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Court Grants Discovery for Search of 9/11 Records

Judge Emmet Sullivan has issued a ruling dealing with the obligation of agencies to search for records when a request has been referred to them by another agency which then essentially abandons its obligation to assure that all responsive records have been searched and processed.

The case involved a request by David Cole to the Federal Emergency Management Agency and the National Institute of Standards and Technology for records on the collapse of the World Trade Center as the result of the terrorist attack on Sept. 11, 2001, specifically, all background or raw data used for the FEMA 403 Building Performance Study (BPS). FEMA acknowledged receipt of the request and sent it to its External Affairs Office, which contained its photo library, the Federal Insurance and Mitigation Administration, and the Region II Office, the regional office that covers New York. FEMA told Cole that it found no records but discovered in the course of its search that all BPS-related records had been sent to NIST in May 2002. As a result, FEMA told Cole that his request was being transferred to NIST for processing and that NIST would respond directly to Cole.

NIST determined that the only office likely to have responsive records was the Engineering Laboratory, which had received all BPS-related records from FEMA in May 2002. The Engineering Laboratory searched its records and located 70 documents comprising 3,947 pages that were potentially responsive to Cole's request. NIST sent those records to FEMA's FOIA office for review. A subject matter expert reviewed the records and concluded that 3,789 pages were releasable in full or in part. However, NIST determined that it was not able to identify what records had been used by FEMA in its BPS study and decided not to disclose any records to Cole other than images and videos it determined were in the public domain. However, FEMA continued to insist that NIST would respond to Cole directly. FEMA also told Cole that it had determined that there were more than 490,000 pages of

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"supplemental" WTC-related records at the National Archives. On March 22, 2013, FEMA asked NIST to return all remaining May 2002 records for further review. NIST then told Cole that it had sent the records back to FEMA because it was unable to determine the releasability of the records, and that FEMA would now respond directly to Cole's request.

Cole complained that there were references to documents that seemed responsive but were not disclosed. There was confusion about a statement that FEMA's counsel had made that there existed a local archive in New York that could be searched and might contain responsive records that had not yet been found. However, FEMA explained its comments were mistaken and that there was no local archive.

Sullivan's decision was based on the recommendations of Magistrate Judge Michael Harvey. Sullivan noted that Harvey had found that "Defendants have not shown that their searches were adequate due to their failure to provide this Court with sufficient details about their methodologies." Harvey also faulted the "Defendants' conduct – engaging in lengthy delays and inconsistent representations and failing to adequately explain them despite this Court's clear expressions of concern."

Sullivan found that there was no clear error in Harvey's conclusions that FEMA and NIST had not shown that they conducted adequate searches. He pointed out that "FEMA has failed to explain both how its searches were carried out and what files the searches covered. The testimony FEMA references. . . asserting that al records were turned over to NIST, does not provide any detail on the search conducted. . .Without more information, 'even if the Court can make "reasonable guesses about the answers to those questions," the Court cannot award the agency summary judgment on the adequacy of its search.'"

NIST argued that it "is involved in this FOIA litigation only because FEMA had transferred the responsive documents to it in 2002" and accordingly "there would be no need for NIST to perform any search beyond what is necessary to locate the files transferred by FEMA." Sullivan pointed out that "for the purposes of FOIA, this court's concern is not how or why NIST came to be in possession of the records that Mr. Cole seeks; the Court's focus is simply on whether NIST has adequately searched for the records transferred to it rather than leaving the Court to speculate. The Court can appreciate the added complexity of searching for records that the agency did not create itself, for which 'it doesn't already have a listing of potentially responsive material,' but that does not excuse NIST's failure to explain how it went about its search."

He added thar "the Court can certainly appreciate how the log would be a useful basis for the BPS material search, but Defendants continue to miss the point that they have not explained how the lists guided their search, and what their methodology was when searching the log." Sullivan observed that "what the Court is missing is *how* the records were searched. The Court finds that NIST's 'blanket assurance' that it searched 'all files and locations likely to contain responsive documents' is insufficient."

