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Washington Focus: Mark Schlefer, a private attorney practicing maritime and shipping law in Washington, D.C., whose interest in improving access to government information led him to work with two other attorneys through the ABA to draft the law that eventually became the Freedom of Information Act, died Dec. 21, 2020 at the age of 98. In a Washington Post opinion column in 2016, Schlefer related how, after he and the other lawyers finished drafting a bill, he met with Rep. John Moss (D-CA), who was primarily responsible for getting FOIA through Congress. Moss told him that he could deliver the House if Schlefer could help move the bill through the Senate. Through a well-connected friend, Schlefer was able to get a hearing for the bill from Sen. James Eastland (D-MS) who ran the Judiciary Committee at that time. The primary Senate sponsors of the bill were Senator Thomas Hennings (D-MO), who died in 1960, and his successor Edward Long of Missouri (D-MO).

OMB Publishes Revisions Of Its 1987 Fee Guidelines

For the first time in 33 years, OMB published December 17, 2020 a revision of its Uniform Freedom of Information Act Fee Schedule and Guidelines, originally published March 27, 1987 as part of the 1986 FOIA amendments, which overhauled the statute's fee structure in exchange for relaxing the standard for withholding records under Exemption 7 (law enforcement records) from "would" to "could reasonably be expected to." Although OMB had no statutory role in FOIA interpretation before the 1986 amendments, it was specifically given that role at the time because Congress did not trust the Department of Justice to interpret the provisions in line with congressional intent. Regardless, DOJ did everything it could behind the scenes to shape the OMB Guidance more to its liking and, indeed, many of the most niggardly interpretations that survived into the original Guidelines reflect more the viewpoint of DOJ than OMB. Several of those harsh interpretations did not survive challenges to the D.C. Circuit, including an early challenge by the National Security Archive concerning what it meant to disseminate information to the public, which fell by the wayside in *National Security Archive v. Dept of Defense*,

880 F.2d 1381 (D.C. Cir. 1989), and a more recent challenge to whether students qualify under the educational institution fee category, which was also rejected by the D.C. Circuit in *Sack v. Dept of Defense,* 823 F.3d 687 (D.C. Cir. 2016).

In its revision of the Guidelines, OMB focuses on four issues, skirting many of the issues brought by commenters who urged the agency to include more generous provisions, particularly the interpretation of what constituted a representative of the news media, that was articulated by the D.C. Circuit in *Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015). The four issues addressed by OMB were whether or not guidance on public interest fee waivers should be included in the OMB Guidelines, whether OMB's original definition of representative of the news media should remain in the Guidelines, whether to change the original guidance on educational institutions to include students, and whether a new separate section should be added to reflect the effects of a provision included for the first time in the 2007 OPEN Government Act prohibiting agencies from charging fees if they missed the statutory deadline unless certain circumstances provided in the statute existed.

Another unnecessary turf battle that arose quickly after Congress passed the 1986 FOIA amendments directing OMB to provide guidance on the new fee provisions was the decision by the Office of Information and Privacy to be the first out of the gate with guidance on fee waivers. Even though no one in Congress had asked them to do so, OIP issued a memo signed by then Deputy Attorney General Steve Markman insisting that agencies should rarely award public interest fee waivers and, further, that agencies should watch the newly created National Security Archive like a hawk lest it try to slip a fast one by agencies through some kind of speculative double-dipping. While OIP probably has a role in issuing guidance on fee waivers, the thrust of the new fee provisions was inextricably tied up with how agencies should treat requesters – like the news media or educational institutions – whose primary focus was to disseminate information to the public, policies which were already embodied in the standards enunciated in the fee waiver provisions, which was also amended as part of the fee provision overhaul. Further, the least-favored group – commercial requesters – could be assessed additional fees for review time, specifically because Congress decided that such requests were unlikely to be in the public interest.

