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Washington Focus: The COVID-19 in Corrections Data Transparency Act (S. 4536 and H.R. 7683) was recently introduced in Congress. The bill, sponsored by Sen. Elizabeth Warren (D-MA) in the Senate and Rep. Ayanna Pressley (D-MA), requires the Bureau of Prisons and the U.S. Marshals Service to post more complete data about the spread of the corona virus in federal prison facilities. . .The Open Courts Act of 2020 (H.R. 8235), sponsored by Rep. Henry Johnson (D-GA) would make access to the federal court PACER system free of charge and would include the ability to do a full text search, a feature currently available only in third party products.

Court Finds One Category of OLC Opinions Subject to Affirmative Disclosure Provisions

In her most recent ruling on whether opinions by the Department of Justice's Office of Legal Counsel constitute final opinions that would qualify for the affirmative disclosure provision of Section (a)(2) of FOIA, Judge Ketanji Brown Jackson has found that only one of the four categories identified by the Campaign for Accountability as qualifying as final opinions – OLC opinions adjudicating inter-agency disputes – sufficiently fits the criteria identified by the D.C. Circuit to state a claim that would allow CfA's suit to continue. Dismissing CfA's other three claims, Brown Jackson noted that "the Court considers it implausible that any of the other types of OLC opinions to which CfA points fit into the FOIA's affirmative disclosure classifications, and thus concludes that CfA has failed to state a claim with respect to those categories of opinions."

Both CfA and CREW have led the charge in litigating cases involving the posting of OLC opinions. Litigation challenging the government's lack of affirmative disclosure was considered a moot issue at the beginning of this phase of litigation since the government's position was that FOIA did not even provide a remedy for violating the affirmative disclosure provisions and that the only cognizable claim was under the arbitrary and capricious standard in the Administrative Procedure Act. That established position

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changed dramatically when the D.C. Circuit ruled, in *CREW v. Dept of Justice*, 846 F.3d 1235 (D.C. Cir. 2017), that FOIA did provide a rather limited remedy which required plaintiffs to first submit a request for the information to the agency, be denied based on an exemption claim, and then attempt to force the agency to provide online access through the affirmative disclosure provisions. Only requesters that had pursued that long arduous route were eligible for potential posting.

While some litigation has focused on agencies' general obligation to post records online under the electronic reading room provision, the CfA and CREW litigation has focused directly on the requirement to provide access to final opinions, specifically those from DOJ's Office of Legal Counsel. While many observers view the role of OLC as providing advice to executive departments that forms the legal basis for government actions, courts have frequently found that its opinions are often not legally binding. One of the important limiting elements in the CfA litigation has been *EFF v. Dept of Justice*, 739 F.3d 1 (D.C. Cir. 2014), in which the D.C. Circuit ruled that an OLC opinion to the FBI was not a final opinion because it was not binding on the FBI. With that ruling in hand, the government successfully blunted claims that all OLC opinions should be posted because at least some of them clearly did not constitute final opinions. Instead, CfA was instructed to come up with categories of OLC opinions that it believed were always binding on the receiving agencies.

CfA came up with four categories – (1) resolution of inter-agency disputes, (2) interpretation of an agency's non-discretionary legal obligations, (3) finding particular statutes that are unconstitutional with which agencies did not need comply, and (4) adjudicate or determine private rights – that CfA contended were always binding when issued. Brown Jackson was perplexed by OLC's insistence that the affirmative disclosure of final opinions related only to private parties. However, she pointed out that "far from OLC's representation that 'Congress's primary concern in [section] 552(a)(2) was the adjudication of private rights,' the House Report to which OLC points demonstrates that Congress enacted section 552(a)(2) to counteract the vague authorization for withholding that existed in the prior version of the FOIA, which had 'permitted an agency's orders and opinions to be withheld from the public if the material is "required for good cause found to be held confidential."' Section 552(a)(2) was aimed at eliminating that 'undefined authority for secrecy,' and the House Report clarified that 'the purpose of the provision was to provide an explicit requirement that agencies 'make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public.'"

She observed that "it is well-established that the 'working law' exception to an agency's authority to withhold records derives from more than a mere concern about how an agency has adjudicated private parties' right; rather, requiring affirmative disclosure of the broad categories of records and information listed in section 552(a)(2) promote the overarching objective of the FOIA, which is to codify 'the citizens' right to be informed about what their government is up to.'" She concluded that "it is clear that what matters for FOIA purposes is whether the agency record at issue reflects agency determinations, interpretations, or policies that have the force of law, and not whether it involves the regulation or adjudication of private rights."

Addressing the impact of *EFF v. Dept of Justice*, Brown Jackson explained that while the *EFF* decision contradicted CfA's claim that all OLC opinions were final she indicated that the *EFF* decision "applies equally well to OLC's argument that *no* OLC opinions can ever qualify as an agency's working law, since OLC always and inevitably serves a mere advisory role. To the contrary, properly understood the D.C Circuit's decision in *EFF* plainly leaves open the possibility that a client agency (such as the FBI) can 'adopt' the OLC's legal advice such that the OLC opinion becomes the agency's working law, or that OLC might, in some cases, 'speak with authority' as to the client agency's policies and interpretations."

Brown Jackson then concluded that CfA had shown that OLC opinions resolving inter-agency disputes could plausibly be considered working law. She explained that "the formal, written OLC opinions that resolve such inter-agency disputes also plausibly qualify as 'final opinions' insofar as they constitute the executive branch's self-professed 'final word on the controlling law.' Indeed, there is no indication, at this stage, that such OLC opinions are only *tentative*, as would be the case if OLC's opinions must later be affirmed or reversed by a higher dispute resolution authority within the executive branch." She observed that "the court finds it entirely plausible that, once OLC settles a dispute among two or more agencies over a question of law, the client agencies that have submitted that dispute to OLC for resolution can be deemed to have 'adopted' OLC's interpretations with respect to the matter that prompted their request for OLC's views within the meaning of section 552(a)(2)(B)." She then rejected CfA's claim that the three other categories constituted final opinions. She pointed out that "unlike the allegations concerning OLC opinions that resolve inter-agency disputes, CfA's amended complaint does not allege that client agencies seek OLC's advice with respect to these categories of opinions pursuant to some presidential or congressional mandate. . ." (*Campaign for Accountability v. United States Department of Justice*, Civil Action No. 16-1068 (KBJ), U.S. District Court for the District of Columbia, Sept. 11)

Court Rules Talking Points Not Privileged Per Se

A federal court in New York has ruled that many Exemption 5 (privileges) claims made by the Department of Homeland Security pertaining to how the agency responded to congressional or press inquiries are not protected by the deliberative process privilege because they are not deliberative. The case underlines a widening gap between the Second Circuit and the D.C. Circuit concerning when discussions pertaining to responding to such inquiries qualify as deliberative.

The case involved FOIA litigation brought by the National Day Laborer Organizing Network, the Asian Law Caucus, and the Immigration Clinic at Benjamin Cardozo School of Law against the Department of Homeland Security for records related to the former Secure Communities program and its successor, the Priority Enforcement Program. There were 200 remaining disputed documents that the agency had divided into four categories – (1) draft documents or emails related to those drafts, (2) talking points, (3) memoranda prepared for senior officials discussing policy proposals not ultimately adopted, and (4) documents protected by the attorney-client privilege and work product privilege, as well as the deliberative process privilege.

District Court Judge Paul Engelmayer first rejected the agency's claims that some records were protected by attorney-client or the attorney work product privilege. He found that the attorney work product claims were particularly broad. The plaintiffs characterized the claims of U.S. Immigration and Customs Enforcement "as arguing that because lawsuits have been brought in the past on detainers generally, and because PEP involves ICE detainers, then ICE attorneys commenting on PEP documents necessarily were doing so in anticipation of some potential, future litigation about detainers." Engelmayer observed that "but that logic is far too conjectural to meet the requirements of the work product doctrine." He pointed out that "in the case of ICE, an agency frequently engaged in litigation in litigation over its policies and conduct, this logic would afford near-blanket protection to otherwise discoverable or FOIA-responsive documents, so long as they happened to be prepared by an attorney. The Court declines ICE's invitation to permit the exception to swallow up the rule."

