the Form 300A information is both readily observable by and shared with employees, who have the right to make the information public."

While OSHA argued that it had changed its policy on posting, meaning the data was not readily available, Ryu pointed out that guidance on how to apply the *Food Marketing* standards posted by the Office of Information Policy in October 2019 indicated that "information *loses* its character of confidentiality where there is an express agency notification that submitted information will be publicly disclosed." Ryu explained that "even if DOL had established that the Form 300A information is 'customarily treated as private by its owners,' the information ceased to be confidential upon submission to the government pursuant to Department of Justice guidelines."

The other case involved continuing litigation by the American Small Business League for records pertaining to plans submitted by defense contractors to hire small business subcontractors as part of Defense Department contracts. ASBL had asked District Court Judge William Alsup to review three compliance reviews submitted by Sikorsky *in camera* to determine if Exemption 4 claims made by Sikorsky and the agency were appropriate. Alsup indicated that "plenty of information within the compliance reports does appear to be bare company information. . .The government appropriately redacted this information." He observed that "Sikorsky's fiscal year 2013 review appropriately redacts several pages plainly reciting Sikorsky's internal procedures for accomplishing its small business subcontracting goals, though disclosing the resulting government evaluations. It also appropriately redacts tables listing specific subcontracts and subcontracting in various categories year-over-year."

However, throughout the ASBL litigation, Alsup had distinguished between the confidentiality of information submitted by defense contractors pertaining to their small business subcontracting plans and the government's subsequent analysis of that information. In this instance, Alsup pointed out that "recall that evaluations – *e.g.*, a finding 'that an SB goal was not met because the company failed to meet the SB goal by a certain percentage' – remains the government's." Alsup provided an example of a paragraph which Sikorsky

had heavily redacted. Explaining why the redactions were inappropriate, Alsup pointed out that "though the conclusions of the government's own evaluations have been disclosed, it appears that the government's analysis remains redacted. This cannot be." He added that "the quantitative values, the amount of money flowing through Sikorsky to small businesses (whether given in absolute dollars or percentages of total revenue) remains company information. But the qualitative assessments of hard data remain the *government's* evaluation of Sikorsky. So, the current redactions unnecessarily shield valuable *qualitative* government assessments. The November order's recognition that the government need not painstakingly redact word by word did not invite lackadaisical over-redaction. . .The company's numbers and the government's analysis remain segregable with reasonable effort."

Alsup also rejected DOD's claim that because a joint-defense agreement existed with Sikorsky as of 2015, discussions of the joint defense were protected under Exemption 5 (privileges). Instead, he indicated that the joint-defense agreement did not exist until 2017. He noted that "the two must have reached *an agreement* to jointly appeal. And, once again, the government points to no offer to jointly appeal and no acceptance of the offer. Without both, no agreement can exist." (*Center for Investigative Reporting v. Department of Labor*, Civil Action No. 18-02414-DMR, U.S. District Court for the Northern District of California, June 4 and *American Small Business League v. Department Defense*, Civil Action No. 18-01979 WHA, U.S. District Court for the Northern District of California, June 5)

Views from the States

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

California

The supreme court has ruled that the provision in the California Public Records Act allowing agencies to recover costs for data extraction from electronic records does not include the cost of redaction of exempt information from electronic records. The case involved a request from the National Lawyers Guild, San Francisco Bay Area Chapter, for records from the City of Hayward Police Department relating to its participation in policing protests that erupted in Berkeley after grand juries in New York and Missouri declined to indict the police officers who were involved in the deaths of Eric Garner and Michael Brown. In responding to NLG's request, Hayward located 141 body-cam videos responsive to the request. Because the video contained potentially exempt data, Hayward, citing the amended provision in the PRA allowing agencies to charge for providing electronic records, charged NLG more than $3,000 to cover the costs of redacting the information. NLG filed suit, arguing that the data extraction provision did not apply to existing records. The trial court ruled in favor of NLG, but the court of appeals reversed, finding the data extraction provision applied to redactions of electronic records. The supreme court reversed the court of appeals ruling. The supreme court noted that "the PRA does not relieve agencies of the obligation to retrieve data to construct disclosable records; it instead protects them from any obligation to generate new substantive content for purposes of public release." The supreme court pointed out that "redacting exempt footage can be time-consuming and costly. . .Whether the unique burdens associated with producing body camera footage warrant special funding mechanisms is a question only the Legislature can decide. We hold only that [the provision allowing agencies to charge for the cost of data extraction], as presently written, does not provide a basis for charging requesters for the costs redacting government records kept in electronic format, including digital

