Volume 46, Number 6
March 25, 2020

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: In a notification posted on its website Mar. 17, the FBI announced that it would stop accepting or responding to requests received through its eFOIPA portal because of the coronavirus. The agency's posting also explained that individuals could continue to file FOIA requests by mail. Reporters Committee attorney Katie Townsend told BuzzFeed reporter Jason Leopold that an assistant U.S. attorney explained to her that "the rapidly evolving COVID-19 situation is forcing the FBI to drastically reduce its FOIA processing because it cannot do the work remotely, due to the system's security constraints. The FOIA processors need to be on-site to do the work, but they are too closely positioned to be able to conform to the new social distancing guidance." Responding to the email, Townsend told Leopold that "government agencies can and should take reasonable measures to address the COIVID-19 pandemic, but there is nothing reasonable about this. Agencies should be encouraging – not prohibiting – members of the public to submit FOIA requests electronically."

Court Rules on Request's Scope and Privilege Status for Factual Materials

In a ruling that resolves the remaining issues in historian and author Kenneth Dillon's two FOIA requests to the FBI for records about its investigation of the 2001 anonymous mailing of anthrax spores to two U.S. Senators, as well as news media organizations in New York City and Florida, ultimately resulting in the deaths of five individuals and the infection of 17 others, Judge Rudolph Contreras discussed the contours of a perfected request, what constitutes an adequate search and when factual data might be considered deliberative for purposes of Exemption 5 (privileges).

After a multi-year criminal investigation, the FBI announced in 2008 that Dr. Bruce Ivins, a scientist at the U.S. Army Medical Research Institute of Infectious Diseases, was responsible for the attacks. Before charges were filed, however, Ivins committed suicide in July 2008. Within two years, the FBI formally closed its investigation, concluding that Ivins acted alone, declining to charge any other parties, and issuing a 96-page Investigative Summary outlining its

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findings. Dillon questioned whether Ivins was involved at all. To support his theory, he submitted two FOIA requests to the FBI. One request asked for email correspondence that included Ivins and some lab notebooks Ivins possessed. The other request sought 38 pages of the FBI's Interim Major Case Summary, a 2000-page report produced in 2006. Dillon specifically requested a 22-pages table of contents and 16 pages discussing Ivins. In his prior decision, Contreras told the FBI to explain why the Ivins emails had not been produced and ordered the agency to provide the 38 pages withheld under Exemption 5 for *in camera* review. In response to Contreras's prior order, the FBI disclosed redacted versions of three emails.

Dillon claimed that the FBI had improperly narrowed the scope of his first request. Contreras started by discussing what constituted a perfected request. He pointed out that "as a practical matter, then, the question is whether the phrasing of the request would permit 'a professional employee of the agency who was familiar with the subject area of the request' to 'locate the record with a reasonable amount of effort.'" He observed that "plaintiff argues that his initially broader request cannot be improperly narrowed, and, moreover, that his more specific request for two enumerated records in his letter, does not amount to a narrowing the FOIA request itself."

But Contreras explained that "Mr. Dillon's contention, however, misconstrues what FOIA requires. The FBI's duty to 'interpret FOIA requests liberally and reasonably' does not require it to 'extend the meaning of a request to include things' that the requester did not seek. The letter that Mr. Dillon submitted in the context of his administrative appeal outright states that Plaintiff sought 'two specific kinds of evidence.' Any 'professional employee of the agency who was familiar with the subject area of the request,' would naturally construe the request as – based on the plain text of Plaintiff's appeal – seeking only those two items."

Contreras rejected Dillon's contention that he could recast his request during litigation. Instead, Contreras pointed out that "plaintiff's contention that a FOIA requester can explicitly narrow, test, and then broaden his request in this way after filing litigation sits without any firm basis in the statutory text or associated case law. Plaintiff cannot, after filing his lawsuit here, adjust his FOIA request by re-characterizing the text that he made therein through his argument before this Court." Rejecting Dillon's claims of bad faith, Contreras indicated that "if Mr. Dillon seeks to renew his broader request given his full awareness of the FBI's representation, he is entitled to submit a new FOIA request. But it is not 'inequitable' to hold Plaintiff to the plain text of is request."

