Volume 46, Number 16
August 12, 2020

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

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Editor/Publisher:
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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.
Copyright by Access Reports, Inc
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ISSN 0364-7625.

Washington Focus: Sen. Patrick Leahy (D-VT) and Rep. Carolyn Maloney (D-NY) and Rep. Gerald Connolly (D-VA) have introduced the Federal Employee Access to Information Act (S. 4438, H.R. 7936) to ensure that federal employees may use FOIA without suffering retaliation. In his statement introducing the bill. Leahy observed that "all Americans, including federal employees, have the right to file Freedom of Information Act requests and know what their government is doing. FOIA is a critical tool for exposing government wrongdoing and federal employees should never be terminated or retaliated against for availing themselves of our nation's premier transparency law."

Second Circuit Finds Disclosure of Photos Does Not Qualify as Official Acknowledgement

The Second Circuit has ruled that FOIA determinations made by individual components of cabinet departments do not waive conflicting processing determinations made by other components of the same department. In a short concurrence, Trump-appointed Circuit Court Judge Steven Menashi went so far as to suggest that individual components be treated as separate agencies for purposes of FOIA, meaning that determinations made by individual components would never be binding on other components within the same agency.

The Second Circuit's decision came in an appeal of Southern District of New York District Court Judge Katherine Failla's finding that U.S. Southern Command (CENTCOM) had waived Exemption 1 (national security) claims for images of damage done to U.S. vehicles by explosions of IED devices because a separate component – U.S. Army Central (ARCENT) – which had conducted the vehicle investigations, had disclosed images of the vehicles. Although Failla agreed with the agency that the damage reports qualified for Exemption 1 protection, ARCENT's decision to disclose the images to the law firm of Osen, representing hundreds of U.S. servicemembers and their families who were suing Iran for its role in supplying Iraqi terrorist groups, constituted an official acknowledgement and waived Exemption 1.

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Osen filed a number of FOIA requests to the Defense Department hoping to find support for its legal theory that Iran had provided technical and financial support to Iraqi terrorists. Osen argued that the weapons used in terrorist attacks in Iraq were more sophisticated and destructive than weapons terrorists in Iraq would or could have obtained themselves. One such weapon was an Explosively-Formed Penetrator – an explosive device used by terrorists to penetrate armored vehicles and maim servicemembers inside. Osen requested military investigation records that contained details about weapons used in terrorist attacks from CENTCOM. One such report was called an Army Regulation (AR) 15-6 investigation report, created after a fatal vehicle attack, including pictures of the damaged vehicle at the scene of the attack. CENTCOM searched its database and located 36 potentially responsive AR 15-6 investigation reports. However, only the Army could make disclosure decisions for those records and the reports were referred to ARCENT, which processed them independently. Osen had also requested the records directly from ARCENT. During the processing of Osen's requests, ARCENT disclosed 14 of the 36 AR 15-6 investigation reports. Failla concluded that the disclosures of the 14 investigation reports acted as a waiver to CENTCOM's right to withhold similar images from all other terrorist attacks. CENTCOM appealed Failla's ruling to the Second Circuit.

Failla had divided the prior disclosures into two categories – (1) the prior CENTCOM disclosures and (2) ARCENT's FOIA disclosures in this case. The prior CENTCOM disclosures included photos and videos that had been publicly disclosed, as well as general discussions of the impact of EFP attacks. CENTCOM had provided an affidavit from its chief of staff explaining the national security implications of disclosure. As to CENTCOM's prior disclosures, Failla found that they were too broad to constitute official disclosures of individual attacks. However, she concluded that the disclosures made by ARCENT "provided specific photographs connected to a specific attack, with dates and detailed location information" that were at issue in Osen's lawsuits. She noted that ARCENT's production "provided the precise type of information that [the CENTCOMM chief of staff] suggests would reveal vulnerabilities through an official disclosure." As a result, Failla interpreted ARCENT's FOIA production as suggesting that ARCENT "made a determination that this type of material does not pose a risk to national security" and concluded that disclosure of the images acted as a waiver under the official disclosure doctrine and ordered the agency to disclose any similar photographs.

Writing for the Second Circuit, Circuit Court Judge Richard Wesley began by noting that *Wilson v. CIA*, 586 F.3d 171 (2nd Cir. 2009), the leading Second Circuit precedent on the effect of official disclosures, required that an official disclosure must be (1) as specific as the information released, (2) match the information previously disclosed, and (3) be made public through an official and documented disclosure. Wesley explained that "this case demands a more granular approach. We must parse out the first two prongs of the *Wilson* test to determine whether the official disclosure doctrine properly applies to compel the broad finding of waiver that Osen advances and that the district court found."