Cole also requested discovery into the issue of why it took so long for the agencies to respond. While FEMA admitted that the agencies had made a mistake in their oversight of Cole's request, Sullivan indicated that "sleeping on its FOIA obligations for several years makes for a glaring *lack* of oversight by FEMA. It does, however, nonetheless provide an explanation. While the Court finds a clear error on this narrow issue, it does not prevent a grant of discovery."

Cole particularly took issue to FEMA's prior statement that there were 490,000 WTC-related records at NARA, some of which could be responsive. Sullivan found FEMA had failed to explain what it intended by that statement, pointing out that "the Court is cognizant that searching through 490,000 pages is an onerous task. However, granting discovery in this case for records FEMA itself identified as supplemental does not 'effectively penalize FEMA for being more transparent;' instead, it ensures FEMA meets its legal duty and

conducts an adequate search for a FOIA request that it improperly ignored for several years. Contrary to FEMA's assertion, Mr. Cole is not advancing 'purely speculative claims about the existence and discoverability of other documents;' he is asking for FEMA to search supplemental records it itself identified." Granting discovery as limited by the Magistrate Judge's recommendation, Sullivan indicated that "based on the continued lack of details in the affidavits provided by FEMA, the Court concludes that this is the rare case where discovery, rather than supplemental declarations is warranted as to the Defendants' searches." (*David Cole v. Walter G. Copan, et al.*, Civil Action No. 15-1991 (EGS/GMH, U.S. District Court for the District of Columbia, Dec. 21)

Views from the States…

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

Arkansas

The supreme court has ruled that the privacy interest of Mark Myers, the former director of the Department of Information Services, and Jane Doe, an employee of a technology company that did business with DIS, in portions of intimate text messages they exchanged on the cloud-based application Blackberry Messenger while they were having an affair, are inextricably intertwined and cannot be separated from portions of those text messages dealing with their business. Myers resigned in November 2016 after a legislative audit disclosed that he was under investigation based on allegations that he had improperly authorized $8.2 million for the purchase of equipment from a vendor that was represented by Doe, someone with whom he was having a romantic relationship. In June 2017, the *Arkansas Democrat-Gazette* submitted a FOIA request for any correspondence between Myers and any representative of Cisco Systems since January 2015. DIS denied the request the following day, citing the exemption that temporarily protects from disclosure public records that are part of an investigation. In 2019, after the criminal investigation was completed, ADG renewed its original request. Transportation and Shared Services, which now had custody of the records, agreed to disclose the records and informed Myers of its intention to do so. After unsuccessfully asking the Attorney General to rule in his favor, Myers filed suit to block disclosure. The trial court allowed Doe to intervene. The trial court found that the business and personal matters were so intertwined that all the messages constituted public records and should be disclosed. The trial court also rejected Doe's argument that she had a constitutional privacy interest in the messages because of their intermingled nature. Myers and Doe appealed to the supreme court, which framed the issues as whether the trial court erred in finding the records were public records and whether the public interest outweighed the privacy rights. Although it recognized that the trial court had properly reviewed the records in camera, the supreme court found that the trial court had reached the wrong conclusion. It pointed out that "here, because these messages are individual, sent on different days, and sent at different times, the messages are not all interrelated and inextricably intertwined as found by the trial court. Rather, the messages in this case are capable of being sorted into private- and public-record categories. Therefore, the trial court clearly erred by not determining whether each individual message met the definition of a 'public record.'" The supreme court observed that "we reverse and remand the matter back to the trial court to perform a detailed content-based analysis and segregate the messages to determine whether the messages fall within the FOIA definition of 'public records. . . On remand, once the trial court has determined which, if any, individual messages are 'public records,' Myers and Doe may raise their right-to-privacy arguments and the trial court must conduct the appropriate weighing test for each item before ordering disclosure." (*Mark Myers and Jane Doe v. Amy Fecher*, No. CV-20-568, Supreme Court of Arkansas, Dec. 16)