Engelmayer found that four final DHS memos qualified for the deliberative process privilege. However, he noted that "although Defendants have established a basis for withholding these records under Exemption 5, the *Vaughn* entries are insufficient to satisfy the additional requirements of the [foreseeable

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harm standard] of the FOIA Improvement Act. Under the Act, Defendants 'must explain how a *particular* Exemption 5 withholding would harm the agency's deliberative process.' An agency must do more than demonstrate why a given record falls within an enumerated FOIA exemption. Defendants must 'specify and particularly describe the Exemption 5-related interests that would be harmed by the disclosure of' *these* documents."

Engelmayer then considered whether talking points could be considered deliberative. Noting the split between the Second Circuit and the D.C. Circuit and observing that the First Circuit had largely sided with the D.C. Circuit's position that talking points were protected if they were both pre-decisional and deliberative, Engelmayer explained that "the appropriate line for the disclosure of talking points lies between these two positions. On the one hand, 'the Government goes to far in suggesting that *all* deliberations over what to say are protected by the privilege. [Taken] to its logical conclusion, that suggestion would render the privilege's restriction to "pre-decisional" deliberations a nullity because, [as] agencies are in constant communication with the public, the press, and Congress, *all* "messaging" deliberations would be "pre-decisional" with respect to some future messaging "decision."' Such broad protection for messaging decisions about otherwise decided-upon policy would severely undercut FOIA's overarching presumption of disclosure and sweep far broader than the policy rationale of the deliberative process privilege." He observed that "this reality counsels against a rule either categorically exempting, or categorically protecting, talking points and similar documents with the deliberative process privilege." Engelmayer then pointed out that "where 'messaging' communications amount to little more than deliberations about how to spin a prior decision, nor merely reflect an effort to ensure that the agency's statement is consistent with a prior decision, protection would be little to advance the purposes underlying the [deliberative process] privilege." (*National Day Laborer Organizing Network, et al. v. United States Immigration and Customs Enforcement, et al.*, Civil Action No. 16-387 (PAE), U.S. District Court for the Southern District of New York, Sept. 14)

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 ruled that the City of Chicago must search for text messages from public officials sent on their personal devices concerning the discovery of lead in drinking water at the Chicago Public Schools in response to requests from the Better Government Association. In response to BGA's requests for communications pertaining to the lead problem, the City initially told BGA that based on the holding in *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, it did not consider text messages sent by individuals on their personal devices to be public records because individuals were not public bodies under the open meeting act. After BGA filed suit, the trial court found that Chicago was required to search for such text messages. Chicago then appealed, arguing that *City of Champaign* was dispositive here. The court of appeals disagreed and upheld the trial court's ruling. The appeals court explained that in the *City of Campaign* decision, the appeals court there had found that an email sent only to an individual member of city council did not qualify as a public record because the individual member was not a public body unless meeting with a quorum of the city council. However, the appeals court had noted that if the individual member had shared the email with a quorum of city council members, it would have become a public record at that point. The appeals court noted that "although we agree with defendants that the individual officials identified in the requests are not themselves public bodies under FOIA, this does not mean that their communications about public business

cannot be public records. Instead, it is sufficient that the communications were either prepared for, used by, received by, or in the possession of a public body." The appeals court pointed out that "the court concluded that the city council was capable of conducting public business only when a quorum of council members was involved. By contrast, the officials in question here are not limited by a quorum requirement. Rather, defendants – although their individual officials such as those named in the requests at issue – can function as public bodies without any official meeting having been convened. For example, the mayor and the director of [the Chicago Department of Public Health] can make unilateral decisions that are binding on their respective public bodies." The court of appeals added that "the communications that pertain to public business from the named officials' personal accounts are subject to FOIA." Having found that the text messages were public records, the appeals court found the City was required to conduct a search. The appeals court noted that "the BGA submitted sufficient evidence to establish a reason to believe that defendants' officials used their personal accounts to conduct public business. Defendants' refusal to even inquire whether their officials' personal accounts contain responsive records was therefore unreasonable under the facts of this case." (*Better Government Association v. City of Chicago, et al.*, No. 1-19-0038, Illinois Appellate Court, Aug. 5)

New Jersey

A court of appeals has ruled that records concerning internal disciplinary actions are protected from disclosure by the personnel records exception in the Open Public Records Act but that because such records are subject to the common law right of access the appeals court remanded the case back to the trial court to consider whether Libertarians for Transparent Government was entitled to the records under the common law right of access. After discovering the existence of the resolution of an internal disciplinary matter in the board meeting minutes of the Police and Fireman's Retirement System involving Tyrone Ellis, Libertarians submitted a public records request to Cumberland County, which had terminated Ellis as a corrections officer. Cumberland County denied the request, arguing that the records were personnel records exempt from OPRA. However, the trial court concluded that the County had characterized the records as personnel records primarily to evade OPRA and ordered them disclosed. The County then appealed. The appeals court reversed, finding OPRA clearly exempted the records. The appeals court noted that "the statute provides no right of access to internal personnel records, including those related to disciplinary infractions or sexual harassment allegations, while requiring disclosure of such records when one side or the other advances that matter out of the internal realm of the public agency by filing a lawsuit." Remanding the case back to the trial court, the appeals court pointed out that "we have no doubt that the settlement agreement at issue here would qualify as a public record under the common law, and that the Libertarians can likely establish an interest in the subject matter of that agreement." (*Libertarians for Transparent Government v. Cumberland County*, No. A-1661-18T2, New Jersey Superior Court, Appellate Division, Sept. 4)

Washington

A court of appeals has ruled that Arthur West has shown that the City of Seattle may have violated the open meetings act through a series of calls, texts, and in-person meetings between city council members concerning how to vote on the reversal of the Employee Hour Tax. The appeals court pointed out that "the in-person meetings, emails, phone calls, and text messages between and among the city council members could constitute a 'meeting' under the OPMA if there was evidence that at least five members (a quorum) participated in and were aware that four others were participating in conversations about repealing the EHT." The appeals court concluded that "if a quorum of a legislative body, such as the city council, collectively commits or promises each other to vote – as a group – in favor or in opposition to a piece of pending legislation at a future public meeting, that such a commitment may be evidence that a majority of the body attended a 'meeting' with the collective intent to take an 'action' in violation of the OPMA. There

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is sufficient evidence here from which a reasonable trier of fact could conclude that the seven members who agreed to join [the mayor'] press statement, indicating that the pending bill had the support of a majority of the council, were expressing their collective decision to vote to repeal the EHT outside of a public meeting." (*James Egan v. City of Seattle*, No. 799920-7-I, Washington Court of Appeals, Division 1, Sept. 8)

The Federal Courts…

The D.C. Circuit has ruled that the Department of State and the Department of Justice properly responded to three separate but related FOIA requests from Juan Luciano Machado Amadis for records concerning why the government had labeled him a drug trafficker, making him ineligible to get a visa to enter the United States. His first set of requests were sent to the Department of State, the FBI, and the DEA for records relating to his criminal activity. The State Department provided records, but both the FBI and the DEA told Machado that they found no records. The Office of Information Policy upheld those decisions on appeal. Machado then requested records on how his FOIA requests were processed by the three agencies. The State Department provided records. DEA produced some responsive records and produced others later after Machado appealed to OIP. The FBI withheld responsive records. On appeal, OIP withheld some records as non-responsive and redacted some records under **Exemption 5 (deliberative process privilege)**. Machado then submitted a third set of FOIA requests to the FBI and the DEA for records concerning himself, including emails. Both agencies told Machado they found no responsive records but agreed to conduct a second search if Machado would provide additional search terms. Machado provided search terms to the DEA, which conducted a second search but still found no responsive records. However, because the FBI told Machado that to conduct a second search would require him to submit a new FOIA request, he neither filed a new request nor appealed the FBI's decision. Machado challenged the **adequacy of the agencies' searches**, the Exemption 5 redactions, and the failure of the FBI and the DEA to **provide a determination** that would require Machado to appeal his requests pertaining to records about himself. Machado argued that because the State Department had only searched its FOIA database for records related to his request, its search was unreasonably narrow. Writing for the court, Circuit Court Judge Gregory Katsas, noting that the agency organized its records by FOIA request number, observed that "it was surely reasonable for the agency to conduct a search that tracked how its own records are organized, just as it surely would be reasonable for our clerk to search by a docket number to locate all court records from a particular case." In response to Machado's attorney's hypothetical that State's search might have missed emails he sent to the agency, Katsas pointed out that "the search did capture both the response and his initial email, which was appended to the response. This bolsters the agency's statement that it consistently uses FOIA request numbers to track associated documents and correspondence." Machado also faulted OIP for failing to disclose FBI and DEA records concerning his appeal of the agencies' processing of his requests. But Katas indicated that Machado had only asked for records "memorializing or describing the processing of his prior FOIA appeals." He explained that "in ordinary usage, this phrase does not encompass records created by other agencies before the appeals were taken. Machado responds that the DEA and FBI documents were contained in OIP's appeals files. True enough, but Machado's request did not seek OIP's entire case files. OIP properly construed Machado's FOIA request to exclude the underlying source documents." OIP had also redacted Blitz Forms, which are filled out by line attorneys to identify issues presented in an appeal, who then analyze the issues and make recommendations for senior attorneys. OIP redacted the fields for recommendations, discussions and search notes, citing the deliberative process privilege. Machado claimed the forms were effectively final decisions because the fields for reviewer comments and attorney follow-up remained blank. However, Katsas noted that "but a recommendation does not lose its pre-decisional or deliberative character simply because a