While a distinction can be made between fee waivers and fee provisions, the policies overlapped to the extent that it made sense to allow OMB to weigh in on the subject. However, OMB decided in its revision to make clear that the Fee Guidance did not cover the issue of fee waivers. Several commentors argued that "there is an interrelationship between a requester's fee category and whether they are eligible for a public interest fee waiver, and, as a result, the OMB Guidelines should also address public interest fee waivers." In response, OMB noted that "whether or not the two issues involve a common element, for instance whether there is a commercial interest at stake, the fact remains that separate legal constructs have developed around each, and other independent considerations are necessary to the analysis of each." The Federal Register Notice indicated that its revision specifically excluded from the scope of the Guidelines "the waiver or reduction of fees if the disclosure of the information is in the public interest." Noting that OIP had updated its fee waiver guidance as recently as 2020, OMB concluded that "it is more effective and efficient for the Guidelines to explicitly and only address fee categories, and to continue the decades-long practice of deferring to other sources for guidance on public interest fee waivers."

Since the definition of "representative of the news media" was codified in the 2007 OPEN Government Act by inserting the definition from the 1987 OMB Fee Guidelines into the statute itself, OMB explained that it was dropping Section 6j from the Fee Guidelines because it was now redundant. Several commenters recommended that OMB include various judicial interpretations of the fee category provisions in the guidelines. While OMB agreed to remove an inconsistency that had been identified by the D.C. Circuit in the *Cause of Action v. FTC* decision, it broadly rejected the idea of including judicial interpretations, noting that "it would not be efficient to try to update the Guidelines to account for decisions in these cases." Further,

OMB observed that "it is not OMB's role to serve as legal counsel to agencies. Every agency has attorneys and the Office of Information Policy at the Department of Justice, exists, in part, to "provide legal counsel and training to agency personnel' with respect to complying with the FOIA."

Because of the ruling in *Sack v. Dept of Defense*, OMB agreed to expand the coverage of the educational institution fee category to include students and staff. OMB noted that "so long as staff of an educational institution or non-commercial scientific institutions can demonstrate that their request is being made in connection with their role at the institution, OMB considers them to be appropriately within the scope of this fee category."

OMB also agreed to add a new subsection explaining that agencies could not generally assess fees to requesters when the agencies missed statutory deadlines. However, OMB pointed out that "this is a complex statutory provision better addressed through legal analysis and individualized counsel, rather than OMB policy." The new revisions were published in the Federal Register, v. 85, n. 243, p. 81955, Dec. 17, 2020.

Views from the States

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

Pennsylvania

The supreme court has ruled that Uniontown Newspapers is entitled to attorney's fees for its litigation against the Department of Corrections to force the agency to disclose data related to the illness of prisoners incarcerated at SCI-Fayette caused by exposure to the facility's proximity to a fly ash dumpsite. In September 2014, the Abolitionist Law Center published a report entitled "No Escape: Exposure to Toxic Coal Waste at SCI Fayette." As a result of the report, DOC conducted an investigation of the allegations. Reporter Christine Haines then submitted a Right to Know Law request for non-identifying data about illnesses of prisoners and staff. The DOC's open records officer interpreted Haines' request as pertaining to the No Escape investigation and withheld the records entirely under the deliberative process privilege and attorney-client privilege. Haines complained to the Office of Open Records, which reversed DOC's decision and ordered the agency to disclose responsive records within 30 days. DOC did not appeal the OOR order and disclosed 15 pages to Haines. Uniontown Newspapers filed suit in the Commonwealth Court, arguing the agency had acted in bad faith by failing to conduct a more extensive search in responding to the request. Uniontown Newspapers requested $215,000 in fees and the Commonwealth Court ultimately awarded it $118,000. DOC argued it was not liable for fees because it did not appeal the OOR order. The supreme court disagreed, noting that "in this case, after DOC denied Appellees' request, they sought relief from the OOR appeals officer who issued a disclosure order in their favor. Having received the relief they requested, Appellees had no reason to seek further appeal. DOC chose not to appeal, yet nevertheless failed to 'discover or disclose all responsive records until after years of litigation.' The effect of DOC's proposed reading of Section 1304 is that a requester who is successful at the OOR is prevented from seeking attorney fees and costs if an agency does not file an appeal. The practical effect of DOC's position is to limit a requester to 'a civil penalty not more than $1,500 if an agency denied access to a public record in bad faith.'" *Uniontown Newspapers, Inc. v. Pennsylvania Department of Corrections*, No. 76 MAP 2019 and No. 77 MAP 2019, Pennsylvania Supreme Court, Dec. 22, 2020)

