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## In this Issue



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*Washington Focus: Former President Donald Trump's consistent and persistent routine violations of the Presidential Records Act continue to become public through the investigation of the Jan. 6 committee. Reporting in the Washington Post, Ashley Parker, Josh Dawsey, Tom Hamburger, and Jacqueline Alemany noted that Trump routinely tore up papers throughout his Presidency. Several persons aware of Trump's habit of tearing up documents indicated that they did not believe his actions were criminally malicious. One former aide told the Post that "I don't think he did this out of malicious intent to avoid complying with the Presidential Records Act. As long as he's been in business, he's been very transactional, and it was probably his longtime practice, and I don't think his habits changed when he got to the White House."*

## Court Approves *Glomar* Responses For Requests on Romanian Intelligence Agencies

Judge Trevor McFadden has approved of the FBI's use of *Glomar* responses, neither confirming nor denying the existence of records in response to FOIA requests from *New York Times* investigative reporter Rukmini Callimachi for records pertaining to her stepfather, Mihail Botez, a former Romanian ambassador to the United States, as well as five more requests pertaining to other Romanian politicians and institutions.

Botez was a leading dissident against former Romanian communist leader Nicolae Ceauescu, who was overthrown and executed in 1989. Romania's new democratic government named Botez the ambassador to the Unites States, a position he held until he died in 1995. In response to Callimachi's FOIA request on Botez, the FBI disclosed 51 pages of records. She filed an administrative appeal, arguing that the agency's search was inadequate.

She then filed five more FOIA requests for records about Virgil Magureanu, the former head of the Romanian domestic intelligence service; Iulian Buga, the Romanian ambassador to the United States in the mid-2010s; and Ioan Talpes, the former head of the Romanian foreign intelligence service. Finally, she submitted two FOIA requests for records

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concerning UM 0215 and UM 0544, Romanian intelligence agencies during the country's Communist period. In response to those five requests, the FBI invoked a *Glomar* response. After Callimachi filed suit, the FBI identified an additional 171 pages responsive to her request on Botez, releasing 90 pages and withholding 81 pages. The agency argued that both its *Glomar* responses and its exemption claims were appropriate.

McFadden first addressed Callimachi's challenges to the agency's *Glomar* responses, specifically those pertaining to Magureanu, Talpes, and UM 0215. She argued that the *Glomar* responses "are 'implausible' because of 'the historical context and events surrounding Magureanu, Talpes, and UM 0215' and their 'key roles. . .in the events leading up to and immediately following the Romanian Revolution of 1989.' In fact (she contends) 'it would be a scandal' if the FBI lacked any records on those subjects." Callimachi also contended that there was evidence of other releases that indicated the existence of records, including a 2011 interview with Talpes by a Romanian newspaper in which he said he met the FBI director and discussed Romanian spies who remained in the United States. She also indicated that she had a record released under the Illinois FOIA apparently on FBI letterhead that mentioned Magureanu and UM 0215.

McFadden noted that "at first blush, Callimachi's arguments appear to assert that the FBI has 'already disclosed the fact of the existence (or nonexistence) of responsive records.' If those documents establish the existence of records then the FBI's *Glomar* responses would fail." He added that "but Callimachi disclaims an 'official acknowledgment' argument. Callimachi's argument thus boils down to the following proposition: The FBI must have records on these subjects because it has a 'clear' interest ' in 'historical events and foreign intelligence operatives.'"

Callimachi relied on *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), in which the D.C. Circuit concluded that the CIA had officially acknowledged its interest in drone strikes because it had made a number of high-level public statements acknowledging its interest. McFadden indicated that "Callimachi's concession that there has been no official acknowledgement here thus vitiates her reliance on *ACLU*." He also rejected Callimachi's claim that the agency must have a clear interest in following foreign intelligence agencies. He noted that "even if the FBI's mission encompasses investigations into historical events and foreign operatives (as Callimachi contends), that mission does not foreclose assertion of a *Glomar* response."

