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Washington Focus: Frosty Landon, co-founder of the Virginia Coalition for Open Government and VCOG's first executive director, died July 18 at the age of 87. After retiring as editor of the Roanoke Times in 1995, Frosty committed his energies to the crusade of substantially revising the Virginia Freedom of Information Act to make it more accessible and enforceable, using the New York Freedom of Information Law as the primary model. I had the privilege of serving on the VCOG board during that time, quickly recognizing that Frosty was the ideal person to lead the fight. His indomitable energy and insight were largely responsible for Virginia's revision of the VFOIA, a statute that, when Frosty began, was mediocre at best, and then became one of the best of the state statutes. At the time when I was working with him closely, I considered Frosty one of my best and closest professional friends and I am very lucky to have had the chance to know him as well as I did. He was a true giant in his field and will be sorely missed.

Response From State Department Does Not Moot Litigation Against USCIS

A federal court in New York has concluded that U.S. Citizenship and Immigration Services cannot moot FOIA litigation brought by the International Refugee Assistance Project against USCIS and the Department of State on the basis that the State Department's independent response to IRAP's request included records that were potentially responsive to IRAP's request to USCIS as well. Because it claimed that the State Department's response provided some of the same records responsive to IRAP's request to USCIS, that agency asked the court to moot the case as it applied to USCIS on the theory that once a requester receives responsive records, it no longer has a cause of action. While it is certainly possible that an agency's actions during litigation can satisfy its FOIA obligations such that it can be dismissed as a party, a claim that an agency's FOIA obligations can be mooted by the actions of a separate, albeit related, agency's response, is rarely the focus of litigation.

IRAP was representing J.D., an Afghan citizen seeking relocation in the United States in order to avoid persecution by the Taliban as a result of his status as a humanitarian worker.

USCIS denied J.D.'s application for resettlement. IRAP then requested a discretionary review, which is still pending. To prepare for the discretionary review. IRAP submitted FOIA requests to USCIS and the Department of State for records concerning J.D.'s refugee resettlement application. The State Department told IRAP that some or all of the requested records originated with USCIS, while USCIS told IRAP that it had no responsive records. IRAP filed suit. DOS responded to the separate request it received from IRAP by disclosing records with redactions. As a result, USCIS moved to dismiss the suit, arguing that DOS's response mooted the case.

In its request to USCIS, IRAP specifically asked the agency to search its Worldwide Refugee Admissions Processing System (WRAPS). Instead, the agency searched two databases that IRAP had not asked to be searched – the Central Index System (CIS) and the Computer Linked Application Information Management System (CLAIMS) – and found no responsive records. IRAP filed an administrative appeal, contending that the agency was obligated to search the WRAPS database. This time, USCIS searched the CIS database, and another database – the Person Centric Query System – and still found no records. However, this time, USCIS indicated that responsive records might be in the custody of DOS. Although IRAP had insisted that the agency was obligated to search the WRAPS database, the agency admitted that it did not do so.

In response to a separate request to DOS, the agency initially disclosed three records, totaling 20 pages. When IRAP filed an administrative appeal, DOS located 55 additional documents, totaling 263 pages. Of those additional documents, DOS disclosed 12 documents in full, disclosing the remaining 43 documents with redactions. USCIS then argued that because DOS had disclosed all records it contended were responsive to IRAP's request, IRAP's FOIA request to USCIS was now moot as well.

Magistrate Judge Robert Lehrburger disagreed. He pointed out that "USCIS has not met its heavy burden of demonstrating that this case is moot." He indicated that "disclosure by one agency does not moot a lawsuit against a different agency for the same records – not as a general principle of FOIA law and not in this case. Second, even if USCIS could establish, as a general matter, that disclosure by one agency moots a lawsuit against another agency, it would not help USCIS here, because DOS's disclosure contains redactions, USCIS cannot establish that IRAP has received all of the requested records, and thus that no dispute remains between the parties even with respect to J.D.'s records. And third, IRAP has adequately pleaded a policy-or-practice FOIA violation, which defeats mootness as to a specific request."

At the beginning of his analysis, Lehrburger noted in a footnote that the case before him differed significantly from the circumstances in which an agency responded to a request to another agency that had been referred to that agency as a part of its administrative process. He observed that "the circumstances of this case – where disclosure by a different agency than the one that is subject to the lawsuit – is distinct from the context of a proper referral, where one agency refers a request to another agency, but remains ultimately responsible for fulfilling the request. In that context, disclosure by a second agency to which the request was sent, not a 'separate agency.' If USCIS had properly referred the requests at issue here, which it did not, the outcome may have been different."

IRAP challenged the adequacy of USCIS's failure to search the WRAPS database. In response, the agency asserted that all non-exempt records had been disclosed by DOS. However, Lehrburger noted that "but the sufficiency of *DOS's* production is not before the Court." He added that "the issues presented in this case are still 'live.' IRAP has a 'legally cognizable interest' in, among other things, ensuring that no agency records are improperly withheld due to an inadequate search. In fact, it is possible for the Court to grant the exact relief that IRAP seeks – compel USCIS to conduct an adequate search and disclose all responsive records and review the propriety of any withholdings or redactions." Because DOS had discovered additional responsive records during a second search, Lehrburger indicated that "it is reasonable to assume that more

records related to J.D. may have been added to WRAPS since January, which this Court can order disclosed. There is thus a real possibility of additional 'effectual relief' that this Court could grant."

