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Washington Focus: A coalition of open government groups has asked the Supreme Court to review whether the public has a First Amendment right of access to decisions of the Foreign Intelligence Surveillance Court after a three-judge panel of the FISC court ruled that it had no authority to even consider the issue. The coalition includes the ACLU, the Knight First Amendment Institute at Columbia University, and the Media Freedom and Information Access Clinic at Yale Law School. Theodore Olson, who is a board member for the Knight First Amendment Institute, noted that "it's crucial to the legitimacy of the foreign intelligence system, and to the democratic process, that the public have access to the court's significant opinions."

Court Blasts DOJ for Mispresenting Memo on Mueller Report

Judge Amy Berman Jackson has blasted the Department of Justice for intentionally misleading the public about the conclusions of the Mueller report on Russian interference with the 2016 presidential election. Ruling in litigation brought by CREW for records about the deliberations of former Attorney General William Barr in publicly announcing that then-President Donald Trump had not obstructed justice when he attempted to undermine the Mueller investigation, Berman Jackson found that one of the remaining disputed documents was protected by Exemption 5 (privileges) but that the other document was not.

CREW sent a FOIA request to the Office of Legal Counsel for records that supported Barr's public conclusion that Trump could not be indicted for obstruction of justice. That request ultimately narrowed to two disputed documents. Addressing the first document, Berman Jackson, after conducting an *in camera* review, agreed with DOJ that the memo was protected by the deliberative process privilege. She noted that DOJ's affidavit described the document as containing "OLC legal advice and analysis, and also contains client information and descriptions of Department of Justice deliberations." Berman Jackson pointed out that "while these vague references to 'decisionmaking' and 'deliberations' did little to establish the first element of the deliberative process

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privilege, the *in camera* review of the record revealed that there was a particular, immediate decision under review to which the document pertained, that there was a particular immediate decision under review to which the document pertained, that it also addressed another specific issue that was likely to arise as a consequence of the determination made with respect to the first, and that the entire memorandum was deliberative with respect to those decisions. The Court therefore finds that it was properly withheld under Exemption 5 and the deliberative process privilege."

However, DOJ did not fare nearly as well when it came to the second document. Here, Berman Jackson noted that "the memorandum is largely deliberative. But the Court cannot find the record to be 'predecisional,' because the materials in the record, including the memorandum itself, contradicts the FOIA declarants' assertions that the decision-making process they have identified was in fact underway. Moreover, the record supplies reason to question the communication preceded any decision that was made."

DOJ provided affidavits from OLC and the Office of Information Policy making the case that the document was both predecisional and deliberative. To put those claims into context, Berman Jackson described the contents of the document. She explained that the document had two sections. She noted that "Section I offers strategic, as opposed to legal advice, about whether the Attorney General should take a particular course of action, and it made recommendations with respect to that determination, a subject that the agency omitted entirely from its description of the document of the justification for its withholding. This is a problem because Section I is what places Section II and the only topic the agency does identify – that is, whether the evidence gathered by the Special Counsel would amount to obstruction of justice – into its proper context. Moreover, the redacted portions of Section I reveal that both the authors and the recipient of the memorandum had a shared understanding concerning whether prosecuting the President was a matter to be considered at all. In other words, the review of the document reveals that the Attorney General was *not* then engaged in making a decision about whether the President should be charged with obstruction of justice; the fact that he would not be prosecuted was a given. The omission of any reference to Section I in the agency's declarations, coupled with the agency's redaction of critical caveats from what it did disclose, served to obscure the true purpose of the memorandum. Thus, the Court's *in camera* review leads to the conclusion that the agency has fallen far short of meeting its burden to show that the memorandum was 'prepared in order to assist an agency decisionmaker in arriving at his decision.'"

