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Washington Focus: Attorney General William Barr announced Feb. 4 the appointment of Bobak (Bobby) Talebian to head the Office of Information Policy, replacing Melanie Pustay who retired last year. From May 2013 to August 2019, Talebian served as Chief of OIP's FOIA Compliance Staff, where he helped implement OIP's responsibilities to oversee and encourage government-wide compliance with FOIA. After Pustay retired, Talebian served as Acting Chief of Staff from August 2019 to October 2019, where he supervised and managed the day-to-day operations of the office, and then as Acting Director since October 2019. In announcing Talebian's appointment as Director of OIP, Barr noted that "Bobby brings a wealth of experience and knowledge to his position. OIP and the Department of Justice will continue to benefit from his insight, expertise and dedication to public service."

DOJ Expedited Processing Denial Arbitrary and Capricious

While requests for expedited processing have become a more common feature in FOIA requests as requesters scramble to establish their need to get records more quickly, there are still few occasions in which a district court is asked to assess an agency's decision not to provide expedited processing. Part of the reason for the scarcity of court decisions on expedited processing is likely the result of strategic decisions on the part of plaintiffs to not press forward with expedited processing claims that are no longer relevant months or years later when the court actually rules on the merits of the case.

Nevertheless, Judge Amy Berman Jackson was in a position to address the issue of expedited processing recently in a case brought by CREW against the Department of Justice for records concerning what evidence was available to Attorney General William Barr when he made his public remarks downplaying the findings of Special Counsel Robert Mueller's report on Russian interference in the 2016 presidential campaign on the issue of whether President Donald Trump obstructed justice.

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Shortly after Barr made his public statement on April 18, 2019, CREW submitted a FOIA request to the Office of Legal Counsel for records related to whether the evidence developed by Mueller was sufficient to establish that Trump had obstructed justice. CREW also sent a request to the Office of Public Affairs, asking for expedited processing. OPA told CREW that is was denying its request for expedited processing because "CREW's FOIA request is not a matter in which there exist possible questions about the government's integrity that affect public confidence."

CREW filed a two-count complaint. Count I alleged wrongful withholding of records while Count II alleged that DOJ had violated FOIA by denying its expedited processing request. DOJ argued that Count II should be dismissed because CREW had failed to exhaust its administrative remedies. Berman Jackson began by noting that judicial review of agency denials of expedited processing were subject to a different standard than the more common *de novo* review when an agency failed to respond within the statutory time limit. Instead, she pointed out that for denials of expedited processing "*agency action to deny* or affirm denial of a request for expedited processing. . .shall be subject to judicial review."

She then explained that "while the D.C. Circuit has not spoken on this matter, courts in this district have interpreted that language to relieve plaintiffs of the exhaustion requirements when appealing a denial of expedited processing." Indicating that she found these district court decisions persuasive, Berman Jackson pointed out that "their reading of the statute is consistent with the purpose underlying the provision that makes expedited review available, and the express Congressional acknowledgment that time may be of the essence for certain requests. To require a requestor who has been denied expedited processing to exhaust administrative remedies before seeking judicial review would defeat the section's aim of accelerating response time."

Turning to the basis of DOJ's denial of CREW's request for expedited processing, Berman Jackson found the denial wanting as well, noting that "OPA's mere recitation of the language in the DOJ provision on expedited review does not suffice as a reasoned explanation of CREW's request." Berman Jackson cited *Al Fayed v. CIA*, 254 F.3d 300 (D.C. Cir. 2001), in which the D.C. Circuit first examined the standard to be used in assessing an agency's response to an expedited processing request, indicating that in *Al Fayed* the D.C. Circuit "found the review of agency action under the Administrative Procedure At to be analogous," explaining that an agency regulation "is entitled to judicial deference. . . as is each agency's reasonable interpretation of its own regulations."

Applying that level of deference here, Berman Jackson indicated that "but that does not mean the Court has no say in the matter. . .Thus, in this context, as in others, an agency is required to offer an adequate explanation for its actions so that a court is able to 'evaluate the agency's rationale at the time of the decision.' Put simply, 'the agency must explain why it decided to act as it did.' And pursuant to the FOIA statute, judicial review of an agency's decision to grant or deny a request for expedited processing 'shall be based on the record before the agency at the time of the determination.'"

