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Washington Focus: Doug Austin, editor of eDiscovery Today recently weighed in on using eDiscovery best practices to address FOIA backlogs. Noting recent reporting indicating that data hoarding was a problem with federal agencies, Austin pointed out that "poor data hygiene can make it difficult for a federal government agency to keep up with its FOIA obligations. To address it involves a combination of best practices – including data mapping to identify where data is being stored – such as leveraging technology – including indexing in place and artificial intelligence techniques such as machine learning and natural language processing to automatically categorize data within the government entity and reduce the amount of redundant data. Less data to search through is the biggest key to speeding up the response time for FOIA requests."

Court Faults Agency's Search, Exemption Claims

A federal court in New York has ruled that the Centers for Disease Control and Prevention improperly narrowed a multi-part request submitted by the Knight First Amendment Institute for records concerning the Coronavirus Task Force led by Vice President Mike Pence. The Knight Institute also requested expedited processing, which the agency rejected. The agency's initial search yielded approximately 60,000 responsive records, but it produced only 629 pages, including 529 pages withheld in full or in part under Exemption 5 (privileges) and Exemption 6 (invasion of privacy). The Knight Institute subsequently narrowed its Exemption 5 challenges after the CDC withdrew many of those claims.

The Knight Institute challenged the agency's search for records relating to policies or procedures governing public communications of CDC staff about the coronavirus, and records relating to policies or procedures for the coordination of communications strategy between the CDC and the Coronavirus Task Force. The CDC interpreted those portions of the Knight Institute's request for policies to relate to actual written policies, while the Knight Institute argued this was too cramped. Judge Analisa Torres sided with the Knight Institute.

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She noted that "here, the plain language of the requests indicate that they encompass more that CDC's interpretation. Requests one and two seek records 'relating to' policies and procedures, and so are broader than merely the policies themselves. By reading requests one and two to include only the policies and procedures, the CDC made the phrase 'relating to' superfluous – 'a result that is anathema to established principles of reasoned interpretation,' including in the interpretation of FOIA requests." She indicated that "moreover, by contrast, in request four, Plaintiff does not include the phrase 'records relating to,' instead requesting only 'the CDC's policies on employee communications with news media and the public in effect from January 2017 to the present.' The comparison with requests one and two clarifies that those requests seek records beyond the policies or procedures."

The CDC argued another part of the Knight Institute's request specifically asked for emails, indicating that it was capable of specifically describing the records it sought. But Torres noted that "however, courts have rejected the idea that including a specific request invalidates an overlapping broader request. Moreover, even assuming the requests are ambiguous and both readings are reasonable, 'the [agency] had a duty under FOIA to select the interpretation that would likely yield the greatest number of responsive records.'" She also rejected the CDC's contention that there was no basis for believing that the agency's search did not include related records. Torres explained that "however, the agency states that it is 'confident that its search produced all documents responsive to the subject of the final narrowed request *as it understood the meaning and scope of that request*.' Moreover, the agency states that it narrowed its initial search based on the 'general responsiveness to the topics identified in the request.' As the CDC's interpretation of the topics in the request was overly narrow, Defendants have not met their burden to demonstrate that the search was reasonably conducted to find all documents responsive to the broader interpretation."

Torres also faulted the agency's decision not to include certain variants of the word "communications," claiming that the use of those terms would capture too many unresponsive records. Torres noted that "but, an agency's duty under FOIA is not to strike such a balance; it is to conduct a search reasonably calculated to uncover documents, unless such a search would be an undue burden. The CDC has not argued that using broader search terms would be unduly burdensome, merely that it would result in a large number of documents. That is not a relevant concern under FOIA." Torres found the agency's explanation of its search was wanting as well. She pointed out that the agency affidavit "does not specify how Boolean searches were used: for instance, it if searched for the two-word terms like 'covid communication' in quotes (producing only documents containing those two words in sequence), or not (producing documents with either one of those words anywhere in the document)."

Torres was skeptical as to why the CDC did not search the email boxes of all 13 individuals the Knight Institute had identified based on the frequency of their appearance in responsive documents. Torres pointed out that "an agency has a responsibility to follow leads discovered in its search that suggest other locations with responsive documents. For that reason, whether an agency's search was reasonable is determined 'based on what the agency knew at its conclusion rather than what the agency speculated at its inception.'" She indicated that "here, the CDC has given no reason it did not search the inboxes of the individuals identified by Plaintiff, which Plaintiff reasonably contends may contain responsive documents."

The CDC withheld records under the presidential communications privilege and the deliberative process privilege. The Knight Institute challenged whether the presidential communications privilege applied to a series of blast emails that involved then Chief of Staff Mick Mulvaney, which were sent to 49 individuals, including 12 non-EOP staffers. Torres cited *Center for Effective Government v. Dept of State*, 7 F. Supp. 3d 25 (D.D.C. 2013), in which Judge Ellen Segal Huvelle held that the presidential communications privilege did not apply when it did not involve a quintessential and non-delegable Presidential power and, instead, was exercised without Presidential involvement. Torres found that Huvelle's analysis applied here as well. She

pointed out that "disclosure of the documents would not prevent the President from operating effectively. The media strategy of an executive agency is not a quintessential presidential power like the removal power; it is and was performed without presidential input." She added that "because the policies were distributed to more than just the President's closest advisors, his ability to communicate his final decisions privately was not implicated."