Large portions of Berman Jackson's opinion were redacted because the memo remained under seal. But her *in camera* review, "which DOJ strongly resisted," "raises questions about how the Department of Justice could make this series of representations to a court in support of its 2020 motion for summary judgment." She indicated that "in sum, while CREW has never laid eyes on the document, its summary was considerably more accurate than the one supplied by the Department's declarants." She expressed disgust at DOJ's behavior, pointing out that "the affidavits are so inconsistent with evidence in the records, they are not worthy of credence. The review of the unredacted document *in camera* reveals that the suspicions voiced by. . . plaintiff here were well-founded, and that not only was the Attorney General being disingenuous then, but DOJ has been disingenuous to this Court with respect to the existence of a decision-making process that should be shielded by the deliberative process privilege. The agency's redactions and incomplete explanations obfuscate the true purpose of the memorandum, and the excised portions belie the notion that it fell to the Attorney General to make a prosecution decision or that any such decision was on the table at any time."

She also found that the document was not predecisional. She explained that "a close review of the communications reveals that the March 24 letter to Congress describing the Special Counsel report, which assesses the strength of an obstruction-of-justice case, and the 'predecisional' March 24 memorandum advising the Attorney General that. . .the evidence does not support a prosecution, are being written by the

very same people at the very same time. The emails show not only that the authors and the recipients of the memorandum are working hand in hand to craft the advice that is supposedly being delivered by OLC, but that the letter to Congress is the priority, and is getting completed first. In sum, the set of emails contained in plaintiff's Exhibit A undermines the uninformed assertions in the declarations upon which the defense relies."

Berman Jackson also rejected DOJ's attorney-client privilege claim. She noted that "given the fact that the review of the document *in camera* reveals that there was no decision actually made as to whether the then-President should be prosecuted. . .the Court is not persuaded that the agency has met its burden to demonstrate that the memorandum was transmitted for the purpose of providing legal advice, as opposed to the strategic and policy advice that falls outside the scope of the privilege. Section I of the memo, which was entirely redacted with no separate justification, contains no legal advice at all, but it offers only. . .strategic advice, so this explanation is entirely deficient to justify the withholding of that portion of the document." She added that "along with the redacted portions of the memorandum, the chronology undermines the assertion that the authors were engaged in providing their legal advice in connection with any sort of pending prosecutorial decision, and this misrepresentation, combined with the lack of candor about what any legal advice provided was for or about, frees the Court from the deference that is ordinarily accorded to agency declarations in FOIA cases."

Berman Jackson also dismissed CREW's expedited processing claim as moot. She observed that "the declarations establish that the responses provided to plaintiff on May 22, 2020, by OLC, and on June 17, 2020, by OIP constitute a complete response to the request as it was narrowed by agreement of the parties. Therefore, there is nothing further for the Court to adjudicate." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 19-1552 (ABJ), U.S. District Court for the District of Columbia, May 3)

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 Pulaski County Circuit Court Clerk who assessed University of Arkansas-Little Rock Robert Steinbuch an $800 fee for preparing records related to his FOIA appeal must be joined as an indispensable party so that the court can determine if the fee was correct. Steinbuch filed suit in 2015, disputing the University's handling of his FOIA request. The circuit court dismissed the case in 2018, finding that the parties had reached a settlement. In January 2020, Steinbuch filed a motion asking that the circuit court's dismissal order be set aside, alleging UALR had violated the terms of the settlement agreement, including the assessment of the $800 fee. Ordering that the circuit court be joined, the supreme court noted that "here, Steinbuch's claims concern whether the fees assessed by the circuit clerk for compiling the record violated [state law]. Without the circuit clerk as a party, the circuit court cannot answer this question and grant appropriate relief, as it is not apparent from the record how the clerk calculated the fee charged to Steinbuch. Accordingly, we remand this matter to the circuit court to join the circuit clerk as an indispensable party pursuant to Rule 19." (*Robert Steinbuch v. University of Arkansas, et al.*, No. CV-20-637, Arkansas Supreme Court, Apr. 29)