Berman Jackson printed the text of CREW's detailed three-paragraph justification for its request for expedited processing. She noted that "the agency responded with a single sentence: 'CREW's FOIA request is not a matter in which there exist possible questions about the government's integrity that affect public confidence.' Since the agency did nothing more than parrot its own regulatory language, and offered no reasoning or analysis, its decision, as in the APA context, is entitled to little deference." Berman Jackson found that DOJ's rote response did not satisfactorily address CREW's justification for its expedited processing request. She pointed out that "neither FOIA nor the departmental regulations require the requester to prove wrongdoing by the government in order to obtain documents on an expedited basis. The request must simply provide grounds to support the contention that the matter is time sensitive, and that it is a 'matter of

widespread and exceptional media interest in which there exist *possible* questions about the government's integrity that affect public confidence.'"

She observed that "CREW's submission supported an inference that at best, the Attorney General undertook to frame the public discussion on his own terms while the report itself remained under wraps, and at worst, that he distorted the truth. For these reasons, the request raised 'possible questions' about the government's integrity that could affect public confidence. And the disclosure of any material that either influenced or contradicted those public statements could very well bear upon the resolution of those questions. Since DOJ provided no explanation for its flat assertion to the contrary, it does not stand up to judicial review." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 19-1552 (ABJ), U.S. District Court for the District of Columbia, Jan 31)

Views from the States

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

Iowa

The supreme court has ruled that the trial court erred when it found that the City of Ottumwa was required to disclose traffic citations generated by an unmanned automated traffic enforcement vehicle to Ottumwa police officer Mark Milligan in response to Milligan's Iowa Open Records Act request because disclosure is prohibited under the federal Drivers Privacy Protection Act. The ATE vehicle generated a speeding citation for Milligan while he was driving a patrol vehicle while off-duty. As a result of the experience, Milligan made an ORA request for names of all persons who had or had not been issued ATE citations by the city after their vehicles were detected speeding by an ATE camera. The city denied the request, claiming the records were protected by both the DPPA and Iowa's statutory provision implementing DPPA. Milligan filed suit. The trial court found that the records constituted traffic citations which were disclosable under DPPA. The supreme agreed with the city that the records were protected under the DPPA. The supreme court noted that "generally speaking, redisclosure is allowed only when initial disclosure would have been permitted on that basis. To put the matter another way, information that started out as protected personal information under the DPPA does not lose that character just because it has been disclosed for a permissible use. Each redisclosure must be supported by its own permissible use." The supreme court rejected the trial court's conclusion that the citations constituted driving violations. The supreme court pointed out that "ATE camera citations do not involve 'driving violations.'" The supreme court noted that "the ATE camera citation is issued to the vehicle *owner*, not the driver." (*Mark Leonard Milligan v. Ottumwa Police Department, et al.*, No. 17-1961, Iowa Supreme Court, Jan. 3)

New Jersey

A court of appeals has ruled that the New Jersey State Police conducted an adequate search for records pertaining to a van that was stopped on 9/11 in East Rutherford because it contained three men who had been seen celebrating the collapse of the World Trade Center in response to two requests submitted by the Lawyers Committee for 9/11/ Inquiry. The State Police found no records pertaining to the incident. After the Lawyers Committee filed suit, the State Police provided several affidavits from its senior forensic photographer who had taken photos on 9/11 testifying that he could find no records of the incident. The trial court ruled in favor of the agency and the Lawyers Committee appealed. The Lawyers Committee argued that a logbook entry that

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had been found during the search was responsive to its request. The appeals court disagreed, noting that "the requested photographs specifically pertained to the investigations of the white van stopped by law enforcement on 9/11. Conversely, logbook entry #1766 referenced undescribed film developed by NJSP for the FBI; the entry did not specify the subject matter of the film rolls, other than terse references to 'WTC bombing' and 'Terrorism.' Nor do the apparent quantities of film stated in the logbook entry match the number of photographs requested by plaintiff." Pointing out that the New Jersey Supreme Court had used the catalyst theory in assessing plaintiffs' entitlement to attorney's fees, the appeals court indicated that the Lawyers Committee was not entitled to attorney's fees here since it had not received any records. The appeals court pointed out that "there exists no basis in law to require NJSP to produce a document that was never requested. And there was no causal nexus between the production of the nonresponsive logbook entry and the requested photographs and records that were never located." The court of appeals also indicated that it disagreed with the trial court's finding that the common law right of access did not provide for attorney's fees. Instead, the appeals court observed that "relevant here, the Supreme Court recognized 'the catalyst theory applies to common lawsuits as well.'" (*Lawyers Committee for 9/11 Inquiry v. New Jersey State Police*, No. A-1204-18T1, New Jersey Superior Court, Appellate Division, Jan. 8)

