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Washington Focus: Russ Kick, who started the Memory Hole website in 2002, posting records he received as a result of FOIA requests, died September 24 at the age of 52. According to his obituary in the Washington Post, one of Kick's first successes was an unredacted internal report from the Justice Department documenting harsh criticism of its diversity efforts. When the report was first published on the agency's website in 2003, half of its 186 pages were blacked out. Kick simply downloaded the file, opened it in Adobe Acrobat and used the "Touch Up Object" tool to highlight and delete the black bars. "It was that simple," Kick told the New York Times in a 2012 interview. "I was kind of surprised, but we are talking about government bureaucracy, so I wasn't that surprised." Reflecting on Kick's legacy, Nate Jones, FOIA director for the Washington Post, noted that Kick "influenced this generation of FOIA requestors by showing the power of posting the records unvarnished, and letting them speak for themselves."

Court Rejects USPS Exemption Claims On Good Business Practices

Ruling in a case brought by American Oversight against the U.S. Postal Service for records concerning Postmaster General Louis DeJoy's calendar entries, Judge Rudolph Contreras has joined several other D.C. Circuit district court judges in restraining the agency's aggressive use of the Postal Reorganization Act, 39 U.S.C. § 410(c)(2), which allows the agency to withhold information that is customarily treated as confidential in a business context, to claim that DeJoy's calendar entries are confidential.

American Oversight submitted a FOIA request on July 29, 2020, to the USPS for Dejoy's calendar entries from June 15, 2020, to the date the search was conducted. USPS initially told American Oversight that it had no responsive records because it considered DeJoy's calendar entries were not agency records but personal records. However, after American Oversight filed suit, the agency changed its position and produced a heavily redacted 155-page *Vaughn* index. USPS justified its redactions under Exemption 3 (other statutes), Exemption 5 (privileges), Exemption 6 (invasion of privacy),

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and Exemption 7(C) (invasion of privacy concerning law enforcement records), covering twelve distinct categories of the 1,024 meetings on DeJoy's calendar. While the *Vaughn* index did not provide detail as to which exemptions applied to which meetings, many of the exemption claims relied upon § 410(c)(2) of the PRA, which exempts from disclosure "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed." American Oversight acknowledged that § 410(c)(2) qualified as an Exemption 3 statute, but contended that the agency had applied it too broadly.

Contreras explained that the USPS regulations on whether or not §410(c)(2) applied consisted of six factors, five of which supported withholding, but the sixth factor instructed that material should be disclosed when it "relates primarily to the Postal Service's governmental functions or its activities as a provider of basic public services." USPS contended the majority of the withheld records fit within the parameters of § 410(c)(2) because disclosure "would aid USPS's competitors and harm the Postal Service's ability to compete in the private marketplace" by revealing "the Postmaster General's strategic priorities, the identities of his key counselors and their areas of responsibility, details about his negotiations with potential customers and partners, the frequency and nature of discussions with labor union representatives, subject matter discussed with his legal counsel, and various other sensitive information that no private enterprise would ever publicly reveal under best practices." By contrast, American Oversight found it difficult to believe that none of DeJoy's meetings related primarily to the agency's government functions.

Contreras agreed with American Oversight. He noted that "USPS's interpretation of how the [sixth] factor should be considered is so limited it directly contravenes the express purposes of FOIA and runs afoul of the agency's own regulations." Contreras pointed out that "the Court gathers that USPS is able to reach such an extraordinary conclusion that no such meetings were scheduled on Mr. DeJoy's calendar (even in the face of such contemporaneous evidence) due to the extreme definition it employs as to what constitutes governmental functions or basic public services. USPS posits that 'even meetings touching upon matters of public concern are *likely* to be inextricably intertwined with commercially-sensitive information related to postal rates, funding, operations and logistics.' Consequently, the agency appears to have created an internal standard that the only calendar entries that would fall under this category are, in its own words, those '*exclusively* addressing issues of public concern without any corresponding commercial sensitivity.'"

Contreras observed that "but this is not what the law requires. First, and foremost, USPS's own regulations direct the agency to weigh whether the information at issue 'relates *primarily* to the Postal Service's governmental functions or its activities as a provider of basic public services.' A 'primary' relationship to matters of public concern is less demanding than the 'exclusive' relationship standard USPS attempts to create. As American Oversight correctly asserts, this means that where information is primarily related to USPS's public functions, 'the focus or attendees of a meeting [can] have some nexus with commercial activities' without transforming the calendar record into protected commercial information."