This granular approach led to an examination of what was meant by "the specific information" disclosed. Wesley pointed out that "the phrase 'the specific information' logically covers the first two prongs of the *Wilson* test: 'the specific information' refers to information that is both 'as specific as' and 'matches' information previously disclosed. Each serves a distinct purpose. If information is as specific as but does not match previously disclosed information, it cannot be '*the* specific information.' The same is true for information that matches a prior disclosed subject but is more or less specific than information previously disclosed; it also does not constitute '*the* specific information' warranting application of the official disclosure doctrine. Thus, the specificity and matching prongs work together to form the crux of the official disclosure doctrine. . ." Wesley observed that "there is no meaningful difference between the Prior CENTCOM Disclosures and ARCENT's FOIA Production. Second, images of EFP damage from different terrorist attacks do not convey the same information such that disclosure of images from one attack constitutes a blanket waiver for images of other attacks under the official disclosure doctrine."

Wesley next analyzed how the two categories of disclosures fared in terms of the specificity and matching required by *Wilson*. Wesley seemed puzzled as to why Failla had differentiated between the prior CENTCOM disclosures – which she found did not constitute an official disclosure – and the ARCENT FOIA disclosures – which she concluded constituted official disclosures. He pointed out that "images of strike points from one EFP attack are 'as specific as' images of strike points from another EFP attack. Each set of images conveys the same level and type of details across various attacks: that an explosive weapon penetrated an armored vehicle and caused damage to the vehicle and its passengers at a certain point in time and at a certain location." He explained that "each of the disclosed and withheld images are equally specific; they tell the same stories, but also different attacks." He added that "the specificity prong of our analysis provides no basis to distinguish between the prior disclosures that the district court found did not waive Exemption 1, and the prior disclosures that the district court found did."

Wesley found that Failla's waiver analysis failed the matching test. He pointed out that: images of damage from one EFP attack do not match images of damage from another EFP attack, and for that reason, none of the prior disclosures upon which Osen relies triggers the official disclosure doctrine for additional images from other attacks." He noted that "the subject matter, facts, and details conveyed by one set of images are unique to that attack and are different from the subject matter, facts, and details conveyed by the other set of images – the information does not match." Wesley indicated that "each set of images effects an Exemption 1 waiver as to the same information about the specific attack to which they relate. . .; but none effects a blanket subject-matter waiver of Exemption 1 for all images of EFP damage from every terrorist attack across the board."

Although the Second Circuit panel was not required to address the issue of whether ARCENT's disclosures waived CENTCOM's ability to protect the same records, Circuit Court Steven Menashi weighed in on the issue. In a concurrence, he noted that "because the FOIA's provisions for disclosure and withholding apply to a subcomponent independent of its relationship with another subcomponent of the same or a different parent agency, it would be anomalous to conclude that the subcomponent's authority to withhold records depends on the independent decisions of another entity also considered an 'agency' under the statute. Moreover, because the FOIA defines 'agency' without regard to 'whether or not it is within or subject to review by another agency,' it would conflict with the statutory scheme for courts to engraft onto the FOIA a judge-made doctrine that gives this consideration dispositive weight." (*Osen LLC v. United States Central Command*, No. 19-1577, U.S. Court of Appeals for the Second Circuit, Aug. 10)

Views from the States

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

Connecticut

A trial court has ruled that the Freedom of Information Commission erred when it concluded that the Department of Corrections failed to provide evidence that it had conducted a search of staff-issued and personal cell phones for text messages related to the conduct of public business as requested by Noah Snyder, an inmate at the Carl Robinson Correctional Facility. In response to Snyder's request for text messages, DOC said it had no way to capture text messages. The FOIC found this explanation insufficient and ordered the agency to search for text messages. DOC then filed suit against the FOIC, alleging it was not required to

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conduct such a search in light of its explanation that it did not possess did not capture text messages. Superior Court Judge John Cordani agreed, finding that the text messages were not agency records. Cordani noted that "on the record in this matter, there is no doubt that text messages on the personal cell phones of Department employees are not disclosable pursuant to a FOIA request to the Department." He observed that "the inability to 'capture' such text messages means that the Department did not maintain or keep such text messages on file. Further, it is evidence that such messages contained only on personal cell phones were not prepared, owned, used, received or retained by the Department." Cordani also pointed out that "whether the employer seizes the cell phones and searches them or orders the employees to search and report the results to the employer, the employees' right to privacy in their personal cell phones and texts contained thereon would be inappropriately violated." (*Commissioner of the Department of Correction, et al. v. Freedom of Information Commission*, No. HHB-CV-19-6053190, Connecticut Superior Court, Judicial District of New Britain, July 30)