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ACCESS REPORTS

Texas

A court of appeals has ruled that a report prepared by Kroll Associates, Inc. to investigate allegations that unsolicited letters of recommendation sent to the dean and faculty at the University of Texas Law School may have had undue influence on decisions to admit applicants who were the subjects of the letters is not privileged and must be disclosed in response to a request under the Texas Public Information Act submitted by the Franklin Center. The university's own investigation found that while there was no evidence of a quid pro quo, individual applicants who benefited from the letters seemed to fare better in the application process than those individuals who did not submit such recommendation letters. Kroll Associates was hired to conduct an independent review of the admissions process and issued a 101-page report that included best practices. After receiving the Franklin Center's request, UT requested an opinion from the Office of the Attorney General asking permission to withhold the report because it was privileged. The Attorney General found that the report was protected with some exceptions. UT filed suit against the Attorney General and the Franklin Center intervened. During negotiations, the Franklin Center narrowed the scope of its request which meant that the privilege claims became moot. The appeals court noted that "the Final Report includes no advice, and the record does not support the UT System's assertion that the investigation was conducted for the purpose of rendering legal services to the UT system." The appeals court added that "it is undisputed that the Kroll investigation was undertaken to determine facts, practices, and policies relating to admissions. . .The fact that [employees of the UT system] reviewed the Final Report to make separate decisions about whether to take disciplinary action against any officers or employees does not convert Kroll's investigation into one done for the purpose of facilitating the rendition of legal services." (*Franklin Center for Government and Public Integrity v. University of Texas System*. No. 03-19-00362-CV, Texas Court of Appeals, Austin, Dec. 22, 2020)

The Federal Courts…

Ruling in a class-action suit brought by non-citizens and attorneys against U.S. Citizenship and Immigration Services seeking declaratory judgment to force the agency to respond to their FOIA requests for Alien files within the statutory time limits, a federal court in California has ordered the agency to complete its existing backlog within 60 days and **enjoined** the agency from failing to adhere to the FOIA statutory deadlines in the future. Judge William Orrick also required the agency to provide quarterly compliance reports to the court and class counsel. Orrick emphasized how important getting timely access to Alien files was for immigrants potentially facing deportation. He noted that "adherence to FOIA's timeframes is critical because there is no adequate substitute for the information contained in an A-File and FOIA is the primary, if not the only, mechanism for accessing A-Files. Failure to timely respond to A-File FOIA requests creates an information asymmetry that hinder plaintiffs in successfully applying for immigration benefits, challenging removal orders, or seeking relief from detention." Orrick found that the class members had shown that the agency had a **pattern or practice** of failing to respond within the statutory time limits. Orrick noted that the 1996 EFOIA amendments included a recognition by Congress that agencies should not be allowed to claim that predictable but overwhelming backlogs were a basis for claiming exceptional circumstances. He pointed out that "since 2017 these defendants have employed aggressive immigration enforcement policies that made an increasing workload predictable and expected. The unfortunate reality is that the FOIA is the only realistic mechanism through which noncitizens can obtain A-Files. Given the critical importance of the information in A-Files to removal defense and legalizing status, it is not at all surprising that the number of A-File FOIA requests has increased with this increase in immigration enforcement." Orrick also pointed out that the agency had done little to ask for congressional funding that might address the problem. He observed that "there is no evidence in the record that defendants have even attempted, let alone succeeded, in persuading Congress to change the law or provide additional funds to achieve compliance." (*Zachary Nightingale, et al. v. U.S.*

Citizenship and Immigration Services, Civil Action No. 19-03512-WHO, U.S. District Court for the Northern District of California, Dec. 17, 2020)