Contreras indicated that "USPS [should] remember that it is the substance of the calendar entries that is at issue here, not the content of the meetings themselves." He observed that "USPS appears to contend that even if a meeting – not the calendar entry – touched on items of commercial nature, it would fall into the exemption." He explained that "it strikes the Court as unlikely that this basic calendar entry information could – in every instance from a five-month period during which USPS carried out critically important public responsibilities – plausibly contain content that is either of a commercial nature or content of public concern that is 'impermissibly intertwined' with sensitive commercial content."

Contreras also faulted USPS for its Exemption 5 claims. Addressing the deficiency of its deliberative process privilege claims, he noted that "USPS does not provide even a general description of the specific

subject matter of each calendar entry at issue, giving the Court only four broad categories of the types of meetings it has withheld from release." He added that "nor is there any attempt to explain how these calendar entries relate to the overarching deliberative process (and how could it, when no deliberative process is identified). USPS also declines to provide any specific information as to which decisionmakers were involved in the record at issue. Without this information, the Court cannot adequately assess if this information is indeed appropriately covered by this exemption." He found the agency's attorney-client privilege claims fell short as well. He pointed out that "the agency has declined to provide any calendar entry specific details abut the type or nature of the legal advice at issue." (*American Oversight v. U.S. Postal Service*, Civil Action No. 20-2580 (RC), U.S. District Court for the District of Columbia, Sept. 23)

Views from the States…

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

New Mexico

A court of appeals has ruled that the Custodian of Public Records for the New Mexico State Land Office properly charged Open Access NM a $26.50 fee to reformat and upload 2,160 pages to a Dropbox account. Open Access NM disputed the charge and refused to pay the fee, which the records custodian considered a necessary prerequisite for obtaining the documents in the first place. Open Access NM argued that the use of Dropbox did not constitute the kind of reformatting covered by the fee. The court indicated that "Dropbox is a file-sharing platform that can allow Petitioner to download copies of documents uploaded by the agency. The statute does not appear to prohibit the agency from charging an hourly fee for any particular activity in connection with downloading records in order that they be made available to a requester, except that the activities must involve the 'actual costs associated with' doing so, in assessing whether the charge of $26.50 associated with this [Inspection of Public Records Act] request represented actual costs in providing the records to Petitioner." The court concluded that "the $26.50 at issue represented the actual cost associated with providing the requested public records for Petitioner to download." (*Open Access NM v. Nicholas Koluncich,*, No. A-1-CA-39157, New Mexico Court of Appeals, Oct. 5)

The Federal Courts…

Judge Amit Mehta has ruled that the DEA has not yet shown that it properly responded to a multi-part request from attorney Kevin Byrnes for records about himself as well as about 16 former DEA special agents whom Byrnes represented in their claims against the agency for violating the Uniform Services Employment and Reemployment Rights Act by penalizing them for serving in the U.S. Armed Forces reserves. Byrnes submitted a five-part FOIA and Privacy Act request asking for communications between the DEA and third parties referring to Byrnes in his role as counsel for the 16 former DEA agents, communications made to DEA attorney Sandra Stevens regarding her role as an arbitrator for the D.C. Bar's Fee Dispute Resolution Panel, surveillance of Byrnes or his clients, attempts by the DEA to dissuade DEA employees from hiring Byrnes as their attorney, and DEA communications claiming that Byrnes violated the professional code of legal ethics. The agency told Byrnes that his requests did not adequately describe the records sought. After Byrnes filed suit, the agency began searching for