In response to the evidence Dillon had produced of the existence of specific emails, the FBI's Washington Field Office searched its anthrax investigation file again, locating several binders of emails containing more than 8,000 emails, that had been overlooked during the first search. In reviewing the emails, the WFO discovered that there were three copies of the same set of emails and told Contreras that "where an email had 'additional handwritten notes,' the FBI processed these pages for release." Dillon complained that the agency should have searched the computers seized from Ivins for emails. Contreras rejected Dillon's challenge to the adequacy of the agency's second search because it found no new emails beyond the three identified by Dillon previously, noting that "what matters are the methods that the FBI used to carry out the search. Nor is the operative legal standard whether '*all* the potentially responsive emails in the FBI's possession' would be located in the 1A binder that the FBI searched. Rather, the key question facing the Court is whether the FBI's choice to search only the 1A attachments associated with the identified binder was 'reasonably calculated to uncover all relevant documents' that Mr. Dillon sought in his narrowed request."

Dillon argued that the agency had failed to show that it had processed all responsive emails from Ivins' computers. But Contreras observed that "because the FBI does not need to conduct a 'perfect' search of 'every record system' for the requested documents, the agency is not required to state that it ingested the universe of relevant emails into the database it searched. Rather, it needs to establish that it conducted a

'reasonable search' of the locations 'likely to possess the requested records.'" He added that "because Mr. Dillon has not provided any non-speculative evidence that would permit the Court to doubt Defendant's claims that it conducted a reasonable search of the locations most likely to contain responsive records, his arguments fall flat."

The FBI withheld 38 pages from its final 2,000-page report explaining the findings of the investigation under the deliberative process privilege. In his prior opinion, Contreras had ruled that the FBI had not shown that factual portions of the report were privileged and further, whether non-exempt portions could be separated and disclosed. However, after reviewing the 38 pages *in camera*, Contreras was convinced that all 38 pages were properly claimed as privileged. Dillon argued that the factual portions were not deliberative. But Contreras pointed out that "what the Court must determine is a subtly distinct question: 'whether any factual material in the records at issue reveals the agency's deliberative process.' This inquiry is 'dependent upon the individual document and the role it plays' in the agency's process and requires attention to 'the context in which the materials are used' and the relationship between the requested information and 'the policies and goals that underlie the deliberative process privilege.'"

Addressing the 16 pages of the report that discussed Ivins, Contreras noted that "in this particular context, a seemingly factual statement such as the time of a meeting with a potential informant or the number of samples of a particular kind of evidence collected becomes inextricably bound up in the broader discussion of investigative conclusions drawn and how the available evidence informs next steps." He found the 22-page table of contents privileged as well. He pointed out that "it is a mistake to conclude that the organizational function of the TOC makes the material fundamentally factual. Even if it contains facts, its compilation required multiple decisions about how to structure the TOC, including what to focus on, what to exclude, and how one particular item in the investigation relates to another investigative pathway." (*Kenneth J. Dillon v. U.S. Department of Justice*, Civil Action No. 17-1716 (RC), U.S. District Court for the District of Columbia, Mar. 16)

Views from the States

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

Nevada

The supreme court has ruled that the Las Vegas Police Department did not waive its claim that police bodycam videos contained exempt juvenile justice information when it failed to respond to four requests from the Republican Attorneys Generals Association within the statutory five business days. The bodycam footage captured the police response to a disturbance at a party attended by a number of juveniles, including the son of then State Senator Aaron Ford. RAGA's Nevada Public Records Act requests all focused on police interactions with Ford. RAGA filed suit after the agency failed to respond within the statutory time period. The police indicated that there were six hours of responsive bodycam footage related to the incident, with two hours concerning Ford. The trial court reviewed the footage *in camera* and ruled in favor of the police on the issue of whether the video footage was exempt. However, it did not rule on any related records. RAGA appealed to the supreme court. Rejecting RAGA's waiver argument, the supreme court noted that "waiver is not an enumerated remedy, and we decline to read it into the statute." The supreme court then explained that "to the extent RAGA contends that waiver is an appropriate remedy otherwise existing in equity, we