New York

A trial court has ruled that a conflict of interest letter sent to New York City Mayor Bill de Blasio indicating that the conduct of his non-profit Campaign for One New York went beyond the general guidance regarding solicitation in the New York City Charter but did not violate any specific Conflict Board rule constitutes a final decision by the Conflict Board and must be disclosed in response to a Freedom of Information Law request from the *New York Times*. The Conflict Board denied the request, citing New York City Charter § 2603(k), which protects records of the Conflict Board, and the FOIL exemption that includes the deliberative process privilege. The *Times* filed suit. The trial court found that § 2603(k) only applied to documents of the Conflict Board. The trial court pointed out that "the Conflict Board is not the Respondent here and the Mayor's office is claiming a confidentiality exemption to a document it merely received." Turning to the privilege claim, the trial court observed that "the entire letter is subject to FOIL as it is unquestionably a final determination of the Conflict Board." The trial court indicated that "the public's interest in knowing the extent of the warning issued to the Mayor supersedes the Mayor's privacy interest, particularly as here the public is already generally aware of the allegations of fundraising in the first place." (*New York Times Company v. City of New York Office of the Mayor*, 158472/2019, New York Supreme Court, New York County, Jan. 15)

The Federal Courts…

A federal court in New York has ruled that the Department of Defense and the Department of State have shown that the remaining disputed documents responsive to a request from the ACLU for records concerning a raid carried out by the U.S. military on January 29, 2017 in al Gihayil, Yemen were properly withheld under **Exemption 1 (national security)** and that the ACLU failed to show that the raid was officially acknowledged by an extensive press exchange on February 2, 2017 by then-White House Press Secretary Sean Spicer and a similar press briefing August 4, 2017 with Capt. Jeff Davis, a Pentagon spokesman, which was covered by several media outlets. As part of its challenge to 12 remaining DOD documents and three remaining State documents, the ACLU also pointed to guidance issued in 2016 and 2018 officially acknowledging broadly applicable legal and policy standards on the use of force abroad. In response to the ACLU's FOIA request, the CIA issued a *Glomar* response neither confirming nor denying the existence of records. However, District Court Judge Paul Engelmayer found that Spicer's press briefing had officially

acknowledged the role of the CIA in the operation. While the CIA's *Glomar* litigation was ongoing, the Defense Department's Joint Staff processed 442 pages, the Office of General Counsel processed 38 pages, and U.S. Central Command processed 343 pages. In its search, the State Department located 489 pages. By the time it filed its final summary judgment motion, the ACLU only challenged the 15 documents withheld by DOD and State. Engelmayer divided the remaining documents into six categories, concluding that the agencies had shown that their exemption claims for five categories were appropriate, and ordering the documents in the sixth category be provided for *in camera* review. The first category contained a State Department email pertaining to the January 6, 2017 Deputies Meeting. The ACLU agreed that the email was properly classified but argued that there must be small details that could be disclosed that would match the acknowledgments made by Spicer. Engelmayer agreed with the agency's assertion that no part of the email could be disclosed. He noted that "the Court finds it logical and plausible that references to the Deputies Committee's recommendation to 'go ahead' and to wait for a 'moonless night,' if any, in this classified and narrowly distributed email are so intertwined with other, non-acknowledged information that disclosure would reveal new information that undisputedly would be more specific than, and not merely match, Spicer's limited revelations." DOD had also withheld an email discussing military options after the raid. The ACLU argued that Davis's comments served as an official acknowledgment of this information. But Engelmayer indicated that "Davis's comments generally discuss categories of military action without providing details as to the time, place, or manner of specific instances of such action; the exigencies of military planning make it unlikely that the DOD email threads are similarly bereft of such details. Indeed, the record provides no reason to think that these post-Raid email threads would include any discussion that came close to matching or being as non-specific as Captain Davis's." The third category was a one-page presidential authorization memorandum prepared by then-National Security Advisor Michael Flynn. Engelmayer found the remaining redactions did not track any disclosures made by Spicer or Davis. He observed that "while the ACLU has pointed to three pieces of officially acknowledged information that one might expect to find in the Authorization Memo, it is hardly illogical or implausible that any references to such categories of information would be so specific and/or intertwined with properly classified information as to justify non-disclosure." The fourth category contained a military order from the Joint Staff to conduct operations. Here, Engelmayer found DOD had not sufficiently justified its withholdings. He noted that "for example, because the Government has officially acknowledge that all operations against AQAP in the relevant area during the relevant period were carried out with the consent of the Government of Yemen, the Government would not be justified in withholding a mention of Yemeni consent of the Raid in the Military Order here." He ordered the government to submit the order for *in camera* review. The ACLU challenged the withholding of a document pertaining to a detailed DOD proposal, arguing that it constituted working law and could not be withheld under **Exemption 5 (privileges)**. Engelmayer disagreed, noting instead that "here, the Operational Proposal is 'simply a plan for a particular one-off operation.' It did not provide a precedent or 'bind' the agency, and the President retained the discretion to adjust course at any time. Indeed, it was 'not "law" at all,' much less the effective law or policy of the government on an ongoing basis." Turning to the last category, top secret operational proposals for military support, Engelmayer found they did not contain the information the ACLU thought they did. He pointed out that "at argument, Government counsel represented that, having reviewed the document, the title of these records had not been revealed, is materially different than what the ACLU thought it might be, and remains classified." (*American Civil Liberties Union v. Department of Defense, et al.*, Civil Action No. 17-3391 (PAE), U.S. District Court for the Southern District of New York, Jan. 27)