He noted that "outside of arguing that the original search was inadequate, that consideration would not give a plaintiff standing to sue an agency that has already responded to a request; otherwise. a requestor would have an indefinite right to sue to compel subsequent searches. Bur in the context of a lawsuit against a different, non-responsive agency filed before any disclosure was made by either agency, the consideration is relevant to whether there is a live dispute between the parties and any effectual relief the Court can grant."

Although he found no cases directly on point, Lehrburger indicated that the Supreme Court's decision in *Dept of Justice v. Tax Analysts*, 492 U.S. 136 (1989), supported his conclusion. He pointed out that "the Court's discussion of the exclusivity of the enumerated exemptions, its dismissal of concerns about 'redundant disclosure,' and the distinction it draws between previous disclosures by the defendant agency versus 'some other person or group' (in that case, the district courts), is quite relevant to the questions presented here." He added that "despite *Tax Analysts*' rejection of the DOJ's argument that FOIA does not require 'redundant disclosures,' USCIS argues to the contrary that separate agencies should not be forced 'to process duplicate records.'" He explained that "*Tax Analysts*, however, seems unconcerned with that consideration – the Court required the defendant agency to use its resources to disclose records that had already been publicly disclosed and noted Congress' awareness that redundancies 'might exist when requested materials have been previously made available.'"

Finding that USCIS had failed to carry its burden of proof, Lehrburger pointed out that "the novel rule of mootness that USCIS seeks here would have negative consequences that run counter to the purposes of FOIA. It would discourage requestors from seeking records from multiple agencies when the requestor is unsure which agency may possess the responsive records. An agency would be relieved of its duty to respond to a request simply because another agency processed a similar request, regardless of what that other agency disclosed (if anything) in response to the request." (*International Refugee Assistance Project, Inc. v. United States Citizenship and Immigration Services*, Civil Action No. 20-4284 (RWL), U.S. District Court for the Southern District of New York, July 22)

Views from the States…

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

California

A court of appeals has ruled that San Diego County properly withheld records identifying the locations of COIVD-19 outbreaks under the catch-all exemption that allows a public body to withhold records after determining that the harms caused by disclosure of the records outweighs the public interest in disclosure. Responding to requests from the Voice of San Diego, KPBS Public Broadcasting, and the *San Diego Union* for records identifying outbreaks of COIVD-19 in the county, San Diego County withheld data identifying the specific locations out outbreaks, arguing that disclosure would discourage businesses from reporting outbreaks if they knew such information would become publicly available. The media coalition filed suit and the trial court ruled in favor of the County. The media coalition then filed an appeal. The appeals court also sided with the County. The media coalition argued that the County's affidavit from Dr. Wilma Wooten, who had been the County's Public Health Officer since 2007, overestimated the effect of disclosure on contact tracing

and was contrary to the way the same type of location information had been treated by Los Angeles County. The appeals court disagreed, noting that "as the County has established, contact tracing is a major pillar in the fight against the spread of disease in the COVID-19 pandemic and the voluntary and public cooperation with contact tracing will occur only if the public is assured that information provided during contact tracing will be kept confidential." Finding the public interest in withholding the data outweighed the public interest in disclosure, the appeals court noted that "although members of the public understandably are interested in learning the exact location of COVID-19 outbreaks, the disclosure of the information does little to advance either the public's ability to avoid COVID-19 infection or the public's understanding of whether the government is taking appropriate steps to address the pandemic. (*Voice of San Diego, et al. v. Superior Court of San Diego County; County of San Diego, Real Party in Interest*, No. D078415, California Court of Appeal, Fourth District, Division 1, July 16

Pennsylvania

The supreme court has ruled that the Department of Health violated the Right to Know Law when it shifted the burden of responding to media requests for medical marijuana grower and dispensary permits onto the applicants. The supreme court also found that the applications were subject to disclosure under the RTKL, but that records were properly redacted under the exemption for facility security information and the trade secrets exemption. The supreme also found that the appeals court had erred in finding that financial information contained in applications was not exempt. In responding to the media requests, the DOH referred requests to redacted applications available on its website but provided no further information. The media requesters complained to the Office of Open Records, which allowed applicants to intervene to defend their confidentiality claims. OOR concluded that most of the records were subject to disclosure except for trade secret claims made by one applicant, Terrapin, and generalized redactions under the constitutional right of privacy recognized in case law by the supreme court. The appeals court accepted Terrapin's facility security claims and minimally redacted trade secrets claims made by several applicants. The supreme court faulted the DOH for accepting applicants' exemption claims and failing to review them independently. The supreme court noted that "simply stated, to effectuate the mandate of the RTKL and its underlying purposes, a government agency cannot blindly defer to the determination of private entities as to what information is exempt from disclosure under the RTKL." While it showed some sympathy to one applicant's claim that potentially applicable exemptions should be applied industry-wide regardless of whether individual applicants had supported their exemption claims, the supreme court pointed out that "to adopt [the applicant's] approach would place the primary burden on the OOR and the Commonwealth Court to discern the applicability of evidence to similarly-situated entities, and would stand on its head the burden the RTKL places on the agency and individual third parties to establish exemptions from disclosure ." The supreme court found that OOR and the Commonwealth Court had erred in failing to consider one applicant's claims that its financial information was protected. The supreme court noted that "after [the applicant] supported its proffered exemptions regarding disclosure confidential financial information. . .it was incumbent upon the OOR, and, ultimately, the Commonwealth Court, to consider the alleged exemptions applicable to such financial information. . ." (*Wallace McKelvey, et al. v. Pennsylvania Department of Health, et al.*, No. 3 MAP 2020, No. 4 MAP 2020, and No. 5 MAP 2020, Pennsylvania Supreme Court, July 21)