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adamantly disagree. Waiving LVMPD's assertion of confidentiality would lead to an absurd penalty resulting in the public disclosure of Nevadan's private information solely because of LVMPD's failure to timely respond." The supreme court added that "refusing to allow an assertion of confidentiality due to LVMPD's noncompliance with the response requirement goes far beyond the NPRA's emphasis on disclosure." Agreeing with the trial court's decision to withhold the bodycam footage, the supreme court pointed out that while bodycam footage was clearly a public record under the NPRA, a provision limiting is availability allowing "the public only to *inspect* bodycam footage containing confidential information that may not otherwise be redacted, *at the location* where the record is held." RAGA also argued that the trial court erred in finding that all the bodycam video qualified as juvenile justice information. The supreme court, however, indicated that "the bodycam footage, including the portions with Ford, directly relates to the investigation of an incident involving a juvenile alleged to have committed a delinquent act. . ." The supreme court agreed with the RAGA that the trial court erred by failing to review non-bodycam records and make a determination. The supreme court remanded that issue back to the trial court to make such a determination. (*Republican Attorneys General Association v. Las Vegas Metropolitan Police Department*, No. 77511, Nevada Supreme Court, Feb. 20)

The supreme court has ruled that the Clark County Coroner's Office cannot categorically withhold records on juvenile deaths after they have been provided to a Child Death Review team, but instead can only redact them to the extent necessary to protect personal privacy. The supreme court also rejected the Coroner's Office's claim that public agencies were not liable for attorney's fees if they had acted in good faith. The Las Vegas *Review-Journal* submitted a Nevada Public Records Act request for records of juvenile deaths since 2012. The Coroner's Office provided a spreadsheet. Dissatisfied with the response, the newspaper met with representatives of the Coroner's Office, which concluded that the newspaper wanted records of all deaths of juveniles involved with the Clark County Department of Child and Family Services. The Coroner's Office then claimed that such records were categorically confidential once they were provided to a CDR team. LVRJ filed suit. The trial court ruled that the records could not be categorically withheld as CDR records and that because the Coroner's Office had not claimed that its records were confidential it had waived that argument. LVRJ then filed for attorney's fees. The trial court rejected the Coroner's Office's claim that because it had acted in good faith it was not liable for attorney's fees. The supreme court disagreed with the trial court's conclusion that the Coroner's Office had waived its privacy claim by failing to include it in its response to LVRJ. Instead, the supreme court pointed out that "the NPRA simply is silent as to forfeiture or waiver of a legal basis for withholding records. The NPRA simply requires the governmental entity to provide to the requester *some* legal authority for denying access to a record on the basis that the record is confidential." Turning to the issue of categorically withholding CDR records, the supreme court concluded that "only a CDR team may invoked the confidentiality privilege to withhold information in response to a public records request and [that confidentiality provision] makes confidential only information or records 'acquired by' the CDR team." But the supreme court agreed that the coroner's juvenile death records qualified for some level of privacy confidentiality. The supreme court noted that "while the authorities the Coroner's Office invoked do not authorize categorically withholding juvenile autopsy reports, they do implicate a significant privacy interest in medical information such that the reports may contain information that should be redacted." Explaining that it had recently adopted the two-part test from the Ninth Circuit's recent ruling in *Cameranesi v. Dept of Defense*, 856 F.3d 626 (9th Cir. 2017) which entailed balancing individual privacy interests against any public interest in disclosure, the supreme court remanded the case back to the trial court to apply the *Cameranesi* test. The Coroner's Office argued that a separate provision providing for damages for the tort of invasion of privacy superseded the concept of attorney's fees from an agency like the Coroner's Office. But the supreme court rejected the claim, noting that "a prevailing requester's entitlement to attorney fees and costs does not depend on whether the government withheld the requested records in good faith. . .We conclude that [the damages provision], as a matter of law, immunizes a governmental entity from 'damages' and that the