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Maryland

The court of special appeals has ruled that the State Attorney's Office for Baltimore County improperly withheld a list of 305 Baltimore police officers whose credibility as witnesses was considered questionable under the exemption for personnel files in response to three Maryland Public Information Act requests from the Baltimore Action Legal Team because while the list was derived from internal personnel records of the Baltimore Police Department, it was not created from personnel records of the State Attorney's Office as required, but that responsive records that contain internal affairs material may be separated and withheld. The court explained that "simply because an officer's name appears on a list generated by SAO does not mean that it is now a personnel record, based on the 'commonly understood meaning of the term.' It seems to us that the SAO uses the list as a tool to ensure that prosecutions are not compromised by the testimony of officers whose veracity is questioned." The court noted that "the SAO created the list. That office has no supervisory authority over individual police officers whose names appear on the list." The appeals court also found that the list was protected as attorney work product. The court pointed out that the list "was not created in anticipation of litigation, but instead is used more as a tool that the SAO may use to assess the strength of a prosecution." The appeals court also found that SAO failed to justify its denial of BALT's two fee waiver requests. (*Baltimore Action Legal Team, et al. v. Office of the State's Attorney of Baltimore City, et al.*, No. 1251 Sept. Term, 2020, Maryland Court of Special Appeals, Dec. 17)

Michigan

The supreme court has ruled that the Independent Citizens Restricting Commission, established as a result of a 2018 constitutional referendum to address redistricting issues on the state and federal level, improperly withheld the audiotape of its meeting with its attorneys to discuss procedures for creating redistricting maps because the supreme court concluded that the constitutional provisions establishing the commission required access to its proceedings. The supreme court also found that seven of ten memoranda associated with its meetings should be disclosed as well. The supreme court noted that "voters in 2018 changed the process for redistricting in Michigan. In doing so, they established numerous safeguards to ensure that the process would be transparent. Today, we enforce two of those provisions against the Commission's attempt to operate outside of public view. We hold that the Commission's October 27 closed-session meeting violated the requirement that the Commission 'conduct all of its business at open meetings.' The discussion that occurred at that meeting involved the content and development of the maps and thus constituted the 'business' of the Commission. We further hold that the Commission was required to publish the seven memoranda sought by plaintiffs. Those seven memoranda constitute 'supporting materials used to develop plans 'because they concern the content of the maps and the direct process by which the maps were developed." (*The Detroit News, Inc., et al. v. Independent Citizens Redistricting Commission*, No. 163823, Michigan Supreme Court, Dec. 15)

A trial court has ruled that email addresses of public employees must be disclosed to the Mackinac Center for Public Policy as part of the disclosure by the University of Michigan pertaining to the MI Safe Start map but that disclosure of email addresses of private persons who were involved in making recommendations or providing information to the State of Michigan would constitute an invasion of privacy. In explaining his ruling, Court of Claims Judge Christopher M. Murray indicated that "with respect to defendant's employees, there is no exemption for the work emails of those individuals. Email addresses do not contain passwords or information of a personal nature, and do not fall within the

exemptions in the [Michigan Freedom of Information Act]. . .[T]hese emails are not related in any manner to these employees' home, or home email addresses, nor do the email addresses allow the public to make any connection to information of a personal nature. The same, however, is not true with respect to the email addresses of private persons. The names of these individuals have already been provided and to provide the private email addresses of those individuals would in fact provide the public with information of a personal nature, would be a clearly unwarranted invasion of these non-government individuals' privacy, and fall within the [privacy] exemption." Murray also rejected the university's claim that records fell within the frank communication exemption. He pointed out that "it is readily apparent that fostering frank communications *can* often be in the public interest. Defendant has given the Court nothing beyond that general concern, however. On the other hand, plaintiff has convincingly argued that the public release of information that may have influenced actions taken by government employees and officials during the early days of the COVID-19 pandemic is a matter of potentially significant public interest." (*Mackinac Center for Public Policy v. University of Michigan*, No. 20-000253-MZ, Michigan Court of Claims, Dec. 21)

