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Washington Focus: The Federal Reserve Board plans to announce its final rule revising its FOIA regulations July 24. The final rule will also address disclosure of confidential supervisory information. The CSI revisions include the ability for supervised financial institutions to disclose such information to directors, officers, employees, and outside counsel and auditors without obtaining prior Board approval. The final rule also updates definitions for expedited processing and helps requesters to "more easily navigate the process of filing a FOIA request."

Split Second Circuit Panel Finds Trump Tweet Not Official Acknowledgement

A split panel of the Second Circuit has ruled that a tweet from President Donald Trump, while critical of the *Washington Post* report on his decision to end covert funding of groups fighting the Assad regime in Syria, did not constitute an official acknowledgement of the existence of payments, and, further, the CIA's role in the funding, and that the agency's *Glomar* response neither confirming nor denying the existence of records was appropriate. However, Judge Rudolph Contreras of the D.C. Circuit district court, had ruled in a 2019 case brought by journalist Jason Leopold for the same records that is was implausible to read Trump's tweet as not confirming the existence of such payments, a conclusion with which Chief Circuit Court Judge Robert Katzman, dissenting, agreed.

In recent years, so many FOIA suits involving national security or law enforcement records routinely revolve around whether or not the government's *Glomar* response refusing to even confirm the existence of records is appropriate in the first instance. Without firm guidance from appellate courts, district courts generally uphold agency *Glomar* claims, requiring requesters to challenge them in the appellate courts. While there has been some progress in those appellate court challenges – *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), in which the D.C. Circuit rejected the CIA's claim that it could deny the existence of records on whether the agency had an interest in drones because of a number of official statements from President Barack Obama an other senior officials had made such a claim implausible and illogical – formed the basis

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of the challenge to Trump's tweet in this case. However, one of the serious problems faced by plaintiffs seeking to use Trump's tweets in particular as the basis for claims of official acknowledgement is that, although Trump's tweets while President have been recognized as official presidential statements, most courts have found those statements so bewildering and unsubstantiated that they generally do not reach the level of official acknowledgment. Nevertheless, Contreras found it impossible to read Trump's tweet on the end of covert funding to Syrian rebel groups as not confirming the existence of such funding, and that the only logical inference was that the CIA had knowledge of such funding.

The Second Circuit case involved a FOIA request from *New York Times* reporter Matthew Rosenberg to the CIA for records, including Inspector General reports, related to the program to which President Trump referred in a July 24, 2017 post on Twitter. That post criticized an article that had appeared several days earlier in the *Washington Post* and read "The Amazon Washington Post fabricated the facts on my ending massive, dangerous, and wasteful programs to Syrian rebels fighting Assad." The CIA told Rosenberg that the existence of records was protected by Exemption 1 (national security) and Exemption 3 (other statutes) and issued a *Glomar* response. Rosenberg filed suit. The district court ruled that the existence of the records was protected under Exemption 1 and Exemption 3 and that Trump's tweet did not constitute an official acknowledgment.

Writing for the majority, Circuit Court Judge John M. Walker agreed that the agency had properly shown that disclosure of the records would cause harm to national security that was protected by both Exemption 1 and Exemption 3. Walker pointed out that "at a minimum, a substantive response to whether the CIA had any documents would reveal that the agency had an interest – or lack thereof – that could expose agency priorities, strategies, and areas of operational interest." However, even if the existence of records was properly protected by Exemption 1 and Exemption 3, Trump's tweet could still have served as a superseding official acknowledgement of the existence of records.

Rosenberg argued that the district court had misread a leading Second Circuit precedent on national security Glomarization – *Wilner v. National Security Agency*, 592 F.3d 60 (2nd Cir. 2009) – to support an agency's decision to invoke *Glomar* unless the *particular records* covered by the *Glomar* response had been officially and publicly disclosed. Instead, Rosenberg argued that *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013) and the subsequent Second Circuit decision on the official acknowledgment of the use of drones for targeted killings, *New York Times v. Dept of Justice*, 756 F.3d 100 (2nd Cir. 2014), indicated that sometimes the breadth of public acknowledgement was so extensive that a *Glomar* response became untenable. But, here, Walker pointed out that "even after the public statements by President Trump and [General Raymond] Thomas, lingering doubts remain as to the information sought. The President never specified that there was any program – let alone one led by the CIA – designed to arm and train Syrian rebels. . .[T[he Times is asking us to draw inferences that the President acknowledged the existence of a covert CIA program. . .While the Times argues that, at a minimum, it 'plainly' must be a decision to end a covert CIA program, these statements, even packaged together, do not remove *all doubt* as to their meaning."