The Federal Courts…

James Boasberg has ruled that the U.S. Small Business Administration properly withheld DUNS numbers and borrower tax-identification numbers from a media coalition headed by the Washington Post under **Exemption 4 (commercial and confidential)** and **Exemption 6 (invasion of privacy)** for later-

discovered records responsive to the media coalition's FOIA requests for records pertaining to companies receiving funds under the Paycheck Protection Program, but that the agency has not so far justified its decision to withhold interim tax-status information and borrower tax-identification numbers. In a series of 2020 decisions, Boasberg rejected large portions of SBA's Exemption 4 and Exemption 6 claims, and, subsequently, awarded the media coalition attorney's fees. However, the current decision focused on similar types of records the agency discovered after the litigation appeared to be wrapped up. Boasberg first turned to whether the interim loan-status information could be considered confidential under the Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), which required the government to show that the submitter customarily treated the information as confidential and had a legitimate expectation of confidentiality from the agency. Boasberg pointed out that "SBA did not contact a single lender and inquire how it actually and customarily treats interim loan-status information. Indeed, the Government has not made any particularized showing whatsoever with respect to the lenders that disbursed PPP funds." Boasberg considered this failure to be a fatal flaw in the agency's argument. He noted that "at bottom, the Government must do *something* to establish how the particular information providers customarily and actually treat the relevant material." The agency argued that it was not practicable for it to obtain confidentiality practices for thousands of participating lenders. But Boasberg pointed out that "yet nowhere does the Government suggest that it could not obtain such statements from *some* lenders. Indeed, in 2021, the top fifteen PPP lenders accounted for over half (52 %) of all loans approved and nearly a third (32%) of net dollars approved. A survey of that small yet meaningful subset of lenders, along with credible substantiation of any individual lender's claim of customary and actual confidentiality with respect to interim PPP loan status, would go a long way toward bringing that material within Exemption 4's sweep." He added that "at present, however, the agency's decision to eschew a party-specific inquiry of *any* scope – despite Plaintiffs' highlighting the issue in their Cross-Motion – only raises questions about whether PPP lenders truly consider and treat the relevant information as confidential." Boasberg then found that the DUNS numbers qualified as both commercial and confidential information. The media coalition argued that Dun & Bradstreet allowed the General Services Administration to access DUNS numbers where needed for purposes of dealing with government contractors. But Boasberg observed that "D&B's decision to provide the Government with limited publication rights for a 'specific subset' of DUNS numbers. . .does not mean that the company has surrendered any claim of customary confidential treatment regarding the overwhelming remainder of its proprietary database, particularly the millions of distinct numbers for PPP borrowers that the D&B-SBA license agreement expressly prohibits the agency from disclosing." Boasberg also agreed with the agency that some Social Security number data was probably inadvertently mixed with non-exempt data, allowing the agency to withhold such information under Exemption 6. (*WP Company, LLC d/b/a The Washington Post, et al. v. U.S. Small Business Administration*, Civil Action No. 20-1240 (JEB), U.S. District Court for the District of Columbia, July 15)

Judge James Boasberg has ruled that the Department of Justice properly withheld records from journalist Jason Leopold in response to two FOIA requests – one concerning congressional inquiries about text messages between FBI agent Peter Strzok and FBI attorney Lisa Page and the second seeking legal opinions pertaining to Robert Mueller's Congressional testimony – under **Exemption 5 (privileges)**. The agency located 611 pages responsive to the Strzok/Page text request, disclosing 516 pages in full and 95 in part. The agency discovered an additional 124 responsive pages, withholding three pages under the deliberative process privilege, and 121 pages in full under the attorney-client privilege. In response to the request on legal opinions pertaining to Mueller's congressional testimony, the Office of Legal Counsel located 312 responsive pages. It released 65 pages in part and withheld 16 pages in full under Exemption 5. Another 231 pages were referred to the Office of Information Policy, which released 114 pages with redactions, withheld 38 pages in full under Exemption 5 and found the remaining 79 pages were duplicates. By the time Boasberg ruled, Leopold's only