video footage." (*National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al.*, No. S25445, California Supreme Court, May 28)

A court of appeals has ruled that the trial court erred when it transferred a Public Records Act request from the superior court in Los Angeles to the superior court in Sacramento because it believed that it did not have jurisdiction to hear a suit brought by the California Gun Rights Foundation against the Attorney General since the AG's records were physically located in Sacramento. After the AG failed to respond to the Foundation's PRA request, the Foundation filed suit in Los Angeles, where the AG also had an office. The trial court however, concluded that jurisdiction was more appropriate in Sacramento and transferred the case there. The court of appeals found instead that the superior court in Los Angeles had jurisdiction. The appeals court noted that "section 6259's place-of-trial provision is not jurisdictional, and [the California Code of Procedure] section 401 applied to *any* action against the State or its agencies, including this one, brought under the CPRA where venue is proper in Sacramento County. We also conclude that the trial court did not exercise its discretion to transfer venue under C.C.P., section 397, and thus the trial court's ruling cannot be upheld on that basis. The trial court therefore erred in transferring the case to Sacramento County." The AG argued that it was necessary to transfer the case to Sacramento County to facilitate a possible in camera review. But the appeals court pointed out that "undoubtedly, there will be many CPRA cases that can be more conveniently tried in the county where the records are located. But while the convenience of the court and witnesses are relevant to the question of venue, we are not aware of any authority for the proposition that convenience affects fundamental jurisdiction." (*California Gun Rights Foundation v. Superior Court of Los Angeles County*, No. B299798, California Court of Appeal, Second District, Division 3, May 29)

Missouri

A court of appeals has ruled that fee claims made by Elad Gross in response to his two Sunshine Act requests to the Governor's Office were justified. Gross submitted two requests for records sent to or from the Governor's Office pertaining to 27 different individuals. The Governor's Office told Gross it had located 13,659 responsive documents and charged $3,618. The court of appeals indicated that there were two sections concerning fees depending on the type of records and that the trial court had failed to assess whether the Governor's Office had justified its charges. The appeals court noted that "because the [trial] court must determine which records were documents governed by Subsection (1) and which records were electronic records governed by Subsection (2), what fees were being assessed for each type of record, whether the Governor's Office assessed an improper fee as to each type of record, and if any fee was charged at an excessive rate, the [trial] court erred in entering judgment on the pleadings as to the fees assessed for [Gross's] First Sunshine Request." (*Elad Gross v. Michael Parson, et al.*, No. WD 83061, Missouri Court of Appeals, Western District, May 26)

Nebraska

The supreme court has ruled that the Omaha *World-Herald* and the ACLU of Nebraska had standing to bring a public records suit against the Department of Corrections for records concerning lethal executions. While the government argued that prior precedent suggested both organizations did not have standing under the circumstances, the supreme court ruled that the precedent did not apply in these circumstances. After requests from *World-Herald* reporters and the ACLU of Nebraska were denied both organizations filed suit. The trial court ruled in their favor and the agency appealed to the supreme court. The supreme court pointed out that "a party denied access to records need only establish a prima facie claim that the requested record is a public record. A party has established a prima facie claim if it has produced enough evidence to demonstrate that it is entitled to judgment if the evidence were uncontroverted. The inquiry of whether a requested record is a public record focuses on the information or record sought." Having found the newspaper and the ACLU