Just weeks after the Ninth Circuit ruled that the Tiahrt Rider did not qualify under **Exemption 3 (other statutes)**, a panel of the Second Circuit has adopted the argument expressed by the dissenting judge in the Ninth Circuit – that a later Congress did not have authority to change the clear intent of an earlier Congress to prohibit use of funds by the Bureau of Alcohol, Tobacco, and Firearm to disclose gun trace data by adding an amendment to Exemption 3 requiring that exemptions passed after 2009 must include a reference to the Freedom of Information Act. The Second Circuit decision comes in case brought by Everytown for Gun Safety Support Fund, a gun-control advocacy group funded by Michael Bloomberg. When the case was decided by Judge Alison Nathan of the Southern District of New York, Alison ruled that the Tiahrt Rider had undergone substantive changes when it was reauthorized in 2010 and that to comply with the 2009 OPEN FOIA Act, it was required to reference the FOIA in its text, which it did not. The agency appealed to the Second Circuit. There, the panel consisted of two senior judges – Circuit Court Judge Ralph Winter, who died before the decision was issued, and Circuit Court Judge John Walker – as well as Circuit Court Judge Steven Menashi, who had been appointed by President Donald Trump. The footnote indicating that Winter had died before ruling on the case, explained that "the two remaining members of the panel, who are in agreement, have determined the matter." Writing for the court, Menashi pointed out that "when Congress employed the same anti-disclosure language in the 2010 Tiahrt Rider and later the 2012 Tiahrt Rider, Congress is best understood to have intended that language to continue to exempt FTS data from FOIA disclosure. The interceding enactment of the OPEN FOIA Act's specific-citation requirement does not overcome the elementary principle that Congress uses the same language to accomplish the same objective." (*Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 19-3438, U.S. Court of Appeals for the Second Circuit, Dec. 23, 2020)

Judge Rudolph Contreras has ruled that the Department of Justice properly withheld the report of an independent monitor evaluating the bank HSBC's anti-money laundering and sanctions compliance policies under **Exemption 4 (confidential business information)** and **Exemption 8 (bank examination reports)**. BuzzFeed reporter Jason Leopold requested the report stemming from a 2012 agreement between HSBC and the Money Laundering and Asset Recovery Section of the Department of Justice that was overseen by the Eastern District of New York. In January 2016, Judge John Gleeson of the Eastern District of New York received a request from a third party to unseal the report. Gleeson found the public interest in disclosure outweighed the need for the report to remain sealed. However, the Second Circuit reversed. In 2019, Leopold requested disclosure of the report under FOIA. DOJ withheld the report under Exemption 4 and Exemption 8, as well as under Exemption 6 (invasion of privacy) and Exemption 7 (law enforcement records). Finding that the coverage of Exemption 4 and 8 were broad enough to encompass the entire report, Contreras indicated he would assess only those exemption claims. Leopold argued that while the report probably qualified for the customarily confidential standard adopted in *Food Marketing Institute*, he noted that Judge Gleeson's ruling in 2016 suggested that such information could be protected by appropriate redactions. Contreras found DOJ had made its case here. He pointed out that "the government has established that the Report contains financial and commercial information that is 'customarily and actually treated as private' and that the information was provided to the government under the assurance of confidentiality." As to Exemption 8, Contreras pointed out the report was covered by the exemption. He indicated that "the broad scope of Exemption 8's text covers the Report. Plaintiffs fail to appreciate the implications of the 'related to' portion of Exemption 8, choosing instead to focus on the second half of the exemption. The Court finds that the government's submission makes clear that, at the very least, the Report contains information 'related to examination, operating, or

condition reports' prepared by, or on behalf of, or for the use of the Federal Reserve." Contreras agreed with Leopold on the issue of **segregability**. Ordering the agency to provide a more thorough explanation of whether the report could be segregated, Contreras noted that "the government's segregability statement is particularly brief given the length of the Report [and] Judge Gleeson's findings that suggest that many concerns with disclosure could be addressed through redactions." (*Jason Leopold and BuzzFeed, Inc. V. United States Department of Justice*, Civil Action No. 19-3192 (RC), U.S. District Court for the District of Columbia, Jan. 13)