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remaining challenge was to whether the agency had sufficiently explained its **foreseeable harm** claims. Boasberg indicated that the issue here was whether the agency could use a categorical – as opposed to a document-by-document –approach, and if so, had it appropriately done so here. Boasberg pointed out that the recent D.C. Circuit opinion in *Reporters Committee for Freedom of the Press v. FBI*, 2021 WL 2753938 (D.C. Cir. July 2, 2021), found that, in the context of the deliberative process privilege, "agencies may sometimes satisfy [the foreseeable harm] burden on a category-by-category basis. . .that is, group together like records." He noted that "if DOJ can 'concretely explain how disclosure [of a particular category] "would" – not "could" – adversely impair internal deliberations,' therefore, that would be enough for this Court to rule in the Government's favor." Leopold argued that the agency's foreseeable harm explanations were boilerplate because they were frequently repetitive. Boasberg rejected the argument, noting that "while 'nearly identical boilerplate statements' of harm are insufficient, the mere recitation of similar reasoning in showing harm does not by itself render that reasoning 'boilerplate.' If Defendants can specifically and successfully argue why a given reason applies to one category, the Court will not require a completely different rational for others." Applying the foreseeable harm standard to the redactions made in response to Leopold's two requests, Boasberg indicated that "instead of cutting and pasting boilerplate explanations, it carefully outlines the specific foreseeable harm that would be caused by release of [these] particular documents." (*Jason Leopold and BuzzFeed, Inc. v. United States Department of Justice*, Civil Action No. 19-2796 (JEB), U.S. District Court for the District of Columbia, July 23)

Judge James Boasberg has rejected the Department of Justice's to apply **Exemption 7 (D) (confidential sources)** and **Exemption 7(E) (investigative methods or techniques)** to categorically withhold at the file level records pertaining to investigations involving Donald Trump before he became President. Trying to resolve the remaining dispute in litigation brought by Property of the People and researcher Ryan Shapiro for records pertaining to investigations involving Trump before he was President, Boasberg addressed the FBI's claim that Exemption 7(D) and Exemption 7(E) applied to categorically exempt the remaining two disputed files. After originally rejecting the agency's invocation of a *Glomar* response neither confirming nor denying the existence of records, Boasberg had ordered the FBI to search for records. The agency located 4,205 responsive pages, withholding 1,554 pages in part and 988 pages in full under several FOIA exemptions. By the time Boasberg ruled again, the only issue remaining was the categorical use of Exemption 7(D) and Exemption 7(E) to withhold the two files. Property of the People and Shapiro argued that the agency should be required to provide **segregable** portions of the files. Boasberg explained that "as there is little precedent regarding the Government's novel approach of categorically involving Exemption 7(D) and 7(E) at the file level, the Court will seek guidance from discussions if similar arguments offered for the related **Exemption 7(A) (interference with ongoing investigation or proceeding)**. He noted that "the legislative history of Exemption 7 speaks volumes here. Congress was partially motivated to amend this exemption to avoid courts' 'erroneously' permitting file-level withholding and to have courts instead 'consider the nature of the particular document as to which the exemption was claimed.'" He indicated that "a category-of-document by category-of-document' approach is permitted, but a 'file-by-file' approach is not." Boasberg agreed with Property of the People and Shapiro that the FBI's withholding explanation described application of the exemption at the file-level only. He pointed out that "although most, if not all, of the documents may ultimately be withheld, defendant must now either provide a *Vaughn* Index or define the relevant categories, determine which category each document belongs in, and state how disclosure would harm law-enforcement proceedings for each category." Having rejected the FBI's attempt to claim the file-level exemption, Boasberg indicated that the agency needed to reconsider the segregability issue as well. He observed that "in light of the Court's rejection of that approach, however, it follows that the Government should revisit its decisions on segregability during its category review and release any reasonably segregable portions." (*Property of the People, et al. v. Department of Justice*, Civil Action No. 17-1193 (JEB), U.S. District Court for the District of Columbia, July 20)