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New York

A trial court has ruled that the City of Syracuse properly responded to a request from the New York Civil Liberties Union for disciplinary records of the police department. Syracuse acknowledged the request and told NYCLU that it would take a year to comply. Syracuse subsequently told NYCLU that it would not disclose records to complaints not yet substantiated. NYCLU argued that the legislature had recently repealed CRL § 50-a, which allowed agencies to deny access to police disciplinary records. However, agencies could still withhold records where disclosure would cause an invasion of privacy, a standard that Syracuse argued allowed agencies to exempt unsubstantiated charges. The court indicated that the legislative changes "did not provide for altering previously existing privacy considerations. The release of unsubstantiated claims has been previously found to be prohibited by [existing law] as an unwarranted invasion of privacy. When considering the repeal of CRL § 50-a through the lens of previous caselaw, the Court has no choice but to deny the request for an order releasing all unsubstantiated discipline records." (*New York Civil Liberties Union v. City of Syracuse*, No. 002602/2021, New York Supreme Court, Onondaga County, May 5)

The Federal Courts…

Judge Beryl Howell has ruled that the New York Times Company failed to show it was entitled to **expedited processing** solely on the basis that the Defense Health Agency and the Department of Health and Human Services did not respond to its requests within the 20 business-day statutory time limit. Both requests asked for de-identified data on the federal government's distribution of COVID-19 vaccines. Both agencies acknowledged receipt of the requests, granted the New York Times' fee waiver request but denied its request for expedited processing, concluding that the records were not time-sensitive under the circumstances. The New York Times argued that it was entitled to immediate production of responsive records once the agency failed to respond within the 20-day time limit. However, Howell pointed out that "the cited 'failure' by defendant does not trigger entitlement to production of responsive records, much less immediate production of the enormous data sets plaintiff's FOIA requests seek." Howell found that both agencies had shown that exceptional circumstances applied here, justifying the need to take more time to respond. She indicated that "lapse of this statutory period without an agency's 'determination and the reasons therefor,' gives plaintiff precisely what it has now obtained, which is to be 'deemed to have exhausted his administrative remedies,' and nothing more, and certainly not entitlement to production of the requested records. . ." Howell also rejected the New York Times' claim that it would suffer irreparable harm if its requests were not processed immediately. But Howell noted that "while attention-grabbing, these purported harms to oversight, vaccination hesitancy and equitable vaccine distribution, which are all important to public health generally, are all premised on theoretical injuries, with no assurance that the remedy for these cited public health ills is production of the datasets requested in plaintiff's FOIA requests." She added that "as serious as the harms named by plaintiff are, they are not sufficiently certain, concrete or imminent to amount to the requisite irreparable harm necessary for extraordinary injunctive relief." Finding that the balance of equities did not favor expedited processing for the New York Times' FOIA requests, Howell emphasized the downside for other FOIA requesters. She observed that "hundreds of individuals and organizations await the results of pending requests, filed ahead of plaintiff's requests, and also seek information relating to the COVID pandemic. These third parties would almost certainly face additional delays if defendants were forced to accommodate plaintiff's complex requests for what could be enormous data sets." (*New York Times Company v. Defense Health Agency, et al.*, Civil Action No. 21-566 (BAH), U.S. District Court for the District of Columbia, Apr. 25)