Pennsylvania

The supreme court has ruled that the determination of what constitutes critical security information under the Public Utility Confidential Security Information Disclosure Protection Act is solely within the purview of the Public Utilities Commission and that the Office of Open Records has no jurisdictional role in deciding whether such information is disclosable under the Right to Know Law. Affirming an earlier decision by the Commonwealth Court that also found that the PUC had sole jurisdiction over such matters, the supreme court dismissed an appeal by Eric Friedman, who lived near the Sunoco Pipeline Mariner East. The pipeline is a highly volatile liquid pipeline owned and operated by Energy Transfer. Friedman attended an open meeting, at which Paul Metro, the PUC's Manager of Safety Division, Pipeline Safety Section answered questions about pipeline leaks, in which he indicated that PUC possessed hazard assessment reports associated with accidents or releases on HVL pipelines. The following week, Friedman submitted a RTKL request to PUC for the records to which Metro referred. PUC denied the request, indicating the records contained exempt confidential security information. Friedman then appealed his RTKL request to OOR. While OOR found most of the records were protected CSI, it ruled that the statute required PUC to disclose records it relied upon in investigating the pipeline. Energy Transfer appealed to the Commonwealth Court, which ruled in its favor. Friedman then appealed to the supreme court. The supreme court affirmed the appellate court's ruling, noting that "the OOR did not have the authority to reconsider the nature of Energy Transfer's CSI-designated records or the public accessibility of those records. Upon receipt of CSI-designated records and supporting affidavits, the OOR should have yielded jurisdiction of Friedman's request to the PUC." (*Energy Transfer v. Eric Friedman*, No. 24 MAP 2021 and No. 25 MAP 2021, Pennsylvania Supreme Court, Dec. 22)

The Federal Courts…

Judge Emmet Sullivan has ruled that the FBI properly issued a *Glomar* response neither confirming nor denying the existence of records about whether or not former Rep. Dana Rohrabacher (R-CA) was being recruited by Russia as an agent of influence. Property of the People and researcher Ryan Shapiro submitted a FOIA request to the FBI for records on Rohrabacher, after Rohrabacher confirmed a

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report in the *New York Times* that he had met with agency officials in 2012 about the claim that Russians considered him an agent of influence. At that time, the agency concluded that Rohrabacher had waived his privacy rights as to that meeting and conducted a search. The FBI disclosed 230 responsive pages and later released an additional 29 pages. While the litigation was ongoing, Property of the People subsequently learned that Rohrabacher had met with Paul Manafort and a lobbyist from Company A in 2013 pertaining to Ukraine. Rohrabacher confirmed that meeting as well. In an earlier opinion in the case, Sullivan had found that the FBI's assertions were too vague and ordered it to provide a more detailed *Vaughn* index. After weighing the competing interests in disclosure or non-disclosure, Sullivan concluded that the balance here weighed against disclosure. Sullivan started by noting that "it is significant to this analysis that Congressman Rohrabacher has not publicly confirmed that he was the subject of an investigation outside of the two meetings. The D.C. Circuit has 'consistently held that Exemption 7(C) authorizes *Glomar* responses to comparable FOIA requests seeking information about particular individuals' when the subject of an investigation has not acknowledged that the investigation occurred." Property of the People argued that Rohrabacher's waived his privacy by confirming that the meetings took place. But Sullivan indicated that "these statements, however, do not diminish Congressman Rohrabacher's privacy interests in the broad manner that plaintiffs assert. While his privacy interest in the 2012 and 2013 meetings 'evaporated' once he publicly acknowledged his involvement, his statements do not disclose that he was ever the target of an FBI investigation outside of his association with the two events. Despite his statements to the media, Mr. Rohrabacher therefore has more than a *de minimis* privacy interest in the existence of any FBI investigative records outside of the two meetings he has publicly acknowledged." (*Property of the People, et al. v. Department of Justice*, Civil Action No. 17-1728, U.S. District Court for the District of Columbia, Dec. 23)