A federal court in New York has ruled that the CIA properly withheld records about the Manchester Manual, an al Qaeda training manual that law enforcement recovered from the home of an al Qaeda suspect in Manchester, England in 2000, and which the CIA later used in developing the 'enhanced interrogation techniques' it applied to certain detainees following the 9/11 attacks under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**, but that a memo pertaining to the enhanced interrogation technique is not protected by **Exemption 5 (privileges)**, relying on the deliberative process privilege. Journalist Raymond Bonner submitted a FOIA request for use in preparing a documentary on the 20th anniversary of the 9/11 attacks. Bonner also requested expedited processing, which was denied. By the time Judge Jesse Furman ruled in the case, the only records remaining in dispute were three documents. The CIA withheld two documents using Exemptions 1 and 3. One document contained the Mitchell Report, a report written by Dr. James Mitchell and Dr. John Jessen that created the enhanced interrogation techniques to be used in interrogating al Qaeda terrorist suspects. The CIA also withheld a Classified Cable, containing references and quotations from open-source reporting on various topics related to global terrorism. Bonner argued that the Mitchell Report had been officially acknowledged. Furman disagreed, noting that "put simply, Bonner does not '[point] to specific information in the public domain that appears to duplicate that being withheld.'" Furman also found that the agency had shown that the Classified Cable met the foreseeable harm standard. He pointed out that "here, as the CIA explains, the classified nature of the intelligence report contained within the Classified Cabe Correspondence makes it impossible to describe its 'specific subject matter. . .on the public record without revealing exempt information.' In light of that explanation, and the Court's *in camera* inspection of the CIA's classified declaration containing 'more detailed information about the substance of [the Classified Able Correspondence],' the Court concludes that the CIA meets its burden of establishing that any reasonably segregable, non-classified portions of the Classified Cable Correspondence are [exempt]." The third document was a draft intelligence report of a terrorism open-source intelligence report prepared on a weekly basis. Even though the CIA relied on *National Security Archive v. CIA*, 752 F.3d 460 (D.C. Cir. 2014), for the proposition that a draft history "helps educate future agency decisionmakers" in the same way that the draft intelligence report might educate future recipients. However, Furman noted that "an agency's official history also 'constitutes the agency's "official statement" concerning the agency's prior actions' and 'makes recommendations for policy changes going forward" and is thus readily distinguishable from the collection of open-source reporting for general 'background use' by governmental personnel." (*Raymond Bonner v. Central Intelligence Agency*, Civil Action No. 19-9762 (JMF), U.S. District Court for the Southern District of New York, July 28)

A federal judge in New York has ruled that the Department of Justice properly reprocessed a request from *New York Times* reporter Charlie Savage after the Second Circuit told DOJ to reconsider its original processing of the request. Savage originally requested records on an investigation by Connecticut Assistant U.S. Attorney John Durham into whether the CIA's detainee interrogations conducted abroad were legal, including the CIA's decision to destroy video tapes of the interrogations. Durham ultimately decided not to bring charges and when Judge Paul Oetken issued his first ruling, there were five disputed memoranda remaining, which the agency withheld under **Exemption 3 (other statutes)**, citing Rule 6(e) on grand jury secrecy. Oetken also found that DOJ could not claim traditional common-law privileges for three memoranda because Attorney General Eric Holder had expressly adopted their reasoning as his final decision. On appeal, the Second Circuit ruled that the express adoption exception did not apply because Durham's prosecutorial determinations were non-precedential and not binding on the public. However, the Second Circuit also found that some of Holder's statements were specific enough that they waived the work-product privilege. As a result of the Second Circuit's holding, DOJ released a redacted version of the Preliminary Review Memorandum, claiming it was the only memo implicated by the work-product waiver found by the Second Circuit. Savage argued that DOJ had interpreted the Second Circuit's waiver too narrowly. Oetken found that

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Savage's interpretation was more accurate but noted that the agency had since agreed to disclose information consistent with Savage's interpretation. He pointed out that "the Court is aware of no reason why the Government may not clarify its position in later briefing, as it has done here." Oetken then found that the agency's Exemption 3 claim for withholding the identities of certain individuals was appropriate. He noted that "given that the Government has made a plausible case that disclosing names. . .would reveal information falling into two of these six categories, Exemption 3 offers an alternative basis for the Government to withhold the names in question." (*New York Times Company and Charlie Savage v. United States Department of Justice*, Civil Action No. 14-3777 (JPO), U.S. District Court for the Southern District of New York, July 23)

A federal court in New York has ruled that while the CIA properly invoked a *Glomar* response neither confirming nor denying the existence of records in response to several portions of a multi-part request from the Open Society Justice Initiative sent to fourteen agencies that are part of the intelligence community for records pertaining to their earliest responses to the COVID-19 pandemic. Judge Jesse Furman found that the CIA's *Glomar* response, which was based on **Exemption 1 (national security)** and **Exemption 3 (other statutes)**, was appropriate for a handful of topics contained in OSJI's FOIA request and that the agency had not **waived** its ability to claim a *Glomar* dense, but that for other topics the agency has so far failed to justify its *Glomar* response. OSJI argued that a press release issued to explain the way in which the intelligence community would address its role in understanding and managing the pandemic constituted a waiver of its activities in this regard. However, Furman disagreed, indicating that OSJI's official acknowledgement claims did not meet the standards articulated by the Second Circuit in *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009), in which the Second Circuit set out a three-part test for determining whether information had been officially acknowledged – (1) the information must be as specific as that previously released, (2) it must match the information previously disclosed, and (3) the information must have been made public through an official and documented disclosure. Furman pointed out that OSJI's FOIA request "does not seek information pertaining to whether the CIA or other parts of the Executive Branch had a response when they first learned of COVID-19. Instead, it seeks more specific information whether the CIA possesses records relating to the Executive Branch's response to COVID-19 *when the Executive Branch* was first informed of the disease. Nothing in the Press Release speaks to the response of the Executive Branch writ large (not to mention any component thereof) when it first became aware of COVID-19, let alone to whether the CIA possesses records on that subject." Furman also rejected OSJI's contention that the press release implied that the intelligence community had been in communication with the White House. Instead, he noted that "but such speculation, however, does not suffice to establish official acknowledgement." Furman then found that the CIA had justified its *Glomar* response as to five topics but not to the others. He indicated that "to hold otherwise, and to accept the CIA's *Glomar* response based on little more than its say so, would be to create a wholesale 'CIA exception' to FOIA, which Congress itself has not done. Judicial deference in the area of national security is certainly warranted. But 'deference is not equivalent to acquiescence.'" Rather than dismissing the agency's *Glomar* responses, Furman allowed the agency to submit a more targeted justification. (*Open Society Justice Initiative v. Department of Defense, et al.*, Civil Action No. 20-5096 (JMF), U.S. District Court for the Southern District of New York, July 15)