Illinois

A court of appeals has ruled that the Kankakee Police Department properly responded to multiple requests from prisoner Antonio Sherrod, who had been convicted of murdering Steven Prendergast at a gas station which included surveillance camera video. One of Sherrod's requests asked for the surveillance video, which Kankakee disclosed on a DVD. Sherrod then requested the video on VHS, which was its native format, but the police department told him it was unable to find anyone who had the ability to copy the tape to VHS format and told him that its disclosure of a DVD copy was responsive to his request. Sherrod filed suit, arguing Kankakee was required to disclose the tape in VHS format. The court sided with Kankakee, noting that "the City took possession of the video in VHS form in 2003. Plaintiff then waited 13 years to request a copy of the VHS. As with the passage of time, new technology made it unfeasible for the police department to copy it in VHS format. The City found an outside company that could copy the VHS to DVD, but it did not have the capability of copying it to VHS. Plaintiff failed to file a counter-affidavit to rebut the City's claim. Moreover, plaintiff did not allege the existence of any alternative option for the City to use to copy the video to a VHS." (*Antonio Sherrod v. City of Kankakee, et. al.*, No. 3-19-0374, Illinois Appellate Court, July 29)

Michigan

The supreme court has ruled that a trial court properly allowed Progress Michigan's FOIA suit against Attorney General Bill Schuette for access to emails to his staff that were sent using personal email accounts to continue after Progress Michigan amended its complaint to comply with the signature and verification requirements contained in the Court of Claims Act. The Attorney General's Office moved to dismiss the case based on its allegation that Progress Michigan had missed the 180-day period of limitations contained in the CCA. Instead, the trial court ruled that since Progress Michigan had filed its complaint in a timely fashion, the amendment to comply with the signature and verification requirements related back to the original filing date. However, the court of appeals reversed, finding that the 180-day time limit was a condition precedent to avoid government immunity. The supreme court, however, sided with the trial court. While the Attorney General's Office agreed that it was a public office subject to FOIA, it argued that Progress Michigan's failure to abide by the signature verification requirement in the COA made it immune from suit under the circumstances. But the supreme court pointed out that "it is not inconsistent to require a plaintiff to comply with the verification requirement in [the COA] while at the same time permitting the action to be commenced and the limitations period tolled [under the statute]." The supreme court observed that "recognizing that an action is commenced under [the COA] and that the statutory period of limitations is tolled under [the statute as well] upon the filing of a complaint does not render the verification requirements [in the statute] meaningless. Plaintiffs still have to verify the complaint, and their complaint might be dismissed if they fail to do so, just not on statute-of-

limitations grounds." (*Progress Michigan v. Attorney General*, No. 158150 and No. 158151, Michigan Supreme Court, July 27)

The Federal Courts…

Judge Amit Mehta has ruled that the Department of Commerce properly withheld funding and technical equipment contributions from Ligado Networks, a private telecommunications company that received a Cooperative Research and Development Agreement from the National Institute of Standards and Technology under **Exemption 4 (confidential business information)**, but found that the names of Ligado employees working on the project are not protected by either Exemption 4 or **Exemption 6 (invasion of privacy)**. David Besson submitted a FOIA request for the agreement. The agency withheld information on financial and technical support Ligado provided to NIST as part of the project, as well as the names of Ligado employees under Exemption 4. Besson filed suit and Mehta gave the parties an opportunity to assess the effect of the recently decided *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), in which the Supreme Court ruled that the competitive harm test was not supported by the plain language of Exemption 4. NIST continued to assert that Exemption 4 applied to the financial and technology data as well as the employees' names. The agency also argued that the employees' names were protected by Exemption 6 as well. Addressing the Exemption 4 claims, Mehta noted that "a company may have a commercial stake in requested information when its disclosure would cause commercial consequences." Regardless, Mehta pointed out that Ligado had not shown how disclosure of employees' names would cause commercial harm. He observed that "it is unclear what commercial consequences *Ligado* risks from disclosure of its employees' names." He added that "how disclosure would create insight into Ligado's business strategy or capabilities or any unique risk of poaching remains unexplained." Mehta then found that the other withheld information qualified as commercial under Exemption 4. He assessed whether the agency had provided Ligado with an assurance of confidentiality sufficient to meet the standard set out in *Argus Leader Media*. Finding the some portions were clearly confidential, Mehta indicated that "the agency bears the burden of establishing a FOIA exemption's applicability, and by injecting into the record the possibility that some portion of the Statement of Work is public, the agency fails to carry that burden here where it seeks to withhold the Statement of Work in its entirety." Mehta also rejected the agency's contention that the names of the Ligado employees were protected by Exemption 6. Instead, he noted that "Defendant has not established even a *de minimis* personal privacy interest in the names of Ligado employees appearing in the CRADA. Ligado itself disclaims any substantial personal privacy interest in the name of the person who signed the CRADA on Ligado's behalf." He pointed out that "there is nothing particularly controversial, political, or newsworthy about the CRADA or its subject matter, or the fact of being employed with Ligado – at least nothing brought to the court's attention." (*David H. Besson v. United States Department of Commerce*, Civil Action No. 18-02527 (APM), U.S. District Court for the District of Columbia, Aug. 5)