Walker pointed out that "the difference between the circumstances in *ACLU* and this case is stark: here, based upon the doubts left by the statements, we are unable to find an official acknowledgment." Walker also cited *James Madison Project v. CIA*, 302 F. Supp. 3d 12 (D.D.C. 2018), another recent D.C. Circuit district court decision by Judge Amy Berman Jackson in which she upheld the CIA's use of a *Glomar* response to deny the existence of records on Russian election interference that had been referred to in another Trump tweet as support of the majority's ruling here because "the CIA 'asserts a broader justification for issuing a *Glomar* response than merely concealing an "interest" in the [requested document].'" Walker noted that "these justifications are sufficiently specific to support our finding that the claimed Exemptions are 'logical and plausible.'"

The majority also rejected Rosenberg's claim that Trump's tweet had served to automatically declassify the existence of records on the funding issue. Instead, Walker observed that "declassification cannot occur unless designated officials follow specified procedures." He pointed out that "the Times cites no authority that stands for the proposition that the President can inadvertently declassify information and we are aware of none. Because declassification, even by the President, must follow established procedures, that argument fails."

Katzman dissented, agreeing with Contreras's conclusion in *Leopold v. CIA*. 419 F. Supp. 3d 56 (D.D.C. 2019) that there was no plausible way to interpret Trump's tweet as not revealing the existence of records on covert funding of Syrian rebels. Katzman observed that "we have never suggested that the ability to read any doubt whatsoever, no matter how implausible or how belied by context, into a statement calls an official acknowledgment into question." (*New York Times, Matthew Rosenberg v. Central Intelligence Agency*, No. 18-2112, U.S. Court of Appeals for the Second Circuit, July 9)

Views from the States

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

Illinois

A court of appeals has upheld an Attorney General's Public Access Counselor opinion finding that electronic communications sent to and from the mayor of Champaign and several city council members during the course of a public meeting constituted public records even if they were created on personal devices. After Champaign denied a request from Patrick Wade, a reporter for the Champaign *News-Gazette*, claiming the communications were not public records because they were created on the members' personal devices, Wade complained to the Public Access Counselor's Office, which is authorized to issue binding opinions. PAC found that since the communications were created during a public meeting, they were by definition public records. The City filed suit challenging the PAC's opinion and Wade filed a counterclaim for attorney's fees. The trial court ruled against the City but did not address Wade's counterclaim. The City then filed an appeal to the Appellate Court, asking that court to reverse the trial court's ruling and dismiss Wade's counterclaim. The appellate court instead upheld the trial court's ruling on the electronic communications. The appeals court noted that "once the individual city council members have convened a city council meeting, it can reasonably be said they are acting in their collective capacity as the 'public body' during the time the meeting is in session. Indeed, the city council cannot act unless it acts through its individual members during a meeting. As a result, it is not unreasonable to conclude communications 'pertaining to the transaction of public business,' which are sent to and received by city council members' personal devices during a meeting are in the possession of the public body." However, the appeals court found that under these circumstances Wade was not entitled to attorney's fees. The appeals court pointed out that "if at some point during the pendency of the Public Access Counselor's review process, the requester brings a FOIA claim in the circuit court for relief, the Public Access Counselor must not take any further action, *i.e.*, administrative review ceases. Here, however, review by the Public Access Counselor was completed, as binding opinion issued, and the City sought review of the binding opinion through the administrative review process. No judicial action pursuant to section 11 [dealing with attorney's fees] was brought by Wade." (*City of Champaign v. Lisa Madigan*, No. 4-12-0662 and No 4-12-0751, Illinois Appellate Court, Fourth District, July 16)