Judge Randolph Contreras has ruled that U.S. Immigration and Customs Enforcement properly responded to a request to the Advancement Project's FOIA request for records concerning visa sanctions against countries who refuse to accept aliens who are citizens and who are being returned to their countries of origin. The Advancement Project submitted FOIA requests to the Department of Homeland Security and the Department of State concerning visa sanctions. By the time Contreras ruled, the only dispute remaining was ICE's response to the request. ICE initially claimed it had no records, but after the Advancement Project filed suit, ICE located 569 pages of responsive records, withholding some records in full and other in part. The

Advancement Project only challenged ICE's withholding under **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods or techniques)**. The Advancement Project claimed that records withheld under the deliberative process privilege were not predecisional because they post-dated the visa sanctions press release that formed the basis of the organization's requests. But Contreras pointed out that "the deliberative process privilege's application cannot be reduced to determining mechanically whether a record predates or postdates a particular agency action. Documents 'dated after' one agency decision 'may still be predecisional and deliberative with respect to other, nonfinal agency policies.' And even documents relating to an already-adopted policy may be privileged if they 'recount or reflect' predecisional discussions about policy. Consequently, the predecisional element does not require an agency to pinpoint a specific decision that chronologically follows the records creation; it instead demands that the agency identify a decisionmaking process to which the record contributed." The Advancement Project also argued that the agency had adopted most of the relevant records. Again, Contreras disagreed, noting that the agency "must not merely agree with the document's conclusions but also endorse the document's reasoning. And significantly, the burden to prove adoption lies with the FOIA requester, not the agency. The Project points to no evidence of adoption other than ICE's high-level decision to enact visa sanctions. That is not enough." The Advancement Project also faulted ICE for withholding records related to the agency's strategy for communicating its decision, arguing that such records only explained the policy already enacted. Contreras, however, pointed out that "determining how to explain an agency decision in response to inquiries from the press, Congress, or members of the public is itself a privileged deliberative process." He noted that "ICE was entitled to withhold documents created as it planned how to message the visa sanction decision in response to inquiries from the media and an interested nonprofit." Contreras indicated that because the agency had failed to support its deliberative process privilege claims for three records, it would need to provide a supplementary explanation if it wanted to continue pursuing those claims. The Advancement Project argued that the records had not been compiled for law enforcement purposes, a threshold requirement for Exemption 7 protection. Contreras disagreed, noting that "as a factual matter, ICE does enforce federal criminal laws. And, more fundamentally, Exemption 7(E) protects records relating to the enforcement of not just criminal laws but civil laws too." Applying that principle here, Contreras noted that "the connection between ICE's law enforcement duties and records created to manage its efforts to detain and remove noncitizens is self-evident." He found that two of the three disputed records sets qualified for protection under Exemption 7(E). He noted that "wrongdoers may well abuse information that provides insight into law enforcement systems." (*Advancement Project v. U.S. Department of Homeland Security, et al.*, Civil Action No. 19-52 (RC), U.S. District Court for the District of Columbia, July 19)

A federal court in Ohio has ruled that, based on records disclosed during FOIA litigation brought by the *Cincinnati Enquirer* based on two FOIA requests for records pertaining to preferential treatment allegedly accorded to a Kentucky Commonwealth Attorney who potentially obstructed justice during the investigation of Ryan Jacobs' drug-trafficking activities, the FBI failed to **conduct an adequate search**. The *Enquirer* requested records on the Jacobs investigation as well as on Operation Speakeasy. In response, the FBI told the *Enquirer* that a keyword search identified no records related to Operation Speakeasy. The agency issued a *Glomar* response neither confirming nor denying the existence of records in response to the *Enquirer*'s request about the Jacobs investigation. The court rejected the *Glomar* defense and ordered the FBI to search for records for *in camera* review. As part of that process, the FBI located a 38-page PowerPoint presentation entitled Operation Speakeasy. Judge Susan Dlott apologized for previously upholding the agency's no records response to the *Enquirer*'s request on Operation Speakeasy. She noted that "the Court now knows that the search was incomplete or inadequate because Defendants submitted to review as part of the Jacobs investigation documents a 38-page PowerPoint presentation entitled Operation Speakeasy. The Summary Judgment Order must be amended. Accordingly, summary judgment is denied to the Defendants on the

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Operation Speakeasy request. Defendants must immediately conduct a new search for [potentially responsive] documents." She added that "given that the Defendants use of the key search term 'Speakeasy' in the NADDIS data index did not find the responsive Operation Speakeasy document, Defendants must conduct a broader search for responsive documents." (*Cincinnati Enquirer v. U.S. Department of Justice, et al*, Civil Action No. 20-758, U.S. District Court for the Southern District of Ohio, July 28)