final decisionmaker later follows or rejects it without comment. To the contrary, the Supreme Court has held [in *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975)] that the deliberative process privilege protects recommendations that are approved or disapproved without explanation." Katsas rejected Machado's claim that the agency's explanation of the redactions had not complied with the **foreseeable harm test**. Instead, he observed that "OIP specifically focused on the 'information at issue' in the Blitz Forms under review, and it concluded that disclosure of the information 'would' chill future internal discussions. The agency correctly understood the governing legal requirement and reasonably explained why it was met here." Although the district court had not addressed the issue of **segregability**, Katsas indicated that "we may do so in the first instance. Here, we readily conclude that OIP appropriately segregated exempt and non-exempt portions of the Blitz Forms." Machado contended that both the FBI and the DEA, by offering to conduct further searches if Machado provided additional information, failed to provide a determination that would require Machado to file an administrative appeal. Katsas disagreed. He pointed out that "by offering to conduct a 'second' search if he provided 'further' information, or to conduct an 'additional' search if he provided 'additional' information, neither agency backed away from the finality of the adverse determination already made – that a sufficient search had yielded no responsive records." He observed that "in sum, offers to conduct additional searches are immaterial to whether an agency has made a 'determination' under FOIA." (*Juan Luciano Machado Amadis v. United States Department of State and United States Department of Justice*, No. 19-5088, U.S. Court of Appeals for the District of Columbia Circuit, Aug. 21)

Judge Rudolph Contreras has ruled that while GSA's exemption claims in response to two FOIA requests from American Oversight concerning plans to redevelop the headquarters of the FBI were appropriate, its searches were deficient. After publication of a report by the GSA's Inspector General finding that GSA Administrator Emily Murphy misled Congress about the White House's involvement in the initiative to relocate the FBI existing headquarters, American Oversight submitted two FOIA requests. Its first request asked for all communications from certain GSA officials and any person in the White House pertaining to the FBI headquarters consolidation project and included a list of GSA officials and suggested search terms for locating responsive records. American Oversight's second FOIA request asked for all communications between or among GSA officials listed in Column A and Trump Organization individuals or entities listed in Column B. The timeframe for both requests was January 2017 through the date of the search. American Oversight did not contest the exemption claims but instead challenged the **adequacy of the agency searches**, arguing that the search for records responsive to the request pertaining to the Trump Organization was improperly limited because the agency had misconstrued the request and that neither search was designed to capture non-email communications. American Oversight argued that GSA had improperly limited its Trump Organization request to communications pertaining to the headquarters consolidation project. Contreras agreed, noting that "neither part [of the request] limited itself to a particular topic or subject area," adding that "it is not the agency's role to intuit the 'purpose' of a request and impose a corresponding limitation on the associated search. Rather, 'the agency is bound to read the request as drafted, not as agency officials might wish it was drafted,' and it may not narrow the scope of a FOIA request to exclude materials reasonably within the description provided by the requester." He pointed out that "the agency erred in construing the request as only relating to seeking records pertaining to the FBI headquarters consolidation project." Contreras also agreed that GSA had inappropriately decided to substitute its own search terms for those supplied by American Oversight. He indicated that "when faced with a request like the one at issue here (that is, one where relevancy is defined by a particular set of terms), an agency is not necessarily required to blindly execute the corresponding search. . .But in the absence of a more specific objection or a showing of burden or infeasibility, the agency cannot narrow or redefine the substance of the request and then craft a corresponding set of search terms." Contreras again agreed with American Oversight that the agency had inexplicably failed to search for responsive text and voicemail messages. He noted that "here, GSA does not even mention why it

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did not attempt to search voicemails or call logs, two formats specifically highlighted by American Oversight's request. Additionally, that the GSA did not 'provide' the relevant employees with text messaging capability or access to messaging systems is not, standing alone, reason to conclude that no relevant agency communications existed in those formats." (*American Oversight v. U.S. General Services Administration*, Civil Action No. 18-2423 (RC), U.S. District Court for the District of Columbia, Aug. 28)

Judge Carl Nichols has ruled that 97 videos showing ballistic testing of readily available ammunition are not protected by either **Exemption 7(E) (investigative methods or techniques)** or **Exemption 7(F) (harm to any person)**. NPR reporter Rebecca Hersher submitted a FOIA request to the FBI for video recordings of ballistics tests conducted with common ammunition. The FBI searched its Ballistics Research Facility and located 97 videos – 76 videos showing testing of .223 Remington ammunition and 21 videos showing testing of 9 mm Luger ammunition. The agency decided to withhold all of them under Exemption 7(E) and Exemption 7(F). Although NPR had seven objections to the FBI's declaration explaining its search, because the agency sufficiently addressed the objections, Nichols found the search was adequate. Challenging the Exemption 7(E) and (F) claims, NPR pointed out that the 1974 legislative history discussing the changes to Exemption 7, resulting in six sub-parts, including Exemption 7(E), indicated that "investigative techniques and procedures" should not include well-known techniques such as fingerprinting and ballistics tests. Nichols observed that NPR was unlikely to get too far relying on legislative history and pointed to "the dearth of recent cases applying the Conference Report in this context stems from courts' newfound hesitance to give weight to legislative history." Instead, Nichols noted the D.C. Circuit's foray into legislative history in *Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), in which the full D.C. Circuit was convinced that Exemption 2 (internal practices and procedures) encompassed instances where disclosure would risk circumvention of law or regulation, including ballistics testing. However, *Crooker*'s judicial gloss was abandoned by the Supreme Court when it ruled in *Milner v. Dept of Navy*, 562 U.S. 462 (2011) using the plain language test that had largely supplanted any reliance on legislative history in statutory interpretation. Applying the plain language standard here, Nichols pointed out that "Exemption 7(E)'s text creates no carve-out for ballistics tests and the Court will not infer one based on legislative history." Nichols noted that the FBI's assertions of harm from disclosure were speculative. After reviewing the tapes himself, Nichols indicated that "the videos do not contain any sensitive government information that might distinguish them from ballistics tests conducted in any other laboratory, and the Court is unable to discern any appreciable risk that the videos' 'disclosure could reasonably be expected to risk circumvention of the law.'" On Exemption 7(F), he observed that "the Court need not discuss the Parties' arguments about the class of individuals who might be at elevated risk of harm, however, because as with Exemption 7(E), the FBI has not justified its assertions that videos contain any information bad actors might use to harm *anyone*." (*National Public Radio, Inc., et al. v. Federal Bureau of Investigation, et al.*, Civil Action No. 18-03066 (CJN), U.S. District Court for the District of Columbia, Aug. 28)