responsive records. Those searches yielded 967 responsive pages. DEA released 623 pages in full or in part and withheld 344 pages in full. The agency also provided a 100-page *Vaughn* index explaining its exemption claims. Mehta agreed with Byrnes that the agency's decision to limit its search for emails responsive to third party communications to email accounts ending in ".gov" was inappropriate. He pointed out that "none of [these requests] seek communications from government entities. Rather, they seek communications from nonprofits, the media, outside attorneys, and state bar authorities. It therefore makes little sense for the agency to limit the communications searched to those that end in '.gov,' the domain for entities of the federal government." Mehta also rejected the agency's decision not to search Stevens' email account separately but as part of search of the Chief Counsel's office. He observed that "the request specifically goes beyond Byrnes' role in matters that he litigated on behalf of DEA to seek records from 'Stevens regarding her role as an arbitrator for the D.C. Bar's Fee Dispute Resolution Panel.' DEA has not provided any reason that records responsive to Byrnes' request for files related to a fee dispute would be located in CC's legal files." Mehta accepted the agency's use of an automated search of CC attorneys' emails but found that the agency had failed to explain what terms it had used in the searches. He indicated that the agency was required to search for records relating to the 16 DEA agents identified by Byrnes. He pointed out that "the agency's blanket refusal to search for records related to any of Byrnes' clients indicates that it failed to follow patently obvious leads. . ." However, Mehta sided with the agency on the issue of whether portions of Byrnes' requests were too burdensome to search, explaining that the presumption of good faith attributed to agency affidavits overcame Byrnes' unsupported allegations. He rejected the agency's attempt to use **Exemption 6 (invasion of privacy)** to withhold the names of agency attorneys because they might be subject to harassment. He noted instead that "where, as here, both the privacy interests and the public interests implicated by the disputed information is minimal, the law breaks in favor of disclosure." (*Kevin Byrnes v. United States Department of Justice*, Civil Action No. 19-0761 (APM), U.S. District Court for the District of Columbia, Sept. 29)

Judge Trevor McFadden has ruled that the National Science Foundation properly responded to a request from Ali Amiri, a researcher who requested records about why an NSF-funded research project he was working on as a graduate student was cancelled. The NSF search initially yielded ten grant award numbers containing at least one of Amiri's search terms. However, after reviewing the records the FOIA staff concluded that only one of the grant numbers was connected to Amiri's project. The NSF's FOIA processing was delayed during the pandemic, but the agency ultimately disclosed 549 pages. Amiri challenged the **adequacy of the agency's search**. Amiri complained that the agency should have disclosed more emails. But McFadden pointed out that "NSF's email policy mandates that deletion of 'transitory email' after 180 days, and email from 'non-supervisory personnel, which includes Program Officers,' after three years. Thus, only a limited number of emails exists on eJacket. The agency fully searched that database and, despite agency policy, directed two Program Officers to manually search their individual email accounts for responsive records." Amiri also argued that he should have received records from the NSF Office of Inspector General. McFadden rejected the claim, noting that "OIG operates independently from NSF and 'handles its own records and FOIA requests.' NSF's FOIA Office and staff have no access to OIG records. More, Amiri never directed his FOIA Request to OIG. The agency need not expand it search beyond 'the four corners' of Amiri's request. Amiri appears to acknowledge this point, as he eventually filed a separate FOIA request with OIG." NSF withheld ten pages with redactions under **Exemption 5 (privileges)**, citing the deliberative process privilege, containing written summaries of a scientific review panel's analysis and funding recommendations about a group of proposals. Amiri argued that comments by graduate students should not be privileged because

they represented the personal opinions of the individual. However, McFadden noted that "the privilege particularly applies to recommendations from subordinates, regardless of their rank or academic degree." He also agreed that the agency's privilege claims met the **foreseeable harm** standard. He pointed out that "disclosure of just the recommendations would confuse the public and cast doubt on the public basis for NSF grant decisions." NSF withheld 25 pages in full and 62 pages in part under **Exemption 6 (invasion of privacy)**. Amiri argued that the agency had waived its privacy claims when it inadvertently allowed FedEx access to the records while copying them for disclosure and mailing. McFadden attributed a more innocent cast to the mistake. He pointed out that "more plausibly, a remote FOIA staff member mistakenly assembled unredacted pages. That error was inattentive, but it suggests no wrongdoing or intentionality, particularly given the circumstances and logistical challenges of the FOIA staff's telework." NSF also asked McFadden to order Amiri to return to the agency a document containing personally identifying information that had been disclosed inadvertently. McFadden agreed with the agency. He observed that "many individuals have a strong privacy interest in the unredacted PII and Amiri has not shown that the public should see that information." (*Ali Amiri v. National Science Foundation*, Civil Action No. 20-02006 (TNM), U.S. District Court for the District of Columbia, Sept. 28)