Judge Timothy Kelly has ruled that the Department of State failed to justify its invocation of the presidential communications privilege under **Exemption 5 (privileges)** in resolving several issues remaining in litigation brought by the American Center for Law and Justice against the Department of State for records concerning a 2013 incident involving then-State Department spokesperson Jennifer Psaki about whether the Obama administration had lied about having secret talks with Iran in 2011 and whether Psaki's predecessor had lied to the press about whether those talks happened. In 2016, the reporter who had asked the question in 2013 apparently discovered that Psaki's exchange had been deleted from the online video of the briefing. The State Department withheld an email that had been sent to Psaki by National Security Council official Bernadette Meehan at the beginning of an email thread that involved Psaki, her deputy Marie Harf, and a reporter who had spoken to Meehan previously about an alleged 2012 secret meeting with Iran. State redacted Meehan's message to the group in her forwarding message, arguing the email was protected by the presidential communications privilege. Kelly found that even with State's supplemental affidavit, the agency had failed to show that the presidential communications privilege applied. He noted that "State seems to argue that because the meeting was convened within the National Security Council framework, it must have been called by an immediate White House advisor covered by the privilege." Kelly found that the fact that President Obama did not attend the meeting was relevant. He pointed out that "without any further explanation from State about how the meeting connected to his decisionmaking, it seems unlikely that the meeting would have been called to advise him on a matter that the participants resolved right then and there, without him. In addition, that the decision concerned how to address 'the administration's response to the press reports regarding U.S.-Iran talks' and 'how to communicate Iran-related policy to the public,' does not, on its own, suggest presidential decisionmaking." He noted that "to be sure, the Court accepts that press strategy *can* be a part of a diplomacy and presidential decisionmaking. But there is no indication that it was true in this case." (*American Center for Law and Justice v. Department of State*, Civil Action No. 16-1355 (TJK), U.S. District Court for the District of Columbia, Apr. 23)

Judge Carl Nichols has ruled that the FBI has now shown that videos showing ballistic testing are protected entirely under **Exemption 7(E) (investigative methods or techniques)** and **Exemption 7(F) (harm to safety of person)**. The test videos were requested by NPR reporter Rebecca Hersher. The FBI initially refused to search for the records, arguing such records were categorically exempt under Exemption 7(E). The FBI eventually agreed to search for records and located 97 videos. However, after reviewing the records, the FBI decided to withhold them entirely under Exemption 7(E) and Exemption 7(F). After conducting an *in camera* review of the videos, the court found the FBI had failed to justify its exemption claims and ordered the videos disclosed. The FBI then asked for reconsideration. By the time Nichols reconsidered the issue, the FBI had narrowed the number of responsive videos to 62. Nichols agreed that reconsideration was appropriate, noting that "third-party concerns also make it appropriate to revisit the Court's prior Opinions and Order in this case, where the government has proffered additional information to demonstrate that releasing the videos would risk endangering members of the public and law enforcement officers." He found that the new affidavits submitted to the court provided the needed justification for withholding the videos under Exemption 7(F). He explained that "because the videos portray the FBI's data-gathering efforts regarding bullets' 'ability to inflict the most effective wound to a human adversary,' they could allow nefarious actors to select ammunition that would 'inflict greater damage to their intended target [or] law enforcement officers responding to crime scenes.'" Although he indicated that his conclusion that Exemption 7(F) protected the videos entirely, Nichols went on to consider Hersher's argument that because such videos were often available through criminal trials, they were publicly available. Nichols rejected the claim, noting that "there is a qualitative difference between the use of individual videos at trial and production of a compilation of every single video the FBI has made. In the context of privacy exemptions, courts have distinguished between the

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release of bits and pieces of private records spread across dockets and comprehensive databases containing vast amounts of information. The same rationale applies here. The results of one ballistics test might not cause much harm, but a comprehensive 'library' of the FBI's ballistics testing methods, would provide nefarious actors with substantially more information than an individual video." He observed that "release of the videos here would provide a shortlist to people trying to select ammunition on the basis of lethality and, by making those bad actors more lethal, increase their ability to circumvent the law." (*National Public Radio, Inc. et al. v. Federal Bureau of Investigation, et al.*, Civil Action No. 18-03066 (CJN), U.S. District Court for the District of Columbia, Apr. 28)