term does not encompass attorney's fees and costs." (*Clark County Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal*, No. 74604, Nevada Supreme Court, Feb. 27)

New Jersey

A court of appeals has ruled that the trial court erred when it concluded that Ewing Township properly withheld a record pertaining to the use of force by the police to arrest a juvenile. The *Trentonian* requested the record under the Open Public Records Act. The Township withheld the record claiming it was covered by the juvenile records exemption. The trial court agreed and ruled in favor of Ewing. However, the court of appeals reversed. The appeals court pointed out that the Attorney General had issued guidance allowing the release of use of force reports pertaining to juveniles with redaction of identifying information. The court of appeals noted that "the UFR guidance promulgated by the Attorney General is designed to capture information about police conduct, not the subject – the person against whom force was used – in an abbreviated fashion. That the 'subject' is a minor, as opposed to an adult, does not shift the focus of a UFR, disclosure of use of force, in any way. In either instance, the need to record police conduct is the same. Deleting the subject's name adequately protects the anonymity." The appeals court added that "the heart of the matter is that a juvenile UFR is not a record pertaining to juveniles charged with delinquency. It is a record pertaining to police conduct." (*Digital First Media v. Ewing Township, et al.*, No. A-5779-17T2, New Jersey Superior Court, Appellate Division, Feb. 19)

Washington

A court of appeals has ruled that the trial court did not err when it found that the Department of Ecology properly withheld data and assumptions regarding an environmental impact study prepared by the Department of Ecology and Cowlitz County pertaining to Millennium Bulk Terminals-Longview's proposal to build a coal export terminal. After the EIS was prepared and published, Millennium submitted four Public Records Act requests for the data and assumptions used in preparing the report. After nine installments, DOE had spent approximately 795 hours on responding to the request and produced 377,000 documents. Millennium argued that 26 documents were still missing. Millennium then filed suit. The trial court found that DOE had conducted adequate searches and had disclosed all the documents Millennium requested. The court of appeals observed that some of the records Millennium was focusing on originated from ICF Jones & Stokes, a third-party contractor who developed and prepared certain documents for both federal and state EISs. The appeals court noted that "although Millennium points to documents that DOE failed to produce, because we conclude that DOE performed an adequate search, DOE's failure to disclose these records does not create a per se PRA violation." The court of appeals also faulted Millennium for the imprecise nature of its request. The court of appeals pointed out that "although 'data and assumptions' may encompass the files that Millennium seeks, 'a search need not be perfect, only adequate.' Given the language Millennium used in its records request, we conclude that DOE's search was 'reasonably calculated to uncover relevant documents' and therefore, we conclude that DOE's search was adequate." (*Millennium Bulk Terminals Longview v. Washington State Department of Ecology*, No. 52270-5-II, Washington Court of Appeals, Division 2, Feb. 25)

The Federal Courts…

Judge Randolph Moss has ruled that the Department of Justice must disclose docket numbers for terrorism-related cases that resulted in convictions, but that docket numbers for terrorism-related cases that resulted in acquittals or dismissals are protected by **Exemption 7(C) (invasion of privacy concerning law**