Even though it found that the Small Business Administration should not be **sanctioned** for its failure to respond to Frank Lawrence's FOIA request for records about his employer's alleged misuse of Paycheck Protection Program funds within the statutory time limit, a federal court in Michigan has ruled that Lawrence is entitled to **attorney's fees** for his litigation against the agency. Lawrence requested records concerning his employer's application to use PPP funds. The agency referred Lawrence to statistical information on its website but otherwise did not respond to his request. Lawrence then filed suit. Lawrence argued that under *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), in which the D.C. Circuit held that if an agency failed to make a determination as to how to respond to a FOIA request within the statutory time limits provided in FOIA, the plaintiff had an absolute right to go to court, was dispositive of the case. However, the court decided *CREW* was distinguishable. Judge Mark Goldsmith explained that "even if, before SBA filed its motion to dismiss, Lawrence's complaint provided the agency with notice of his interpretation of *CREW*, the existence of a single case of recent vintage in a single circuit does not necessarily signal that another position is unequivocally groundless." Goldsmith indicated that "SBA's June 8, 2020 letter, which Lawrence received before bringing this action, did not postpone a decision for a later date, and did not state that it was not subject to appeal. Accordingly, it did not place Lawrence in the same type of 'Catch-22' identified by the court in *CREW*. Instead, the letter expressly told Lawrence that he could appeal." He noted that "given these distinctions – together with the principle that individuals must generally exhaust administrative remedies before seeking judicial review of a FOIA request – it was not objectively unreasonable under the circumstances for SBA to determine that its June 8, 2020 letter was sufficient to constitute an appealable decision." He added that "because SBA's position was not objectively unreasonable, sanctions are not warranted under Rule 11." However, after finding that the agency was not subject to sanctions, Goldsmith concluded that Lawrence had substantially prevailed and was entitled to attorney's fees. The agency argued that Lawrence's litigation did not cause the agency to change its position, but that a case filed by a media coalition – *WP Company v. Small Business Administration*, 502 F. Supp. 3d 1 (D.D.C. 2020) – actually caused the agency to change its position. The court disagreed, noting that "simply because news organizations substantially prevailed in *WP Co.* does not preclude Lawrence from substantially prevailing here." He pointed out that "while the SBA contends that because of the *WP Co.* order, Lawrence would have obtained his requested

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information if he had 'done nothing,' the record indicates that is not the case." Having found Lawrence's fee request reasonable, Goldsmith awarded him the entire $16,167 he requested. (*Frank J. Lawrence, Jr. v. United States Small Business Administration*, Civil Action No. 20-11637, U.S. District Court for the Eastern District of Michigan, Sept. 27)

A federal court in New York has ruled that the Department of Justice properly withheld records concerning two programs for state and local law enforcement agencies related to gang suppression involving the recruitment of unaccompanied alien children funded by the Office of Juvenile Justice and Delinquency Prevention under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods or techniques)**, in response to a multi-part FOIA request from the ACLU but the agency failed to show that the records were protected by **Exemption 6 (invasion of privacy)**. By the time Judge Mary Kay Vyskocil ruled, the only issues remaining concerned DOJ's withholding under Exemptions 6, 7(C), and 7(E). Vyskocil agreed with the agency's contention that Exemption 6 could apply to non-identifying information that could still be used to help identify someone. She observed that "it would effectively nullify Exemption 6 if only names and clear identification raises a privacy interest under FOIA, but there were no privacy interests even where information sought could lead the requester to easily identify an individual's name or identity." But she indicated that the agency had not shown that disclosure would invade an individual's privacy. She noted that "it may be that these individuals are vulnerable to harassment because their involvement with immigration law enforcement, but Defendants bear the burden of establishing that the exemption is warranted. Because the Defendants have not made any such showing, whatever privacy interest the individuals may have in controlling the disclosure of their employment history, job responsibilities, and professional awards, among other things is *de minimis* and the need to balance the privacy interest with the public interest in disclosure is not triggered." Turning to Exemption 7, the ACLU argued that Exemption 7 did not apply unless there was an ongoing investigation. Vyskocil rejected the claim, noting instead that "the 'investigatory file' language Plaintiff uses appears to be outmoded former language held over in dicta from a pre-1974 amendment to FOIA. The Court finds no support for the Plaintiffs contention that Defendants' arguments must fail because 'courts apply Exemption 7 only to "investigatory files."'" She added that "defendants plainly provide evidentiary support that in this case the information withheld under Exemption 7 was 'compiled' by the agency from 'information of law enforcement personnel submitted by various local law enforcement agencies.'" As to Exemption 7(C), she observed that "plaintiff cannot, and has not, shown how the additional disclosure will serve the public interest, and disclosure would therefore be 'an unwarranted invasion of personal privacy.'" Vyskocil also agreed with the agency that disclosure of information protected by Exemption 7(E) would reveal protected intelligence sources. (*American Civil Liberties Union v. Department of Justice and Office of Justice Programs*, Civil Action No. 19-5483 (MKV), U.S. District Court for the Southern District of New York, Sept. 27)