A federal court in New York has declined to reconsider its earlier opinion finding that U.S. Immigration and Customs Enforcement **failed to conduct an adequate search** and that both U.S. Citizenship and Immigration Services and the Department of State had failed to show that **Exemption 7(E) (investigative methods and techniques)** applied to some of the records the agencies withheld. The Knight First Amendment Institute submitted a FOIA request to multiple agencies for records concerning communications sent from the White House to agencies regarding the consideration of individuals' speech, beliefs, or associations in connection with immigration determinations. ICE located 14,000 pages of potentially responsive records, disclosing 463 pages in one response and 395 pages in a second response. After the Knight First Amendment Institute narrowed its request to expedite processing, ICE located an additional 99 pages, releasing 50 of them. The agencies asked District Court Judge Andrew Carter to reconsider his ruling

that ICE's search was inadequate and that USCIS and State's Exemption 7(E) claims were inappropriate. ICE argued that Carter had overlooked supplemental affidavits from the agency that further explained its search, including the search terms it used. Carter indicated that he considered all of ICE's affidavits but still found the wanting. He noted that "although these search terms are better than none, they do not, as Defendants erroneously argue, mirror the terms used by [the Office of Legal Counsel at the Department of Justice] and [the Department of State], which I cited with approval." Carter also faulted the agency's search for the date restrictions used, noting that "ICE conducted all searches by January 2018, before the administrative remand was requested let alone granted." In his first opinion, Carter found that Terrorism-Related Inadmissibility Grounds (TRIG) questions could not be withheld under Exemption 7(E), but that TRIG exemption could be withheld. Both State and USCIS indicated that they had difficulty distinguishing between the two. Carter explained that "I understand TRIG Questions to be 'the questions and follow-ups' 'designed to *elicit*' information from applicants 'that would shed light on whether the applicants have any ties to terrorist organizations and activities.' TRIG Exemptions, by contrast, are the criteria USCIS uses to *evaluate* applicants' answers. The latter material is internal to the agency and protectable, whereas the former material is, by definition shared, specially with applicants." He also indicated that in rejecting the agencies' Exemption 7(E) claims he had meant to order disclosure, not clarification. (*Knight First Amendment Institute v. U.S. Department of Homeland Security, et al.*, Civil Action No. 17-07572-ALC, U.S. District Court for the Southern District of New York, Sept. 13)

Judge Amy Berman Jackson has ruled that the *Washington Post* has **standing** to sue the Special Inspector General for Afghanistan Reconstruction to challenge the agency's response to a FOIA request submitted by reporter Craig Whitlock for all transcripts or audio tapes of interviews conducted during the Lessons Learned program. SIGAR told Whitlock that 410 interviews had been conducted, 374 without audio recordings or transcripts. Of the 36 interviews recorded, SIGAR possessed only 17 of them and only nine had been transcribed. The agency asked Whitlock if he was requesting interview notes. He told SIGAR that he wanted any records pertaining to the interviews. By the time the *Post* filed suit, SIGAR had processed about half of the responsive records. The agency first argued that the *Post* did not have standing because Whitlock was the only person who corresponded with SIGAR about the request. Berman Jackson noted, however, that "the record fully supports a finding that the FOIA request was made on behalf of *The Washington Post*. The FOIA request was sent on company letterhead bearing the company name in its signature font at the top of the page along with its address. It is signed, Craig Whitlock, 'Staff writer,' reflecting that he authored the letter in his capacity as a Post employee. The body of the letter also indicates that Whitlock was acting as an agent of the publication. . ." SIGAR argued that the *Post* had **failed to exhaust its administrative remedies** because it did not appeal what SIGAR characterized as a determination about the request. But Berman Jackson pointed out that an email sent to the *Post* "does not inform the Post that SIGAR would be redacting or withholding records, or on what grounds." She observed that "because SIGAR failed to fulfill its obligations under FOIA to inform the Post of the reasons for its determinations and the grounds for any withholdings, the Post was not in a position to initiate the administrative appeal that is generally required before a suit can be brought." Berman Jackson agreed that the agency's search was adequate. As to **Exemption 1 (national security)** claims, she indicated that the affidavits submitted by the State Department were insufficient to support the classification claims. She explained that "the State Department's *Vaughn* index uses identical boilerplate language to justify each Exemption 1 withholding without addressing the specific harm to national security that would flow from the release of any particular document in whole on in part. . ." The *Post* argued that SIGAR's Lessons Learned was done for information gathering purposes, not for law enforcement purposes. Berman Jackson disagreed, noting that the agency's affidavit explained that "the main purpose of SIGAR's Lessons Learned reports is to make actionable recommendations to Congress and the Executive Branch agencies, including law enforcement matters such as ways to deter and prevent waste, fraud, and abuse."

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Having found SIGAR qualified as a law enforcement agency Berman Jackson then found that personal information about interviewees was protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Berman Jackson pointed out that "the informants not only agreed to be interviewed with the understanding that their identities would be kept private, but that many could face serious consequences if their identities were revealed. For these reasons, the Court finds that SIGAR has supported its position that the interviewees have a significant privacy interest in remaining anonymous." But she rejected SIGAR's 7(C) claim concerning interview codes. She noted that "these anonymous labels could easily be segregated from other identifying information and produced to the Post in accordance with the agency's statutory duty to produce any reasonably segregable portion of the information requested." However, Berman Jackson agreed with SIGAR had properly invoked **Exemption 7(A)(interference with ongoing investigation or proceeding), Exemption 7(E) (investigative methods or techniques)**, and **Exemption 7(F) (harm to any person)**. (*Washington Post Company v. Special Inspector General for Afghanistan Reconstruction*, Civil Action No. 18-2622 (ABJ), U.S. District Court for the District of Columbia, Sept. 15)

After conducting an *in camera* review of the **Exemption 5 (privileges)** claims made by the Department of Defense and OMB, Judge Colleen Kollar-Kotelly has ruled that, with the exception of a handful of claims, the agencies properly applied Exemption 5, **Exemption 3 (other statutes)** and **Exemption 6 (invasion of privacy)**. The Center for Public Integrity submitted two related requests to DOD and OMB for records of communications between OMB and DOD acting comptroller Elaine McCusker and others concerning the Ukraine Security Assistance Initiative. The agency processed 292 pages and provided a *Vaughn* index. Kollar-Kotelly found the *Vaughn* index did not provide sufficient justification for the Exemption 5 claims and ordered DOD to provide them for *in camera* review. The agencies withheld some records under Exemption 3, citing 10 U.S.C. § 130c which allows agencies to withhold sensitive information from foreign governments. Kollar-Kotelly pointed out that CPI did not contest that 10 U.S.C. § 130c qualified as an Exemption 3 statute. After reviewing the information withheld, she noted that "Defendants have provided a declaration explaining that the information is 'based upon extensive cooperation between the United States and Ukraine,' that 'Ukraine does not publicize such information,' and that Ukraine has 'requested, in writing, that such information not be produced under the FOIA.'" Challenging the Exemption 5 claims, CPI argued that the deliberative process privilege did not apply because of the government misconduct exception, pointing to the fact that the General Accounting Office had concluded that OMB violated the Impoundment Control Act when it withheld the appropriated funds for Ukraine. Kollar-Kotelly found that was insufficient. She noted that "the Court makes no decision as to whether or not an agency's action, found to be in violation of a statute, could ever rise to the level of extreme government misconduct. Instead, the Court decides only that Plaintiff has not established that the OMB's alleged violation of the Impoundment Control Act is sufficient to show nefarious intent or extreme government misconduct on the part of Defendants." She pointed out that "discussions within the OMB and discussion with the DOD regarding apportionment of funds encompass one of the OMB's core responsibilities. Even if the ultimate decision as to the apportionment of the funds was found by the GAO to violate the Impoundment Control Act, it is not clear that the discussion themselves, considering different options for the release or delay of the USA1 funding, were sufficiently egregious as to trigger the government misconduct exception." CPI argued that the agencies had not justified their privilege claims under the foreseeable harm standard incorporated in the 2016 FOIA Improvement Act. Noting that both agencies had divided their privilege claims into multiple discrete categories, Kollar-Kotelly explained that both agencies had "categorized the withholdings under Exemption 5 and explained the particular harm that would be caused by the release of the information in each category. . .[The agencies] stated, in general terms, the content of each category of withholdings and explained how the release of the information would harm the decision-making process of the agency." Except for a handful of instances, Kollar-Kotelly accepted the agencies' privilege claims. She also agreed that OMB had properly redacted two disputed email addresses under Exemption 6. (*Center of Public Integrity v. United States*