The D.C. Circuit has ruled that both the FBI and the district court misunderstood the scope of the *Hubbard* factors for disclosure of sealed court records CNN and other media organizations submitted a FOIA request to the FBI for the Comey Memos, which memorialized then FBI Director James Comey's conversations with President Donald Trump concerning the Mueller investigation of Russian interference with the 2016 Presidential election. The FBI denied the records under Exemption 7(A) (interference with ongoing investigation or proceeding), but after the Justice Department disclosed redacted versions of the Comey Memos to members of Congress, who disclosed them to the media, the FBI withdrew its Exemption 7(A) claim. The parties then moved for summary judgment once again and the FBI provided an *ex parte in camera* declaration written by Deputy Assistant FBI Director David Archey, who supervised all FBI employees working on the Russian interference investigation. CNN asked for an unredacted version of the Archey declaration, and the FBI filed a redacted public version instead. The district court ruled that the FBI had properly redacted the Comey Memos to protect intelligence sources and methods. Further, the district court found that CNN had a common-law right of access to the remaining 41 words still redacted from the Archey Declaration. The only issue remaining before the D.C. Circuit was whether the district court erred in ordering the FBI to disclose the remainder of the Archey Declaration. The FBI argued that the district court erred in concluding that the Archey Declaration was a judicial record. Writing for the D.C. Circuit, Circuit Court Judge Justin Walker indicated that "if the goal in filing a document is to influence a judge's decisionmaking, the document is a judicial record." He observed that "here, the purpose *and* the effect of the Archey Declaration was 'to influence a judicial decision.' The whole point of filing the Archey Declaration was to help the FBI demonstrate to the court the national security interests at stake in the case. And it worked." Having concluded that the Archey Declaration was a judicial record, Walker turned to whether the six *Hubbard* factors had been applied properly. Reviewing the six factors, he found the district court had misinterpreted them. For example, the first factor deals with the public interest in disclosure. Walker noted that "the first factor should consider the public's need to access the information that remains sealed, not the public's need for other information sought in the overall lawsuit." He also rejected the district court's finding that the FBI's claims for keeping the declaration sealed did not carry as much weight as would those of a third party. Instead, Walker pointed out that "the FBI is no ordinary agency. The National Security Act requires the FBI to keep intelligence sources and methods confidential." Sending the case back to the district court, Walker observed that "our ruling does not mean that the Archey Declaration should remain redacted. Rather, we remand for the district court to reapply the *Hubbard* factors 'in light of the relevant facts and circumstances of this particular case.'" (*Cable News Network v. Federal Bureau of Investigation*. No. 19-5278, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 8)

A federal court in Colorado has ruled that the Bureau of Land Management **conducted an adequate search** in response to a 2017 FOIA request from Rock Mountain Wild for records concerning whether specific identified parcels were being considered for oil and gas leases. The list of specific identified parcels was based on BLM's public announcement. The agency conducted searches for the parcel numbers, but in his first ruling in the case, Judge William Martinez faulted the agency for failing to search for records for several parcels that had also been considered but did not make the final list. After Martinez ordered the agency to search for those parcel numbers as well, the agency conducted a second search. That search yielded an

additional 37 pages, which were produced to Rocky Mountain Wild. Rocky Mountain Wild argued that the second search was too narrow and that if the agency used the same search terms as in the initial search it would have located more records. Martinez disagreed. He noted that "even assuming that the Court's directive *could* be liberally construed to include taking new custodians to search for records relating to the New Parcels and the Proposed Parcels, the Court finds that BLM's search was reasonable under the circumstances." The agency staffer who oversaw the second search had decided that two employees who had records responsive to the first stage search were not likely to have any further records because the staffer found their records were duplicative of those collected from the other 30 custodians whose records were searched. Martinez pointed out that "it is conceivable that [those two employees] may have additional documents that have not been captured by the Prior Searches and BLM's search for records relating to the New Parcels. However, 'the issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate, which is determined under a standard of reasonableness, and is dependent upon the circumstances of the case.'" He noted that 'based on the totality of the facts of this case, the Court concludes that BLM acted in good faith and expended extensive efforts to comply with Rocky Mountain Wil's FOIA request and the Court's directive. Rocky Mountain Wild has not produced evidence contradicting the adequacy of BLM's search or evidence of BLM's bad faith. Thus, the Court finds that BLM's search, which was reasonable in scope and intensity, complies with its FOIA obligations." (*Rocky Mountain Wild v. United States Bureau of Land Management*, Civil Action No. 18-0314-WJM-STV, U.S. District Court for the District of Colorado, Dec. 30, 2020)