The Knight Institute challenged the application of the deliberative process privilege to several documents. Torres found none of them were completely covered and decided to view one of them *in camera.* She also found that the agency had failed to justify its deliberative process privilege claims under the foreseeable harm standard. (*Knight First Amendment Institute at Columbia University v. Centers for Disease Control and Prevention, et al.*, Civil Action No. 20-2761 (AT), U.S. District Court for the Southern District of New York, Sept. 17)

Views from the States…

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

Vermont

The supreme court has ruled that Wellpath LLC operated as an instrumentality of the government through its contracts with the Department of Corrections to provide medical care to inmates at state prisons. The Human Rights Defense Center, a non-profit organization focusing on public education and advocacy related to the criminal-justice system, sent a request to Wellpath for records relating to claims, lawsuits, or settlements arising from Wellpath's provision of services under its contract with the DOC. Wellpath declined to respond, arguing that as a private entity, it was not subject to the Public Records Act. HRDC filed suit, arguing that Wellpath was acting as the functional equivalent of a public agency. The trial court ruled in favor of Wellpath, holding that the company was not the functional equivalent of a public agency because provision of healthcare is not a government function. HRDC appealed to the supreme court, which reversed, noting that "we do not reach the question of whether the functional-equivalency test applies to the determination of whether an entity is a 'public agency' pursuant to the PRA because it is unnecessary to our conclusion; rather, we find that Wellpath was an 'instrumentality' of the DOC during the contract period and thus a 'public agency' subject to the disclosure obligations of the PRA." The supreme court pointed out that "we conclude that the language of the PRA is unambiguous: where the state contracts with a private entity to discharge the entirety of a fundamental and uniquely governmental obligation owed to its citizens, that entity acts as an 'instrumentality' of the state." (*Human Rights Defense Center v. Correct Care Solutions, LLC*, No. 2020-308, Vermont Supreme Court, Sept. 9)

The Federal Courts…

Judge Amit Mehta has ruled that U.S. Immigration and Customs Enforcement has finally persuaded him that providing the data elements the agency used to include in response to FOIA requests from TRAC would constitute **creating a record** that is not required under FOIA. Mehta explained that "to produce those fields in the [Secure Communities Removal Report], ICE must build upon what is available in the SC Removals Report against the broader [Integrated Decision Support System] removals dataset. That analysis required additional complex correlations and calculations to establish connections

between various data points across the two sources." ICE argued that *National Security Counselors v. CIA*, 969 F.3d 406 (D.C. Cir. 2020), in which the D.C. Circuit held that requiring the CIA to sort its requests based on categories would require creation of a record, was directly on point. Mehta disagreed, noting that "unlike that case, the *information* required to produce the disputed fields *does* exist in the IIDS." However, he pointed out that "the question remains, therefore, whether producing those fields using the information available necessitates the creation of new records. The court holds that it does." He explained that "to produce the disputed fields, ICE must do more than simply sort through the information using preexisting connections – it must create many of those connections in the first instance." Mehta pointed out that "the production of the disputed fields requires ICE to manufacture complex and often imprecise connection between otherwise facially unrelated data in the IIDS. Because constructing those connections requires the agency to go beyond merely 'sorting. . .information to make it intelligible' or 'writing new computer code to locate responsive records' production of the disputed fields is tantamount to the creation of new records." (*Susan B. Long, et al. v. Immigration and Customs Enforcement*, Civil Action No. 17-1097 (APM), U.S. District Court for the District of Columbia, Sept. 2)

The D.C. Circuit has ruled that a statement made by the Department of State indicating that it had no prior knowledge of Saudi intentions to kill journalist Jamil Khashoggi when he visited the Saudi consulate in Istanbul cannot serve as binding official acknowledgements by the other four members of the intelligence community -- the CIA, the Office of the Director of National Intelligence, the National Security Agency, and the FBI – when they issued *Glomar* responses neither confirming nor denying the existence of records concerning whether the U.S. intelligence community had knowledge of Saudi intentions before Khashoggi was murdered. In response to FOIA requests from the Knight First Amendment Institute and the Committee to Protect Journalists, the intelligence agencies issued a *Glomar* response. Knight voluntarily dismissed its claims. CPJ dismissed its claim against the State Department but continued to press its claims against the other four intelligence community members. CPJ argued that without prior knowledge of an impending threat to Khashoggi, the intelligence agencies had no duty to warn Khashoggi under the 2015 Executive Directive 191, which requires such warnings when the intelligence agencies receive credible information about such threats. Writing for the court, Circuit Court Judge Gregory Katsas, citing *Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999), pointed out that "we do not 'deem "official" a disclosure made by someone other than the agency from which the information is being sought.'" Katsas noted that there was an exception to *Frugone* – that "if a public disclosure is 'made by an authorized representative of the agency's parent' it is 'official' as to the subordinate agency." But he explained that "this exception does not apply here. . .[T]he State Department [cannot] be considered an 'authorized representative' of the President for this exception." Katsas rejected CPJ's argument that because the intelligence community was considered an integrated body, statements made by one agency could bind the others as well. However, Katsas pointed out that "we see little basis for a rule permitting so many agencies to make official acknowledgements extending across large swaths of the entire Executive Branch." (*Knight First Amendment Institute and Committee to Protect Journalists v. Central Intelligence Agency, et al.*, No. 20-5045, U.S. Court of Appeals for the District of Columbia, Aug. 27)

Judge James Boasberg has ruled that Energy Policy Advocates failed to show that it was entitled to **expedited processing** for records concerning possible ethical considerations surrounding Department of Interior official Elizabeth Klein. EPA submitted a FOIA request to Interior for documents produced or received by employees within the Departmental Ethics Office pertaining to Klein. EPA also requested expedited processing, claiming there was an urgency to inform the public about the issue. The agency

denied the request for expedited processing and EPA filed suit challenging the denial. The agency argued that it denied EPA's expedited processing request because EPA had failed to show that it was primarily involved in disseminating information and that it failed to demonstrate the underlying urgency for processing the records expeditiously. Noting that an assessment of eligibility for expedited processing is based on the administrative record before the agency, Boasberg indicated that "the Administrative Record contains no proof that EPA has previously been considered an entity primarily engaged in disseminating information." He observed EPA had shown some success in being granted a fee waiver but noted that "while the Fee Waiver section thus provides some evidence that EPA engages in disseminating information, it is difficult to conclusively evaluate – based on the administrative record alone – whether that is the group's primary function." Boasberg indicated that EPA had failed to show urgency as well. He pointed out that "while the request may suggest that the requested information is *important* in some sense, it failed to identify any specific reason to conclude that obtaining the requested documents is *time* sensitive." He added that "it is also worth noting that Interior has already produced a significant number of the requested documents and that it anticipates producing all remaining ones within the next five months. . . In sum, there is no basis for offering Plaintiff special treatment not available to similarly situated FOIA requesters, most of whom are patiently waiting in line." (*Energy Policy Advocates v. U.S. Department of the Interior*, Civil Action No. 21-12467 (JEB), U.S. District Court for the District of Columbia, Sept. 22)