Judge Timothy Kelly has resolved FOIA litigation brought by paralegal Barbara Kowal at the Middle District of Florida for records concerning the conviction of Daniel Troya, who was being represented by the Federal Defender in post-conviction hearings. Kowal asked for records from the FBI, the DEA, and the Bureau of Alcohol, Tobacco and Firearms. Kelly originally rejected the FBI's *Vaughn* index and ordered the agency to supplement the index. This time, Kelly found the FBI's supplemented *Vaughn* index sufficient to justify its exemption claims. The FBI withheld wiretap records under Title III, citing **Exemption 3 (other statutes)**. Kowal argued the agency had waived the exemption because the

records had been disclosed during Troya's trial. Kelly disagreed, noting that "but Kowal's argument misses a critical point – the *Vaughn* index makes clear that the records at issue are part of a 'narrative summary' document, not a transcript or tapes of a wiretap. Even assuming the wiretaps referenced in the narrative summary were played at trial, Kowal has not shown that the document at issue is part of the public domain." Kelly also sided with the agency on **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. He rejected Kowal's claim that the public interest in disclosure outweighs any privacy interests. He pointed out that "in part, this argument presumes that these individuals' identities were revealed at trial. While perhaps some of them were, Kowal does not meet her burden to show that the identical documents and information that FBI seeks to withhold were made public then." Kowal also complained that the agency had not shown that assurances of confidentiality were promised for purposes of **Exemption 7(D) (confidential sources)**. Kelly noted that "an assurance of confidentiality can still be implied based on the nature of the criminal investigation and the informant's relationship to the target. This is one of those situations." (*Barbara Kowal v. United States Department of Justice, et al.*, Civil Action No. 18-2798 (TJK), U.S. District Court for the District of Columbia, Sept. 30)

Judge Amy Berman Jackson has resolved the *Washington Post*'s litigation against the Special Inspector General for Afghanistan Reconstruction by ruling in favor of some of the agency's remaining exemption claims, including **Exemption 1 (national security), Exemption 6 (invasion of privacy)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Berman Jackson had ordered SIGAR to supplement its *Vaughn* affidavit to better substantiate the privacy claims for individuals who had been interviewed. Berman Jackson agreed that the agency had shown that its records were compiled for law enforcement purposes but was skeptical that the agency had made its case on its **7(D) (confidential sources)** claims for individuals who had spoken on the record. She found those interviews were not protected, noting that "defendant has failed to justify the withholding of any 'on the record' [interviews] or associated audio records under the specific terms of Exemption 7(D), and the Court will grant summary judgment for plaintiff on that issue." Berman Jackson was more sympathetic to SIGAR on the issue of whether third party identification could be withheld under Exemption 7(C). She noted that "defendant has adequately explained the harm associated with releasing this information and the courts in this district have recognized that the public interest in knowing the identities of third parties, even high-ranking officials, rarely outweighs such privacy interests." While she recognized that higher-level officials had a diminished privacy interest, she nonetheless found that SIGAR had shown the public interest in disclosure did not outweigh the individuals' privacy interests. While she agreed that 11 interviews were pre-decisional for purposes of the deliberative process privilege, she noted that they were not deliberative, observing that SIGAR "has not shown that the [interviews] were part of the internal give and take that led *to* the reports as opposed to sources of information used *in* the reports." Berman Jackson also found that portions of the interviews were protected by the presidential communications privilege. (*Washington Post Company v. Special Inspector General for Afghanistan Reconstruction*, Civil Action No. 18-2622 (ABJ), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in Minnesota has ruled that U.S. Immigration and Customs Enforcement properly responded to a FOIA request from Melvin Gutierrez Guillen and Marleny Pineda Guitierrez for records concerning the agency's decision to deport him to El Salvador for illegally entering the U.S. in 2016 by redacting identifying information under **Exemption 6 (invasion of privacy)** and **Exemption 7(C)**