Judge Amit Mehta has ruled that the Consumer Financial Protection Bureau properly withheld records responsive to requests from the law firm of Frank, LLP concerning investigational transcripts compiled by CFPB in advance of its civil enforcement action against the National Collegiate Master Loan Trust, and its administrative enforcement action against the National Transworld Systems, a national debt-collection coordinator, under **Exemption 7(A) (interference with ongoing investigation or proceeding)** and that no portion of the withheld 537 responsive pages is **segregable**. Frank represented a class of consumers in two consolidated civil actions against NCSLT, Transworld, and a debt-collection law firm, Foster & Garbus for using false affidavits signed by Transworld employees to file unlawful student loan debt-collection lawsuits.

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The claims in the two lawsuits mirrored allegations in the two actions filed by CFPB. Frank submitted a FOIA request for the records of the two enforcement actions but agreed to narrow its request to the investigation-hearing transcripts, akin to depositions, of nine affiants. The agency initially asserted that the records were categorically exempt under Exemption 7(A) and that both Exemption 4 (confidential business information) and **Exemption 7(E) (investigative methods or techniques)** applied as well. After Frank filed an administrative appeal, the agency dropped its Exemption 4 claim but continued to assert that the records were protected by both 7(A) and 7(E). Frank argued that much of the information related to the lawsuits was publicly available and that disclosure would not interfere with the government's cases. Mehta disagreed. He noted that "plaintiff's contentions are unconvincing. Nothing about the nature of the investigation transcripts or the circumstances of disclosure warrants deviating from established precedent recognizing such statements as protected under Exemption 7(A). The withheld investigational transcripts are witness statements in the traditional sense. . .Implicit in CFPB's arguments is the concern that release of the transcripts would reveal the 'focus and scope' of the proceedings and result in premature disclosures. Those are legitimate protectable interests under Exemption 7(A)." Mehta also agreed that the investigation transcripts were protected by Exemption 7(E). He pointed out that "it is logical to infer that releasing CFPB's investigational process, which could be revealed through the transcripts, would increase the risk that a violator would alter his or her behavior to avoid prosecution." Mehta found that the records were not segregable. He pointed out that "the investigational transcripts all fit into the category of protected witness statements. Accordingly, although the Bureau did not address in its declaration whether any of the withheld information could be segregated, the court independently concludes that there are no reasonably segregable portions of responsive records." (*Frank LLP v. Consumer Financial Protection Bureau*, Civil Action No. 19-01197 (APM), U.S. District Court for the District of Columbia, Aug. 5)

Judge Colleen Kollar-Kotelly has ruled that because the Department of Defense and OMB have failed to provide sufficient justification for their **Exemption 5 (privileges)** claims, she will review the documents *in camera* to make a determination. The Center for Public Integrity submitted FOIA requests to DOD and OMB for records concerning discussions between DOD acting comptroller Elaine McCusker or other officials within the comptroller's office and OMB concerning the Ukraine Security Initiative. The agencies disclosed 292 pages with redactions under Exemption 1 (national security), Exemption 3 (other statutes), Exemption 5, and Exemption 6 (invasion of privacy). Although CPI challenged all the agencies' exemption claims, Kollar-Kotelly indicated that because the justification for many of the Exemption 5 claims was inadequate, she would first review them *in camera*. While the agencies argued that *in camera* review was not needed, Kollar-Kotelly disagreed. She noted that "agency affidavits and a *Vaughn* index are sufficient to justify summary judgment when they show, with reasonable specificity, why the redactions fall within the FOIA Exemption. Here, many of the *Vaughn* index entries are insufficiently specific. And, the agency affidavits fail to provide additional specificity for many of the documents." Having outlined her concern, Kollar-Kotelly pointed out that "while not every document withheld under FOIA Exemption 5 suffers from these deficiencies, a significant number do. As such, the Court finds it necessary to conduct an *in camera* review of specified documents in order to make a responsible de novo determination of the claims of exemption." (*Center for Public Integrity v. U.S. Department of Defense*, Civil Action No. 19-3265 (CKK), U.S. District Court for the District of Columbia, Aug. 6)