Judge James Boasberg has ruled that the FBI justified some of its exemption claims in response to a request from Property of the People for records discussing former President Donald Trump's connection with a two-decades-old gambling investigation. The FOIA suit also included journalist Jason Leopold and researcher Ryan Shapiro. The FBI withheld records under **Exemption 3 (other statutes), Exemption 7(C) (invasion of privacy concerning law enforcement record), Exemption 7(D) (confidential sources),** and **Exemption 7(E) (investigative methods or techniques)**. After Boasberg reviewed the disputed documents *in camera*, he began by addressing the Exemption 3 claims. The FBI withheld records under Rule 6(e) on grand jury secrecy. He accepted those redactions, noting that "the information Plaintiffs seek would indeed reveal much about the grand jury's activity here." The FBI also withheld records under Title III's wiretapping provisions. Boasberg indicated that his review confirmed that the exempted records had been sealed by the original court. To resolve this problem, he noted that "the Government, which did not mention this issue in briefing, must first determine if the sealing orders remain in effect. If so, it cannot release the documents. If the orders are no longer extant, then the Government must release material unrelated to the actual interceptions. . ." He also agreed with the agency's Exemption 7(A) claim. He pointed out that "DOJ here has provided substantive explanations for how disclosure may allow an individual currently under investigation to 'analyze the information in the documents pertinent to the investigation' and identify potential witnesses or 'counteract evidence developed by investigators.'" Property of the People argued that Exemption 7(C) only applied to personally identifying information. However, Boasberg noted that "the exemption protects not only actual identities, but also other information that may reveal the identity of an individual without naming him explicitly." Applying that here, he noted that "because the documents contain identifying details revealed in interviews, the Court finds that even with the redactions supported by Plaintiff, release would invade the interest third-party individuals have in remaining unassociated with federal investigations." Property of the People questioned whether the FBI had provided assurances of confidentiality under Exemption 7(D). Boasberg noted that "here, the Government has provided affidavits supporting its claim that the foreign government at issue 'provided information under an express assurance of confidentiality' during the course of a cooperative investigation." Boasberg rejected the agency's claim that surveillance logs were protected by Exemption 7(E). Instead, he pointed out that "the Government has generally agreed that logs memorializing the physical surveillance of a subject to report his movements is not the kind of law-enforcement technique protected by Exemption 7(E)." (*Property of the People, Inc. et al. v. Department of Justice*, Civil Action No. 17-1193 (JEB). U.S. District Court for the District of Columbia, Apr. 29)

A federal court in Ohio has ruled that the DEA has not justified a privacy exemption-based *Glomar* response for records concerning its investigation of Ryan Jacobs for selling drugs, including allegations from Jacobs that an assistant Commonwealth Attorney in Northern Kentucky was complicit in covering up his illegal drug use as well. Jacobs was investigated for selling drugs to an unidentified couple in Kentucky, who were friends with the assistant Commonwealth Attorney. The *Cincinnati Enquirer* sent a FOIA request to the DEA for records concerning its role in the Jacobs investigation cooperation with state and local enforcement officials. The agency issued a *Glomar* response neither confirming nor denying the existence of records,

citing **Exemption 7(C) (invasion of privacy concerning law enforcement purposes)** as the basis of the *Glomar* response. The *Enquirer* appealed the denial, which was upheld by the agency. The *Enquirer* then filed suit, arguing that Jacobs had no privacy interest because he had been convicted, but acknowledging that identifying information about the assistant Commonwealth Attorney and the other individuals involved could be redacted. The *Enquirer* asked the court to require the agency to provide more detail through a *Vaughn* index. The court rejected the *Enquirer*'s claim that Jacobs had no privacy because he had been convicted, noting instead that "convicted persons do maintain privacy interests. The Supreme Court held in *Reporters Committee* that individuals have privacy interests in their rap sheet information. Lower courts have recognized these privacy interests as well." The court explained that "the Enquirer is not arguing that there is a public interest related to the investigation or prosecution of Ryan Jacobs himself. The Enquirer, accordingly, appears to implicitly concede that there is no public interest in the Jacobs investigative records except to the extent that individual documents and files shed light on the United States Attorney's decision not to prosecute the Commonwealth Attorney for obstruction of justice." The court then pointed out that "it bears emphasizing that the alleged wrongdoing by the Commonwealth Attorney is not itself a significant public interest for FOIA purposes. Exposing possible criminal behavior by a public official such as the Commonwealth Attorney is not sufficient public interest unless it also reveals something about a federal agency's conduct, here the decision of the United States Attorney not to prosecute the Commonwealth Attorney." Finding the *Enquirer* had shown a potential public interest in disclosure, the court pointed out that "when the Supreme Court allowed the categorical denial of rap sheet information in *Reporter's Committee*, it was because the request did not seek 'official information' about a government agency. Conversely, the Enquirer here is seeking information about an investigation that may shed light on a specific United States Attorney's prosecutorial decision concerning a public figure and law enforcement official who allegedly obstructed justice. The Court concludes that the disclosure of a *Vaughn* index is appropriate here." (*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, May 3)