The Ninth Circuit has ruled that the district court erred in finding that VW had lost its right to **intervene** in a FOIA case brought by Loyola Marymount University Professor Lawrence Kalbers for records concerning the investigation of VW for tricking the EPA into believing that its diesel engine could pass all EPA emissions standards. Kalbers was interested in studying the investigation conducted by the Department of Justice that resulted in an independent monitor being appointed to oversee changes agreed to by VW. He filed a FOIA request with the Department of Justice, which initially withheld all the records under Exemption 7(A) (interference with ongoing investigation or proceeding). Kalbers then filed suit and DOJ sent VW's civil counsel a copy of Kalbers' complaint. Nothing further took place in the litigation for the next 11 months. In September 2019, DOJ formally advised VW's counsel about Kalbers suit, as well as a similar one filed by the New York Times in the Southern District of New York. DOJ explained that the letter constituted a pre-disclosure notification to allow VW to provide comments on the confidentiality of the records under Exemption 4 (commercial and confidential). DOJ explained that it did not intend to disclose the records but if its position changed VW would be given the opportunity to object to disclosure. At about this time, the district court held a hearing and ordered DOJ to provide a *Vaughn* index, meaning it could no longer rely solely on Exemption 7(A). Based on the current situation, VW decided to intervene as a matter of right. Kalbers opposed VW's motion to intervene, arguing that VW had waited too long to intervene since it knew about the suit substantially before that time and should have known that the government would not automatically protect its interests. The district court agreed with Kalbers, finding that VW's motion to intervene was untimely based on its "failure to provide any reasons or otherwise justify its delay," as well as its alleged "misrepresentation of the record." VW appealed to the Ninth Circuit. Reversing the district court's ruling, the Ninth Circuit indicated that "the general rule for measuring delay applies in a FOIA case: Delay is measured from the date the proposed intervenor knew or should have known that the parties would no longer adequately protect its interests.

The government's obligation to comply with FOIA does not transform this fact-specific analysis into a bright-line rule mandating immediate intervention upon learning of the litigation." The Ninth Circuit explained that when DOJ first notified VW of the existence of the litigation the only exemption at issue was Exemption 7(A), a law enforcement exemption to which VW's intervention would not be relevant. It was not until Exemption 4 came into play as a possible exemption claim that VW's intervention could be useful in analyzing the commercial confidentiality of the records. The Ninth Circuit pointed out that "VW's knowledge about the confidentiality and commercial nature of its records was now important. VW's subsequent motions to intervene to litigate 'the scope and application of Exemption 4. . .on summary judgment' reflected its realization that DOJ could no longer protect its interests." (*Lawrence P. Kalbers v. United States Department of Justice; Volkswagen AG, Proposed Intervenor*, No. 20-56316, U.S. Court of Appeals for the Ninth Circuit, Dec. 28)