A federal court in Oregon has ruled that the Bonneville Power Administration, which is overseen by the Department of Energy, properly withheld records from Jerome Berryhill concerning the agency's decision to trim trees on his property, which included an easement for use by the agency, because they were privileged under **Exemption 5 (privileges)**. BPA maintained two sets of 115-volt transmission wires that crossed Berryhill's property. Under the terms of the easement, BPA is authorized to perform maintenance on the property to prevent vegetation and other objects from interfering with the transmission lines. BPA informed Berryhill that trees on his property had grown too tall and needed trimming. Berryhill initially disputed whether the trees the agency wanted to trim were actually part of the easement. As a result, the agency had a survey conducted and permanently marked the boundaries of the easement. Although Berryhill and BPA officials met to discuss the trimming project, Berryhill disagreed with the agency's plan. After hearing nothing further from Berryhill, BPA went ahead and trimmed the trees. Berryhill then submitted a FOIA request for records concerning his property. BPA located 453 pages of responsive records and redacted 28 pages. Berryhill filed an administrative appeal. The agency upheld the redactions under Exemption 5 and Berryhill filed suit. The found that the redactions were appropriate under the deliberative proves privilege and the attorney-client privilege. Berryhill argued that the agency trimmed the trees as a way to retaliate against him for disagreeing with its plans. But the court pointed out that "on their own, these allegations are insufficient to warrant disclosure of privileged information. Berryhill must produce more than just 'unsubstantiated assertions of Government wrongdoing' to establish a meaningful evidentiary showing, and he has not done so here." (*Jerome Boyd Berryhill v. Bonneville Power Administration*, Civil Action No. 19-02001-SB, U.S. District Court for the District of Oregon, Dec. 23, 2020)

With one exception, Judge James Boasberg has ruled that the IRS has **conducted an adequate search** for records concerning the identity of a whistleblower who revealed the existence of a tax fraud scheme by Thomas and Beth Montgomery. The litigation has focused on the identity of the whistleblower, which the IRS withheld under **Exemption 7(D) (confidential sources)**, but the Montgomerys have continued to successfully challenge various aspects of the agency's search pertaining to the multi-part request, allegations that have prolonged the litigation to this point. But with the exception of the Montgomery's claim that the agency had not explained why it had not searched the emails of four agency employees, this time Boasberg

sided with the agency. In describing the breath of the agency's searches, Boasberg noted that "specifically, it investigated three electronic databases containing various tax records – including reportable-transaction disclosures, tax-shelter registration applications, and material-advisor-disclosure statements – using keywords Thomas and Beth Montgomery's names and social-security numbers, along with the names of tax-identification numbers of four associated entities." He observed that "the agency has also recited the magic words that were conspicuously absent throughout its last summary-judgment bid – namely, that 'it has searched all locations/systems reasonably likely to contain records responsive to [the request].' That assertion, or something akin to it, is a critical prerequisite to any determination that the IRS performed an adequate search." He added that "in the absence of these or other red flags, the mere fact that the IRS uncovered less than the Montgomerys hoped does not render its search unreasonable." Boasberg agreed that the IRS had not shown that it had searched the email accounts of four employees the Montgomerys had identified, even though the agency characterized their involvement as peripheral. Boasberg pointed out that "while the agency need not perform a search just because the Montgomerys suggest it, the Service cannot establish an adequate investigation simply by gesturing to past inquiries into peripheral employees' records when Plaintiffs identify other repositories seemingly more likely to contain relevant information." (*Thomas A. & Beth W. Montgomery v. Internal Revenue Service*, Civil Action No. 17-918 (JEB), U.S. District Court for the District of Columbia, Jan. 5)