of Nebraska had standing, the court concluded that the records were public and did not identify anyone participating in executions. The supreme court noted that "here, it is clear that [the agency] has proved that an exemption applies to the names of execution team members as well as any of their identifying information, such as that person's official title or contact information. However, we find nothing in the record on appeal which suggests that an exemption applies to the portions of the purchase orders and chemical analysis reports which do not identify an execution team member and there is no evidence that the exempt portions of the records are inextricably intertwined with nonexempt portions. Nonexempt portions are not entitled to protection [under the public records act] and must be disclosed." (*State of Nebraska ex rel. BH Media Group, Inc., et al. v. Scott Frakes*, No. S-18-604, Nebraska Supreme Court, May 15)

New Hampshire

In two closely-related decisions, the supreme court has ruled that since its case law precedent had changed in the aftermath of the 2011 U.S. Supreme Court's ruling in *Milner v. Dept of Navy*, finding that the internal procedures exemption in the federal FOIA was limited to personnel records, its previous ruling in *Union-Leader Corp. v. Fenniman*, 620 A.2d (1993), finding that police disciplinary investigation records were per se exempt, was no longer good law. The court noted that "because the *Fenniman per se* rule is inconsistent with our historical and current interpretation of the exemption for 'confidential, commercial, or financial information,' we are persuaded that it has become no more than a remnant of abandoned doctrine. We therefore overrule *Fenniman* to the extent that it adopted a *per se* rule of exemption for records relating to 'internal personnel practices.'" (*Union Leader Corporation v. Town of Salem*, No. 2019-0206 and *Seacoast Newspapers, Inc. v. City of Portsmouth*, No. 2019-0135, New Hampshire Supreme Court, May 29)

New York

A trial court has ruled that the Suffolk County Police Department failed to show that it had only a handful of records responsive to a request from the New York Civil Liberties Union and Latino Justice for records concerning the department's identification of suspected gang members and communications between it and the federal U.S. Immigration and Customs Enforcement. After the agency failed to respond within the statutory time limit, NYCLU and Latino Justice filed suit. Finding the police department had not justified its claim that it had few responsive records, the court noted that "it is virtually inconceivable that the SCPD would have no tangible record reflecting the flow of information it has developed or otherwise obtained concerning these young people, its assessment of that information and its sharing of that information with governmental entities and their agents and employees." The court added that "in any event, the materials submitted and cited by petitioner provide a more than ample factual basis for its contention that the SCPD has in its custody or under its control material that it responsive to the August 1, 2017 FOIL request." Although the court acknowledged an appellate court's ruling in *Grabell v. New York City Police Dept*, 139 A.3d 477 (2016), recognizing that the New York City Police Department could invoke a *Glomar* response neither confirming nor denying the existence of records in response to a request for terrorism-related investigations, the trial court pointed out that "here, in view of the substantial documentary record tendered by the petitioner. . .it is virtually inconceivable, if not entirely improbable, that the SCPD did not have and had not maintained any records beyond a single, nine-page set of procedural provisions, that constitute, document, reflect or otherwise bear on its many efforts to address gangs and gang-related activity in Suffolk County and in Suffolk County schools and that are responsive to the. . .petitioner's August 1, 2017 FOIL request." (*New York Civil Liberties Union v. Suffolk County Police Department*, No. 18-1851, New York Supreme Court, Suffolk County, May 18)

A court of appeals has ruled that the trial court erred in allowing the New York City Department of Education to deny a request from the Jewish Press for forms used by school employees to request absences for

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religious observances, in cases where the request was denied, because its request was not reasonably described. While the Jewish Press agreed to accept anonymized records, the Department of Education contended that since there were more than 100,000 potentially responsive records the request was too broad. The trial agreed that the request was too broad. The appeals court reversed, noting that "the respondent has conflated the requirement of reasonable description with the related, but separate, consideration as to whether it would be unduly burdensome for the respondent to comply with the petitioner's request. While the respondent's submissions demonstrate that it knows where the requested records are located, the respondent also maintains that it would be burdensome for it to conduct a search of the personnel files at each of its 1,700 schools to produce the requested records." The appeals court pointed out that the Department of Education had not shown the level of potential burden. The appeals court observed that "there is no information in the record as to what that cost would be or whether petitioner would in fact be willing to reimburse the respondent for the full amount of those costs, once those costs are determined." (*In the Matter of Jewish Press, Inc. v. New York City Department of Education*, No. 2019-0579, New York Supreme Court, Appellate Division, Second Department, May 13)