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New Mexico

The supreme court has ruled that the Albuquerque Police Department failed to justify its categorical use of the investigative records exemption in the Inspection of Public Records Act to withhold records requested by Andrew Jones, the brother of James Boyd, who had been shot and killed in March 2014 by the Albuquerque Police, pertaining to the shooting. The Albuquerque Police withheld records based on the confidential source exemption, claiming that the FBI was investigating the shooting and had told the police not to disclose records that might reveal its sources. Jones filed suit and moved for summary judgment. The trial court ruled that since the investigation was ongoing, the investigatory records exemption encompassed those records as well. At the court of appeals, Jones argued that the trial court erred in finding that the police were eligible for summary judgment. The appeals court found that since Jones had not challenged the police department's summary judgment motion, he did not have standing to do so at the appellate level. The police argued that since Jones had failed to file an interlocutory appeal of its summary judgment motion he did not have standing to appeal. Rejecting that claim, the supreme court observed that "we decline to conclude that it was mandatory in this case for Jones to apply for discretionary remedies from a nonfinal, interlocutory, ruling in order to preserve his argument that the requested records were improperly withheld." Instead, the supreme court indicated that "the district court allowed [the police department] to broadly withhold law enforcement records in toto because there was an ongoing criminal investigation." The supreme court pointed out that "the interpretation of the district court was overbroad and incongruent within the plan language of [the exemption]." The supreme court found that the trial court should have granted summary judgment to Jones since the police had not justified withholding the records. The supreme court noted that the police had failed to review any of the records for segregability. The supreme court also rejected the police's claim that it was required to withhold the records because the FBI had requested it to do so. Instead, the supreme court observed that "the FBI asked only that [the police] withhold information to the extent possible under IPRA." (*Andrew Jones v. City of Albuquerque Police Department, et al.*, No. S-1-SC-37094, New Mexico Supreme Court, July 14)

New York

A court of appeals has ruled that the Department of Health properly responded to a Freedom of Information Law request from the non-profit genealogical organization Reclaim the Records for records related to the agency's relationship with Ancestry.com. Both Reclaim the Records and Ancestry.com made FOIL requests to the agency for death indexes in electronic formats, expressing willingness to consider paying the cost of digitizing the indexes, many of which were maintained in microfiche. While Reclaim the Records was negotiating about costs, Ancestry.com agreed to pay the costs and the agency provided both Reclaim the Records and Ancestry.com digital copies. Reclaim the Records then submitted a FOIL request to the department for records concerning Ancestry.com. The agency partially denied the request, in part because Reclaim the Records had failed to properly describe the records. After Reclaim the Records appealed, the agency denied its appeal. Reclaim the Records then filed suit. The trial court ruled in favor of the agency. Reclaim the Records then filed an appeal at the court of appeals. The appeals court agreed that the department had explained why it could not search the records requested. The court of appeals noted that "here, respondent established that its indexing system did not permit searching either its paper or electronic records by the name of an entity, and that it had no method of searching correspondence records, whether on paper or in digital form, for the terms provided in petitioners' request. On appeal, petitioners contend that their request should have been interpreted in a more limited form. However, nothing in the language of the original request or the administrative appeal supports such an interpretation. Neither the language of the original request nor that of the administrative appeal demonstrates that the limitations now proposed were previously enunciated or provided." Reclaim the Records argued that a separate provision requiring agencies

to search their electronic records for responsive records undercut the agency's claim that it could not conduct a search. The court of appeals, however, observed that "nothing in this provision contradicts or replaces the requirement that requested records must be 'reasonably described.' A failure to provide a reasonable description of the records sought may present the same obstacles to an electronic search as it does to a search for paper records, preventing an agency from retrieving a record 'with reasonable effort.' Here, respondent explained the indexing limitations and the lack of reasonable description that prevented it from using the terms supplied by petitioners to locate electronic records." (*In the Matter of Reclaim the Records, et al. v. New York State Department of Health*, No. 530220, New York Supreme Court, Appellate Division, Third Department, July 16)