Department of Defense, et al., Civil Action No. 19-3265 (CKK), U.S. District Court for the District of Columbia, Aug. 28)

Resolving the only remaining dispute, a federal court in New York has ruled that the Department of Justice properly withheld a draft memo prepared by its Office of Community Oriented Policing Services in connection with a collaborative reform assessment of the North Charleston, South Carolina Police Department under **Exemption 5 (privileges)** in response to a FOIA request from the NAACP Legal Defense and Educational Fund. The NAACP asked for five categories of records related to grant awards and technical assistance provided to the NCPD from COPS from January 20067 to the present. In an interim response, the agency disclosed 44 pages without redactions and 14 pages with redactions under Exemption 4 (confidential business information) and Exemption 6 (invasion of privacy). In its final response, the agency disclosed three additional pages but withheld 331 pages under Exemption 5. After LDF filed suit, the agency conducted an additional search based on clarifications of LDF's request. COPS released 18 more pages with redactions under Exemption 5 and Exemption 6 but withheld in full 315 pages under Exemption 5. In consultation with LDF, COPS agreed to expand its search for records pertaining to NCPD, this time disclosing 7,207 additional pages with redactions. COPS also agreed to re-review three drafts of the NCPD report for **segregability**. As a result of that review, COPS continued to withhold a 112-page draft report under the deliberative process privilege. LDF argued that because the draft was prepared by the Police Foundation, the report did not satisfy the inter- or intra-agency threshold requirement for Exemption 5 coverage. The court, however, rejected the argument, noting that "the June 30 Draft, prepared by the Police Foundation as the technical assistance provider to the COPS Office on the NCPD engagement, is an intra-agency document. Therefore, the 'source' of the June 30 Draft is a government agency." The court then found that the draft report was pre-decisional, noting that "the Draft temporally preceded any decision by the COPS Office as to what to include in the finalized report, and whether to adopt the final report as COPS's official recommendation to the NCPD. These decisions were never reached because the program ended its work on the NCPD engagement before the June 30 Draft was finalized. Even where a draft never became final, the draft version remains predecisional." The court agreed that the draft was deliberative as well. The court pointed out that "the June 30 Draft reflects the then-ongoing collaboration between the Police Foundation and COPS on a document that contains preliminary assessments, initial findings, and proposed recommendations, along with notes and comments by the drafters. The Draft was subject to change, and its contents had not been verified. Such a draft document reflects the thought processes of the 'give-and-take' of the agency and its outside consultant, rendering it deliberative and protected by Exemption 5." LDF also challenged the agency's segregability analysis, suggesting the agency could have separated out more factual matter and disclosed it. The court disagreed, observing that "the factual material that the Police Foundation and the COPS Office included in the June 30 Draft would reveal what the government considered significant to the project during the preliminary stages of creating the NCPD recommendations." The court added that "the inclusion of particular information here depended on the subjective judgement of the drafters, and would reveal what they considered significant at a particular, preliminary stage of the drafting process." The court also found that the agency had shown disclosure could cause **foreseeable harm**. The court pointed out that "law enforcement may be hesitant to approach the COPS Office to engage in such deliberative processes if such information could be released to the public at preliminary stages." (*NAACP Legal Defense and Educational Fund v. U.S. Department of Justice*, Civil Action No. 18-4354 (PKC), U.S. District Court for the Southern District of New York, Sept. 2)

Judge Amit Mehta has ruled that the Department of State properly withheld a legal memo authorizing U.S. participation in the 2016 Paris Climate Agreement under **Exemption 5 (privileges)**. The Competitive Enterprise Institute submitted three FOIA requests concerning Circular 175, which provides the legal basis for

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U.S. participation in international treaties. The Department of State withheld the legal memo pertaining to the Paris Climate Agreement under Exemption 5. CEI argued that the only decision remaining for the Secretary upon receipt of the memo was whether or not to join the Paris Climate Agreement. But Mehta noted that "the very provision that Plaintiff cites for the proposition that [the Office of the Legal Advisor] must have made the decision as to the form of the agreement explicitly states that 'all legal memoranda accompanying Circular 175 requests . . . will discuss thoroughly the legal authorities underlying the type of agreement *recommended*. Although the provision goes on to provide additional steps that must be taken to obtain a decision from the Secretary as to the form of an agreement when there is no internal consensus on a recommendation for the accompanying legal memorandum, nowhere does the FAM or any other evidence put forth by Plaintiff suggest that anyone other than the Secretary or his designee had authority to make a decision as to the form of the Paris Climate Agreement." Mehta found the memo deliberative as well. He pointed out that "the Legal Memo originated in OLA, comprises subordinate officials' views on legal questions concerning the Paris Agreement, and flowed upward to the Secretary for a decision." Mehta rejected CEI's claim that the memo constituted working law. Instead, he observed that "it contains legal advice from a subordinate office for a decision to be made by a superior, the Secretary, on a matter of U.S. foreign policy. It is the opposite of 'working law.'" CEI also argued that the legal memo had been publicly acknowledged because it had been leaked. The State Department told the court that the legal memo had not been officially disclosed. Mehta noted that "plaintiff offers no evidence to contradict this representation. Moreover, the posted document bears no indicia of an official disclosure." He pointed out that "its mere public availability is not enough." (*Competitive Enterprise Institute v. United States Department of State*, Civil Action No. 17-02032 (A)M), U.S. District Court for the District of Columbia, Sept. 15)

Ruling in consolidated cases brought by BuzzFeed reporter Jason Leopold and CNN for records concerning the typewritten narrative of FD-302 forms created by the FBI in conjunction with Mueller investigation of Russian interference in the 2016 election, Judge Reggie Walton has found that the narrative sections were protected by **Exemption 5 (privileges)**. The agency withheld the records under the attorney work-product privilege and the presidential communication privilege. Walton initially pointed out that "the information withheld by the Department from the FD-302s pursuant to Exemption 5 based on the attorney work product privilege falls squarely within the scope of the privilege." Leopold and CNN argued that the attorney work product privilege did not apply because Special Counsel prosecutors did not consider the FD-302s as their work product. However, Walton pointed out that "the plaintiffs ignore that the FD-302s, as 'factual recitations of what occurred during the interview' are protected by the attorney work product privilege." He observed that "to the extent that the information contained in the FD-302s are factual in nature, they are nevertheless protected by the attorney work product privilege and are exempt from disclosure pursuant to Exemption 5." Walton also rejected Leopold and CNN's assertion that the government misconduct exception applied because of the alleged misconduct underpinning the Mueller investigation. But Walton indicated that was irrelevant in the FOIA context. Instead, he pointed out that "the plaintiffs have failed to produce any evidence showing 'that the [Department] [handling its] FOIA request engaged in illegal activity.' Lacking any such evidence of misconduct on the part of the Department, the plaintiffs' argument must be rejected." Walton found the presidential communications privilege applied as well. He noted that "all three of the Department's categories describe communications that involve the type of advisers – individuals with 'broad and significant responsibility for investigating and formulating the advice given the President' – contemplated as being covered by the presidential communications privilege." (*Jason Leopold and BuzzFeed, Inc. v. United States Department of Justice, et al.*, Civil Action No. 19-1278 (RBW) and *Cable News Network v. Federal Bureau of Investigation*, Civil Action No. 19-1626 (RBW), U.S. District Court for the District of Columbia, Sept. 3)