Judge Randolph Moss has ruled that BuzzFeed journalist Jason Leopold failed to show that U.S. Immigration and Customs Enforcement and U.S Customs and Border Protection could **conduct a reasonable search** for video and audio recordings showing the agency's treatment of migrants and immigration fugitives in response to his FOIA request. After receiving Leopold's request, ICE asked Leopold to clarify his request and eventually indicated that it had no responsive records. After a number of discussions with the agency as to how to narrow the scope of his request, Leopold first suggested limiting the search to specific ICE facilities, and eventually settled on focusing on five cases that were in litigation. Moss characterized the positions of the parties, indicating that "ICE maintains that it was never required to provide a response because Plaintiffs' original request is too vague and unduly burdensome and thus does not 'reasonably describe' the records sought." Leopold argued that he had appropriately narrowed the request, and further that "the burden of producing records does not inform whether a request 'reasonably describes' records and thus the breadth of their request is irrelevant." Moss recognized that because Leopold had narrowed his request, "it is this more limited search, and not the scope of Plaintiffs' original request that controls for purposes of summary judgment." However, Moss accepted ICE's argument that the description of the records was too vague to conduct a search. He pointed out that "the Court agrees with ICE that the phrase 'any and all immigration enforcement actions' without clarification from Plaintiffs, is too broad and vague to 'reasonably describe' the records sought." Although Leopold had not focused on this issue, Moss suggested that his request could be read to limit the records sought as being limited to instances of detention. However, Moss concluded that distinction would cause more trouble that it would resolve. Instead, he noted that "for these reasons, the Court concludes that Plaintiff's reference to 'detention' in the June 5, 2020, status report does not rescue the vagueness of its request." (*Jason Leopold, et al. v. U.S. Immigration & Customs Enforcement, et al.*, Civil Action No. 18-2415 (RDM), U.S. District Court for the District of Columbia, Sept. 17)

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Judge Beryl Howell has ruled that although the Office of the Federal Defender for the Eastern District of California made five FOIA requests to the Department of State on behalf of Omar Ameen, who was fighting extradition proceedings, Ameen himself has standing to litigate on his behalf after his attorney-client relationship with the Federal Defender ended. After the agency refused to process the requests, arguing that Ameen did not have jurisdiction because he was not the **proper party**, Ameen filed suit in his own name. Howell noted that "an agency's duties under FOIA are triggered by a properly framed request for information, and the agency's obligations flowing from that request are with respect to 'the requester' of the information." State argued that the Federal Defender had not sufficiently indicated that it was representing Ameen for the purpose of obtaining documents under FOIA. However, Howell pointed out that "the release form attached to the request and signed by plaintiff explicitly states that he is the requester." She added that "these two requests, in light of the language of the requests themselves and in the attached releases, *do* explicitly state they were made on plaintiff's behalf." She observed that "moreover, the release forms expressly request the release of records, indicating in the broader context of the attorney-client relationship, that plaintiff was not just authorizing the release of records, but affirmatively requesting their release himself through counsel." In concluding, she rejected "defendants' proposed distinction between (1) cases in which counsel expressly states that counsel represents a client for purposes of the FOIA request and (2) cases in which counsel expressly states that counsel represents a client in another matter and makes the request within the scope of that representation. In either case, the FOIA request is made on behalf of the client, and the client has standing, after the attorney-client relationship with original counsel is over, to enforce FOIA statutory rights if the request is denied." (*Omar Ameen v. United States Department of State, et al.*, Civil Action No. 21-1399 (BAH), U.S. District Court for the District of Columbia, Sept. 13)

Judge Randolph Moss has ruled that the Department of Health and Human Services has not yet shown that it properly withheld 13 records in response to Protect Democracy Project's FOIA request for records concerning the decision to discontinue advertising for the federal insurance marketplace during the final weeks of the 2016-2017 open enrollment period under **Exemption 5 (privileges)** and has ordered the agency to provide the disputed documents for *in camera* review. The agency disclosed 274 pages with redactions under Exemption 5. By the time Moss ruled in the case, the parties had narrowed the remaining dispute to 13 records withheld under the deliberative process privilege. PDP did not challenge the applicability of the deliberative process privilege to the disputed records but instead contended they contained **segregable** factual and post-decisional material that HHS was required to disclose. PDP argued that financial summary data was factual and must be disclosed. Moss pointed out that "the question for the Court to decide with respect to this category of documents, then, is whether the selection of information included in the financial summary of the organization or presentation of that information would reveal the Department's deliberative process." He explained that "the problem here is that the Court cannot discern whether the factual material included in the summaries is likely to reveal anything about the Department's pre-decisional deliberations regarding the termination of planned outreach activities." While Moss indicated that revealing only that the Trump administration intended to curtail the spending would probably not qualify as privileged, he noted that "if the summaries highlight those outreach activities that the agency staff had selected for possible termination based on policy priorities or other, similar factors, disclosure would likely reveal protected recommendations made by staff and less senior agency officials to the decisionmakers." Turning to whether talking points were privileged, Moss referred to one instance in which "the talking point was not final; it did not come from decisionmakers but, rather, was offered to decisionmakers to 'inform' the 'decision-making' process. In short, the talking point was sent to advise the White House on its public messaging. That is a quintessentially deliberative

communication." Nevertheless, in many instances, Moss found that he did not have sufficient information to determine whether disputed documents were privileged and order the agency to provide them for *in camera* inspection. (*Protect Democracy Project, Inc. v. U.S. Department of Health & Human Services*, Civil Action No. 17-792 (RDM), U.S. District Court for the District of Columbia, Sept. 13)