Judge Amy Berman Jackson has ruled that the intelligence agencies properly invoked a *Glomar* response neither confirming nor denying the existence of records in response to Washington attorney Gene Schaerr's multi-part FOIA request for records concerning unmasking and upstreaming of classified information gathered under the Foreign Intelligence Surveillance Act. Schaerr asked for policies and

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procedures involving unmasking, as well as whether there had been any requests to unmask or upstream information about 21 individuals who either served in or were supporters of the Trump administration. All the agencies initially issued *Glomar* responses for those portions of Schaerr's request pertaining to the 21 named individuals. All of the agencies searched for records pertaining to those portions of Schaerr's request that did not relate to third party individuals. The FBI and the National Security Agency provided some records but withheld others. Berman Jackson found that all the agencies' *Glomar* responses were appropriate under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Schaerr argued that the *Glomar* responses were improper because the agency had acted in bad faith. He cited *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994), in which the Sixth Circuit found that the FBI's handling of the COINTELPRO operation suggested that the court in this case should consider whether the agency had acted in bad faith, to support his claim. Noting that *Jones v. FBI* was not binding on D.C. Circuit courts, Berman Jackson nonetheless pointed out that "some of these circumstances [suggesting bad faith in this case] may be relevant to an 'official acknowledgement' argument, but they are not relevant to demonstrate the bad faith that would undermine agency affidavits because the information [suggesting bad faith that Schaerr highlighted] has nothing to do with plaintiff's FOIA request itself or the agencies' *Glomar* responses." Schaerr's primary challenge to the agencies' *Glomar* responses was to point to various public statements to show that the information had been officially acknowledged. Schaerr pointed to four tweets from President Donald Trump, referring to possible improper surveillance, two statements by Rep. Devin Nunes (R-CA) suggesting that improper unmasking had taken place, one statement by then-Press Secretary Sarah Huckabee Sanders referring to allegations that former National Security Advisor Susan Rice had requested unmasking while serving in the Obama administration, and statements by former Director of National Intelligence James Clapper and former Attorney General Sally Yates testifying before the Senate that they had viewed intelligence documents in which names of members of Congress or Trump administration officials had been unmasked. Berman Jackson agreed that Sanders could be considered an authorized representative of her parent agency but found that Sanders' statement was far too vague to qualify as an official acknowledgement of the unmasking of specific individuals. She indicated that both Clapper and Yates were authorized to speak for their agencies but then explained that "their testimony generally acknowledged that they had viewed documents in which Congressmen and Trump officials had been unmasked, and Clapper testified that on at least one occasion, he had requested unmaskings of 'Congressmen and Trump associates.' But this testimony does not confirm that documents responsive to plaintiff's FOIA request, which specifies a time frame and names twenty-one individuals, definitively exist." Berman Jackson explained that Trump's tweets also failed the specificity test. She observed that "by acknowledging that the President was responding to a Fox and Friends broadcast, plaintiff concedes that the President was not responding to information he learned through government documents." Turning to whether the agencies **conducted an adequate search** for those portions of Schaerr's request that did not qualify for a *Glomar* response, Berman Jackson found that the FBI, the NSA, and the National Security Division at the Department of Justice had not shown that their searches were adequate, while the CIA, ODNI, and the State Department had shown their searches were adequate. Berman Jackson faulted the affidavits from the FBI, the NSA, and DOJ's National Security Division primarily because they did not provide enough detail to satisfy the agencies' burden of proof. As to the NSA, she noted that "the description of the agency's search does not assure the Court that the search was reasonably calculated to uncover responsive documents. The declaration does not detail what files or repositories were searched, whether hard copy or physical documents were searched, and through what processes the documents were searched." Schaerr argued that State's sampling search was inadequate. But Berman Jackson pointed out that "it was not unreasonable to review a sample of documents unearthed with the use of a broad term to determine whether the search needed to be more targeted." She rejected Schaerr's claim that the subsequent search terms used by State were also too limited. Instead, she noted that "these search terms were reasonably calculated to uncover responsive documents to part 1 of plaintiff's request, and every document that resulted from the narrower searches was reviewed for responsiveness." (*Gene C. Schaerr v. United States Department of Justice*, Civil Action No. 18-0575 (ABJ), U.S. District Court for the District of Columbia, Jan. 28)