The D.C. Circuit has upheld the district court's ruling pertaining to two FOIA claims against the CIA stemming from requests for records on the agency's processing of FOIA requests filed by National Security Counselors, but rejected the district court's finding that the official acknowledgement of two Office of Legal Counsel opinions also waived the **attorney-client privilege**. NSC claimed that requiring the CIA to search for data on the fee categories for FOIA requesters did not require the agency to create a record. The CIA had told

the district court that it did not include that data field in its current electronic database and to locate that data would require a manual search of all requests. NSC argued broadly that electronic databases were not "records" in and of themselves but instead contained information entered into data fields. However, the D.C. Circuit pointed out that "regardless of whether a given record exists in an electronic or paper format (or both), the statute only calls for the disclosure of existing records, not the generation of new ones. And whatever questions may arise in future cases about when disclosing the results of an electronic search of records entails creation of a record, here, responding to NSC's request would require manual review and sorting of numerous electronic records and the ensuing compilation of lists that do not otherwise exist." The district court had agreed with the agency that NSC's request for records on the IBM supercomputer Watson was too broad. At the D.C. Circuit, NSC argued that the CIA's interpretation was overbroad and should have been limited to Watson's impact on the intelligence community. The D.C. Circuit, however, noted that "the request though does not say that." The D.C. Circuit added that "to be sure, NSC, when asking for a public-interest fee waiver in its letter transmitting the request, said the responsive records would 'serve as a case study for the CIA's involvement in artificial intelligence research.' But the request itself was not so confined, and the NSC did not refine its request after the CIA invited it to do so." However, the D.C. Circuit rejected the district court's finding that official acknowledgment of the existence of two OLC opinions waived any attorney-client privilege. Instead, the D.C. Circuit noted that "OLC's own disclosures concerning the two opinions at issue, then, did not effect a waiver of the attorney-client privilege, at least absent any indication (absent here) that OLC was acting on behalf of the client when making the disclosure." (*National Security Counselors v. Central Intelligence Agency*, No. 18-5047 and No. 18-5048, U.S. Court of Appeals for the District of Columbia Circuit, Aug. 11)

Judge Rudolph Contreras has ruled that the EPA properly withheld two email lists used to send email communications to individual users who had voluntarily signed up to receive periodic communications from the Water Security Division and/or the Office of Water under **Exemption 6 (invasion of privacy)**. An email entitled "Prepare for Harmful Algal Blooms" was sent to an email list containing 19,000 email addresses, while one with the subject line "Conestoga River Watershed" was sent to an email list of 47,000 email addresses. In response to Hall & Associate's request for the Algal Blooms communication, the EPA redacted email addresses while leaving the names associated with the addresses. The agency also charged Hall & Associates $98 for the cost of producing the redacted list. In response to Hall & Associate's request for the Conestoga River Watershed communication, the agency withheld the full distribution list – which did not include names of individuals or organizations associated with the email addresses. Contreras explained the analytical difference between privately held and publicly available email addresses. He pointed out that "Courts in this District have routinely held that release of privately held email addresses would implicate a privacy interests," but noted that "publicly available email addresses, however, do not implicate a privacy interest protected by Exemption 6. For a publicly available address, unsolicited contact might actually serve the interests of the account owner as a means to develop business." Contreras rejected Hall & Associate's contention that the threat of disclosure of email addresses was no more than *de minimis*. Instead, Contreras noted that "while unwanted emails can be dealt with in short order, that does not change the interest individuals have in keeping their email addresses private and controlling the dissemination of that information." He disagreed that disclosure of the email addresses would shed light on government activities. Rather, he observed that "appearing on these distribution lists does not suggest any desire to influence the agency and is a function of actions taken by the owners of the email addresses. As such, more is revealed about the interests of those owners rather than about how or whether EPA is performing its statutory duties." Contreras explained that 'the interest in controlling the dissemination of private email addresses outweighs the virtually nonexistent public interest in disclosure. Disclosure of the privately held email addresses, which would allow Plaintiff and any other party to immediately contact the individual owners of the addresses, does

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not serve. . .Plaintiff's proffered public interests in disclosure." Contreras also assessed whether EPA had appropriately considered **segregability** in deciding not to try to separate out business addresses. He noted that "given the presumption in EPA's favor, the Court's finding regarding the lack of public interest in disclosure of the distribution lists, and the very small percentage of potentially non-exempt email addresses, EPA's declarations sufficiently fulfill its segregability obligations. Although a literal line-by-line review has not been conducted, the Court is satisfied that EPA's method supports its claim that any non-exempt information is not *reasonably* segregable." (*Hall & Associates v. United States Environmental Protection Agency*, Civil Action No. 19-1095 (RC), U.S. District Court for the District of Columbia, Aug. 12)