The D.C. Circuit has affirmed the district court's solution in a dispute involving **Exemption 6 (invasion of privacy)**, agreeing that disclosure of the initials of landowners and their street names whose property was potentially affected by plans to build the Atlantic Coast Pipeline project was sufficient rather than disclosing the full name and address of the landowners. The case involved a FOIA request submitted by the Niskanen Center, which represented landowners affected by the construction of the Atlantic Coast pipeline, to the Federal Energy Regulatory Commission for lists of landowners for the now-discontinued project. The agency concluded disclosure would constitute an invasion of the landowners' personal privacy and denied the request. The Niskanen Center then filed suit. Trying to broker a compromise, the district court judge asked the Niskanen Center's counsel why it needed full names and addresses. The Niskanen Center indicated that a current landowner might share initials with a previous landowner, although it admitted that chance would be rare. The district court judge ordered the parties to negotiate. Those negotiations failed and the district court ruled in favor of the agency. The Niskanen Center appealed to the D.C. Circuit. The D.C. Circuit upheld the district court's solution to provide initials and street names only. Writing for the D.C. Circuit, Circuit Court Judge David Tatel noted that "the landowners' privacy interests are more acute than in many Exemption 6 cases because they took no action to avail themselves of any government benefit but appear on FERC's lists by mere happenstance of geography." Tatel explained that "the public obviously has a strong interest in whether FERC fulfills its statutory notice obligations. But to determine whether it does so, the public has no need for the personal identifying information of affected landowners. Indeed, Niskanen concedes that the redacted lists allow it and other members of the public to ascertain a great deal about what FERC and certificate applicants were up to. . . At the same time, despite the district court's repeated prodding, Niskanen offered the court no cogent reason it needed the landowners' full names and addresses." (*Niskanen Center v. Federal Energy Regulatory Commission*, No. 20-5028, U.S. Court of Appeals for the District of Columbia Circuit, Dec. 17)

A federal court in Washington has ruled that a 1967 report written by the House Appropriations Committee concerning the effectiveness of the Defense Department's communications system that was involved in the Israeli attack on the U.S.S. Liberty is a **congressional record** not subject to FOIA. Although the report was provided to the National Security Agency in 1968 and was referred to in a 1981 report declassified by the agency, the report itself was labeled Top Secret and marked "Not for release unless and until authorized by the Committee." Researcher Michelle Kinnucan submitted a FOIA request to the NSA for the House Report and a second request for encrypted traffic reports and other documents.

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Kinnucan also filed a FOIA request with the CIA asking for unredacted reports involving the U.S.S. Liberty attack. Since she found no Supreme Court or Ninth Circuit precedent on the issue of what constituted a congressional record, Senior District Court Judge Marsha Pechman turned to the D.C. Circuit's holding in *ACLU v. CIA*, 823 F.3d 655 (D.C. Cir. 2016), in which the D.C. Circuit established two inquiries – (1) the facts and circumstances of the documents' creation, and (2) the conditions attached to the documents' transfer to the agency. Pechman noted that "here, the Committee clearly indicated its intent to control the report by marking it 'Not for release unless and until authorized by Committee' and 'Top Secret.'. . .[Further], the Committee's decisions to create the report and provide it to the NSA were squarely in line with Congress's oversight role. In the year after the attack, the Committee held a hearing in which it discussed the report and defense communications systems more broadly in the context of proposed appropriations." She observed that "while Plaintiff argues that Congress's references to the report in open hearing cuts against the conclusion that it intended to keep the report secret, that does not necessarily follow. If Congress wanted the report to be public, it could have released it in full. It did not and instead made sure the report would not be disclosed." She added that "the 'not for release' marking is an unequivocal expression of Congress's intent to maintain control over the report." However, Pechman found that the CIA's exemption claims pertaining to other responsive records under **Exemption 1 (national security)** and **Exemption 3 (other statutes)** were insufficiently supported, particularly where they pertained to large documents that were nearly 50 years old. She pointed out that "without more, it is difficult to determine whether these documents remain properly classified in full. Because the records are old, thirteen date to 1967, two to 1978 – it is not self-evident that they implicate intelligence methods and sources that continue to deserve classification. In addition, the Court cannot just accept the CIA's assertion that it is impossible to segregate exempt from nonexempt records." (*Michelle J. Kinnucan v. National Security Agency, et al.*, Civil Action No. 20-1309-MP, U.S. District Court for the Western District of Washington, Dec. 28)