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enforcement records). In response to a FOIA request from the Brennan Center for Justice and Professor Charles Kurzman for records relating to public terrorism cases – including docket numbers – the Executive Office of U.S. Attorneys withheld the docket numbers under Exemption 6 (invasion of privacy) and Exemption 7(C). Moss pointed out that two D.C. Circuit decisions – *ACLU v. Dept of Justice (ACLU I)*, 655 F.3d 1 (D.C. Cir. 2011), and *ACLU v. Dept of Justice (ACLU II)*, 750 F.3d 927 (D.C. Cir. 2014) – were dispositive. The case record data was contained in the agency's Legal Information Office Network System (LIONS). Moss began by examining whether the records qualified under Exemption 7. He observed that "although the principal function of several components of [DOJ] is undoubtedly law enforcement, the Department does not contend that EOUSA is such a component." But he pointed out that "even without any deference to the Department's characterization of the database, the Court is convinced that the records at issue – which deal with terrorism investigations and prosecutions – were compiled for law enforcement purposes." Challenging that characterization, the Brennan Center noted that the database contained both civil and criminal law enforcement records. Moss indicated that "the particular docket numbers at issue, moreover, relate to terrorism cases." He added that "the Department has explained that the docket numbers are used to prosecute criminal cases and to assist U.S. Attorney's Offices in deciding how to allocate law enforcement resources." While in *ACLU I*, the D.C. Circuit concluded that the privacy interest of individuals who had been convicted in the disclosure of docket numbers was *de minimis* but not non-existent. The *ACLU I* decision also indicated that some charges could potentially be so stigmatizing that the privacy interest would dramatically increase. DOJ argued terrorism cases were such an instance. Moss acknowledged the stigma of being involved in a terrorism case, noting that "the stigma of a terrorism conviction is likely substantial and that disclosure of the docket numbers of cases that the Department has characterized for its internal purposes as terrorism-related risks invites unwanted attention to the subject of those prosecutions." But Moss pointed out that DOJ's argument ran into the same problem as did the criminal convictions in *ACLU I* – public attention. He observed that "the Department cannot plausibly argue (nor does it attempt to argue) that the public 'will hear of' the terrorism-related nature of cases 'for the first time merely because the Justice Department releases a list of docket numbers.'" As a result, Moss explained, "if the privacy interest at stake here is greater than in *ACLU I*, the interest is still far weaker than the core interests protected by Exemption 7(C)." He indicated that "this is not to say that criminal defendants have '*no* privacy interest in the facts of their conviction' but only that their 'interests are weaker than' the interests of those 'who have been acquitted or whose cases have been dismissed.'" Moss found that the public interest in disclosure outweighed the privacy interest of those convicted of terrorism. He observed that "release of the docket numbers from the LIONS database will elicit attention or news coverage that intrudes on the defendant's privacy in a new or different manner. On the other hand, the public interest weighs heavily in favor of disclosure. Understanding how and when the Department categorizes cases as terrorism cases and following trends relating to these prosecutions would light on the workings of government. . ." Although in *ACLU II*, the D.C. Circuit found that individuals who had been acquitted or whose charges had been dismissed had a substantial privacy interest in non-disclosure of docket numbers, the Brennan Center argued that the circumstances here differed. The Brennan Center argued that there had been public disclosure of the filing of many terrorism cases. Rejecting that notion, Moss observed that "the question is whether disclosure would impede the defendants' ability 'to move on with their lives without having the public reminded of their alleged but never proven transgressions.' For the reasons explained in *ACLU II*, it would." Finding that the docket numbers for cases that resulted in acquittal or dismissal were protected, Moss noted that "to be clear, *ACLU II* did not hold that the disclosure of docket numbers for cases that resulted in acquittals or dismissals is never warranted but, rather, only that the privacy interests at stake are more substantial than for cases that ended in conviction. Here, that distinction is dispositive because Plaintiffs have offered no basis for the Court to find that the public interest in disclosure of the docket numbers is greater than the public interest the D.C. Circuit considered in *ACLU I* and *ACLU II*." (*Brennan Center for Justice, et al. v. United States Department of Justice*, Civil Action No. 18-1860 (RDM), U.S. District Court for the District of Columbia, Mar. 12)