The Federal Courts…

A federal court in Washington has ruled that U.S. Customs and Border Protection has failed to show that it **conducted an adequate search** for records responsive to two FOIA requests submitted by the law firm of Davis Wright Tremaine pertaining to the agency's decision to classify foreign nationals who worked in the legalized cannabis industry in Canada or the United States as drug traffickers. When the agency had still failed to respond five months after submitting the requests, the law firm filed suit. The agency then began by searching the Seattle Office of Field Operations as well as the national OFO using key words referring to cannabis legalization. The agency later searched another database – the Enforcement Programs Division and Admissibility and Passenger Programs – using keywords pertaining to Canadian legalization of cannabis. A further search was conducted of the agency's Office of Public Affairs and the Office of Training Development. The agency ultimately located 116 pages. Addressing the adequacy of the agency's searches, District Court Judge Ricardo Martinez noted that "on first look, and afforded the presumption of good faith, CBP's evidence appears to paint a clear picture of a reasonable and comprehensive response to Plaintiff's requests. However, the details are far hazier. Drawing reasonable inferences in favor of Plaintiff, the Court is left with too many questions to find that CBP's search was reasonable and adequate as a matter of law." Martinez questioned the agency's decision not to search various component offices. He indicated that the agency's affidavits "do not adequately establish that CBP searched for 'all relevant documents. [The declarant] testifies only that OFO was the office 'most likely to 'maintain' responsive records. CBP does not establish that other component officers were *unlikely to possess* responsive records." Martinez observed that "the Court in unable to see why discovery of a single document created by a different component office makes it *less* likely that the office will have other nonduplicative and relevant records." He noted that "drawing presumptions in Plaintiff's favor, it was unreasonable to not search additional component offices." Martinez explained that the agency had not met its burden of showing that its searches were reasonable. He pointed out that "while perhaps not explicitly CBP's burden to bear, CBP provides no indication of why further searches were *un*reasonable. CBP give no indication of the volume of requests it handles, no indication of the volume of relevant records requiring processing on these requests, no indication of the time spent responding to Plaintiff's requests, no indications that it would not have been reasonable to do more, and no indication that further searches would have interfered with CBP's operation." He pointed out that the fact that CBP used inconsistent search terms "leads to an unfortunate appearance of an agency hand-picking the documents to provide. FOIA expects more than ad-hoc searching by whichever individual is left holding the bag. From afar, CBP's actions appear intended to obfuscate and delay and leave the disturbing impression that CBP has

spent more time opposing any disclosure than it has searching for responsive records." Martinez agreed with Davis Wright Tremaine that the agency had improperly limited its email search to two email accounts. He observed that "CBP does nothing to indicate that responsive records were *unlikely* to be found in the email accounts of its other 60,000 employees." (*Davis Wright Tremaine LLP v. United States Customs and Border Protection*, Civil Action No. 19-334 RSM, U.S. District Court for the Western District of Washington, June 16)