Judge Colleen Kollar-Kotelly has ruled that the Department of Justice properly withheld four drafts attached to emails sent to then Acting Attorney General Sally Yates in January 2017 under **Exemption 5 (privileges)** in response to a FOIA request from Judicial Watch. Judicial Watch requested Yates' emails but by the time Kollar-Kotelly ruled here, the dispute had narrowed to four remaining drafts that had been attached to emails that had already been disclosed to Judicial Watch. Finding that the four drafts qualified for protection under the deliberative process privilege, Kollar-Kotelly pointed out that "working drafts of a DOJ policy statement to be issued by the Acting Attorney General regarding the legality of an executive order appear manifestly 'deliberative' and 'predecisional.' This is particularly true given that these documents 'reveal the drafters' evolving thought-processes regarding the Executive Order' and were transmitted directly between Ms. Yates and one of her principal aides." Kollare-Kotelly agreed that DOJ had shown that disclosure would cause **foreseeable harm**. She indicated that the agency's affidavit "explains *why* disclosure of these particular draft memoranda would implicate the specific harms identified." She noted that "DOJ has sufficiently connected the disclosure of the withheld documents in this case to a foreseeable harm, as is required by the FOIA Improvement Act and has therefore justified its deliberative process withholdings under FOIA Exemption 5." Judicial Watch also argued that the government misconduct exception applied here. Kollar-Kotelly disagreed, noting that "these documents are 'working drafts' of a DOJ policy statement addressing the validity of an executive order, passed between the Acting Attorney General herself and one of her principal aides. Far from an egregious act of government wrongdoing, such internal drafts concerning the legality of government action lie at the very hear of the Attorney General's official role. And the fact that Ms. Yates ultimately *disagreed* with the President's view on Executive Order 13,769, in and of itself, does not represent foul play, but rather independent judgment. Nor does the President's decision to relieve Ms. Yates of her post after this disagreement suggest malfeasance, as Judicial Watch implies. Instead, it represents the administrative prerogative of a President to remove an executive officer who holds views diverging from his own." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 17-0832 (CKK), U.S. District Court for the District of Columbia, Sept. 18)

Judge Dabney Friedrich has ruled that the National Institute for Standards and Technology properly responded to David Cole's FOIA request for audio recordings of 116 interviews conducted with first responders concerning the agency's investigation of the collapse of the World Tower buildings as a result of the 9/11 terrorist attacks. After conducting a search in response to Cole's FOIA request, NIST located nine sets of notes regarding the content of interviews. The agency sent Cole a link to the publicly available McKinsey Report. The agency disclosed the notes from a single interview with the job title of the interviewee redacted and withheld the notes of the remaining eight interviews under **Exemption 3 (other statutes)**, citing section 7(c) of the National Construction Safety Team Act, which prohibits disclosure of voluntarily provided safety-related information if the information is not directly related to the building failure being investigated and the NIST Director finds disclosure would inhibit voluntary provision of that type of information. Cole filed an administrative appeal, but the agency upheld its original decision. Cole then filed suit. Cole argued that the agency had failed to **conduct an adequate search**, pointing to a reference in a 2005 report referring to transcriptions of the interviews. Siding with the agency, Friedrich noted that "NIST asserts that the word 'transcribed' refers only to the hand-written notes originally taken during the interviews. Given the ambiguity of 'transcribed' in this context, NIST's explanation is a reasonable one, and Cole has offered no other evidence that verbatim transcriptions exist." Cole also faulted the agency for not searching ATLAS.ti, a subscription database that included some of the interview materials. However, Friedrich pointed out that "NIST had no obligation to examine the ATLAS.ti database because it no longer subscribes to the database." Challenging the Exemption 3 claim, Cole argued that the interviewees, who all worked for New York or Nee York City, had a legal duty to report the information contained in the interviews and that submission of the information could not be considered voluntary. Friedrich, however, noted that "any duty to report arising out

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of these individuals' government employment would not have been owed to any entity beyond the state and municipal government that employed them." She also rejected Cole's contention that the interviews were directly related to the building collapse. Instead, she observed that "eyewitness observations about the sights and sounds observed on September 11 my give rise to various references about the structural factors that ultimately caused the towers to fall. But such observations are not 'directly related' to the building failures in the sense that they shed direct light on the complex engineering questions surrounds the collapse of multiple skyscrapers. The focus of the interviews in question was the emergency response and the evacuation procedures employed on September 11, 2001, not the details concerning the structural integrity of the buildings being evacuated." Friedrich also agreed that the agency had properly withheld personally identifying information from the one set of interview notes under **Exemption 6 (invasion of privacy)** but indicated that NIST had not shown that it conducted an adequate **segregability analysis**. She sent that issue back to NIST for further explanation. (*David Cole v. Walter G. Copan, Director, National Institute for Standards and Technology*, Civil Action No. 19-1070 (DLF), U.S. District Court for the District of Columbia, Aug. 27)

Judge Ketanji Brown Jackson has ruled that the CIA properly withheld records about President George Bush and Zapata Petroleum Corporation in response to a request from the James Madison Project and journalist Jefferson Morley under **Exemption 1 (national security)**, but agreed with its claim the agency has failed to justify its claims under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Although JMP and Morley argued that the agency's affidavits justifying the Exemption 1 claims had not taken account of the age of the documents, Brown Jackson disagreed. Instead, she noted that "specifically, because the twenty-five -year-old records discuss sources and methods that are 'still in active use,' they are exempt from the automatic declassification under section 3.3(b) of the Executive Order. And with respect to the records that are over fifty years old, which also discuss methods still in use, the supplemental declaration notes that the Director of the CIA has exempted 'sensitive information that could reveal an intelligence method in active use' and that the Interagency Security Classification Appeals Panel has approved this exemption, consistent with sections 3.3(h) and (j) of the Executive Order." However, Brown Jackson found the agencies privacy exemptions wanting. She pointed out that "notwithstanding the records' manifest dearth of detailed identifying information, the CIA maintains that 'the release of this information would constitute a clearly unwarranted invasion of these individuals' personal privacy' because 'knowledgeable people' could determine the individuals' identity based on 'information that is not publicly accessible or available to the Agency.' These allegations are the exact type of speculative assertions that this Court has repeatedly rejected." (*James Madison Project, et. al. v. Central Intelligence Agency*, Civil Action No. 18-03112 (KBJ), U.S. District Court for the District of Columbia, Sept. 23)

Resolving a suit brought in 2016 by the American Immigration Lawyers Association against U.S. Customs and Border Protection for records concerning the development of a new manual – the Officers Reference Tool – Judge Trevor McFadden has ruled that the agency properly withheld 35 documents under **Exemption 7(E) (investigative methods or techniques)**. Noting that the bar to show that Exemption 7(E) applied to records was low, McFadden pointed out that "CBP clears this bar. Its evidence establishes that the withheld information in these documents would '*train* potential violators to evade the law or *instruct* them how to break the law,' or '*increase the risks* that a law will be violated or that past violators will escape legal consequences.' Indeed, the protected information in these documents appears to be central to CBP's law enforcement mission. CBP withheld the techniques and procedures it employs to determine eligibility to enter or remain in the United States and assess and monitor risks at the borders." McFadden explained that "application of Exemption 7(E) for these documents is 'self-evident.' CBP cannot reveal the details of these techniques and procedures because doing so would allow those seeking to circumvent the federal immigration

laws to extrapolate what to avoid and how to prepare, increasing the risk that they enter or remain in the United States illegally. To grant AILA's request for more information would be untenable. It would require disclosure of the very details that create the risk that a law will be circumvented in the first place. This is not what FOIA contemplates." AILA argued that some of the redactions were apparently based on publicly available information and thus not protected by Exemption 7(E). McFadden, however, indicated that "the presence of unredacted, publicly available information in [two records] does not overcome CBP's decision to withhold information in these documents under Exemption 7(E). That is because *how* CBP employs public information may not be known and can itself disclose law enforcement techniques and procedures." (*American Immigration Lawyers Association v. U.S. Department of Homeland Security, et al.*, Civil Action No. 16-02470 (TNM), U.S. District Court for the District of Columbia, Sept. 2)