Judge Trevor McFadden has ruled that the DEA **conducted an adequate search** for records responsive to Michael Chavis's FOIA request for records concerning the investigation and prosecution of Ricardo Sanchez for the multiple murder of the Escobedo family and that the agency properly withheld records under **Exemption 7 (law enforcement records)**. Chavis was an investigator with the Federal Defender Services of Eastern Tennessee, which represented Sanchez in his post-conviction proceedings. Because the Escobedo murder prosecution involved co-defendants as well, the DEA initially invoked a *Glomar* response neither confirming nor denying the existence of records unless Chavis could provide thirty-party authorization. He provided a privacy authorization for Sanchez but none of the other defendants. As a result, the DEA processed records relating to Sanchez only. It withheld 229 pages and released 107 pages with redactions. Chavis decided not to the challenge 94 redacted pages and did not pursue the privacy-based *Glomar* response as to other co-defendants. McFadden indicated that although it was difficult to determine whether Chavis was challenging the agency's decision not to search for records on co-defendants, he noted that "indeed, he does not dispute the DEA's position that the 'records were categorically exempt from disclosure, and DEA was not required to conduct a search for the requested records' absent 'an overriding public interest.'" Turning to the agency's search for records on Sanchez, McFadden rejected Chavis's claim that the agency's search was too narrow because it only searched for files using Sanchez's name. He pointed out that "if he sought all documents of the investigation into the Escobedo murders, he could have made that request. He did not. It is unrealistic to expect the DEA (or any federal agency) to read between the lines and hunt for a class of documents that a plaintiff has not identified as potentially relevant. Such a cryptic request also ignores the fact that FOIA paralegals and other administrators – not DEA agents or detectives – set up and execute the FOIA search." Chavis also argued that the agency's *Vaughn* index was insufficient. McFadden disagreed, noting in one instance that "that the DEA relied on similar (or the same) descriptions to justify its withholdings in these documents does not help Chavis. The records that Chavis seeks 'are criminal investigatory data

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compiled for law enforcement purposes.' It is unsurprising then that the same exemptions prevent disclosure of similar (or the same) information." (*Michael R. Chavis v. United States Department of Justice, et al.*, Civil Action No. 20-00638 (TNM), U.S. District Court for the District of Columbia, Apr. 28)

Judge Amit Mehta has ruled that the National Institute of Standards and Technology has shown that three redacted sentences from the Statement of Work for a cooperative research and development agreement between NIST and Ligado Networks, a private telecommunications company, are confidential for purposes of **Exemption 4 (commercial and confidential)**. David Besson argued that the redacted information had been made public by Ligado. But Mehta observed that "plaintiff points to statements made by Ligado's CEO about the company's work with NIST, but he offers nothing to establish that the CEO's statements are 'duplicates' of what has been withheld from the Statement of Work. Plaintiff's indiscriminate listing of public statements by Ligado about its business activities similarly falls far short of satisfying his burden." (*David H. Besson v. U.S. Department of Commerce, et al.*, Civil Action No. 18-02527 (APM), U.S. District Court for the District of Columbia, May 3)