Judge Colleen Kollar-Kotelly has ruled that the Federal Emergency Management Agency has shown that documents it withheld from PEER were protected by **Exemption 5 (deliberative process privilege)**. PEER submitted a FOIA request for FEMA's 2015 Strategic National Risk Assessment. The agency disclosed 716 pages but withheld portions of the report under Exemption 5. Both PEER and FEMA agreed that the report was a "fully-adjudicated draft," with PEER emphasizing the "fully-adjudicated" language and FEMA focusing on the "draft" language. Kollar-Kotelly pointed out that although "FEMA characterized the SNRA draft documents as 'fully-adjudicated' does not imply that the agency viewed them as final or as a consummation of the agency's views on the matter. At most, the term 'fully-adjudicated draft' implies that the SNRA documents were considered by the agency to be sufficiently complete such that the agency could then decide on particular policies and actions it could take." PEER argued that a reference to the report in a 2018 RAND report indicated that it was finalized. However, Kollar-Kotelly observed that "the mere fact that a draft document has some practical effect or consequence on the agency does not mean that the draft 'constitutes a final administrative decision.'" She added that "because the 2015 SNRA draft documents were neither finalized by the agency nor completed, their later use by RAND does not strip them of their predecisional and deliberative character." (*Public Employees for Environmental Responsibility v. Department of Homeland Security*, Civil Action No. 18-0158 (CKK), U.S. District Court for the District of Columbia, Dec. 17)

Judge Randolph Moss has ruled that the Executive Office for U.S. Attorneys **failed to conduct an adequate search** for records concerning any *ex parte* communications between the two Assistant U.S.

Attorneys and the presiding judge in Antonio Akel's trial on drug and firearms convictions in the Northern District of Florida. Akel submitted two FOIA requests for any *ex parte* email communications between the U.S. Attorney's Office for the Northern District of Florida and the district court judge and cited the docket number of his case. The FOIA contact located the two AUSAs – Alicia Forbes and Thomas Swaim – who participated in Akel's prosecution and the AUSA who handled Akel's appeal. The FOIA contact also sent a mass email to all AUSAs and staff to search for potentially responsive records. Forbes indicated that she had kept every email related to Akel's prosecution in a .pst file, had searched the file and found no *ex parte* communications. Two other AUSAs who had worked only on Akel's appeal confirmed that they had no *ex parte* communications. The FOIA contact also conducted an email search using Akel's name and docket number and found no *ex parte* communications. However, because Swaim no longer worked for the Northern District, none of his email records were recovered. Akel filed an administrative appeal, but the Office of Information Policy upheld EOUSA's search. While Moss found that the search overall was adequate, he faulted EOUSA for its failure to search Swaim's emails. EOUSA argued that it was unnecessary to search Swaim's emails because any such *ex parte* communications would have surely been included in Forbes' records and that there was no basis for Akel's allegations. Moss noted that "the relevant question is not whether a FOIA request seeks records that an agency is likely to possess but, rather, whether the agency has looked in those places where responsive records are likely to be found, assuming they do exist. Applying an *a priori* filter based on the agency's good-faith belief that its officers or employees are trustworthy and do not violate legal or ethical norms runs head on into FOIA's promise of transparency. A FOIA requester is entitled to a search and response, even if the response merely affirms that no records of wrongdoing exist." Moss pointed out that "since Swaim was one of two prosecutors in Plaintiff's criminal case, and the Department acknowledges that Swaim's emails have been archived and, therefore, can be recovered and searched, the Department's decision not to search its files renders that portion of the Department's search inadequate." However, Moss rejected Akel's claim that the agency should have searched all its archived emails, concluding instead that only Swaim's archived emails needed to be searched. (*Antonio U. Akel v. United States Department of Justice*, Civil Action No. 20-3240 (RDM), U.S. District Court for the District of Columbia, Dec. 30)