The Federal Courts…

A federal court in California has ruled that Forms 300A, which contain summaries of work-related injuries and illnesses provided to the Occupational Safety and Health Administration by Amazon.com are not protected by **Exemption 4 (confidential business information)** because they are neither commercial nor confidential under the test articulated by the Supreme Court in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct 2356 (2019). While the Supreme Court overturned the substantial competitive harm test used to analysis most Exemption 4 cases, it didn't bother to provide more than minimal guidance on what constituted commercial information and binding promises of confidentiality. The Center for Investigative Reporting requested the Form 300A data for several Amazon.com facilities. In response, OSHA redacted information on the average number of employees, total hours worked, and all of the data on the injuries and illnesses under Exemption 4. Magistrate Judge Sallie Kim found that because the agency had not shown that the information was confidential, it had failed to show that Exemption 4 applied in the first place. Because Amazon was required to post the information at its facilities for three months, Kim noted that "it is not clear that Amazon could restrict employee's use and disclosure of these forms." She pointed out that OSHA had mischaracterized two earlier cases – *OSHA Data v. Dept of Labor*, 220 F.3d 153 (3rd Cir. 2000) and *New York Times v. Dept of Labor,* 340 F. Supp. 2d 394 (S.D.N.Y. 2004) – to stand for the proposition that work-related injury data was not public even if posted. Instead, she quoted the court in the *New York Times* decision that "OSHA no longer regards employee hours as 'confidential commercial information' and employers have no expectation of a competitive advantage based on their ability to keep the hours confidential.'" Kim also found OSHA's current regulations on posting ran counter to any concept of confidentiality. She noted that "in light of the requirement to construe FOIA exemptions narrowly, finding documents confidential even if they are available to and broadly disclosed to all current and former employees of a large company without any confidentiality or nondisclosure agreements is untenable. In fact, even absent the requirement to narrowly construe exemptions, the Court cannot find a document is confidential when it is available to and disclosed to such a large group of people without any restrictions." (*Center for Investigative Reporting, et al. v. United States Department of Labor*, Civil Action No. 19-05603-SK, U.S. District for the Northern District of California, July 6)

Judge Thomas Hogan has granted the American Immigration Council a preliminary injunction in its litigation against the Department of Homeland Security to enforce its request for **expedited processing** for records on the number of detainees being held by U.S. Immigration and Customs Enforcement who have contracted COVID-19, as well as staff at ICE detention centers. The agency told AIC that it had located 800 potentially responsive pages and was referring 500 pages to DHS for coordination. After ICE failed to respond further, AIC filed suit to enforce its request for expedited processing, asking Hogan to require the

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agency to disclose records at a rate of 400 pages a month. Hogan noted that AIC was likely to succeed on the merits of its claim. He indicated that "plaintiff's request concerns a serious and time-sensitive matter, and it is entitled to an order requiring Defendant to process and produce responsive documents on a more expeditious timeline than that proposed by Defendants." Hogan also agreed that AIC had shown it would suffer irreparable harm if its expedition request was not enforced. DHS argued that AIC "cannot point to any concrete deadline by which it needs the records' because 'the COVID-19 pandemic continues.'" But Hogan pointed out that "the fact that the COVID-19 pandemic is an ongoing public health crisis only bolsters Plaintiff's claim of irreparable harm." Hogan found that AIC's request for production of records at a rate of 400 pages a month was reasonable. He indicated that he appreciated that "defendants' employees are facing unexpected challenges due to the COVID-19 pandemic and associated closures and telework arrangements, and for that reason, the Court found plaintiff's initial request that the Court order Defendants to process and produce all non-exempt, responsive records within 30 days was not reasonable, The alternative timeline imposed by the Court should place minimal hardship on Defendants." He added that "the public's interest in obtaining the requested non-exempt records outweighs any possible harm to other requesters that may result from an accelerated processing of this request." (*American Immigration Council v. U.S. Department of Homeland Security, et al.*, Civil Action No. 20-1196 (TJH), U.S. District Court for the District of Columbia, July 6)