Judge Beryl Howell has ruled that the EOUSA properly responded to Antonio Gutierrez's nine-part FOIA request about his conviction in New Mexico on child pornography charges, even though the agency was unable to locate responsive records to only one of his requests. Howell found the agency had **conducted an adequate search** for the records he requested but noted that "the only responsive records located was the 'portion of the trial transcript. . .obtained from PACER, addressing Items Two and Three of the original FOIA request. EOUSA released this portion of the transcript to plaintiff on January 30, 2020." Gutierrez argued the agency had failed to respond to three portions of his request, two of which related to transcripts of videotaped interviews. However, Howell pointed out that "EOUSA no longer is obligated to respond to plaintiff's original FOIA request, which included Items Seven and Eight for transcripts of videotaped interviews, because plaintiff modified the requests and eliminated these items. In any event, EOUSA adequately explains why it did not, and could not, produce transcripts." She observed that "here, plaintiff did not request videotapes, he requested transcripts of the videotaped interviews which, according to EOUSA's declarant, 'were not introduced into evidence at trial.'" Further, it was difficult for the agency to decipher several of Gutierrez's requests. Howell indicated that "EOUSA must 'construe a FOIA request liberally,' but EOUSA cannot be expected to divine which records in its possession, if any, would qualify as 'exculpatory evidence.'" She noted that "plaintiff cannot fault EOUSA for discontinuing its search efforts when, at plaintiff's request, it ceased its efforts after having expended the two-hour limit on searches provided at no charge." (*Antonio Gutierrez v. Executive Office for United States Attorneys*, Civil Action No. 20-1524 (BAH), U.S. District Court for the District of Columbia, Apr. 27)

Judge Amy Berman Jackson has ruled the Department of Justice **conducted an adequate search** for records concerning Harris Ballow's 2011 extradition from Mexico to face criminal charges in the United States and that the agency properly withheld all 84 responsive records under **Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)**. The agency construed Ballow's request as being for records from the U.S. Attorney's Office for the Southern District of Texas regarding his extradition from Mexico. EOUSA referred the records to the Criminal Division, which withheld all responsive records. Ballow challenged the adequacy of the agency's search. Berman Jackson agreed that the agency's search was sufficient, noting that "defendant referred plaintiff's FOIA request to the USAO/SDTX, the office which prosecuted the criminal case against plaintiff and the place where responsive records likely would be located. A search of USAO/SDTX recordkeeping databases using variations of plaintiff's name and criminal case number as search terms yielded ten boxes of potentially responsive records, and a physical search of these paper records yielded information pertaining to plaintiff's extradition from Mexico." Ballow questioned whether Mexican authorities qualified as confidential sources under Exemption 7(D). Berman Jackson

pointed out that "a foreign government entity may be a 'confidential source' for purposes of Exemption 7(D) and the information it provides may be protected." She noted that "defendant adequately demonstrates that a Mexican government source provided information to the Criminal Division about plaintiff's extradition, and that it is reasonable to infer that the source did so under an implied assurance of confidentiality. . ." (*Harris Ballow v. U.S. Department of Justice*, Civil Action No. 20-0245 (ABJ), U.S. District Court for the District of Columbia, May 4)

A federal court in Minnesota has ruled that, with minor exceptions, the Department of Justice properly withheld records under **Exemption 5 (privileges), Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** from Mohamed Abdihamid Farah, who had been convicted of multiple charges of conspiracy and terrorism. The agency withheld some records in full, claiming the attorney work-product privilege. After reviewing the privilege claims, the court identified two pages that could be separated and disclosed. The court noted that "rather than revealing attorney thoughts or trial strategy, the identified phrases and sentences merely report what had already happened in communications with Farah's defense counsel; these pages include some material which can be disclosed as straightforward factual recounting of what occurred, not reflecting analytical views." As to the redactions made under the privacy exemptions, the court indicated that "after conducting its in camera review of the Correspondence file, the Court finds that no additional responsive material should be disclosed. The redactions cover personal identifying information, and the public interest in Farah's ability to challenge his conviction or sentence does not outweigh the privacy interests, even when documents are otherwise publicly available or are not personnel or medial files." (*Mohamed Abdihamid Farah v. United States Department of Justice*, Civil Action No. 20-622 (JRT/DTS), U.S. District Court for the District of Minnesota, Apr. 30)