A federal court in Missouri has ruled that the Department of Justice **failed to conduct an adequate search** for records concerning its investigation of a 1988 fire, which killed six firefighters responding to a trailer fire at a construction site in Kansas City. The court also found the agency had failed to justify its **Exemption 7(C) (invasion of privacy concerning law enforcement records)** claims. Shortly after the firefighters arrived, the trailer, which contained 25,000 pounds of ammonium nitrate and fuel oil, blew up, killing all six firefighters. In 1994, the Bureau of Alcohol, Tobacco and Firearms renewed its investigation of the fire and indicted five individuals, including Bryan Sheppard, on arson charges. After a seven-week trial, all five were convicted and sentenced to life in prison. Between 2007 and 2009, the *Kansas City Star* published a series of articles alleging misconduct in the Sheppard trial, including that several government witnesses lied at the trial. In 2008, the U.S. Attorney for the Western District of Missouri asked DOJ to review the *Star*'s allegations. The three-year investigation resulted in a final Memoranda of Investigation, which was released in heavily redacted form after the *Star* submitted several FOIA requests. In 2017, Sheppard submitted a FOIA request for the records of DOJ's review. The agency withheld records under **Exemption 6 (invasion of privacy)** and **Exemption 7(C)**. Judge Nanette Laughery agreed that the records were created for law enforcement purposes. She pointed out that "because the investigation, and the associated records, were compiled in the furtherance of the law enforcement of federal law, and because there is a nexus between the investigation and DOJ's law enforcement mandate, the record had a law enforcement purpose." Laughery indicated that there were three separate privacy interests implicated here – (1) third-party MOI interviewees who discussed their experience with the underlying criminal trial, (2) accused MOI interviewees; and (3) agency MOI interviewees. She pointed out that "within each group, two types of privacy interests are implicated: first, a privacy interest in any identifying information – including names, addresses, phone numbers, and any other information that could be traced to an individual; and second, a privacy interest in the substance of the information disclosed during the interviews." She then noted that "except for the Accused MOI interviewees – any privacy interests implicated are significantly weaker. The *substance* of the interviews reflected in the Third-Party and Agency MOIs, after redaction is applied to protect identifying information, does not appear to permit a reader to identify any individual interviewee." She explained that there was a public interest in disclosure of the substance of the investigation, observing that "the *Star* reported that witnesses came forward after Mr. Sheppard's trial alleging misconduct, including that several government witnesses lied at trial and that the government used coercive investigative tactics and suppressed evidence. That these allegations were investigated and reported by a Pulitzer-prize winning journalist working at a reputable news outlet pushes the allegations beyond 'just a bare suspicion' of official misconduct." While she found that the privacy of individuals who did not speak to the *Star* meant that their identities could be withheld, she indicated that even for those individual interviewees' substantive portions of their interviews that did not identify them could still be disclosed. (*Bryan E. Sheppard v. United States Department of Justice*, Civil Action No. 17-1037-NKL, U.S. District for the Western District of Missouri, Sept. 21)

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A federal court in New York has ruled that the CIA and the Office of the Director of National Intelligence, and five other intelligence agencies, are not required to provide confirmation of its conclusion that Saudi Arabia was responsible for the death of journalist Jamil Khashoggi while at the Saudi Arabian consulate at Istanbul. The Open Society Justice Initiative submitted the request to seven intelligences for records about Khashoggi's death. The CIA and the ONDI disclosed materials from their press offices and then claimed that they provide nothing more definitive than a no number, no list response in which an agency admits that it has records but provides no more detail. Judge Paul Engelmayer found that although the existence of some documents related to the intelligence community's assessment of the Khashoggi killing had been acknowledged the CIA's report was still protected under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. He explained that "on its careful review of the agencies' classified and unclassified filings, the Court finds that the withheld intelligence records, and the details about them, remain properly classified and protected from disclosure by FOIA Exemption 1 and 3, not withstanding the disclosure of the 2021 Assessment and partial disclosure of the 2020 NCIM." (*Open Society Justice Initiative v. Central Intelligence Agency, et al.*, Civil Action No. 19-234 (PAE) and No. 19-1329 (PAE), U.S. District Court for the Southern District of New York, Sept. 13)

A federal court in California has rejected the IRS's claim that Paul Stanco, Jose Linares, and Henry Strodka **failed to exhaust their administrative remedies** when instead of filing administrative appeals of their original requests, they administratively appealed later duplicative requests that, they argued, included the records encompassed in their original requests. The agency claim was based on *Toensing v. Dept of Justice*, 890 F. Supp. 2d 138 (D.D.C. 2012), a D.C. Circuit district court decision in which the court held that "despite frustration of the particular administrative scheme, a duplicate request can constructively exhaust a previous, unexhausted request so long as the purposes of exhaustion have been met. The court here expresses doubts that *Toensing* actually supported the agency's position." He observed that "to grant Defendant's motion to dismiss, the Court would need to accept what seems to be Defendant's sweeping argument that a requester can *never* constructively exhaust a FOIA request by filing and fully exhausting a duplicate request. Defendant fails to provide authority to support this broad proposition. As discussed, *Toensing* seems to suggest the opposite: That a duplicate request *can* constructively exhaust previously exhausted issues so long as the purposes of exhaustion. . .have been met." (*Paul Stanco; Jose M. Linares, and Henry M. Strodka v. Internal Revenue Service*, Civil Action No. 18-00873-TLN-CKD, U.S. District Court for Eastern District of California, Sept. 1)