Judge Tanya Chutkan has ruled that the Department of Treasury properly withheld personally identifying information under **Exemption 6 (invasion of privacy)** in response to researcher Grant Smith's requests for names and identifying information for all Treasury employees. Smith requested the information from Treasury and then submitted a second request to OPM, which the agency referred to Treasury for response. Treasury sent Grant a copy of its headquarters organizational chart and referred him to its website. After Smith appealed the decision, Treasury upheld its action, citing Exemption 6. In his request to OPM, Smith specifically requested the names, titles, and occupations of employees in Treasury's Office of Terrorism and Financial Intelligence (TFI). In response to OPM's referral, Treasury provided seven heavily redacted pages, citing Exemption 6 as well. Smith filed suit and Treasury searched its various components. Under Exemption 6, Treasury redacted business cell phone numbers for all personnel, and phone numbers for TFI, IRS, and Financial Crimes Enforcement Network (FinCEN) employees. It also withheld the names of non-senior employees in law enforcement components, including some IRS employees, under Exemption 6 and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Treasury also withheld the names, titles, and phone numbers of TFI employees, citing **Exemption 1 (national security)**. Chutkan found that non-senior employees had a privacy interest in their names but indicated that work cell phone numbers were a closer call. She noted that "cell phone numbers implicate a different privacy interest from landline office phone numbers because employees carry cell phones with them outside the office and regular work hours." As such, she pointed out that "disclosing the numbers of work cell phones, which employees maintain in their homes and on their person, could subject them to the type of harassment exemption 6 was designed to prevent, and therefore the court finds that Treasury employees maintain a privacy interest in protecting their work cell phone numbers." However, Chutkan indicated that Treasury had not yet provided sufficient justification for its claim that phone numbers of TFI and IRS employees were protected by the privacy exemptions. She noted that "Treasury's affidavits are unclear about whether these are personal or office phone numbers Therefore, there is insufficient factual basis to determine the personal privacy interest in withholding disclosure of those phone numbers, and the court denies summary judgment on this issue. Again, because Treasury provided some information, the court will permit the agency to provide additional information and file a renewed motion for summary judgment." Having found that non-senior Treasury employees had a personal privacy interest, Chutkan addressed Smith's public interest claim. She found it fell short, noting that "Smith's request seems designed to obtain personal information that would allow him to infer the ethnic heritage, religion, and/or national origin of certain Treasury employees. The court cannot find that such an inquiry is in the public interest, but does find that disclosure would increase the risk of harassment to those employees." Chutklan agreed with Smith that the agency had failed to provide the records in his **choice of format**. She indicated that "Treasury did not respond to Smith's argument on this issue, and therefore the court will treat it as conceded. Therefore, Treasury must re-produce the requested documents in a form or format readily reproducible, consistent with FOIA, or provide Smith with a sufficiently detailed explanation on whether the requested form or format is readily reproducible." (*Grant F. Smith v. United States Department of Treasury, et al.*, Civil Action No. 17-1796 (TSC), U.S. District Court for the District of Columbia, Jan. 23)

A federal court in Illinois has ruled that prisoner William White either **failed to exhaust his administrative remedies** or **failed to perfect** many of his requests to the Executive Office for U.S. Attorneys for records concerning his prosecution and conviction in the Western District of Virginia. White submitted his request to the Western District rather than EOUSA headquarters. WDVA responded within the statutory 20 work-day time limit, telling White that because he had not provided a certificate of identity, it would close the request. White then resubmitted the request to EOUSA, providing the required certificate of identity.