A federal court in Montana has ruled that the National Park Service failed to show that emails concerning the size of the bison population in the Yellowstone ecosystem were protected by **Exemption 5 (deliberative process privilege)**. The Buffalo Field Campaign, focused on documenting and publicizing the plight of the bison, submitted a FOIA request to NPS pertaining to the size of the bison herd at Yellowstone. The agency disclosed 108 pages and redacted an additional 149 pages. Although the agency did not act on the Buffalo Field Campaign's administrative appeal, it disclosed an additional 14 pages that had been withheld previously. The agency claimed the redactions were appropriate under the deliberative process privilege. The Buffalo Field Campaign argued that the redaction in an email concerning bison habitat were not predecisional. Judge Donald Molloy agreed, indicating that "even if the language regarding 'getting this up and running' were sufficient to make it predecisional, it also fails the deliberative requirement. It is unclear from either the document or the *Vaughn* index who authored the forwarded message and what his or her capacity is within the Bureau of Land Management. It also is unclear whether the redacted information proposes formal recommendations from the sister bureau or the opinions of the individual employee." Molloy also found that the agency failed to show that a series of briefing statements were either predecisional or deliberative. However, Molloy found the agency's decision to withhold drafts of two scientific articles were not protected by the deliberative process privilege. He noted that "the Park Service implies that the agency may never have intended to publish the article. . . If publication was never intended, the agency cannot now argue that it was engaged in a decision-making process culminating in a publication decision. Finally, the *Vaughn* index indicates the decision-making process at issue was 'the formulation of policy related to the [Interagency Bison Management] Plan,' not publication. But such a broad reference to current bison management is not itself predecisional." (*Buffalo Field Campaign v. United States Department of the Interior, National Park Service*, Civil Action No. 19-165-M-DWM, U.S. District Court for the District of Montana, July 7)

A federal court in Maine has ruled that U.S. Customs and Border Protection properly withheld most of the records it claimed under **Exemption 7(E) (investigative methods and techniques)** in response to FOIA requests from the ACLU of Maine, the ACLU of Vermont, and the ACLU of New Hampshire pertaining to immigration enforcement along the Canadian border with those three states. The court first rejected the ACLU's argument that because the border checkpoint operations were so invasive the 7(E) claims should be assessed based on a Fourth Amendment due process analysis. The court pointed out that "were this standard

to gauge the appropriateness of redactions pursuant to Exemption 7(E), the rule would swallow the exception crafted by Congress." However, the court found in two instances that the agency's 7(E) claims were too broad. The agency argued that disclosure of the identification of a highway that ran along the border was protected. But the court observed that "while the location described in the signature block [of an email] is specific, the location redacted twice from the body of the email is a route upon which checkpoints take place that spans hundreds of miles, undercutting the plausibility of the [agency's] conclusion that its disclosure 'could reasonably be expected to risk circumvention of the law.' CBP, hence, carries its burden to demonstrate the necessity of the redaction of the location from the signature block but not the location mentioned twice in the body of the email." The court rejected most of the other challenges made by the ACLU, including checkpoint locations. The court pointed out that "while the underlying maps themselves are no secret, the information that has been added to them and/or noted beneath them that [the agency] represents is nonpublic and of relevance to continuing operations." The court indicated that the agency "plausibly concludes that the above information could aid those seeking to avoid encounters with the Border Patrol to develop countermeasures to evade detection, inspection, and examination and reveal the locations of Border Patrol agents, exposing them to individuals who intend to cause them harm." (*American Civil Liberties Union of Maine Foundation, et al. v. U.S. Department of Homeland Security, et al.*, Civil Action No. 18-00182-JDL, U.S. District Court for the District of Maine, July 6)

Judge Amy Berman Jackson has dismissed FOIA litigation brought by Mark Isaac Snarr, who was convicted and sentenced to death in a federal proceeding in 2010, after finding that she did not have **standing** over his suit against the Bureau of Prisons because he was not named or mentioned in the two requests filed by the Office of the Federal Defender for the District of Utah. The agency had not responded to either of the two requests, which asked for records concerning two other inmates, before Snarr file suit. David Wengler had consented to disclosure of his records, while Danny Fortner was deceased. Although Snarr acknowledged that the requests were made on his behalf, neither request made any mention of Snarr. Berman Jackon explained that Snarr had a right to amend his complaint to substitute himself as the plaintiff but had decided to proceed with summary judgment instead. However, given Snarr's decision, Berman Jackson found that under the circumstances Snarr had not shown that she had jurisdiction to hear his suit. Berman Jackson indicated that "when a party does not appear on a FOIA request, he lacks the necessary injury in fact to establish standing to bring a claim in relation to that request." As a result, she noted that "plaintiff does not contend that he was named in any communications between the public defender and the agency. He does not assert that his defense team made it clear to BOP that the FOIA requests were submitted on his behalf, and the records supplied to the Court do not reflect that he was mentioned. Therefore, when BOP failed to respond to [the public defender's] FOIA requests, plaintiff did not suffer an injury in fact, and he does not have standing." Berman Jackson then dismissed Snarr's motion to amend his complaint, noting that "because the Court has determined that plaintiff lacks standing to bring a FOIA claim against defendant and that it therefore lacks subject matter jurisdiction to hear his case, the Court may not grant a motion for leave to amend jurisdiction." (*Mark Isaac Snarr v. Federal Bureau of Prisons*, Civil Action No. 19-1421 (ABJ), U.S. District Court for the District of Columbia, July 6)