In two separate but related cases, federal courts in Washington have ruled that immigration attorney Katherine Honor Rich is not entitled to **attorney's fees** for her FOIA suits against U.S. Citizenship and Immigration Services and the Executive Office for Immigration Review filed after the agencies failed to respond to her requests within the statutory time limits. Ruling against Rich in her case against USCIS, the court noted that "Ms. Rich's only argument for eligibility is a temporal one. She contends that she had not received the requested documents before the filing of this suit, and the government subsequently released the records." The court indicated that "without more, Ms. Rich has not shown that she is eligible for attorney's fees." In her suit against EOIR, the court pointed out that the Supreme Court's ruling in *Kay v. Ehrler*, 499 U.S. 432 (1991), foreclosed giving attorney's fees to pro se attorneys and that Rich had not indicated that she was requesting the records on behalf of a client. The court also indicated that since Rich had not shown that she substantially prevailed, she was not eligible for her costs of filing as well. (*Katherine Honor Rich v. United States Citizenship and Immigration Services*, Civil Action No. 20-0813-JLR, U.S. Court for the Western District of Washington, Dec. 21, 2020 and *Katherine Honor Rich v. Executive Office of Immigration Review*, Civil Action No. 20-1220-RAJ-MLP, U.S. District Court for the Western District of Washington, Jan. 6)

Judge Amy Berman Jackson has ruled that Harris Ballow **failed to exhaust his administrative remedies** in connection with his FOIA suit against the Department of State for records concerning his extradition from Mexico in 2011. The agency did not become aware of Ballow's request until he filed suit. The agency conducted searches in their FOAXpress and FREEDOMS 2 databases using Ballow's name and "Mexican extradition" in the description line. The agency found no record of any request received from Ballow. Although Berman Jackson extended the deadline for Ballow to respond, he failed to file an opposition. Berman Jackson nevertheless addressed the agency's summary judgment motion. She noted that the agency's affidavit "outlines the State Department's procedures for handling FOIA requests, identifies the databases where information about a FOIA request is maintained, and describes the multiple searches agency staff conducted in an attempt to locate a FOIA request it was supposed to have received from plaintiff in or about October 2019. Thus, absent any showing by plaintiff to the contrary, defendant demonstrates that it conducted reasonable searches for a FOIA request from plaintiff but did not locate one." She pointed out that "

in the absence of a proper request, the State Department's failure to release responsive records would not

violate FOIA because plaintiff has not exhausted his administrative remedies." (*Harris Ballow v. U.S. Department of State*, Civil Action No. 19-3828(ABJ), U.S. District Court for the District of Columbia, Jan. 5)

Judge Christopher Cooper has ruled that Dr. Yanping Chen may subpoena the cell phone records of U.S. Army Chief Warrant Officer Stephen J. Rhoads as part of her **Privacy Act** suit against the FBI for disclosing personal records seized from her home by the FBI and then leaked to Fox News but will modify the subpoena to protect Rhoads' privacy interests. Chen is a naturalized U.S. citizen and the founder of the University of Management and Technology, an educational institution that historically attracted a significant number of military servicemembers who attended with tuition assistance for the Department of Defense. Rhoads is an Army officer and a former employee of UMT. Starting in 2010, Chen was the focus of an FBI investigation concerning statements she made on immigration forms about her work in China in the 1980s. Rhoads cooperated with the FBI during its investigation and became a source for Fox News, which broadcast several pieces about Chen's case in 2017. As part of her Privacy Act suit, Chen subpoenaed T-Mobile for access to Rhoads' cellphone records. Rhoads moved to quash the subpoena. Cooper noted that "the notion that Rhoads was involved in disclosing Chen's records, while admittedly unproven, it is not based on mere speculation. The evidence . . .shows that Chen has a good-faith basis to believe Rhoads may have disclosed the documents himself or otherwise played a role in the leak." He explained that "Rhoads's call and text logs may provide material circumstantial evidence. . .The facts may or may not bear out that scenario. The arrangement is not implausible, however, and, if proven, would be highly relevant to the merits of Chen's Privacy Act claim." However, Cooper set limits on the subpoena, narrowing "the temporal scope of the subpoena to the period relevant to Chen's lawsuit" and requiring "T-Mobile to produce the subpoenaed records to Rhoads and to the Court, not directly to Chen." (*Yanping Chen v. Federal Bureau of Investigation, et al.*, Civil Action No. 20-mc-107 (CRC), U.S. District Court for the District of Columbia, Dec. 24, 2020)