Judge Colleen Kollar-Kotelly has ruled that records concerning the FAA's review of design changes to the Boeing Company's 737 MAX in the wake of two fatal crashes are protected by **Exemption 4 (commercial and confidential)**. The Flyers Rights Education Fund submitted a request to the FAA for the agency's review of the design changes required by the agency to allow the 737 MAX to begin flying again. The agency located 49,000 pages of responsive records but narrowed the request to 9,443 pages. The agency provided documents to Boeing for confidentiality claims. The parties narrowed the request to 108 documents. The agency disclosed five documents in full and 22 documents with redaction of names of low-level Boeing employees under **Exemption 6 (invasion of privacy)**, released 38 documents with redactions pursuant to Exemption 4 and Exemption 4, and withheld 37 documents entirely under Exemptions 4 and 6. Flyers Rights argued that the records were generated by the agency and had not been obtained from a person. Kollar-Kotelly disagreed, noting that "the FAA's description in its *Vaughn* Index establishes that this information was generated by Boeing, not the government and therefore satisfies the 'obtained from a person' requirement of Exemption 4." She then found the records withheld

under Exemption 4 were provided to the agency in confidence by Boeing. She pointed out that "based upon its review of Boeing's and the FAA's supporting affidavits, the Court is satisfied that Boeing 'customarily and actually' treats these categories of disputed information as 'private.'" She also found that Boeing had received an assurance by the government that it would keep its information confidential. Here, she concluded that "the FAA has carried its burden to demonstrate that the disputed documents were provided to the agency under express and implied assurances of privacy. . . Accordingly, the FAA has demonstrated that the material withheld from production satisfies Exemption 4's definition of 'confidential' information." (*Flyers Rights Education Fund, Inc. v. Federal Aviation Administration*, Civil Action No. 19-3749 (CKK), U.S. District Court for the District of Columbia, Sept. 16)

Judge Amy Berman Jackson has ruled that the Department of the Navy has not shown that redactions made to an investigation report of charges against Courtland Savage, an African American and former naval officer assigned to as a student pilot with the Navy's Strike Fighter Squadron, who was removed from the program after a subjective review board, were proper. Savage challenged the outcome, arguing that he was the victim of racial discrimination. The Navy conducted an investigation and Vice Admiral Dewolfe Miller endorsed some but not all portions of the final report. In response to Savage's FOIA request, the agency disclosed a redacted version of the report, withholding information under **Exemption 5 (privileges)**. Berman Jackson found that the redactions were covered by the deliberative process privilege. But Berman Jackson explained that the Navy had failed to satisfy the **foreseeable harm** standard. She noted that "since it is already publicly known that the Vice Admiral rejected recommendations from the investigating officer he appointed, the excision of his observations might have more of a chilling effect on future investigations than the release of the information would." She observed that "if the purpose of the Act is to enable the public 'to be informed' about what their government is up to,' and to make it own judgment concerning the validity of governmental decision making, that purpose will be frustrated in this case if the public is only given access to the decision to delete statements or conclusions and not to the matters the Vice Admiral decided to delete. Under those unique circumstances, the Navy's recitation of boilerplate warnings of the harm that could flow from disclosing deliberative material is particularly unpersuasive as a basis for withholding it in this case." Berman Jackson indicated that personally identifying information had been properly redacted under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. She pointed out that "the privacy interest in this case is clear: individuals were named in the report in connection with allegation of racial bias and harassment." She observed that "the specter of third parties losing some degree of privacy is hardly theoretical; one of the goals of this lawsuit is to publish unredacted materials which plaintiff's lawyer has already seen." Savage argued that there was a public interest in disclosure, but Berman Jackson indicated that "these significant interests can be fulfilled without revealing the names of every individual involved in this case." (*Courtland Savage v. Department of the Navy*, Civil Action No. 19-2983 (ABJ), U.S. District Court for the District of Columbia, Sept. 8)

A federal court in New York has rejected Document NY's attempt to require the Department of State to process the remaining 2,600 pages by the end of November 2021 but has agreed with the plaintiff to require the agency to process the request at a rate of 400 pages a month rather than the previous 300 pages per month rate. Documented NY submitted FOIA requests to the Department of State, the Department of Health and Human Services, and the Office of Management and Budget for records concerning the Trump proclamation requiring immigrants to show that they had health insurance within

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30 days of entering the United States. Documented NY also requested **expedited processing**, seeking production of 3,000 pages in the first week and 2,500 pages each following month. State's response was to suggest a processing rate of 300 pages a month. State claimed that because of the pandemic, it could only process 200 pages a month but would commit to a rate of 300 pages a month going forward. The agency estimated at that rate it could complete processing 2,600 pages of potentially responsive records by May 31, 2022. Documented NY asked the court to order State to process all remaining records by November 30, 2021. Judge Alison Nathan noted that because the Trump proclamation had been enjoined and later repealed by the Biden administration it was difficult for Documented NY to show the requisite exigency. She pointed out that "while the Court agrees that, as Plaintiff has shown, Proclamation 9945 is both newsworthy and of importance the general public, Plaintiffs request likely does not implicate the level of exigency necessary to compel expedited processing." Nathan found that the constraints on State's resources made it impossible for the agency to respond by November 2021. But she indicated that "yet the Court also appreciates that State's processing capacity continues to improve and that the costs of delayed production only increase over time. Accordingly, the Court concludes that State shall increase its rate to process 400 pages of relevant documents each month, which will complete State's production two earlier than its initial proposal." (*Documented NY v. United States Department of State, et al.*, Civil Action No. 20-1946 (AJN), U.S. District Court for the Southern District of New York, Sept. 16)