Judge Christopher Cooper has ruled that Jens Porup failed to show that the CIA's earlier policy to decline to respond to requests for records concerning illegal activities constituted a **pattern or practice** contrary to FOIA because the agency largely abandoned the policy and agreed to process requests for historical records from the 1975 Church Committee investigation. Porup requested records about the agency's use of poison for covert assassinations. The CIA responded that because there was a legal prohibition on assassinations, they had no records. Porup clarified that he wanted records for the entire history of the agency. With that clarification, the CIA located 39 documents that it believed were responsive in light of Porup's clarification. The agency also found that 22 of those documents were set to be released by the National Archives under the JFK Assassination Records Collection Act. After NARA posted those records, the CIA processed the remaining 17 documents. The agency ultimately released 2,000 pages of documents in full or in part, withholding records under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Porup argued that the CIA's policy declining to respond to requests about illegal activities constituted a pattern or practice violation on the part of the agency. Cooper disagreed, finding instead that even if the earlier policy constituted a pattern or practice violation, the agency's change to the policy had rectified that situation. He pointed out that "the new policy is materially different from the challenged practice." Porup argued that the agency was required under the best evidence rule to provide a written copy of the new policy. But Cooper indicated that "Porup misconceives the scope of the best evidence rule," explaining that "the existence of an agency policy may be proved by a declaration from an agency official, even if a written record of the policy exists." Cooper added that the CIA's declaration "attesting to the implementation of the new mandatory policy for processing of FOIA requests clears this standard." Porup argued the agency had failed to **conduct an adequate search**, particularly for operational files normally protected by the CIA Information Act. The CIA agreed that since Porup's request dealt with actions discussed by the Church Committee, it was required to search its operational files as well. Porup argued that the agency's search of its operational files was too limited because it did not address potential use of assassinations decades later. But Cooper observed that Section 3141(c) "does not require the CIA to search its operational files for all information, including on events occurring decades later, that could *hypothetically* have been deemed central to a congressional committee's investigation. Section 3141(c) mandates only disclosure of 'information central to the committee's *direct* investigation.'" He indicated that "although it is possible that a document created after 1980 could pertain to an event directly investigated by the Church Committee, the agency 'reasonably calculated' that a search of all its operational files created four years after the investigation's final report 'would uncover all relevant documents.'" Cooper also approved the agency's withholdings under Exemption 1 and Exemption 3. (*Jens Porup v. Central Intelligence Agency*, Civil Action No. 17-72 (CRC), U.S. District Court for the District of Columbia, Mar. 17)

A federal court in Virginia has ruled that FOIA does not provide a remedy for halting the notice and comment period for rules promulgated under the Administrative Procedure Act merely because an agency failed to respond to a FOIA request within the statutory time limit. The case involved a 2018 FOIA request from the Southern Environmental Law Center to the Council for Council on Environmental Quality for records pertaining to the Council's intention to revise the National Environment Policy Act. In January 2020 the Council published a Federal Register notice announcing a proposed rulemaking to revise the NEPA. The Council indicated on its website that comments were due by March 10, 2020. SELC had already filed suit in connection with its 2018 FOIA request and after the Council's Federal Register notice was published, SELC filed two new motions to try to extend the time period. SELC argued that an early Supreme Court FOIA decision, *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974), recognized the possibility of equitable injunctive relief as a remedy under FOIA. But Judge Glen Conrad indicated that "FOIA and *Bannercraft Clothing* do not permit the court to enjoin an agency from closing a notice and comment period