Judge Colleen Kollar-Kotelly has ruled that the FBI properly issued a second *Glomar* response neither confirming nor denying the existence of records related to Imad Hage, a Lebanese businessman who claimed to speak for Iraq in the run-up to the 2003 invasion of Iraq, after the agency agreed that because a 2003 incident at Dulles airport where Hage was detained and questioned by government agents was part of the public record it was required to search for and disclose non-exempt records pertaining to that incident. Graduate student David Austin Lindsey submitted a FOIA request for records on Hage as part of his research on diplomatic initiatives. Even though Hage's detention at Dulles airport was a matter of public record, the FBI initially issued a *Glomar* response declining to confirm whether or not it had records on Hage, relying on **Exemption 1 (national security), Exemption 3 (other statutes)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. In her first ruling in 2017, Kollar-Kotelly found that because the detention of Hage at Dulles airport was a matter of public record the agency could not decline to search for records pertaining to that incident. The agency then searched its records on the Dulles airport incident, located 400 potentially responsive records but disclosed only two records with redactions. After processing its records on Hage pertaining to the Dulles airport incident, the FBI then came back with a second *Glomar* response declining to confirm or deny the existence of any other records on Hage. This time, Kollar-Kotelly agreed that the agency had now shown that its more limited *Glomar* response was appropriate. Discussing the Exemption 1 claim, she noted that "it is plausible that either confirming or denying the existence, or non-existence, of any other records responsive to Plaintiff's request, which regard a foreign national, could reasonably be expected to damage intelligence sources and methods by revealing Defendant's investigative interests and priorities, which could be used by foreign intelligence actors in employing counterintelligence measures." Lindsey argued that since Hage had spoken to the media in regard to the Dulles airport incident his privacy interest was diminished. However, Kollar-Kotelly pointed out that "any diminishment is narrow and that otherwise is privacy interests are not diminished. In that case, his strong privacy interests still outweigh the public interest identified by Plaintiff here." (*David Austin Lindsey v. Federal Bureau of Investigation*, Civil Action No. 16-2032 (CKK), U.S. District Court for the District of Columbia, Sept. 18)

Judge Dabney Friedrich has ruled that the SEC properly withheld records under **Exemption 5 (privileges), Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to a FOIA request from Nova Oculus Partners, a medical device company in California that was the subject of an enforcement action by the SEC for concealing the true identity of who controlled the company and misappropriating investor funds. Nova Oculus requested email communications from various individuals involved with the company. The SEC initially withheld the records under **Exemption 7(A) (interference with ongoing investigation or proceeding)**, but after Nova Oculus agreed to narrow the scope of its request, the SEC produced 3,883 pages. The agency withheld records under Exemption 5, redacted personally identifying information under Exemptions 6 and 7(C), and withheld 672

pages entirely under the privacy exemptions, claiming that was the only way to protect the privacy of individuals involved in the law enforcement action. Nova Oculus argued that because Blair Mowery and Marshall Masko, who had been involved in the predecessor company to Nova Oculus, had been publicly identified as part of the investigation their privacy rights were diminished. But Friedrich pointed out that "the fact that the individuals' identities have been disclosed does not destroy their privacy interests in the *nature* of their involvement in the SEC enforcement matter, as opposed to the mere *fact* of that involvement." She then explained that "if disclosure of the records sought could in fact reveal additional, not-yet-public information, the relevant privacy interests are more likely to outweigh the public interest. And that is precisely the case here. While Mowery and Masko no longer have any privacy interest in the fact of their involvement in the SEC enforcement matter against Nova Oculus, the identifying emails that have already been publicly disclosed do not reveal anything about the *nature* of their involvement in the matter. Therefore, they maintain substantial privacy interests in the content of the investigative files on *that* basis." Friedrich agreed with the agency that disclosure of the 672 withheld pages would violate the privacy of Mowery and Masko because their email addresses were the search terms. She indicated that "only by withholding the documents in full could the SEC protect Mowrey and Masko's 'privacy interest. . .in avoiding disclosure of the details of [their involvement in] the [SEC's] investigation.'" Friedrich approved the agency's privilege claims, rejecting Nova Oculus's argument that the government misconduct exception applied. Instead, she observed that "assuming the government misconduct exception does apply in the FOIA context, the exception does not apply in this case [because] the plaintiffs have offered no 'reason to believe the documents sought may shed light on government misconduct.'" (*Nova Oculus Partners, LLC, et al. v. U.S. Securities and Exchange Commission*, Civil Action No. 19-666 (DLF), U.S. District Court for the District of Columbia, Aug. 28)

Judge Amy Berman Jackson has ruled that although the Naval Criminal Investigative Service failed to find video footage recorded in January 2004 at Camp Lejeune Marine Corps Base in North Carolina the agency still **conducted an adequate search** for the record. The video footage was requested in 2016 by James Coleman, co-director of the Wrongful Convictions Clinic at Duke University Law School, who was representing Rueben Wright, a former Marine who had been convicted of murder in 2006, in post-conviction proceedings. Wright had been convicted of murdering retired Marine James Taulbee at his home outside Camp Lejeune on January 5, 2004. During the investigation, NCIS recovered the stock of the gun used to kill Taulbee at the home of Marine Randy Linniman. Linniman admitted to purchasing the weapon but told investigators that he had given Wright a ride to Taulbee's home without knowledge of his true intent and that Wright had actually committed the murder. Coleman requested six still photos labeled "Main Gate Outbound" after finding they were missing from the trial court file. During the course of its investigation to locate the photos, NCIS concluded that the photos had been taken on a motion-activated camera at the Main Gate and not the side gate that was where Linniman and Wright had exited and entered the Camp. NCIS provided some photographic materials but not the photos Coleman sought. He challenged the adequacy of the search. Berman Jackson noted that "the question before the Court is not whether video from the Main Gate ever existed or whether it should have been provided in discovery during the criminal case. The question is whether the Navy's efforts to find it in its own files were adequate. . . [T]he search requests were broad and related to evidence in the case in general, the areas searched were appropriate, and plaintiff has not pointed to any evidence of bad faith or identified any places that should have been searched or search terms that were neglected." (*James E. Coleman, Jr. v. Department of the Navy*, Civil Action No. 19-3191 (ABJ), U.S. District Court for the District of Columbia, Sept. 16)

Judge Reggie Walton has ruled that the IRS properly responded to a FOIA request from George Houser, who had been convicted of health care tax fraud in the Northern District of Georgia in 2014. Houser submitted a three-part FOIA request to the IRS. He asked for Integrated Collection System transcripts

concerning himself and five corporate entities. The second part of his request was for the way in which testimony was provided regarding the payment of taxes. The third part of his request asked for records concerning the professional conduct of giving testimony in his case. The agency conducted multiple searches, including federal records centers, finding thousands of records, some of which were withheld from Houser. Walton found the multiple searches were adequate, pointing out that "the IRS's searches not only were reasonable under the circumstances, but also extended beyond the scope of what the FOIA demands." The IRS withheld records under **Exemption 3 (other statutes)**, citing Section 6103, prohibiting disclosure of tax return information without consent. Accepting those claims, Walton noted that "the plaintiff has neither presented waivers from third parties whose information is implicated, nor has he demonstrated a material interest in the withheld information." He added that "the IRS has adequately demonstrated that the potential chilling effect upon disclosure of the identities of witnesses and interviewees justifies reliance on Exemption 3 in conjunction with 26 U.S.C. §6103(e)(7)." He also agreed that **Exemption 7 (A) (interference with ongoing investigation or proceeding)** applied. He pointed out that "release of the withheld information could reasonably be expected to interfere with the IRS's tax collection efforts or future enforcement proceedings." (*George D. Houser v. Diana Church, et al.*, Civil Action No. 16-1142 (RBW), U.S. District Court for the District of Columbia, Sept. 14)

Judge Rudolph Contreras has ruled that the FBI and DEA properly issued a *Glomar* response to FOIA requests filed by Jay Jurdi, who had been convicted on drug conspiracy charges, in response to Jurdi's FOIA requests for records concerning his co-conspirator Anthony Grasso, who had testified at Jurdi's trial. The DEA claimed that disclosure of any records would reveal information on Grasso protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Characterizing DEA's blanket denial as "ambitious," Contreras noted that "on closer analysis, however, it becomes clear that, because Jurdi's request is tailored to files and reports referencing or related to Grasso, any responsive documents would necessarily introduce new information about the circumstances of Grasso's involvement with law enforcement and work at least some marginal invasion into his still-extant privacy interests." Jurdi argued that the agency had waived its ability to withhold Grasso's records because he had been identified as an informant and had testified at Jurdi's trial. However, Contreras pointed out that "even assuming the DEA officially acknowledged Grasso's role as an informant, Jurdi must show more: under the 'officially acknowledged' exception, the requestor 'has the burden of showing that there is a permanent public record of the exact portions he wishes.'" He noted that "Jurdi fails to make the analogous showing here," observing that "because the government has not 'officially acknowledged' or disclosed any of these exact records, that Jurdi has requested, his argument must be rejected." Contreras approved the FBI's *Glomar* response as well. He indicated that "any official acknowledgement that Grasso also had a relationship with the FBI would reveal additional information about the extent of his cooperation with the government and inflict at least some further invasion of his privacy. Situations where the agency has officially confirmed the third-party's status as an informant are distinguishable, because here, there is no evidence of any official confirmation by the FBI specifically." (*Jay Jurdi v. United States of America*, Civil Action No. 18-1892 (RC), U.S. District Court for the District of Columbia, Sept. 21)