Judge Florence Pan has ruled that the Department of Defense properly responded to eight FOIA requests submitted by Robert Hammond to Walter Reed National Military Medical Center and the Navy Bureau of Medicine and Surgery. Hammond asked for a copy of Walter Reed's annual FOIA report as well as a copy of a quarterly privacy report. His other requests asked for records on how other transactions he had with Walter Reed had gone. Dissatisfied by the responses, Hammond filed suit arguing that the agency had **failed to conduct an adequate search**. Pan noted that his arguments "betray a fundamental misunderstanding of Walter Reed's obligations under FOIA. A FOIA requester is not guaranteed provision of specific records, but only a reasonable search as guided by their request." She observed that "these arguments are simply a demand that Defendants search more and find more. But Hammond is not entitled to a search of his own choosing. Defendants' methodology in conducting the searches 'must only be reasonable, it need not be exhaustive.'" She pointed out that "the searches conducted by Walter Reed were reasonable and adequate." One of Hammond's requests asked for information identifying third parties who had made FOIA and Privacy Act requests for their medical records. The agency withheld identifying information under **Exemption 6 (invasion of privacy)**. Hammond argued that the records did not encompass actual medical records. But Pan observed that "persons who make requests under FOIA and the Privacy Act at Walter Reed surely have a personal privacy interest in information about the existence and location of their medical records, as well as when

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and how they chose to access those records. . . Although the appearance of an individual's name on the FOIA Processing Log would not disclose the medical record, it would disclose that a particular individual has a medical record at Walter Reed and attempted to access that record, which are private details about the individual's medical care." (*Robert Hammond v. Department of Defense, et al.*, Civil Action No. 16-421 (FYP), U.S. District Court for the District of Columbia, Dec. 23)

A federal court in South Dakota has ruled that the Executive Office for U.S. Attorneys properly responded two four FOIA requests from Edward Picardi, who was convicted in 2012 of tax fraud, for records concerning his conviction. After substantial back and forth concerning Picardi's willingness to pay fees, he paid the estimated $4,497.90 in fees and the agency began processing his request. The agency reviewed over 90,000 pages of potentially responsive records and disclosed 7,555 pages in full or in part to Picardi. Picardi argued that the agency had **failed to conduct an adequate search**. Picardi had indicated that he wanted four categories of records – (1) surveillance, (2) final discovery CD used for trial expected to reveal the level of incompetence of the defense attorney who falsely claimed experience in tax law. (3) contacts with his neighbors, the Zimmionds; and (4) information involving AUSA Mara Kohn. The agency searched for records associated with the trial exhibits and discovery, using search words that referenced "surveillance," "the Zimmionds," and "Mara Kohn." The search yielded 322 government trial exhibits but did not find any references to "surveillance," "the Zimmionds," or "Mara Kohn." Chief Judge Roberto Lange began by noting that "the FOIA inquiry was extensive." He pointed out that the agency had conducted multiple searches using Picardi's suggested search terms and found nothing. He concluded that "based on these declarations that detail the USAO and the EOUSA's extensive efforts to locate and produce information related to Picardi's FOIA requests, this Court finds their search reasonable." The agency withheld records under **Exemption 3 (other statutes), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Lange approved all the withholdings. The agency had cited Rule 6(e) on grand jury secrecy to withhold records from the grand jury that heard the charges against Picardi. Picardi argued that his own testimony before the grand jury should be disclosed. The agency provided an affidavit from the court reporter explaining that she did not transcribe Picardi's testimony. Lange observed that "therefore, even if the exemption did not apply, Defendants have met their burden of proving the record is 'unidentifiable,' and thus have discharged their duty under the FOIA." As to the privacy exemptions, Lange noted that "Defendants have stated, via sworn statement, that no records exist in relation to the impropriety alleged in the investigation by Picardi regarding the Zimmionds or Kohn. Therefore, Picardi has not established an entitlement to any additional information contained within the Vaughn index." (*Edward J.S. Picardi, M.D. v. U.S. Attorney Offices, Pierre, SD, et al.*, Civil Action No. 18-03014-RAL, U.S. District Court for the District of South Dakota, Dec. 16)

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Card # _____-_____-_____-_____ Expiration Date (MM/YY):_____/_____
Card Holder:_____ Phone # (_____) _____-_____

Name: _____ Phone#: (____) _____-_____
Organization: _____ Fax#: (____) _____-_____
Street Address: _____ email: _____
City: _____ State:_____ Zip Code: _____

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