A federal judge in Alaska has ruled that the FBI properly issued a no-records response to Steven Stoufer in response his request for records pertaining to his allegation that the agency had retaliated against him for refusing to become an informant. The court noted that "given that Plaintiff sought records related to himself, ostensibly alleging that he is the subject of – or associated with – FBI law enforcement activity, ay such information would reasonably be expected to reside within [the Central Records System]. The FBI searched the system twice with adequate variations and found no responsive records." Stoufer objected to the fact that the FBI was unable to find several emails he had sent. The court, however, noted that "plaintiff has not adduced admissible evidence of his alleged communications with the FBI. The purported emails are merely lines of text. The documents do not contain the distinctive characteristics of an email, such as the identity of the sender and the recipient, the date and time sent, and the subject line. Accordingly, the Court declines to consider these documents in assessing the adequacy of the FBI's search. And even if the Court were to consider the purported emails, 'the failure to produce or identity a few isolated documents cannot by itself prove the searches inadequate.'" (*Steven Stoufer v. Federal Bureau of Investigation, et al.*, Civil Action No. 20-00046-SLG, U.S. District Court for the District of Alaska, Apr. 27)

A split panel of the D.C. Circuit has ruled that subgroups of the Drone Advisory Committee, set up by the Federal Aviation Administration, are not FACA advisory committees themselves, nor are they subject to the disclosure provisions of the **Federal Advisory Committee Act**. After being denied access to DAC records, EPIC filed suit, alleging violations of FACA. The district court ruled that DAC itself was subject to FACA and ordered disclosure of those records but found that the subgroups themselves were not subject to FACA because they merely reported to DAC, the parent FACA committee. EPIC appealed to the D.C. Circuit. Writing for the majority, Circuit Court Judge Gregory Katsas agreed with the district court. He first addressed EPIC's argument that the subgroups were independently subject to FACA. He explained that "Section 3(2) provides that a 'subcommittee is a covered advisory committee only if it independently satisfies the statutory definition – the subcommittee itself must be established or utilized by an agency to obtain advice for the

agency." He pointed out that "FACA cannot cover a subcommittee merely because it advises a parent committee that in turn advises an agency. That would turn any subcommittee into an advisory committee and collapse the distinction between reporting to an agency and merely reporting to a parent committee." Katsas observed that "because the subgroups advised and reported to the DAC – not to the FAA – they were not advisory committees." Katsas then dismissed EPIC's claim that subgroup records also qualified as DAC records and should be released for that reason. But he pointed out that "the present dispute thus involves only records created by the subgroups and never given to the DAC – for example, drafts of proposals that died before the subgroups or minutes of subgroups meetings. Such records were neither 'made available to' nor 'prepared for or by' the DAC. Instead, under the same line of thinking adopted above, we think that such records were 'prepared for or by' the subgroups themselves." Circuit Judge Robert Wilkins dissented. Wilkins sided with EPIC. He observed that "here, common sense tells us that the subgroups' advice is developed with the end goal of assisting the FAA in designing its airspace policy. To say that the subgroups;' advice is not 'for' the agency because it's not delivered 'directly to' the agency is a bit like saying that expert advice or recommendations given to a congressional committee is not 'for' Congress as a whole, but rather exclusively for the benefit of that particular committee." (*Electronic Privacy Information Center v. Drone Advisory Committee, et al.*, No. 19-5238, U.S. Court of Appeals for the District of Columbia Circuit, Apr. 30)