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EOUSA forwarded the request to WDVA to process. WDVA told White it had found 20,000 potentially responsive records. WDVA indicated that it would take an estimated 8-10 hours to search and review the records for exemptions and asked White to submit $400 to cover the additional 8-10 hours. Instead, White sent a letter indicating that he should be considered a member of the news media for fee purposes. WDVA then administratively closed the request. White argued that since the agency failed to respond within 30 days, it could not collect fees. The agency, however, claimed that because White's request involved more than 5,000 pages, it qualified for unusual circumstances. White appealed the fee determination to the Office of Information Policy, which upheld the agency's fee determination 163 days later. He then claimed that OIP's failure to respond within 20 days prohibited the agency from assessing fees. The court disagreed, noting instead that "while the Court finds the delay in the OIP's final determination served to constructively exhaust Plaintiff's administrative remedies, it does not serve to waive the agency's assessment of search fees. Constructive exhaustion does not relieve Plaintiff of his statutory obligation to pay any and all fees which the agency was authorized to collect. Plaintiff has abandoned the claim he is entitled to a fee waiver as a member of the news media and therefore the assessment of search fees was permissible." White had submitted requests for records pertaining to his Virginia prosecution as well as prosecutions in Illinois and Florida. The agency told the court that it had closed the requests because White failed to certify his identity. However, EOUSA could not produce any records confirming that correspondence and asked the court for a presumption of good faith in assuming that the letters had been sent. While White asked the court to force the agency to provide the responsive records within 120 days, the court indicated that "it is appropriate to require the agency to provide the necessary information to permit the Court to determine whether FOIA requires the release of documents. Defendant EOUSA is ordered to reopen Plaintiff's FOIA request and conduct a reasonable search of records responsive to these requests within 30 day." (*William White v. Executive Office of U.S. Attorneys*, Civil Action No. 18-84-RJD, U.S. District Court for the Southern District of Illinois, Jan. 21)

Judge Trevor McFadden has ruled that the U.S. Marshals Services has so far failed to show that it **conducted an adequate search** for records in response to Angel Pichardo-Martinez's FOIA request. While in the custody of the Marshals Service, Pichardo-Martinez was held in two non-federal facilities – the Community Corrections Association facility in Youngstown, Ohio, and the Lake County Jail. He alleged that he was assaulted in the Lake County Jail. He submitted a FOIA request to the Marshals Service for medical records generated at the Lake County Jail from September 21, 2015 to April 19, 2016. He submitted a second FOIA request for medical records from the Community Correction Association facility for the same time period. The agency claimed it did not receive Pichardo-Martinez's requests until he filed suit. The Office of General Counsel searched records in the Eastern District of Pennsylvania and the Northern District of Ohio and located 51 pages of responsive records and an additional 18 pages, which were disclosed. The agency then filed for summary judgment. Rejecting the summary judgment motion, McFadden explained that "the declarant merely states in a conclusory fashion that searches were conducted without stating, for example, what search terms the Eastern District of Pennsylvania, Northern District of Ohio, or the Prisoner Operations Division may have used, or the types of files these offices maintain, or the process by which these searches were conducted. There simply are not enough proffered facts from which the Court could determine whether the Service has made 'a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" Noting that he had rejected an earlier summary judgment motion submitted by the agency, McFadden observed that "yet once again, the Service's declaration has come up short." (*Angel Pichardo-Martinez v. United States Marshals Service*, Civil Action No. 18-02674 (TNM), U.S. District Court for the District of Columbia, Jan. 27)

Judge Emmet Sullivan has ruled that the Department of Energy **conducted an adequate search** and properly withheld records under **Exemption 5 (privileges)** and **Exemption 6 (invasion privacy)** in response to a request from Clarence Baldwin. Baldwin worked as a loan specialist for the Department of Energy from

February 2017 until his termination during his probationary period in January 2018. Baldwin submitted a FOIA request for email exchanges he had with seven named employees. The agency searched the Loan Programs Office and the Office of the Chief Human Capital Officer, after concluding those were the two offices most likely to have responsive records. Those searches yielded 39 documents from LPO and six documents from the HC staff. The agency disclosed responsive in three batches. Its first disclosure consisted of 13 documents containing 63 pages, which were disclosed in their entirety. The second batch consisted of six documents containing 23 pages, which were also disclosed in their entirety. However, the third batch consisted of 25 responsive documents, of which the agency disclosed seven in their entirety, withholding the remaining 18 documents under Exemption 5 and Exemption 6. Sullivan found the agency had properly withheld records under Exemption 5, citing the deliberative process privilege and the attorney-client privilege. As to the agency's attorney-client privilege claim, Sullivan noted that "the declarant explains that DOE employees sought legal advice which outside counsel provided 'regarding withdrawal of funds under a loan agreement.' If such information were released, the declarant states, DOE staff would be deprived 'of the benefit of confidential advice. . .in legal matters and agency decision-making which would have a chilling effect' on their ability to discuss matters frankly and openly with outside legal counsel." The agency withheld mobile phone numbers and conference call numbers from email chains under Exemption 6. Agreeing with the agency that the numbers potentially qualified for protection, Sullivan pointed out that "in the face of individuals' privacy interest, plaintiff has identified no public interest in disclosure, and the Court finds that no public interest is readily apparent. Accordingly, the Court concludes that DOE properly withheld the mobile telephone number and conference call number from the email chains described in the Vaughn index." (*Clarence E. Baldwin v. U.S. Department of Energy*, Civil Action No. 18-1872 (EGS), U.S. District Court for the District of Columbia, Jan. 23)