Judge Trevor McFadden has ruled that the Department of the Navy properly responded to Tarik Philips' FOIA request for records his New York state conviction for second murder, which, Philips believed was primarily based on the testimony of Jody Brown, who was a member of the Navy at the time he was a witness to the crime. Philips submitted a FOIA request to the Navy for Brown's medical evaluation board records at the time Brown retired from the Navy. After initially asking Philips to provide a better identification for Brown, the Navy located a physical evaluation board file on Brown but withheld it under

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Exemption 6 (invasion of privacy). After Philips filed suit, the Navy found a 67-page report prepared by the Naval Criminal Intelligence Service pertaining to Brown's involvement with Philips's case. After redacting personal information, the Navy disclosed the NCIS report. The agency also disclosed an additional six pages from Brown's Physical Evaluation Board file that had originally been withheld. Philips argued that the agency failed to **conduct an adequate search** because it did not search for correspondence between the Navy and the Brooklyn District Attorney's Office. McFadden sided with the agency. He noted that Philips' argument "is simply a demand that the Navy go well beyond the scope of his FOIA request. The only reference to 'correspondence' in his FOIA request was 'letters of support *produced before the boards review* that was written by Assistant District Attorney Robert Walsh or any office of the court.' This refers only to letters produced before the PEB; it does not encompass any and all correspondence between the Navy and the Brooklyn District Attorney's Office." McFadden observed that "the voluntarily released NCIS repot is itself beyond the scope of Philips' FOIA request, which sought Brown's 'Medical Evaluation Board records.'' Based on that request, the Navy found Brown's PEB file, and then it searched only because of a reference in the PEB file. Philips would now have the Navy search for additional records not responsive to his FOIA request based on the alleged cross-reference in the NCIS report." McFadden explained that "speculative claims about the existence of additional documents are insufficient to rebut the presumption of good faith accorded agency affidavits. Vague references in the NCIS report to underlying correspondence between the Navy and the Brooklyn District Attorney's Office do not establish a clear lead or show that the Navy has access to such documents. The Brooklyn District Attorney's Office is not subject to the federal FOIA, which applies only to Executive-branch agencies, and an agency need not 'obtain or regain possession of a record' from the files of some other agency or entity." McFadden agreed that the agency's application of the privacy exemptions was appropriate. He rejected Philips' claim that Brown's records were in the public domain because he testified at Philips' trial. McFadden pointed out that "an official disclosure generally must come from the agency itself, and the testimony of witnesses in a state criminal trial is far afield of disclosures from the Navy." He added that "the testimony that Philips highlights related tangentially – at most – to information that might be revealed in the withheld documents. He has not matched the testimony with the withheld information, much less shown it to be identical." (*Tarik Philips v. Department of the Navy*, Civil Action No. 19-00650 (TNM), U.S. District Court for the District of Columbia, July 15)

Judge Christopher Cooper has ruled that the Department of Justice has not yet shown that it **conducted an adequate search** for records in response to FOIA requests from James Price, who was convicted on child pornography charges in 2012, and has failed to justify some of its exemption claims. Price's requests went primarily to the Office of Justice Programs and the Criminal Division. The two components located five documents, one of which was released in full while another was withheld in full. The other three documents were disclosed with redactions under **Exemption 2 (internal practices and procedures), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(E) (investigative methods or techniques)**, and **Exemption 7(F) (harm to safety of any person)**. Generally, Cooper found that the agency had justified its search by OJP and the Criminal Division. He noted that "the agency chose search terms that closely paralleled the language of Price's own request, and Price does not offer any evidence that the agency's queries were not reasonably calculated to turn up responsive documents." However, Cooper faulted portions of the searches conducted by OJP. In one instance, he indicated he was puzzled by the agency's failure to search a specific case number specified by Price. He pointed out that "the omission appears even more conspicuous in light of the agency's use of case numbers as search terms in handling other similar requests from Price. There may be a reasonable explanation for why the [agency's] declaration does not mention the case number as a search term [for the disputed request]; for example, the agency may have manually searched its systems for files associated with the case number at issue. However, the current record lacks sufficient details concerning the agency's search methodology for the Court to discern whether the search was reasonably calculated to uncover all document