A federal court in Pennsylvania has ruled that the National Transportation Safety Board properly withheld records concerning several airplane crash investigations from the Wolk Law Firm under **Exemption 4 (commercial and confidential), Exemption 5 (privileges)**, and **Exemption 6 (invasion of privacy)**. Wolk only challenged the agency's Exemption 5 and Exemption 6 claims. The court accepted all the NTSB's claims that records were protected by the deliberative process privilege including two disputed documents that the court reviewed *in camera*. Although Wolk had not contested the agency's attorney-client privilege claims, the court agreed that privilege applied as well. Turning to the Exemption 6 claims, the court noted that the judge in an earlier case brought by Wolk had rejected the law firm's claim that death scene photos were not protected. Here, the court pointed out that "they are of the same nature and subject to the same overriding privacy interests in the documents Judge Robreno found were protected by Exemption 6. For the same reasons, we conclude the NTSB properly withheld the documents." (*The Wolk Law Firm v. United States of American, National Transportation Safety Board*, Civil Action No. 19-1401, U.S. District Court for the Eastern District of Pennsylvania, July 23)

Judge Randolph Moss has ruled that the Department of Justice properly responded to Julio Lopez-Pena's 2019 request for records concerning his prosecution in the Southern District of New York. The agency initially argued that it had not received his 2019 request and Lopez-Pena subsequently admitted that he had misaddressed the request and as a result the request was sent back to him. He then submitted a nearly identical request in 2020 to the correct address and the agency provided an initial response. Lopez-Pena argued that since he had copied the wrong address from a government-posted flyer at the prison library, he should not be penalized for misaddressing the original request. However, Moss pointed out that "it is unfortunate that the bulletin board in the prison law library includes misleading information, but, contrary to Plaintiff's suggestion, nothing in the record indicates that the erroneous flyer was placed in the prison library by any official from the Bureau of Prisons of from any other component of the Department of Justice. In any event, EOUSA did not receive Plaintiff's 2019 request. And EOUSA cannot be expected to respond to FOIA requests that it never receives, even when the requester misdirects the request through no fault of his own." Lopez-Pena also argued that Moss should not dismiss his suit over his 2019 request while the agency was still responding to the identical request from 2020. Moss noted that "the Court has no way of knowing whether Plaintiff is dissatisfied with the Department's response to his 2020 request, he may file a separate lawsuit challenging that response. But his submission of a separate FOIA request cannot salvage this action, which is based on only the 2019 request." (*Julio Lopez-Pena v. United States Department of Justice*, Civil Action No. 19-2884 (RDM), U.S. District Court for the District of Columbia, July 20)

A federal court in New York has ruled that the FBI properly responded to FOIA requests from Jizi Cui, Shoumei Kan, and Fengzhe Jin, three Chinese women who were victims of an Asian criminal enterprise involved in an international fraudulent document/identity theft and alien smuggling operation. Cui, Kan, and Jin all made requests for records about themselves. The agency did a keyword search using their names and came up with no records. When the three filed suit, the agency conducted a broader search, locating 91 potentially responsive records, which were withheld under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. Judge Margo Brodie agreed that the agency had shown the applicability of

Exemption 7(A), pointing out that "the record establishes that a law enforcement proceeding. Further specificity or description of 'office involvements of identifying information' is unwarranted." She also noted that "the FBI Log and declarations provide ample evidence that Defendant properly withheld the documents because the release of additional information could reasonably be expected to cause articulable harm to the investigation of 'an Asian criminal enterprise involved in an international fraudulent documents/identity theft and alien smuggling operation.'" Brodie also declined to conduct an *in camera* review. (*Jizi Cui, et al. v. Federal Bureau of Investigation*, Civil Action No. 19-2904 (MKB), U.S. District Court for the Eastern District of New York, July 26)

A federal court in Washington has ruled that the law firm of Davis Wright Tremaine failed to show that U.S. Customs and Border Protection has disregarded the court's order to process the law firm's request on why Canadians working in its legal cannabis industry are considered ineligible to travel to the United States because marijuana, which contains cannabis, is an illegal drug under the federal Narcotics Act. Based on reported interviews with Todd Owens, CBP's Executive Commissioner for its Office of Field Operations indicating that he considered anyone involved with the cannabis industry to be ineligible for entry into the United States, DWT submitted a FOIA request to CBP for records on the policy. After the agency failed to respond within the statutory time limit, DWT filed suit. The agency then released 116 pages. DWT challenged the **adequacy of the agency's search**. The district court ordered the agency to expand its search to include emails. Dissatisfied with the progress of the agency's search, DWT filed a motion asking the court to enforce its order, arguing that the agency had failed to produce Owens' emails within the 30-day timeframe established by the court's original order. But the court noted that "the Court's prior order was mindful that it is was not in the best position to craft and oversee CBP's search so that responsive records DWT sought were identified and produced. CBP is the entity tasked with crafting a reasonable search. The Court is comfortable that CBP has done so here." Instead, the court ordered the parties "to determine the manner in which their continuing disputes over exemptions are best presented to the Court." (*Davis Wright Tremaine, LLP v. United States Customs and Border Protection*, Civil Action No. 19-334 RSM, U.S. District Court for the Western District of Washington, July 27)