Judge Carl Nichols has ruled that the Department of Interior properly identified the **foreseeable harm** in disclosure of each of 22 FOIA requests related to then-Secretary Ryan Zinke's activities, as well as those of other senior officials and staff. The agency disclosed approximately 1,020 pages in total in response to the 22 requests submitted by journalist Jimmy Tobias. Rather than challenge any of the exemption claims, Tobias argued that in all cases the agency had failed to adequately explain the foreseeable harm that disclosure would cause. Nichols noted that "here, Interior has adequately demonstrated through its declarations that foreseeable harm would result from production of the information it has withheld. Each declaration focuses on the information at issue, and each concludes that disclosure would chill future internal discussions or otherwise 'harm an interest protected by an exemption.'" Nichols pointed out that "indeed, the *Vaughn* Index (which the declarations specifically incorporate) specifically identifies each individual piece of withheld information and explains why its disclosure 'would' harm a government interest. In doing so, the *Vaughn* Index identifies what the redactions were applied to, and the harm foreseen with greater specificity than the declarations that the Court of Appeals held were sufficient in *Machado Amadis v. U.S. Dept of State*, 971 F.3d 364 (D.C. Cir. 2020)." (*Jimmy Tobias v. United States Department the Interior, Office of the Secretary*, Civil Action No. 18-01368 (CJN), U.S. District Court for the District of Columbia, Sept. 20)

As has been his apparent habit throughout his career as a district court judge, Senior Judge Richard Leon has once again decided to ignore the criticism leveled against him by the D.C. Circuit and uphold his original decision that the IRS had properly withheld a memo from tax attorney Bradley Waterman, who had requested the contents of an agency investigation of his fitness to continue to practice tax law. After the New Hampshire Health and Education Facilities Authority leveled misconduct charges against Waterman with the IRS Office of Professional Responsibility, the agency investigated the charges and cleared Waterman of wrongdoing. Waterman requested a copy of the investigation informally but was told he would need to request it through FOIA. The agency withheld the analysis contained in the report under **Exemption 5 (privileges)**. Waterman filed suit and Leon upheld the agency's decision. Waterman then filed an appeal to the D.C. Circuit, which ruled that the IRS had not shown why non-

exempt information could not be disclosed from the memo and sent the case back to Leon for application of its ruling. Leon apparently viewed the D.C. Circuit's ruling as nothing more than a suggestion and once again affirmed the agency's decision, although with slightly more detailed analysis. He pointed out that "the fact that these memoranda contain summations of the factual allegations concerning Waterman – even straightforward recitals of his interactions with the agencies – does not *alone* render the deliberative process privilege inapplicable, as the very choice of which facts to present and rely upon in reaching investigative recommendations and decisions is shielded by the privilege and thus Exemption 5." (*Bradley Waterman v. Internal Revenue Service*, Civil Action No. 16-1823 (RJL), U.S. District Court for the District of Columbia, Sept. 20)

After requiring the FBI to explain its failure to search for records on Operation Speakeasy and its claim that a *Glomar* response neither confirming nor denying the existence of records for its investigation of Ryan Jacobs on drug charges was appropriate under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, a federal court in Ohio has resolved the remaining issues involved in two FOIA requests submitted by the *Cincinnati Enquirer* stemming from allegations that a Kentucky Commonwealth Attorney had been a target of the investigation. Judge Susan Dlott noted that "the Commonwealth Attorney and other individuals accused of or investigated for criminal activity during the course of the Ryan Jacobs investigation have privacy interests, interests that are greater because, to the Court's knowledge, they were not charged and convicted of any crime." The *Enquirer* argued that the agency could use pseudonyms that would allow the agency to disclose more non-identifying information. But Dlott pointed out that "requiring a federal government agency to insert new information in the place of redacted information – such as the pseudonyms employed by the Cincinnati Enquirer in the complaint – in effect requires the government agency to create new documents, a task not required by FOIA." Dlott found all the remaining records were protected by Exemption 7(C). She pointed out that "it bears repeating than that the alleged wrongdoing by the Commonwealth Attorney is not itself a significant public interest for FOIA purposes. Moreover, a decision not to prosecute an individual, standing alone, is ordinarily not particularly illuminating about an agency's decisionmaking processes because it is only a 'single data point.' The Court, having carefully considered the Remaining Jacobs Documents and the Additional Operation Speakeasy Documents, concludes that these responsive documents only minimally advance a public interest in shedding light on the decision of the United States Attorney to not prosecute the Commonwealth Attorney." (*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, Sept. 20)

Judge Randolph Contreras has ruled that attorney Jim Lesar, who represented author Carl Oglesby in his FOIA litigation against the FBI and the CIA for records of those agencies' surveillance during his career as a political activist, including as president of Students for a Democratic Society, is entitled to **attorney's fees** for his work starting in March 2002, but that because Lesar's time records are so inadequate, Contreras reduced his fee request by 40 percent to compensate for a number of unsubstantiated charges. Oglesby died in 2011 and Barbara Webster, the administrator of his estate, and Aron DiBacco, Ogleby's daughter, were substituted in his place. DOJ challenged both Lesar's eligibility for fees as well as the amount requested. Contreras first pointed out that because the case was filed before the attorney's fees amendments included in the 2007 OPEN Government Act became effective, those amendments restoring the catalyst theory did not apply here. However, Contreras indicated that a 2002 scheduling order requiring DOJ to disclose roughly 1500 pages it had already processed, and a 2012 order