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(invasion of privacy concerning law enforcement records). Guillen requested asylum, which was denied in 2019. Part of the reason his asylum request was rejected was because of alleged inconsistencies between his asylum affidavits and the testimony given to an asylum officer through an interpreter during Guillen's credible fear interviews. Guillen appealed the denial to the Board of Immigration Appeals, which is still pending. Guillen filed a FOIA request with U.S. Citizenship and Immigration Services for records pertaining to his credible fear interview. USCIS located 659 responsive pages, disclosing 600 pages in full, 34 pages in part, and withholding six pages in full. USCIS also referred 19 pages to ICE. Guillen filed an administrative appeal and ICE ultimately disclosed the 19 pages with redactions. Guillen and his wife settled all claims against the agencies except for the redactions of the names of agency employees made in the 19 pages under Exemption 6 and Exemption 7(C). Guillen's only argument for disclosure was so that he could contact the employees about their connection with his pending removal proceedings. The court, however, indicated that "this is Guillen's personal interest, which fails to establish a valid public interest in knowing the redacted names and duty stations of ICE and USCIS employees in order to understand the operations or activities of government. To the extent that Guillen has a valid private interest in knowing the names of the affected employees in order to advance discovery in his administrative hearing, that is a discovery issue to be addressed by the administrative court." The court noted that "here, Plaintiffs fail to articulate how disclosure of the individual DHS employees' names and duty stations would 'contribute significantly to the public understanding *of the operations or activities of the government*.'" The court agreed with the agency that the records had been compiled for law enforcement purposes, noting that "the asylum officer whose name is redacted is a USCIS employee; however, that individual, a DHS employee, was involved in law-enforcement-related work in the same set of documents." (*Melvin Gutierrez Guillen and Marleny Pineda Gutierrez v. United Stated Department of Homeland Security, et al.*, Civil Action No. 20-1713 (MJD/ECW), U.S. District Court for the District of Minnesota, Sept. 30)

Judge Amy Berman Jackson has ruled the Civil Rights Division of the Department of Justice properly withheld records concerning its report on the death of Jamar Clark by the Minneapolis Police Department. In response to a pro se FOIA request from Edgar Nelson Pitts, the CRT located two potentially responsive documents – one was a "Notice to Close File," which the agency deemed was not responsive to Pitts' request, which had specified that he was requesting a report, and the other, a press release on CRT's actions in response to Clark's death, which the agency disclosed in full. CRT filed a motion for summary judgment, but Pitts did not respond. Berman Jackson pointed out that *Winston & Strawn v. McLean*, 843 F.3d 503 (D.C. Cir. 2016) – a non-FOIA procedural decision in which the D.C. Circuit indicated that district courts were required to assess all motions for summary judgement even if they were unopposed before granting relief – she was still required to address the merits before granting summary judgment. Berman Jackson indicated that CRT had not sufficiently explained how it conducted its search, but she pointed out that "although the reasonableness of a search is not determined by its results, given plaintiff's apparent lack of interest in litigating this case, the Court will not trouble itself on this point." She agreed with the agency that the Notice to Close File was protected by **Exemption 5 (privileges)**. She observed that "because the Notice to Close File was prepared by attorneys and reflects their impressions, legal theories, personal opinions, and recommendations, it is apparent that the attorney work product privilege applies." She indicated that **Exemption 7(C) (invasion of privacy concerning law enforcement records)** protected third-party identifying information as well. She pointed out that "neither the parties nor the Court identifies a public interest to outweigh the third parties' privacy interests, and the Court concludes that CRT properly relies on Exemption 7(C) to withhold third party

information from the Notice to Close File." (*Edgar Nelson Pitts v. U.S. Department of Justice, e al.*, Civil Action No. 19-1784 (ABJ), U.S. District Court for the District of Columbia, Oct. 4)