A federal court in New York has **sanctioned** attorney Jack Jordan and his client, Sandra Immerso from filing any further motions in FOIA litigation filed by Jordan on behalf of Immerso seeking an email attorney Darin Powers sent to DynCorp in-house counsel Christopher Bellomy which was found privileged under Exemption 4 (commercial and confidential) by courts in the D.C. Circuit and the Eighth Circuit in response to identical FOIA requests submitted by Jordan, who was representing his wife. After failing multiple times in litigation brought against the Department of Labor in the D.C. Circuit and the Eighth Circuit, Jordan opened a new avenue of litigation in the Second Circuit. District Court Judge Nicholas Garaufis noted that Jordan has filed more than 50 motions in this litigation. He pointed out that "no matter how frustrated a litigant or attorney is to find that the door has closed on the relief sought, it is not justified in pounding aggressively on the closed door ad nauseum, let alone pounding with both its fists, kicking with both its feet, and bashing its head against the door just to make a point. That is effectively how Mr. Jordan, purporting to act on behalf of Ms. Immerso, has conducted himself in this case. As such, his battering-ram style of advocacy has plainly crossed the line that separates zealousness from vexatiousness." Garaufis ordered Jordan and Immerso not to file any more motions and required them to file his order with any other court to which Jordan turned to continue his litigation. (*Sandra Immerso v. U.S. Department of Labor*, Civil Action No. 19-3777, U.S. District Court for the Eastern District of New York, July 28)

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Judge James Boasberg has ruled that the FCC, the EPA, and the Office of Government Information Services properly responded to FOIA requests from James Chelmowski for records concerning two informal complaints filed with the FCC. Dissatisfied with the FCC's response, Chelmowski complained to OGIS. Still unsatisfied, Chelmowski filed 16 FOIAPA requests concerning the informal complaints and how his original FOIA requests were handled. While the FCC refused to search for records under FOIA unless Chelmowski paid fees, its Privacy Act search yielded more than 1,000 pages. Chelmowski's requests to OGIS yielded more than 5,000 pages of responsive records. Chelmowski then filed suit against both agencies. His primary challenge was against the FCC's decision to charge him fees. Chelmowski contended that fees were illegal, but Boasberg pointed out that "he neglects to mention that he has failed to pay a search fee for a previous request, thus allowing the FCC to mandate advance payment." Chelmowski also challenged the **adequacy of the search** by both agencies because they had not provided the locations and dates of searches. However, Boasberg noted that "on the contrary, the FCC and NARA *did* provide information about the locations searched for requests processed under FOIA and the Privacy Act. . .[T]he FCC did not need to provide the locations or dates it did not conduct FOIA searches at all, as Plaintiff had failed to pay the respective search fees." (*James Chelmowski v. United States of America, et al.*, Civil Action No. 17-1394 (JEB), U.S. District Court for the District of Columbia, July 21)

A federal court in Virginia has ruled that the Department of Homeland Security did not violate the **Privacy Act** when it disclosed a redacted version of an investigation into allegations that John Brusseau, a Homeland Security Investigations agent, who had been accused of misconduct during an investigation of money-laundering charges against two defense contractors. When counsel for Anham USA, one of the defense contractors, provided allegedly threatening text messages between Brusseau and Anham's financial director Marwan Belbeisi, Brusseau self-reported the matter to U.S. Immigration and Customs Enforcement's Office of Professional Responsibility. Counsel for Anham then submitted a FOIA request for the OPR investigation. The agency initially denied the request under Exemption 7(A) (interference with ongoing investigation or proceeding). Anham then filed suit in district court in the D.C. Circuit. During that litigation, DHS decided it could disclose a redacted version of the OPR investigation but did not inform Brusseau before doing so. Brusseau then filed his Privacy Act suit, arguing that the disclosure violated the Privacy Act. Judge Leonie Brinkema first reviewed the applicable FOIA exemptions and noted that "in all 400-plus pages of disclosure, plaintiff's name appears unredacted only 3 times. None of these stray failures to redact plaintiff's name create any 'association. . .with alleged wrongful activity' because, as defendants correctly argue, the records clearly document an investigation into allegations and not a finding of wrongdoing." After finding that no FOIA exemptions applied to the redacted OPR investigation records, Brinkema pointed out that the routine use exemption in the Privacy Act provided the basis for disclosing the records under FOIA. She observed that Brusseau acknowledged that "Belbeisi's information request, submitted through his counsel, was limited to requesting 'information related to the investigation into [Brusseau].' By plaintiff's own account, the information disclosed clearly matches the 'routine use' established in [DH's Privacy Act] Notice." (*John A. Brusseau v. Department of Homeland Security, et al.*, Civil Action No. 20-1364 (LMB/IDD), U.S. District Court for the Eastern District of Virginia, July 27)

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