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requiring DOJ to process 16,705 pages it had previously withheld at a rate of at least 500 pages a month constituted a change in the legal relationship between the parties that qualified Oglesby as having substantially prevailed for eligibility purposes. Contreras indicated that "this is a fundamental shift from the preexisting relationship between Plaintiffs and the DOJ, in which DOJ ignored Plaintiffs requests without punishment. Consequently, the Scheduling Order changed the legal relationship between the parties and Plaintiffs substantially prevailed in this litigation as a result of its issuance, even under the [pre-2007] standard." Contreras found that Oglesby's request about his own surveillance by the agency was in the public interest. He observed that "a book covering government surveillance of dissidents leveraging 16,000 pages of original documents appears significant enough to 'have at lest a modest probability of generating useful new information' in the public interest." Contreras also found the agencies' decision to withhold records was unreasonable. He noted that "the DOJ was delayed in releasing thousands of documents as part of this litigation and its only excuse for those delays was administrative backlog, not the propriety of their withholdings. This rationale does not constitute a reasonable basis in law." Turning to Lesar's fee request for $376,190, Contreras reduced that amount 40 percent, to $225,714. He explained that he found "numerous faults with Plaintiffs supporting documentation. These shortcomings are pervasive and serious enough for the Court to use its discretion to order a reduced award. First, the Court identifies errors in Plaintiffs' accounting of the hours their attorney worked. Second, the Court apples the rates in the USAO Matrix in determining the lodestar, rather than the higher rates of the LSI Matrix that Plaintiffs request, because Plaintiffs did not provide the requisite supporting evidence to justify the latter matrix's use. Finally, the Court adjusts the lodestar down due to Lesar's poor, non-contemporaneous bookkeeping and lack of supporting proof." (*Barbara Webster, et al. v. U.S. Department of Justice*, Civil Action No. 02-603 (RC), U.S. District Court for the District of Columbia, Sept. 17)

A federal court in Georgia has ruled that the Office of the Fulton County District Attorney is entitled to **attorney's fees** for its litigation against the Department of Justice. As part of its investigation into the fatal shooting in Fulton County of Jamarian Robinson by the U.S. Marshals Service Southeast Regional Fugitive Task Force, the Fulton County District Attorney's Office submitted three FOIA requests for records concerning the task force's standard operating procedures and records related to the investigation of Robinson's death. The agency initially denied the requests, citing **Exemption 7(A) (interference with ongoing investigation or proceeding)**. The agency later dropped its Exemption 7(A) claim and disclosed all the records the district attorney had requested. However, at the time the district attorney's summary judgment motion was granted, the court declined to award attorney's fees. This time, the court found that Fulton County had substantially prevailed by receiving an order requiring the agency to disclose the requested records. The court found that USMS's investigation was internal in nature and carried no likelihood of criminal penalties and, thus, was not conducted for law enforcement purposes in the first place. The court concluded that "because defendant has not shown it correctly withheld the 7(A) Records under Exemption 7(A), and because those records constitute a sizeable portion of the total records sought by Plaintiff in this case, Plaintiff's claim for the records was 'not insubstantial.' Plaintiff has obtained relief though a voluntary change in Defendant's position on a not insubstantial claim." Turning to Fulton County's entitlement to fees, the court observed that "the Court has already determined the records were not exempt. And Defendant has done nothing to show its assertion of Exemption 7(A) was reasonable though ultimately incorrect." The court granted Fulton County $113,037 in fees, deducting $22,280 from Fulton County's fee request for reimbursement for its related but separate litigation in a *Touhy* subpoena action. (*Office of the Fulton County District Attorney v. United States*

Department of Justice, Civil Action No. 18-5902-MLB, U.S. District Court for the Northern District of Georgia, Sept. 16)

Judge Rudolph Contreras has finally resolved the endless litigation brought by Jack Jordan, an attorney representing his wife, who had suffered an on-the-job injury while working as an employee with DynCorp, a government contractor. As part of those administrative proceedings, Jordan learned of an email exchange between the attorneys representing DynCorp. Because the emails had been made part of the administrative record at the Department of Labor, Jordan made a FOIA request for them. DOL denied access to the emails under **Exemption 4 (commercial and confidential)**, under the theory that were privileged. Although he found one email not privileged, Contreras agreed that the other email was privileged under Exemption 4 and ruled against Jordan. Jordan lost an appeal to the D.C. Circuit. He then litigated the same case in the Western District of Missouri and the Eastern District of New York, suing the Department of Justice as well since they also had access to the emails through the litigation. He lost all the cases, but a number of motions remained unresolved until now. Contreras agreed with DOJ that **collateral estoppel** applied to the agency's ability to claim the Exemption 4 case had already been fully litigated. Contreras noted that "Jordan raised the exact issue in his previous suit against the DOL, and this Court squarely held that Exemption 4 protected the email from disclosure. Moreover, it is not unfair to bind Jordan to the Court's previous judgment; in fact, it would be unfair to require DOJ to debate an issue already decided." Contreras also indicated the **Exemption 5 (privileges)** applied to materials withheld under the deliberative process privilege. He noted that "communications exchanging the correspondents' ideas on strategy going forward consist of the kinds of 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinion of the writer rather than the policy of the agency' that the deliberative proves privilege is meant to protect." (*Jack Jordan v. U.S. Department of Justice*, Civil Action No. 17-2702 (RC), U.S. District Court for the District of Columbia, Sept. 3)

A federal court in Washington has ruled that attorney Jonathan Shaklee is not entitled to **attorney's fees** for his litigation against U. S. Citizenship and Immigration Services to obtain Alien Files on behalf of clients after the agency failed to respond within the statutory time limit, including delays brought about by COVID-19. After the agency responded to each of the three FOIA requests and disclosed the relevant Alien File, Shaklee filed a motion for attorney's fees. The court found that Shaklee had not shown that his lawsuit caused the agency to disclose the records. The court observed that "indeed, once the Federal Records Center resumed operations [after the pandemic], USCIS requested the records, processed them and sent them to Plaintiffs two weeks later. There is no evidence that the release of records was triggered by anything other than the normal procedure for processing such requests pursuant to the [First in First Out] process and reopening of the FRC. As USCIS notes, it never refused to provide the documents and it has informed Plaintiffs of possible delays due to the large volume of FOIA requests processed on a FIFO basis." The court explained that "because Plaintiffs have not shown that they 'substantially prevailed,' the Court concludes that they are not eligible for attorney's fees." (*Shaklee & Oliver, P.S. v. United States Citizenship and Immigration Services*, Civil Action No. 20-0806-RAJ, U.S. District Court for the Western District of Washington, Sept. 13)