A federal court in Illinois has ruled that the FBI may continue to process a voluminous request from documentary filmmaker Assia Boundaoui, who was making a film on the surveillance of Muslim Americans in the Chicago neighborhood of Bridgeport in the 1990s, known as Operation Vulgar Betrayal, at the same pace as agreed to in its 2017 order. The 2017 order required the FBI to process 33,120 responsive pages at a rate of 3,500 pages a month. The agency subsequently located another responsive file, known as the Salah file, containing an additional 41,250 pages. At a 2019 show cause hearing, Boundaoui argued that the agency

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should process her subsequent requests expeditiously. But the court pointed out that "because Defendants will have processed upwards of 74,000 documents between the OVB and Salah files despite the fact that Plaintiff's FOIA request was overbroad and vague, the Court will not require Defendants to search for documents related to other entities, and other individuals referenced in News Articles and/or OVB files. . ." Sympathizing with the plaintiff, the court directed the FBI "to process the remainder of the approximately 41,250 pages that make up the Salah file at a rate of 1,000 pages per month. . ." (*Assia Boundaoui v. Federal Bureau of Investigation, et al.*, Civil Action No. 17-4782, U.S. District Court for the Northern District of Illinois, Sept. 23)

A federal court in New York has ruled that U.S. Immigration and Customs Enforcement properly responded to a FOIA request from Kamephis Perez, an attorney for ICE, concerning his complaint against his superior, Khaliah Taylor alleging misconduct. During the investigation, Perez was informed that he was being transferred. He submitted a FOIA request for records on the investigation of his complaint, particularly for the identities of people who had learned about his complaint. The agency initially withheld the records under Exemption 7(A) (interference with ongoing investigation or proceeding) but subsequently agreed to conduct a search of the office of Professional Responsibility, the Ethics Office, and the Office of Principal Legal Advisor in the New York Office of Chief Counsel. Those searches located 461 pages of potentially responsive documents. After review, the agency decided that only 172 pages were responsive, and that the remaining 289 pages were non-responsive or duplicative. The agency disclosed 166 pages without redactions and withheld six pages in full under **Exemption 6 (invasion of privacy)**. Perez did not challenge the agency's search but challenged the agency's exemption claims and its conclusion that 289 pages were non-responsive. The court agreed that the agency had shown that the privacy interests in the six withheld pages outweighed any public interest in the investigation and that the agency had conducted a sufficient **segregability analysis**. The court also rejected Perez's claim that the agency acted in bad faith by withholding the 289 pages as non-responsive, noting that "after thoroughly reviewing Perez's allegations with respect to each category, [the magistrate judge] found that these categories of documents were properly classified as non-responsive, and that Perez's arguments to the contrary were 'based entirely on. . .conjecture' and 'unsupported assumptions' about what documents were included in these categories." (*Kamephis Perez v. U.S. Immigration and Customs Enforcement*, Civil Action No. 19-3154 (PGG), U.S. District Court for the Southern District of New York, Sept. 8)

A federal court in California has ruled that Paul Stanco, Jose and Maria Linares, and Henry and Bozena Strodka all **failed to exhaust their administrative remedies** by failing to file administrative appeals with the IRS for their FOIA requests concerning the requirements to file IRS Forms 8938 and 5471. The agency provided some records but withheld others. However, instead of appealing the denials administratively, they filed a consolidated complaint against the IRS. In court, the IRS argued that three appellate decisions – *Oglesby v. Dept of Army*, 920 F.2d 57 (D.C. Cir. 1990), *Taylor v. Appleton*. 30 F.3d 1365 (11th Cir. 1994), and *McDonnell v. United States*, 4 F.3d 1227 (3rd Cir. 1993) – all held that requesters were required to file administrative appeals if the agency responded to the requests before the requesters filed suit. Agreeing with the cited precedents, the court noted that "permitting Plaintiffs to bypass administrative remedies in these circumstances would prevent Defendant from exercising its discretion and expertise on the matter, making a factual record to support its decision, and potentially correcting mistakes made at lower levels that may remove the need for judicial review altogether." The plaintiffs also argued that *Toesing v. Dept of Justice*, 890 F. Supp. 2d 121 (D.D.C. 2012), a case in which Toesing argued that her subsequent request for the same records for which she had failed to file an administrative appeal originally resurrected her appeals rights pertaining to the original request, applied here. *Toesing* actually held that she was not entitled to such relief. Here, the court noted that "because plaintiffs raised this argument for the first time in a supplemental brief, Defendant was not given a full opportunity to respond." The court added that "regardless,

the Complaint does not include any allegations about the January 2019 requests or appeals, as they relate to exhaustion of the April 2017 requests. . .but Plaintiffs may amend their Complaint if they wish the Court to consider those allegations in the future." (*Paul Stanco, et al. v. Internal Revenue Service*, Civil Action No. 18-00873-TLN-CKD, U.S. District Court for the Eastern District of California, Aug. 31)

A federal court in Michigan has ruled that the Michigan Immigrant Rights Center failed to show that U.S. Customs and Border Protection should be **sanctioned** for its failure to respond to the Center's FOIA request within the statutory time limits, including a claim that CBP had a **policy or practice** of forcing requesters to file suit in order to have their requests processed. District Court Judge Mark Goldsmith first addressed the Center's allegation of bad faith, noting that "conduct is undertaken in bad faith when it is motivated by improper purposes such as harassment or delay. However, 'negligent, even sloppy, performance by the defense counsel,' is insufficient to award monetary sanctions under a court's inherent power.'" Goldsmith recognized that the performance of CBP's Detroit office was filled with ineptitude but observed that "this error nevertheless does not rise to the level of willfulness or bad faith. While Defendants' conduct, in many respects, has been underwhelming and hardly a model of efficient and professional executive action, the Court cannot find that Defendants' recent bungling was deliberate or motivated by an improper purpose." Goldsmith rejected the Center's claim that CBP had a policy or practice of deliberately slowing down FOIA requests. He indicated that "plaintiffs have not explained why those errors must be attributed to institutional failure, rather than human error in this particular episode. Plaintiffs have not meaningfully drawn into question Defendants' position that, but for the erroneous review of relevant document, the last production would have been compliant with the Court's order. Defendants' performance in this case leaves much to be desired, but it does not evidence bad faith, on an institutional or individual level." (*Michigan Immigrant Rights Center, et al. v. U.S. Department of Homeland Security, et al.*, Civil Action No. 16-14192, U.S. District Court for the Eastern District of Michigan, Sept. 21)

Judge Rudolph Contreras has ruled that Judicial Watch **failed to state a claim** in its **Federal Records Act** suit against the FBI, contending that the agency had failed to establish records management guidance for maintaining text messges. Judicial Watch's suit alleged that technology existed to manage and maintain text messages, but the FBI had failed to take advantage of such technology, a violation of its records management obligations under the FRA. Contreras found Judicial Watch's complaint "does not state a plausible claim for relief. The new factual assertions, when accepted as true, do not plausibly establish that the FBI recordkeeping policy violates the FRA or that it amounts to arbitrary or capricious agency action." Contreras pointed out that "nothing in the FRA or NARA's regulations requires agencies to adopt the most advanced technologies for recordkeeping or technologies that will automatically preserve records, and the Court is in no position to dictate what technologies the FBI should adopt." Dismissing the case, Contreras observed that "while Plaintiff added some new factual allegations to its amended complaint, they are not 'enough to raise a right to relief above the speculative level.' Plaintiff cites no source of law that suggests that, even if all its factual allegations are accepted as true, the Policy fails to comply with the FRA or applicable regulations. Accordingly, the Court finds that Plaintiff has failed to state a proper claim and grants the FBI's motion to dismiss." (*Judicial Watch, Inc. v. FBI*, Civil Action No. 18-2316 (RC), U.S. District Court from the District of Columbia, Sept. 11)