Judge Dabney Friedrich has ruled that the Department of the Navy **conducted an adequate search** and properly withheld records under **Exemption 5 (privileges),** and **Exemption 6 (invasion of privacy)** in processing FOIA and Privacy Act requests from Robert Carlborg concerning his 2015 involuntary separation from the Marine Corps. The agency searches located more than 1,750 potentially responsive records but disclosed only 161 pages with redactions. Carlborg challenged the adequacy of the search, particularly focusing on the small number of records released compared to the number of potentially responsive records the agency's searches initially located. However, Friedrich noted that "although there were 1,750 pages of hard copy files identified as responsive to Carlborg's requests, most of those records were duplicative or had already been produced to Carlborg in response to earlier FOIA requests." She also upheld the agency's email search, observing that "the Navy's failure to produce particular emails does not suggest the inadequacy of its search." Friedrich found that emails retrieved by using Carlborg's identifier were not subject to Privacy Act disclosure because they were not contained in a system of records. She pointed out that "although Carlborg stresses that the Navy was able to search these files for Carlborg's name, '*capability* to retrieve records based on individual identifiers is not tantamount to *actually* retrieving them based on such markers.' And Carlborg has not shown that the Navy regularly retrieves information from .pst files using names or personal identifier, or that it created these files in order to do so." Friedrich also rejected Carlborg's contention that 10 U.S.C. § 1556(a) provided a separate avenue for disclosure. She pointed out that "Carlborg has provided no authority that suggests this provision may be enforced as part of an action brought under the FOIA or the Privacy Act, or that this Court has jurisdiction to consider a claim seeking to enforce 10 U.S.C. § 1556(a)." Friedrich agreed with the agency that its withholdings under Exemption 5 and Exemption 6 were appropriate. (*Robert S. Carlborg v. Department of the Navy*, Civil Action No. 18-1881 (DLF), U.S. District Court for the District of Columbia, Aug. 10)

A federal court in Washington has ruled that the FBI properly issued a *Glomar* response neither confirming nor denying the existence of records under **Exemption 7(D) (confidential sources)** in response to a request from Michael Withey and Sharon Maeda for records that would confirm whether Levane Forsythe, who died 30 years ago, served as an FBI informant during the investigation of the murders of Gene Viernes and Silme Domingo. The FBI processed the request, disclosing 234 pages but refused to confirm whether Forsythe had been an informant. Ruling in favor of the FBI, Judge John Coughenour noted that "plaintiffs' FOIA request all but demands a *Glomar* response." He pointed out that "if such documents are acknowledged by the FBI, then the FBI would necessarily reveal that it used Forsythe as a confidential informant and that Forsythe furnished certain information to the FBI." Withey and Maeda argued that disclosure was in the public interest. However, Coughenour noted that "the Government's *Glomar* response is appropriate even though Forsythe is dead, even if Forsythe said in a deposition that he was an informant, and even if the public has an interest in knowing whether and how the FBI used Forsythe as an informant." Withey and Maeda argued that Coughenour should allow them to **depose** the FBI on the issue of why confirming Forsythe's role as a confidential informant would harm the agency's ability to use confidential sources in the future. However, Coughenour disagreed. He noted that "although Congress enacted Exemption 7(D) with a specific

goal in mind – namely, 'assisting federal law enforcement agencies to obtain, and to maintain, confidential sources' – Congress drafted the exemption broadly to achieve that goal. To prevail at summary judgement, the FBI need only show that the broad language of Exemption 7(D) applies to Plaintiffs' FOIA request." (*Michael E. Withey and Sharon Maeda v. Federal Bureau of Investigation*, Civil Action No. 18-1635-JCC, U.S. District Court for the Western District of Washington, Aug. 6)

Judge James Boasberg has ruled that the Department of Justice has now shown that it **conducted an adequate search** and properly withheld records under **Exemption 5 (privileges), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in responding to Babar Javed Butt's FOIA request for records pertaining to his criminal conviction in the Southern District of Texas, leading to his pending deportation. Butt submitted a FOIA request to the Executive Office for U.S. Attorneys for records concerning his conviction. The agency located 329 pages of potentially responsive records. The agency concluded that 280 pages were responsive and disclosed 35 pages in part. Butt challenged the adequacy of the agency's search. However, Boasberg explained that "while its initial declarations may not have been specific enough to demonstrate that it conducted an adequate search, it subsequently provided detailed supplemental declarations. The Court is satisfied that the latter demonstrate that EOUSA's search was adequate." Boasberg faulted the agency's search only to the extent that it had not searched for emails from U.S. Attorney Ryan Patrick because they might be privileged. Boasberg indicated that "the adequacy of a search and the application of FOIA exemptions are two separate issues; an agency cannot refuse to search a certain location just because that search *could* uncover materials that *may* fall under a privilege. Second, while Patrick was not U.S. Attorney when Plaintiff was *indicted* in 2016, Butt's criminal case obviously continued after that time, as it was not closed until April 2020." He added that "as the Government's explanation for Patrick's exclusion is thus unsatisfactory, Defendants must either search its physical or digital records for potentially responsive materials or offer a declaration better explaining why they need not do so." Butt argued that various records were not privileged because they were created after his conviction. But Boasberg pointed out that "while many of these documents do fall into this category, that matters little. Myriad proceedings occur in the typical criminal case between plea and termination, including sentencing, and at times, an appeal." (*Babar Javed Butt v. United States Department of Justice, et al.*, Civil Action No. 19-504 (JEB), U.S. District Court for the District of Columbia, Aug. 3)