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for a non-final proposed rulemaking, even if that agency has likely violated FOIA by failing to produce documents that are responsive to a timely FOIA request and that are directly relevant to the proposed rulemaking at issue." Conrad explained that *Bannercraft Clothing* and *Chrysler v. Brown*, 441 U.S. 281 (1979), which recognized a cause of action to block agency disclosure of allegedly confidential business information under the APA, but not FOIA, indicated that the Supreme Court understood that Congress did not intend for FOIA to supplant the non-access provisions of the APA. Rejecting SELC's attempt to suspend the notice and comment period on the basis of FOIA, Conrad observed that "the Administrative Procedure Act – and a robust body of case law – allows for enforcement mechanisms if agencies fail to comply with preliminary matters in rulemaking procedures. This court concludes that FOIA does not." (*Southern Environmental Law Center v. Council on Environmental Quality*, Civil Action No. 18-00113, U.S. District Court for the Western District of Virginia, Mar. 19)

Judge Royce Lamberth has ruled that the Defense Intelligence Agency properly responded to two FOIA requests filed by journalist Raffi Khatchadourian for records concerning the findings of the Information Review Task Force, convened by the Secretary of Defense to assess the damage to national security caused by the release of classified information to Wikileaks. Khatchadourian asked for a records from DIA's email system, which originally was estimated to encompass 1.8 million records, which was narrowed to 118,000, then to 18,000. DIA located 1,750 emails and 650 records from its database, concluding that only five emails and seven additional attachments were responsive. The agency identified 5,000 responsive pages, withholding records under **Exemption 1 (national security), Exemption 3 (other statutes), Exemption 5 (privileges), Exemption 6 (invasion of privacy)**, and **Exemption 7 (law enforcement records)**. Khatchadourian argued that the agency had failed to **conduct an adequate search**, in part because the agency had interpreted his request too narrowly by concluding that its first broader prong was modified by its second narrower prong. Lamberth disagreed, noting that "the difference in wording would lead a reasonable person to conclude that the scope of the first prong is broader than the scope of the second prong. It is true that agencies have a 'duty to construe a FOIA request liberally.' This does not, however, mean that agencies are prohibited from reasonably interpreting FOA requests." Lamberth also dismissed Khatchadourian's claims that DIA had failed to follow up on clear leads, finding that his allegations were merely speculative. Lamberth agreed that DIA had properly re-classified some records. He pointed out that "DIA was entitled to reprocess the records and change its mind about whether they were classified. Agencies frequently do this, and oftentimes they realize that they can release documents they previously thought should be exempt. If agencies can later release information they previously withheld, there is no reason why the reverse should be impermissible." Lamberth approved of the agency's Exemption 3 claims as well. But he found that the agency's **segregability analysis** for both Exemption 1 and Exemption 3 was conclusory and ordered the agency to provide further affidavits addressing that issue. Lamberth rejected the agency's deliberative process privilege claims, finding that the agency had not shown the records were predecisional or deliberative. (*Raffi Khatchadourian v. Defense Intelligence Agency, et al.*, Civil Action No. 16-311 (RCL/DAR), U.S. District Court for the District of Columbia, Mar. 19)

A federal court in Illinois has ruled that prisoner William White failed to show that the FBI was improperly responding to a series of voluminous FOIA requests primarily focused on white supremacist groups. White submitted six FOIA requests to the FBI covering 57 subjects. In defending its actions, the FBI told Magistrate Judge Reona Daly that its responses to White's requests fell into five separate categories. Two of those categories included instances in which White had **failed to exhaust his administrative remedies** or had received a *Glomar* response neither confirming nor denying the existence of records. For two other categories the FBI had either located responsive records and was processing them for release or had conducted a search and found no responsive records. The fifth category encompassed requests where the FBI had