Judge Colleen Kollar-Kotelly has ruled that the Bureau of Prisons **conducted an adequate search** in response to federal prisoner Isaac Allen's FOIA request for records concerning why he was characterized as a security threat by BOP, and properly withheld records primarily under **Exemption 7 (law enforcement records)**. The agency also used **Exemption 6 (invasion of privacy)** to withhold personally identifying information about third parties. Allen challenged the agency's search, arguing that it had not yielded all potentially responsive records. But Kollar-Kotelly noted that "plaintiff misunderstands BOP's obligations under FOIA. BOP does not run afoul of FOIA because its searches did not result in the discovery of particular information of interest to plaintiff. Nor does BOP violate FOIA by refusing to identify and verify each [Security Threat Group] BOP may have assigned plaintiff. FOIA does not require an agency to answer a requester's questions." Rejecting Allen's claims that the agency's searches were insufficient, Kollar-Kotelly observed that "BOP's searches were not perfect, but perfection is not the standard." Although Allen was entitled to see his pre-sentence report, the agency, citing a regulation focusing on inmate safety concerns, had told Allen that he could review his PSR in person but could not have a copy of it. Kollar-Kotelly upheld that policy, noting that "in this circuit, as long as an inmate is afforded a meaningful opportunity to review and take notes about his PSR, he has no recourse under FOIA for release of his PSR. BOP is not obligated to release plaintiff's PSR in response to his FOIA request." BOP withheld identifying information of third parties in disciplinary reports. Allen argued that he knew the identify of at least one individual whose information had been redacted. Kollar-Kotelly pointed out that made no difference, noting that "unless disclosure of third parties' names or identifying information about them in law enforcement records 'is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.'" Although the agency withheld security threat assessments under **Exemption 7(E) (investigative methods and techniques)** and **Exemption 7(F) (harm to safety of any person)**, Allen only challenged the 7(E) justifications, arguing that not all security threat assessments revealed procedures or techniques. Kollar-Kotelly disagreed, noting that "plaintiff's assertions are unsupported,

however, and cannot overcome BOP's showing." She also pointed out that since Allen had not challenged the agency's Exemption 7(F) claims, both exemptions applied to protect the withheld information. (*Isaac Kelvin Allen v. Department of Justice, et al.*, Civil Action No. 17-1197 (CKK), U.S. District Court for the District o Columbia, Jan. 29)

A federal court in Ohio has ruled that prisoner Keith DeWitt **failed to exhaust his administrative remedies** when he tried to piggyback his 2016 FOIA request to the IRS with an alleged 2014 request he claimed to have made to the IRS's Kansas City office. Ruling in DeWitt's case had been complicated by the fact that he had been moved from his original prison facility in Ohio, where he originally filed his suit, to another federal facility in Edgefield, South Carolina. During that time, the government apparently lost track of him and argued that his suit should be dismissed because of lack of prosecution on his part. However, even after DeWitt was able to respond, the court, after reviewing an affidavit submitted by Deborah Lambert-Dean, the IRS attorney who oversaw the processing of DeWitt's request, agreed with the agency that DeWitt had failed to show that he had submitted the 2014 request. The court pointed out that "at this stage of the case, without affirmative evidence supporting these allegations, there is no genuine dispute over the fact that the IRS has no documentation indicating that Plaintiff has exhausted his claim." The court added that "even if non-exhaustion of administrative remedies is viewed as an affirmative defense upon which the Government bears the ultimate burden of proof, the Government is entitled to summary judgment because Lambert-Dean's sworn Declaration – which no evidence of record refutes – satisfies the Government's burden of establishing non-exhaustion." Rejecting DeWitt's claim to link his 2016 request to his unanswered 2014 request, the court noted that "chronologically, his January 2016 request for information cannot serve as his alleged request in 2014 for information to which the IRS allegedly failed to respond. In other words, his request for information in January 2016 does not create a genuine issue of material fact over whether the IRS received his request in 2014 or over the IRS's actions or omissions in 2014." (*Keith DeWitt, Sr. v. Commissioner of the Internal Revenue Service*, Civil Action No. 16-00021-TMR-SLO, U.S. District Court for the Southern District of Ohio, Jan. 27)