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A federal court in California has both accepted and rejected various claims made by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services made under **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods or techniques)** concerning the agencies' social media surveillance policies in response to a FOIA request from the ACLU that was sent to seven different agencies after reviewing the disputed documents *in camera*. Judge Edward Chen agreed with the ACLU that the *Vaughn* Index submitted by CBP was insufficient. But he noted that "indeed, the CBP's *Vaughn* index is unworkable. That being said, after conducting an *in camera* review of the documents, the Court need not ask CBP to update its *Vaughn* index in order to rule on the parties' disputes." (*American Civil Liberties Union Foundation, et al. v. U.S. Department of Justice, et al.*, Civil Action No. 19-00290-EMC, U.S. District Court for the Northern District of California, Sept. 22)

Judge Tanya Chutkan has ruled that the IRS **conducted an adequate search** for records in response to Bryon Taylor's four requests concerning penalties for submitted frivolous returns. Taylor argued that the agency failed to explain how it conducted its searches for his requests. However, Chutkan agreed that the agency's search was adequate. She noted that "the IRS need only conduct a search reasonably calculated to uncover all relevant documents. Insofar as Plaintiff demands information pertaining to penalties assessed for income tax documents deemed frivolous by the IRS, Defendant adequately explains that penalty-related information would be maintained in penalty assessment files and that a search for such files is conducted by IDRS using a taxpayer's Social Security number and the Command Codes [the agency's affidavit] identified. [The agency] did so, retrieved the records, and the IRS released these penalty files in full – as they exist – for tax years 2010, 2011, 2012, and 2015." (*Bryon Taylor v. Internal Revenue Service*, Civil Action No. 18-2666 (TSC), U.S. District Court for the District of Columbia, Sept. 10)

Judge Timothy Kelly has ruled that the DEA properly responded to a request from Griselle Marino, who was continuing her husband's FOIA litigation concerning his drug conviction. In response to Griselle's litigation, the DEA conducted a new search and located 406 pages of additional records. The agency disclosed 62 pages in full and 260 pages with redactions. It withheld 12 pages in full. Marino challenged the **adequacy of the agency's search**, arguing that the agency interpreted the request too narrowly. Kelly upheld the agency's search, noting that "the request's plain language sets the search parameters as documents indexed to that number [of Marino's drug investigation]. Indeed, the DEA likely went above and beyond what the request called for by searching the three case files for all documents referring to Lopez, even if they were not indexed to NADDIS No. 3049901." Marino argued that *Maydak v. Dept of Justice*, 218 F.3d 760 (D.C. Cir. 2000), in which the D.C. Circuit ruled that the Department of Justice could not claim new exemptions after its initial Exemption 7(A) (interference with ongoing investigation or proceeding) no longer applied, applied to her case as well. But Kelly pointed out that "the *Maydak* case concerns instances in which the government tries to raise additional exemptions late in litigation as to the *same documents* over which it previously asserted different ones. Marino has not suggested that it is what has happened here, and she cites no case in which *Maydak* was applied to bar invocation of new exemptions over newly identified documents." (*Griselle Marino v. Drug Enforcement Administration*, Civil Action No. 06-1255 (TJK), U.S. District Court for the District of Columbia, Aug. 26)

A federal court in South Carolina has ruled that the Farm Service Agency properly responded to Benjamin Zeigler's FOIA request for all emails and phone calls to or from Kyle Daniel, the FSA County Director for Georgetown County, South Carolina from 2006 to the present by concluding that many of them did not qualify as **agency records**. Ziegler also provided 44 search terms. After narrowing the request to 12,624 pages, the agency hired two full-time contract employees to respond to Ziegler's request, using the ten factors identified in *Bureau of National Affairs v. Dept of Justice*, 742 F.2d 1484 (D.C. Cir. 1984), to determine which records were personal and which records qualified as agency records. The agency disclosed 1,040 pages of emails and determined that 11,279 pages were not agency records. Most of the withheld records dealt with Daniels' relationship with his business partner, with whom he had a hunting business. Finding that the agency had properly separated the records between personal and agency records, the court noted that "the question is not whether Daniel may have used his position for personal gain, the question is whether the emails sought are properly considered 'agency records' or 'personal records' under relevant case law. Considering the [relevant factors in the case law], especially the extent to which agency personnel have read or relied on the withheld emails to carry out the business of the agency, along with [the agency's] declarations, the briefs, and the *Vaughn* index, and the *in camera* submission, the Court concludes that Defendant properly determined the documents at issue to be personal records." (*Benjamin Zeigler v. United States Department of Agriculture – Farm Service Agency*, Civil Action No. 19-02633-RBH, U.S. District Court for the District of South Carolina, Sept. 13)

A federal court in Maryland has ruled that the Department of Treasury and the Department of Veterans Affairs properly responded to multiple FOIAPA requests from pro se litigant Kiesha Lewis, a former employee of the IRS, covering a range of claims under both FOIA and the **Privacy Act.** The agencies argued that most of the complaints should be dismissed because Lewis had **failed to exhaust her administrative remedies.** The court found three instances in which Lewis had filed appeals but dismissed many of the others, noting that Lewis claimed the agencies failed to respond on time or provided unsatisfactory responses. The court pointed out that "such lengthy delays and unsatisfactory responses do not excuse the failure to exhaust. . .Once the agencies provided responses, even if unsatisfactory, Lewis was required to filed administrative appeals before filing suit." The court found the VA had failed to show that either **Exemption 5 (privileges)** or **Exemption 6 (invasion of privacy)** applied to documents pertaining to hiring. As to the Exemption 5 claim, the court noted that "where the VA has described the document in question as a memorandum relating to the appointment of the members of the Executive Resources Board for a particular hiring decision, it is unclear whether it contains similar material or whether it simply lists the appointed individuals, the dates of their meetings, or other such information. The VA has not provided legal authority establishing that Exemption 5 protects such non-consultative information from disclosure." (*Kiesha D. Lewis v. Department of Treasury, et al.*, Civil Action No. TDC-20-0494, U.S. District Court for the District of Maryland, Sept. 21)

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