identified responsive records but had withheld them categorically under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. One of White's requests was for records on Michael Lefkow, who was deceased. The agency found approximately 20,000 responsive pages, asked for and received an advanced payment of $297.50, and then agreed to process the request at a rate of 500 pages a month. White challenged the agency's rate of 500 pages a month as being too slow under the circumstances. But Daly pointed out that "it is true that it is improper to inquire into the requester's public interest motive for his request when determining whether the agency must respond, but this Court believes it is entirely appropriate to consider it when determining *how* and *when* the agency must respond." Daly observed that "while he may be entitled to all of the non-excluded records he seeks, he is not entitled to them next week, or even next year." Noting that in *National Security Counselors v. Dept of Justice*, 848 F.3d 467 (D.C. Cir. 2017), the D.C. Circuit had upheld the FBI's policy of disclosing pages at a rate of 500 pages a month, Daley pointed out that "given the larger volume and complexity of responding to Plaintiff's request, releasing documents at the rate of 500 pages a month balances the need for transparency in government with the allocation of the FBI's limited resources." White also complained that the FBI had improperly **aggregated** ten of his requests together for fee purposes. In response, Daley noted that "the FBI reasonably believed a number of Plaintiff's requests involved related matters. The Court finds under the circumstances there is a reasonable basis for determining that aggregation is warranted." The FBI issued a *Glomar* response for records concerning a white supremacists rally in Pikesville, Kentucky that had been under surveillance, asserting **Exemption 7(D) (confidential sources)** as the basis for its *Glomar* response. Approving the use of the exemption under the circumstances, Daley indicated that "plaintiff's request was most certainly aimed at gaining information regarding the FBI's use of informants at the Pikesville rally. While a broader interpretation is possible, the Court finds the FBI's understanding of the request was not unreasonable. The FBI's *Glomar* response was appropriate and it did not violate FOIA by responding that it could not reveal records regarding the use of confidential informants." White argued that one individual whose records he had requested waived his privacy rights by appearing on television. Daley disagreed, noting that "the fact that someone is shown on national television does not indicate that individual has waived his privacy interests as to the existence of records held by a federal agency." She added that "Plaintiff's declaration as to what he believes he saw on CNN is not sufficient to outweigh the privacy interest of the third party." Daley agreed with the FBI's responses were appropriate. Noting that processing some of White's requests at a rate of 500 pages a month would extend the case for nine years, Daley dismissed the case instead, explaining instead that "it is not in the interest of judicial efficiency to leave a case languishing on the Court's docket for such a lengthy period of time. Should the FBI stop processing the records at the rate of 500 pages per month, Plaintiff may have a new FOIA claim. The Court's granting of summary judgement on this count should be interpreted as a review only of the FBI's actions up to the date of this Order." (*William A. White v. Executive Office of U.S. Attorneys, et al.*, Civil Action No. 18-841-RJD, U.S. District Court for the Southern District of Illinois, Mar. 17)

The D.C. Circuit has ruled that the National Archives and Records Administration properly withheld the final decision letter from the Department of Justice terminating an Assistant U.S. Attorney for cause under **Exemption 6 (invasion of privacy)**, but has found that the AUSA's response letter contained no personal information that qualified for protection. After failing to get records on the terminated AUSA through his FOIA litigation against the Justice Department, Howard Bloomgarden, who was serving a life sentence for murder in California, submitted a FOIA request to the NARA to obtain the final termination letter and the AUSA's response. The agency withheld both under Exemption 6 and the trial court upheld the agency's decision. The D.C. Circuit explained that "the Archives contends only that the AUSA Response should remain private because it 'discusses the grounds for the former AUSA's removal.' We reviewed both letters *in camera*, as did the district court, and we see no such discussion in the AUSA Response. Because the Archives offers no viable reason why the AUSA (or anyone else) has a substantial privacy interest in the AUSA

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Response, 'FOIA demands disclosure' regardless whether the public has any identified interest in the letter's contents." But the D.C. Circuit indicated that the privacy interest in the termination letter remained strong. The court noted that "like the various courts that have reviewed materials related to the termination of the AUSA, we conclude from our own *in camera* review that the Letter's findings do not identify any prosecutorial misconduct affecting the merits of any case or otherwise threatening the integrity of the prosecutorial function, but are limited to instances of incompetence and insubordination." (*Howard Bloomgarden v. National Archives and Records Administration*, No. 18-5347, U.S. Court of Appeals for the District of Columbia Circuit, Mar. 13)