responsive to [the disputed request]." By contrast, Cooper found the Criminal Division had thoroughly justified its searches. The Criminal Division withheld portions from its manual on location and description of personnel working in a certain area. Cooper noted that in *Milner v. Dept of Navy*, the Supreme Court had indicated that Exemption 2 did not cover rules for personnel, only those about personnel. Since the agency had failed to explain the Exemption 2 withholdings in sufficient detail, Cooper rejected those claims, noting, however, that the agency claimed that much of the disputed information was also protected by Exemption 6. Cooper then found those Exemption 6 withholdings were appropriate. He approved of the agency's Exemption 7(C) and 7(E) claims as well. (*James Price v. United States Department of Justice, et al.*, Civil Action No. 18-1339 (CRC), U.S. District Court for the District of Columbia, July 14)

A federal court in Minnesota has ruled that the DEA has not shown that records pertaining to supplies of oxycontin sent from 2015 to 2017 to Cardinal Heath in Georgia and Michigan are confidential for purposes of **Exemption 4 (confidential business information)** in response to FOIA requests submitted by Christopher Madel. Since in earlier litigation the court had indicated that the DEA's claim that oxycontin supply records more than five years old would cause drug suppliers competitive harm was not credible, DEA now took the position that drug supply records more recent than five years old were exempt. However, the court noted that "the Court's comments in *Madel I* cannot justify Defendants' refusal to disclose information that is less than five years old." DEA argued that the Supreme Court's recent decision in *Food Marketing Institute v. Argus Media Leader*, 139 S. Ct. 2356 (2019), had changed the standard for determining confidentiality under Exemption. The court did not disagree with the claim, but pointed out that "even if Defendants are correct that *Argus Leader* changes the standard for reviewing Exemption 4 claims, they have failed to meet their burden to establish even that less-strict standard here." DEA argued that Cardinal Health had provided the information under an assurance of privacy. But the court observed that "it is DEA's burden to demonstrate that Exemption 4 applies and, moreover, that the temporal limitation DEA has placed on the ostensibly exempt information here is necessary to protect Cardinal Health's general confidentiality interests. The declaration offers precisely the type of 'barren assertions' that the [Eighth Circuit] previously rejected. It is patently insufficient to carry Defendants' burden here." (*Christopher W. Madel v. United States Department of Justice and Drug Enforcement Administration*, Civil Action No. 18-487 (PAM/BRT), U.S. District Court for the District of Minnesota, July 15)

A federal court in Washington has ruled that U.S. Citizenship and Immigration Services properly responded to a FOIA request for records pertaining to the illegal practice of immigration law by non-attorneys Edwin Cruz, Maurice Terry, and their subsequent relationship with attorney Alexander Chan under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records),** and **Exemption 7(E) (investigative methods or techniques)**. The Washington State Attorney General received a complaint that Cruz and Terry were practicing immigration law without a license. To avoid prosecution, Terry and Cruz signed a consent decree. However, Terry and Cruz then continued their illegal practice of law by teaming up with Attorney Alexander Chan. That arrangement was thwarted after further investigation by the Attorney General. Fatima Moujtahid and others filed a RICO suit against Terry, Cruz, and Chan. To support their case, they filed FOIA requests for records pertaining to Terry, Cruz, and Chan. For those requests that concerned subject of record data, USCIS refused to disclose any records without authorization. The court found that Moutjtahid had failed to show a public interest in disclosure that would overcome individual privacy interests. The court noted that it was "not convinced that Plaintiffs' RICO action alone constitutes a sufficient public interest for purposes of the (b)(6) balancing test given the records do not shed light on the functions of USCIS, but rather contain personal information about applicants. The Court can imagine how these records could benefit the public interest in assisting the discovery of potential plaintiffs in