Judge Beryl Howell has ruled that the Department of State properly withheld two documents concerning U.S. policy towards preventing Taiwan from joining the United Nations under its own name in response to a request from Paul Risenhoover under **Exemption 1 (national security)**. In his original FOIA request, Risenhoover asked for directives that had been read by American Institute in Taiwan Taipei Director Steven Young regarding U.S. policy towards Taiwan joining the UN as well a freezing the National Unification Council. Risenhoover indicated that the directives may have been issued by the White House to the State Department for transmission to the American Institute in Taiwan Taipei Office. The State Department conducted a search and located five responsive cables. However, it told Risenhoover it was withholding all five cables under Exemption 1. Howell reviewed all five cables, providing general descriptions of their contents. She indicated that she was satisfied that State had met the requirements for classification under the Executive Order on Classification. She explained that "in all but the March 9, 2007 cable, State withheld 'written statements to the United States by Taiwan, through AIT, in confidence, as well as detailed descriptions of statement made by [Taiwanese] President Chen during confidential discussions,' which qualify as foreign government information under Section 1.4(b) [of the E.O. on classification]. The information comprising all of the cables, including the March 19, 2007 cable, also was classified under Section 1.4(d) because it 'concerns sensitive aspects of U.S. foreign relations.' State's declarant has reasonably explained why confidentiality is 'a vital aspect of successful foreign relations' and the potentially chilling effect on foreign relations if expectations of confidentiality are unmet." Howell agreed with the agency's assessment that all the documents included "discussions of sensitive security topics involving the policies and politics of Taiwan and the broader region" and "candid assessments shared by U.S. and foreign authorities." She observed that "if disclosed, such information 'has the potential to inject friction into, or cause damage to;' the United States' relationship with Taiwan 'as well as other bilateral relationships with countries whose cooperation is important to U.S. national security.'" Risenhoover also challenged the **adequacy of the agency's search**, in particular that State should have searched for records from the White House. Howell rejected the claim, noting that "plaintiff's suggestions, to the extent intelligible, misapprehend FOIA, which obligates an agency to disclose only those records it possesses and controls at the time of the FOIA request. In other words, State was not obligated, as plaintiff seems to suggest, to seek out records created by and/or maintained at the White House or any other non-departmental office." (*Paul Maas Risenhoover v. United States Department of State, et al.*, Civil Action No. 19-715 (BAH), U.S. District Court for the District of Columbia, June 12)

Judge Dabney Friedrich has ruled that affidavits submitted by the Department of Justice to justify its exemption claims in response to a request from researcher Ryan Shapiro for records concerning a *Lewis* list, which is used by the agency to determine whether allegations of misconduct must be disclosed in connection with court proceedings, are insufficient to justify its exemption claims. After explaining that affidavits were required in FOIA litigation to force the agency to analyze its exemption claims, enable the court to rule on the agency's claims, and, further, allow the requester enough information to challenge the agency's claims, Friedrich pointed out that "form follows function, and so agencies 'frequently rely on *Vaughn* indices' to satisfy these requirements. A *Vaughn* index is 'a system of itemizing and indexing' that correlates the

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agency's 'refusal justification with the actual portions of the document' withheld. That said, an agency's supporting materials can take any form so long as they meet all the requirements. . .Here, the Department of Justice has opted not to submit a *Vaughn* index. It relies instead on seven supporting affidavits. It also has offered to provide documents for *in camera* review if necessary." She indicated that "the Department's supporting affidavits do not satisfy these requirements." She found that there were multiple descriptions of what was contained in the *Lewis* list. She pointed out that "the Court cannot evaluate the justifications for withholding the *Lewis* List without more clarity about what it contains." Friedrich indicated that DOJ had withheld 3,199 emails from AUSA Roy McLeese, but that the agency had "described those emails as falling *mainly* into two categories. Not only did the Department fail to describe the emails that fell *beyond* those two categories, but also the descriptions of the two categories themselves are 'too vague and non-specific to evidence that [the agency] carefully analyzed all information withheld.'" Friedrich noted that "of course, the Department of Justice need not 'treat each document individually,' and 'codes and categories may be sufficiently particularized to carry the agency's burden of proof.' But the Department's submissions do not resemble the specificity of other submissions that the D.C. Circuit has blessed." Telling the agency to provide further justification, Friedrich indicated that the agency might well be able to justify its exemption claims by supplementing its current affidavits. But she pointed out that "for now, the Court lacks 'the minimal information necessary to make a determination' in this FOIA dispute." (*Ryan Noah Shapiro v. United States Department of Justice*, Civil Action No. 16-1959 (DLF), U.S. District Court for the District of Columbia, June 11)