Judge Christopher Cooper has ruled that Yanping Chen is not precluded from continuing her **Privacy Act** suit alleging that the FBI improperly disclosed information to Fox News about its investigation of her for-profit university in Virginia because of her previous litigation in the Eastern District of Virginia to sanction the agency for misuse of its search warrant. In 2012, Magistrate Judge John Anderson of the Eastern District of Virginia, signed two search warrants related to the FBI's investigation of Chen for lying on her immigration forms about her previous work as a scientist for the Chinese space program. The FBI searched both her home and office and seized a considerable amount of evidence. Six years later, Chen was informed that no charges would be filed. However, a year later, Fox News ran a series of "exclusive" investigative reports on Chen, her university, and her alleged ties to the Chinese military. Chen believed that photographs and documentary evidence used in the reports could have only come from the documents collected by the FBI. In 2017, Chen went back to Anderson at the Eastern District of Virginia, filing a motion under Federal Rule of Criminal Procedure 41, which governs federal search warrants, seeking a show cause order sanctioning the agency for disclosing her personal information to Fox News. Anderson dismissed the motion, explaining that Chen could not get Privacy Act-like relief through a search warrant. Chen appealed to Judge Liam O'Grady, who also dismissed Chen's charges, noting that the records were not part of a system of records under the Privacy Act and that evidence obtained as part of a search warrant was not covered by the Privacy Act at all. The Fourth Circuit upheld O'Grady's ruling and pointed out that Chen should instead file a Privacy Act action in district court. Chen then filed a Privacy Act suit in the District for the District of Columbia. Defending against the suit, the FBI suggested that Chen's previous litigation in the Eastern District of Virginia constituted issue preclusion and that her Privacy Act suit in the District for the District of Columbia should thus be

dismissed. Cooper agreed that superficially the issues had been addressed in the previous litigation but then explained that "the Court finds, however, that neither issue is precluded." Cooper pointed out that "first, the issue of whether the seized materials were held in a 'system of records' was not fully and fairly litigated in the search warrant proceeding because Dr. Chen lacked access to discovery procedures that would have enabled her to make that showing. Especially considering that all the evidence to prove that issue is in the primary control of the Government, it would 'work a basic unfairness' to Dr. Chen if she were bound by that determination here." After examining the case law on preclusion, Cooper pointed out that "the search warrant proceeding offered no mechanism whatsoever for discovery on Dr. Chen's Privacy Act claim, and, absent some other purely legal challenge to the Complaint, Dr. Chen would have an opportunity here to conduct discovery on whether the materials seized from her home and office were stored in a 'system of records.' Further. . .evidence of whether the seized evidence was stored in a 'system of records' is wholly within the control of the Government; it is only through discovery that Dr. Chen could begin to probe that issue." Turning to O'Grady's ruling, Cooper noted that "contrary to the Government's description of his opinion, Judge O'Grady did not squarely hold that the fruits of a search warrant are exempt from the Privacy Act's wrongful-disclosure provisions as matter of law." He observed that had O'Grady "held that the Privacy Act categorically did not permit her claims, that suggestion would have made no sense. Because the Court finds that this portion of the prior court's opinion was dicta and therefore not preclusive, Dr. Chen may raise her Privacy Act claims in this court." (*Yanping Chen v. Federal Bureau of Investigation, et al*, Civil Action No. 18-3074 (CRC), U.S. District Court for the District of Columbia, Jan. 27)

A federal court in Montana has ruled that the Western Organization of Resource councils may take **discovery** as part of its **Federal Advisory Committee Act** suit to explore if the Bureau of Land Management is continuing to use recommendations made by the Royalty Policy Committee to set policy even after the court enjoined the use of committee recommendations because of FACA violations. The court noted that "continuing to rely on policy guidance that was, in turn, based on the Committee's recommendations is further use or reliance. That interpretation is the only one that is consistent with the analysis underlying the injunction itself. The Royalty Committee was unlawful from the start. Thus, everything the Committee did and every recommendation it issued was unlawful as well. Western has raised a significant question as to whether Defendants can rely on Committee recommendations in the present regardless of when they were issued." The court observed that "as long as Defendants are taking actions in the present – such as approving [Application to Drill Permits] – that is based on the Royalty Committee's unlawful recommendations, that prospective conduct potentially falls within the scope of the Court's injunction." BLM argued that the disputed policy documents had been issued by the agency, not the committee. But the court pointed out that "but that implicates the very question Western seeks to answer: what is the basis of the documents? While Defendants may ultimately be able to show there was no violation of the injunction, they have not persuasively argued that no further inquiry is warranted. To the contrary, the timing of the Bulletin and Memorandum raises a significant question about their connection to the recommendations issued by the Royalty Committee's June 2018 meeting." (*Western Organization of Resource Councils v. David Bernhardt*, Civil Action No. 18-139-M-DWM, U.S. District Court for the District of Montana, Jan. 16)

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