On remand from the D.C. Circuit, Judge Colleen Kollar-Kotelly has ruled that the Executive Office for U.S. Attorneys **conducted an adequate search** for records concerning grand jury materials from the Eastern District of New York pertaining to the conviction of Peter Liounis. EOUSA initially withheld records in their entirety under **Exemption 3 (other statutes)** and **Exemption 5 (privileges)**. After Liounis filed suit, Kollar-Kotelly questioned the adequacy of the agency's search and its exemption claims. She ordered the agency to supplement its affidavits. The second time around, she approved of both the search and the exemption claims. Liounis then appealed to the D.C. Circuit. The D.C. Circuit upheld the exemptions but questioned the search and sent the case back to Kollar-Kotelly. The supplemental search was conducted by Assistant U.S. Attorney Jonathan Lax, who had been involved in Liounis' prosecution. Finding that the search was adequate, Kollar-Kotelly noted that "based on Mr. Lax's declaration, the Court finds that Defendant conducted a reasonable search in response to Plaintiff's request. Mr. Law personally searched the entire case file. He also personally searched the electronic case file and subsequently conducted a search of that case file with targeted search terms. Mr. Lax attests that 'there is no other location in the USAO-EDNY where other records which might be responsive to this request are likely to be located; and I am not aware of any other method or means by which a further search could be conducted, which would likely locate additional responsive records.'" (*Peter*

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Liounis v. United States Department of Justice, Civil Action No. 17-1621 (CKK), U.S. District Court for the District of Columbia, Aug. 3)

Judge Timothy Kelly has ruled that the Executive Office of U.S. Attorneys has now provided pro se prisoner Ifeanyichukwu Abakporo all non-exempt records pertaining to his request for the dates on which the term of the grand jury that indicted him was extended and orders documenting that extension. The agency denied his request under **Exemption 3 (other statute)**, citing Rule 6(e) on grand jury secrecy. The orders extending the term of the grand jury were initially under seal. Once the court issued an order unsealing the records, EOUSA located 37 boxes related to Abakporo's prosecution, but found no more responsive records. After several unsuccessful attempts to locate where Abakporo was currently incarcerated, the agency was able to deliver the records to Abakporo in person. Abakporo acknowledged that he had received the records. Abakporo challenged the **adequacy of the search**, Kelly noted that "EOUSA located 37 boxes of potentially responsive documents, which it retrieved from storage and reviewed page-by-page. Even thought EOUSA was required only to search its own records, the U.S. Attorney's Office staff obtained from the District Court the specific grand jury records of interest to Abakporo: court orders that presumably reflect the dates the grand juries were extended." Turning to the issue of disclosure, Kelly observed that "EOUSA has represented that it disclosed in full all the records Abakporo requested, and Abakporo has not raised a genuine issue to the contrary." (*Ifeanyichukwu Abakporo v. Executive Office for United States Attorneys*, Civil Action No. 7-846 (TJK), U.S. District Court for the District of Columbia, Aug. 11)

Judge Amy Berman Jackson has ruled that pro se prison litigator Munir Abdulkader **failed to state a claim** for jurisdiction in his suit alleging wrongful conviction and a vague request for documents related to his conviction. Abdulkader requested records from the clerk's office for the U.S. District Court for the Southern District of Ohio. He also submitted a FOIA/PA request to no particular agency asking for grand jury transcripts and other records related to his conviction. He then filed suit, naming President Donald Trump, Attorney General William Barr, and several senior officials in the Executive Office for U.S. Attorneys and the U.S. Marshals Service. Berman Jackson agreed with the government that she did not have jurisdiction over Abdulkader's challenge to his conviction. She then found that Abdulkader's had failed to state a claim in pertaining to his FOIA request. She noted that "apart from suing the wrong defendants, plaintiff has not alleged facts which the Court can find or reasonably infer that any federal agency has received a proper FOIA request, much less improperly withheld records in response. To trigger an agency's disclosure obligations under FOIA, the request must be 'made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed.'" Abdulkader argued that he sent a request to U.S. Citizenship and Immigration Services and that request should serve as a request to all agencies with potentially relevant records. Berman Jackson disagreed, noting that "plaintiff's suggestion is incorrect. USCIS is a component of the Department of Homeland Security, not the Department of Justice, and neither that agency nor its component is a defendant in this action." She added that "a FOIA requester must follow the regulations of the agency from whom records are sought. So plaintiff, having shown no compliance with DOJ's regulations, has not 'nudged' his FOIA claim 'across the line from conceivable to plausible.'" (*Munir Abdulkader v. Donald Trump, et al.*, Civil Action No. 19-2199 (ABJ), U.S. District Court for the District of Columbia, Aug. 6)

Judge Beryl Howell has ruled that pro se prison litigator David Wattleton **failed to exhaust his administrative remedies** because he was unable to provide evidence that his appeal to the Executive Office of U.S. Attorneys was received by the agency. Wattleton requested records pertaining to his case in Georgia and the names of individuals who had accessed those records. The agency denied the request under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**.