Magistrate Judge Deborah Robinson has recommended that EPIC be denied **attorney's fees** for its litigation against the Federal Trade Commission for records concerning the agency's assessment of Facebook's privacy policies after the agency issued an order against Facebook in 2012. The agency told EPIC that it would be unable to respond within the statutory time limit. EPIC then filed suit. The FTC ultimately disclosed 152 pages in responsive to the fourth category of EPIC's request and an additional 452 partially redacted pages in response to the fifth category of EPIC's request. EPIC then asked for an attorney fees award, claiming that it had received a court minute order requiring the agency to disclose the records and that its litigation had caused the agency to comply with EPIC's request. Robinson rejected both claims. She noted that "the order at issue here required the parties to 'file another joint status report by October 20, 2018.'" She observed that "the July 30, 2018 Minute Order did not create 'a court-ordered change in the legal relationship between the plaintiff and the defendant.' While Defendant predicted, and the parties anticipated, certain dates for production of records from a previous status report, these were not the kinds of unequivocal stipulations to produce records that were at issue in *Judicial Watch* [*v. Dept of Justice*, 774 F. Supp. 2d 225 (D.D.C. 2011]." EPIC's causation claim was based on the fact that the agency had failed to respond on time. Robinson pointed out that "to the extent there was some delay, this delay was unavoidable." She added that "defendant coordinated with multiple offices within the agency and two interested third parties, all while ensuring that plaintiff was satisfied with production. Completing production within six months evinces diligence under these circumstances. Given that these causes for delay would have existed if Plaintiff had not filed suit, the undersigned cannot conclude that Plaintiff's suit caused or accelerated production in this action." (*Electronic Privacy Information Center v. Federal Trade Commission*, Civil Action No. 18-00942-TJK/DAR, U.S. District Court for the District of Columbia, June 16)

Judge Reggie Walton has dismissed two consolidated cases brought by pro se litigants Brad and Christine Francis against the IRS after their original litigation was dismissed by the U.S. District Court for the Western District of Missouri. The Francises sued the IRS in 2016 and 2018 in the Western District of Missouri challenging the agency's actions pertaining to their 2010 and 2015 tax returns. The Western District dismissed both suits after concluding that it lacked subject matter jurisdiction. The Francises then filed suit in

2018 in the District of Columbia, asserting the same claims. In March 2019, Walton dismissed most of their claims but allowed their **policy or practice** claim to continue. The Francises also claimed that the agency had violated FOIA by failing to disclose their tax returns. However, Walton dismissed that claim since the agency had provided the tax returns without reference to the FOIA. He then dismissed the policy or practice claim as well. He pointed out that "even assuming that such a cause of action may be pleaded under the Privacy Act, the plaintiffs' improper policy or practice claim still fails because" there was no evidence that the Francises had ever submitted an actual FOIA or Privacy Act request. (*Brad S. Francis, et al. v. Internal Revenue Service*, Civil Action No. 19-949 (RBW) and No. 19-3177 (RBW), U.S. District Court for the District of Columbia, June 12)

A federal court in South Carolina has adopted the recommendation of a magistrate judge's report that the FBI properly responded to two requests from Robert Samuel for records supporting two complaints filed with the Internet Cybercrime Complaint Center pertaining to purported hacking. After the FBI failed to respond to his requests, Samuel complained to the Office for Government Information Services. As a result, the FBI disclosed records with redactions made under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. After Samuel filed suit, the magistrate judge found that the FBI's responses were appropriate. Judge Richard Gergel agreed, pointing out that "plaintiff fails to submit any evidence to dispute Defendant's evidence that it responded to Plaintiff's FOIA requests. As the record demonstrates Defendant complied with and responded to Plaintiff's FOIA request making this case moot." (*Robert T. Samuel III v. Federal Bureau of Investigation*, Civil Action No. 19-01787-RMG, U.S. District Court for the District of South Carolina, June 10)

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