A federal court in New York has accepted the recommendation of a magistrate judge that attorneys for the Center for Popular Democracy are entitled to **attorney's fees** as the result of its FOIA litigation against the Federal Reserve but has reduced the attorney's fees award request for the San Francisco-based firm of Altshuler Berzon by 40 percent to reflect the actual cost of litigating in the Eastern District of New York, where the litigation took place. CPD submitted a 27-page request with multiple parts focused on how the agency developed policies for leadership roles. In five interim releases, the Federal Reserve disclosed 1,167 pages, and agreed in a July 16, 2019 order to search for further records. The agency argued that because of the complexity of the request and slowdowns because of the pandemic, CPD's suit, which was filed only two months after the statutory time limit expired, did not cause the agency to respond more quickly. However, the magistrate judge found that the July 19, 2019 order created a change in the relationship of the parties that established CPD as the prevailing party for that order only. The court agreed that CPD had shown that it was entitled to fees. Magistrate Judge Vera Scanlon observed that "on balance, this Court finds [the four factors used to assess eligibility for fees] weighs in favor of CPD as to the documents sought on summary judgment because the Court rejected the Board's contention that it had conducted a reasonable search for responsive documents as to many of CPD's requests." Turning to the fee request itself, Scanlon noted that "the requested hourly rates are not in line with the prevailing rates in the Eastern District of New York or even the Southern District of New York." She added that "a 40% discount on all rates proposed by Altshuler Berzon for attorneys and law clerks would bring the rates of the timekeepers within the range granted in this District for complex litigation." Scanlon also found that the hours requested were excessive, reducing them by 40 percent as well. As a result, she awarded CPD a total of $156,545 in fees and costs. (*Center for Popular Democracy v. Board of Governors of the Federal Reserve System*, Civil Action No. 16-5829 (NGG) (VMS), U.S. District Court for the Eastern District of New York, Sept. 29)

Judge Amy Berman Jackson has ruled that the Department of Veterans Affairs properly withheld records concerning a complaint sent to the agency from an implant center complaining of the company's business practices in response to a FOIA request from Perioperative Services and Logistics under **Exemption 6 (invasion of privacy)**. In response to the company's FOIA request, the VA located two responsive pages but told Perioperative Services that it would withhold the records under **Exemption 5 (privileges)**. Perioperative Services filed an administrative appeal, which was upheld by the agency. However, in its appeals decision, the agency indicated that the records would be withheld under Exemption 6 rather than Exemption 5. Perioperative Services then filed suit. Berman Jackson agreed with the agency that Exemption 6 applied to protect the records. She noted that "the privacy interest here is clear, plaintiff specifically asked to be informed of the identity of the third party that filed a complaint with a federal agency. Other courts in this district have held that these complainants have a substantial privacy interest in their identity. This can be true 'even where such identifying information is otherwise available from public records,' and it is certainly true in this instance, where the complainant has never been publicly identified, and the plaintiff has been vociferous about its interest in 'unmasking' the source of the complaint." Perioperative Services argued that it had been harmed by the alleged allegations. But Berman Jackson observed that "advancing a personal vendetta is not a purpose FOIA was designed to

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serve." (*Perioperative Services and Logistics, LLC v. U.S. Department of Veterans Affairs*, Civil Action No. 20-0095 (ABJ), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in Massachusetts has ruled that the Executive Office for Immigration Review properly responded to freelance journalist John Hawkinson's FOIA request for EOIR decisions containing the text "alternatives to detention" or "alternatives-to-detention," from the Board of Immigration Appeals that originated either in Boston or Hartford. EOIR disclosed two decisions. Because Hawkinson believed there was a third responsive decision, he filed an administrative appeal with the Office of Information Policy. OIP upheld EOIR's response and Hawkinson filed suit. Hawkinson's request was handled by Shelly O'Hara, Attorney Advisor for FOIA with the Office of the General Counsel at EOIR. Her office handled two different types of requests – untargeted requests, which seek BIA decisions based on a particular immigration judge or court, and targeted requests, which request BIA decisions based on an alien's name. Targeted requests are not fulfilled without a Privacy Act waiver. O'Hara's search located two BIA decisions that qualified as untargeted requests, but she did not search the targeted decision database since Hawkinson did not provide a third-party authorization. Hawkinson argued that O'Hara should have been able to find the third decision by searching its immigration court database since it was clearly responsive to his request. Rejecting the claim, the court pointed out that "EOIR has a policy of not responding to document requests about particular individuals absent a requestor providing verification of identity for that individual. This same verification is required for targeted searches, which is in essence what Hawkinson was asking EOIR to perform in order to locate the missing document and explain its omission." (*John A. Hawkinson v. Executive Office for Immigration Review*, Civil Action No. 20-12273-MPK, U.S. District Court for the District of Massachusetts, Sept. 27)