Wattleton indicated that he had sent an appeal of the denial, but the agency argued it had no record of receiving Wattleton's appeal. Howell sided with the agency, noting that "plaintiff bears the burden of demonstrating not that he mailed a notice of appeal, but that the agency actually received it. Second, even assuming that plaintiff's notice of appeal was mailed, the record shows that plaintiff attempted to mail the document to an incomplete and incorrect address." (*David Earl Wattleton v. U.S. Department of Justice*, Civil Action No. 19-1402 (BAH), U.S. District Court for the District of Columbia, Aug. 12)

Judge Emmet Sullivan has ruled that Roger Day **failed to exhaust his administrative remedies** because he did not show that the IRS ever received the FOIA request he claimed to have sent to the agency. Day argued that he had sent a request to the agency for a private letter ruling in July 2017. The agency acknowledged receipt of the request and forwarded it to its Ogden, Utah office for a response. Day heard nothing further from the agency and filed suit. The agency argued that it had not received a proper FOIA request. Sullivan explained that "a proper FOIA request is one which 'reasonably describes' the records sought and complies with an agency's published procedures for submitting a FOIA request." Sullivan noted that "the IRS need not spring into action simply because Plaintiff places a request in the mail, particularly when Plaintiff appears to have sent his FOIA request to an incorrect address. On summary judgment Plaintiff must produce some evidence to show that the IRS actually received a proper FOIA request. Where, as here, 'no FOIA request is received, an agency has no reason to search for or produce records and similarly has no basis to respond.'" Sullivan also dismissed Day's claims under the Privacy Act. He pointed out that "Plaintiff points to no evidence to show that the IRS receive a proper Privacy Act request from him. Given Plaintiff's failure to exhaust administrative remedies under the Privacy Act, the Court is deprived of subject matter jurisdiction and the claim must be dismissed." (*Roger Charles Day, Jr. U.S. Department of the Treasury*, Civil Action No. 19-3467 (EGS), U.S. District Court for the District of Columbia, July 31)

Judge Royce Lamberth has once again ruled that John Eakin can amend his complaint to include digitized records representing those U.S. servicemembers who died in World War II but whose remains have not been properly identified whose last name begins with letters falling between M-Z in the alphabet. Although Eakin already has ongoing litigation challenging the A-L category, he requested permission to amend his complaint to include the M-Z category as well. Lamberth noted that "as the Court has made clear numerous times throughout this litigation, 'the Defense Department could save time and resources for both itself and the court if it treated Mr. Eakin's [May of 2016] FOIA request as a request for all of the digitized documents.' The Defense Department has undoubtedly been aware since Mr. Eakin made his initial FOIA request that he would eventually seek all of the digitized files. The Defense Department thus cannot seriously argue that it was be prejudiced by the Court's decision to grant leave to amend the pleadings." Approving the amendment, Lamberth pointed out that "the Court understands that the digitization of the files is taking place alphabetically, meaning that the further along in the alphabet the file is, the longer it may take to obtain. With this understanding in mind, there is no reason why Mr. Eakin's M-Z requests should not be combined with his ongoing lawsuit." (*John Eakin v. United States Department of Defense*, Civil Action No. 16-972-RCL, U.S. District Court of the Western District of Texas, July 30)

Judge Emmet Sullivan has ruled that the Department of Veterans Affairs responded appropriately to two FOIA/Privacy Act requests from Kenneth Stelmaszek. His first request asked for the transcript for his Decision Review Officer Hearing, the audio recording of the hearing, and an updated copy of his claims file. Seven months later, the agency provided the records Stelmaszek requested. He also alleged that he had submitted a FOIAPA request in December 2018, but the agency argued that his request was sent to an

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incorrect address. Dismissing Stelmaszek's first request as **moot**, Sullivan noted that "defendant has since released all of the requested responsive records in full, thereby satisfying its obligations under FOIA and the Privacy Act and rendering moot any statutory functions of this Court." Dismissing Stelmaszek's second request as well, Sullivan pointed out that "defendant contends that plaintiff ostensibly incorrectly assumed that he should submit the December Request to the same component where he sent his October Request – the [Veterans Affairs Evidence Intake Center] – when it should have been directed to the St. Petersburg VARO." He added that "the Court agrees that 'an agency's disclosure obligations are not triggered. . .until it has received a proper FOIA request *in compliance with its published regulations*.' It an agency receives a request that does not comply with its published rules, it 'has no reason to search or produce records.'" (*Kenneth A. Stelmaszek v. Department of Veterans Affairs*, Civil Action No. 19-00172 (EGS), U.S. District Court for the District of Columbia, Aug. 12)

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