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the civil RICO action. However, Plaintiffs present no evidence that Terry, Cruz, and Chan are engaging in an ongoing criminal enterprise, or that the AG's efforts to investigate other unlawful practitioners of law are insufficient. Plaintiffs' civil litigation discovery interests alone are not enough to tip the scale." (*Fatima Moujtahid v. United States Citizenship & Immigration Services, et al.*, Civil Action No. 18-1789RSM, U.S. District Court for the Western District of Washington, July 15)

A federal court in Missouri has dismissed two companion cases brought by surrogates of attorney Jack Jordan, who had already litigated multiple times in both the D.C. Circuit and the Western District of Missouri in his own name to obtain emails sent by Darin Powers, an attorney for DynCorp, a company being sued by Jordan's wife Maria under the Defense Base Act, after concluding that both plaintiffs – Ferissa Talley and Robert Campo – had failed to show that the emails were not privileged. In litigating his wife's DBA claim, Jordan learned of the Powers and Huber emails, which had been submitted to an administrative law judge at the Department of Labor who was adjudicating Jordan's claim. Jordan filed a FOIA request to obtain the emails and DOL withheld them as privileged under Exemption 4 (confidential business information). Jordan then filed suit in the D.C. Circuit district court. Judge Rudolph Contreras found that the Powers email was privileged. However, after questioning the privilege claim for the Huber email, DOL subsequently disclosed it to Jordan. Jordan appealed to the D.C, Circuit, which upheld Contreras' decision. Jordan then filed the same litigation in the Western District of Missouri, which dismissed the suit as an attempt to relitigate the D.C. Circuit decision. That dismissal was upheld by the Eighth Circuit. Jordan then turned to Talley and Campo to continue his crusade. Talley sued DOL, while Campo sued the Department of Justice, asking for the Powers email on the theory that it had come into the possession of DOJ when representing DOL in Jordan's FOIA litigation. Judge Ortrie Smith dismissed Talley's suit, noting that "Talley and Jordan are in privity, which bars Talley from bringing this matter." Smith analyzed Campo's claims against DOJ, finding the agency had shown that the Powers email was still privileged. (*Ferissa Talley v. U.S. Department of Labor*, Civil Action No. 19-00493-W-ODS, U.S. District Court for the District of Western Missouri, July 13, and *Robert Campo v. U.S. Department of Justice*, Civil Action No. 19-00905-W-ODS, U.S. District Court for the District of Western Missouri, July 13)

The D.C. Circuit has ruled that the district court erred in finding that because the administrative burden on the government in unsealing closed electronic surveillance orders was too great the government was not required to process them for unsealing under the common law of public access to court records. Ruling in an appeal brought by journalist Jason Leopold and the Reporters Committee for Freedom of the Press, Circuit Court Judge Merrick Garland observed that "the public's right of access to judicial records is a fundamental element in the rule of law. Administrative burden is relevant to *how* and *when* a judicial record may be unsealed, but not to *whether* it may be released at all." While recognizing the existence of a common law right of access to judicial records, the district court rejected Leopold and the Reporter's Committee's claim of First Amendment access to the sealed orders. Ultimately, the district court found that the administrative burden of unsealing such orders meant that the government was not required to unseal any past order and to provide only limited access to future orders. Leopold and the Reporters Committee then appealed. The D.C. Circuit agreed with the district court that all the requested records were judicial records. Garland pointed out that the six-factor test in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), the leading D.C. Circuit precedent in determining access rights to court records, was applicable here. Although the district court had analyzed the six factors in *Hubbard* in reaching its conclusion, Garland indicated that administrative burden in and of itself was not a factor. Instead, he observed that "it is undisputed, then, that in considering the legitimate interests identified in *Hubbard*, a court may reasonably find that the administrative burden of protecting those interests should affect the manner or timing of unsealing." But, Garland explained, that "although administrative burden is relevant to how and when documents are released, it does not justify precluding release forever. . .

Production may be time-consuming, but time-consuming is not the same thing as impossible." (*In Re: In the Matter of the Application of Jason Leopold to Unseal Certain Electronic Surveillance Applications and Orders; Jason Leopold and Reporters Committee for Freedom of the Press v. United States of America*, No. 18-5276, U.S. Court of Appeals for the District of Columbia Circuit, July 7)

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