Judge Royce Lamberth has ruled that the Bureau of Prisons properly redacted the signatures of nine BOP personnel whose oaths of office documents were requested by prisoner Martin Cox. The agency issued a *Glomar* response neither confirming nor denying the existence of records, citing **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Cox then filed suit in the Eastern District of Kentucky, which dismissed his case for failure to state a claim. Cox then appealed to the Sixth Circuit, which vacated the judgment and remanded the case. Cox then moved to transfer the case to the D.C. Circuit district court, which was granted. The agency then disclosed all nine oath-of-office documents with the signatures redacted. Cox challenged those redactions. Lamberth agreed with the agency's explanation that such signatures were sometimes used as the basis for filing false liens against the signatories. He pointed out that "in contrast with this substantial invasion, there is no public interest in the disclosure of these signatures." He indicated that he determined that "defendant has released all information to the plaintiff that FOIA obligates it to release. The handwritten signatures were properly redacted under Exemption 6 to protect the individuals in question from an unwarranted invasion of privacy." (*Martin Cox v. Bureau of Prisons*, Civil Action No. 20-0887-RCL, U.S. District Court for the District of Columbia, Sept. 24)

A federal court in Massachusetts has resolved eight-year-old litigation brought by Thomas Stalcup for records showing that TWA Flight 800, which crashed shortly after take-off from New York, killing everyone on board, was actually shot down by stray missiles fired by local military training, by accepting the recommendations of a magistrate judge. Stalcup submitted three FOIA requests for records from the Missile Defense Agency and the Department of Defense pertaining to the crash. Stalcup argued that

MDA in particular had not **conducted an adequate search** because it did not search outside entities that might have responsive records. However, the court noted that "but even if Stalcup had 'firm evidence' of such records existing outside DOD, [one of its declarations] avers that MDDC is the single authoritative location for all missile test records, including Aegis test records.' This assertion leads the Court to the reasonable conclusion that even if external entities also have responsive records, those records would seem to already be within the MDDC depository identified by DOD as the source for all missile test records." However, the court found that DOD failed to justify its search of the Office of the Secretary of Defense. The court pointed out that "the declarations do not contain a description of the file system, such as by explaining 'which series correlates to what functions, within OSD, and why searching those other series would be overly burdensome or unlikely to locate responsive records.' Without more, such as descriptions of the various numbered series assuming there are additional ones or a sworn declaration, similar to that provided by MDDC, averring that Series 2000 is the only place where the actual test plans would be found or is the single authoritative location for them. . ." (*Thomas Stalcup v. Department of Defense*, Civil Action No. 13-11967-LTS, U.S. District Court for the District of Massachusetts, Oct. 2)

Judge Richard Leon has ruled that American Oversight failed to show that there was a committee created to advise President Donald Trump on use of his clemency powers that would have been subject to the **Federal Advisory Committee Act**. Based on reporting that appeared in the *Washington Post*, American Oversight filed suit against Trump and presidential advisor Jared Kushner, who was identified as chairing the committee, arguing that the work of such a committee as described in the *Post* would fall under FACA. By the time Leon ruled on the merits, American Oversight acknowledged that its meetings claims were moot, but that its records-based claims were still actionable. However, Leon agreed with the government that American Oversight had not shown a remedy existed under FACA, the Administrative Procedure Act, or the Mandamus or Venue Act. The only evidence American Oversight produced of the existence of a clemency advisory committee was a press release from February 2020. But Leon pointed out that "far from supporting plaintiff's allegation, the press release shows the opposite to be true – that each act of clemency was supported by dissimilar *ad hoc* groups of unassociated individuals – the precise groups over which FACA does not apply." (*American Oversight v. Joseph R. Biden, Jr.*, Civil Action No. 20-00716 (RJL), U.S. District Court for the District of Columbia, Sept. 24)

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