Having decided that the *Glomar* responses were appropriate, McFadden then turned to whether the FBI had justified their invocation. He found that Callimachi had shown no public interest in disclosure of the records. He observed that "Magureanu and Talpes have a substantial privacy interest, and disclosure of the existence of the responsive records about them would compromise that interest. Callimachi asserts no countervailing public interest in disclosure." McFadden then approved of the agency's *Glomar* response pertaining to UM 0215 on the basis of Exemption 3 (other statutes). He pointed out that "here, the FBI has logically and plausibly explained why the existence or nonexistence of responsive records is classified information. The existence of responsive records would show that the FBI 'has an intelligence interest in, and the ability to gather information about' a foreign intelligence agency. Confirmation or denial of the existence of records would allow foreign adversaries 'to learn about the interests, certain methods, and capabilities of the FBI and about its intelligence-gathering activities.'" He added that "on the other hand, the nonexistence of responsive records would signal the FBI's lack of an intelligence interest in Romanian agencies. That would be 'extremely valuable information' to foreign adversaries looking for blind spots in the FBI's capabilities."

The exemption claims made to withhold or redact information from the records the FBI disclosed to Callimachi pertaining to Botez were based on Exemption 1 (national security), Exemption 7(D) (confidential sources), and Exemption 7(E) (investigative methods and techniques). Having reviewed the records *in camera*, McFadden accepted all of the agency's exemption claims. On Exemption 7(E) he approved of the agency's withholding of information pertaining to types and dates of investigations referenced in the records.

He pointed out that "the Court agrees with the Bureau that revealing this information would show its investigative 'toolbox' that it uses for some investigations. Criminals could use disclosure here to adjust their behavior to avoid certain tools in that toolbox." He observed that 'the same holds for information about the timing of investigations. Some of the information withheld shows whether the FBI's investigation was a 'preliminary' one or a 'full' one. This distinction apparently matters because a designated 'full' investigation makes available certain techniques and procedures not otherwise available for preliminary investigations. Criminals could do much with this information. Knowledge of when and under what circumstances the FBI initiates a full investigation would allow criminals to modify their behavior so they can avoid being the subject of a full investigation. The same is true for information about when the FBI begins a preliminary investigation. If a criminal knows these investigative habits, he can assess and exploit them. That the information concerns past investigations changes nothing – 'a potential criminal can glean the same information about investigative techniques from past investigations as present ones.'" (*Rukmini Callimachi v. Federal Bureau of Investigation, et al.*, Civil Action No. 20-1362 (TNM), U.S. District Court of the District of Columbia, Jan. 28)

# 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 trial court erred when it found that photos of uniformed state police officers not serving in undercover assignments should be disclosed in response to a request from Russell Racop. Racop submitted a FOIA request to the Arkansas State Police for "photographs of all uniformed, plain-clothed, non-undercover Arkansas State Troopers hired since I made a similar request on June 11, 2019." ASP denied the request, citing a provision that prohibited disclosure of undercover police officers. Racop argued that since disclosure was the default position of the statute, photographs of non-undercover police officer should be disclosed. However, the supreme court disagreed, noting that "clearly, comparing information already available to the public, from sources like the Arkansas Transparency website – which provides names, service dates, salaries, race, gender, and other identifying information of State employees, including state troopers – with a list of non-undercover troopers would reveal that the officers whose photographs were not released are undercover. This is because knowing who is *not* undercover would reveal that the officers whose photographs were not released *are* undercover." (*Arkansas State Police v. Russell R. Racop*, No. CV-21-183, Arkansas Supreme Court, Feb. 3)

## Kentucky

A court of appeals has ruled that the Legislative Research Commission improperly claimed an exception for legislative immunity during the process of considering, passing, or rejecting legislation to deny access to a complaint made by an LRC staffer against Rep. Jim Stewart in response to an Open Records Act request made by reporter David Descrouchers. LRC argued that disclosure would cause an invasion of privacy. When Descrouchers filed suit, the trial court found that although legislative immunity might apply, it had been waived by the legislature. The trial court's decision was upheld by both the court of appeals and the supreme court. LRC asked the trial court to reconsider its ruling, which resulted in Descrouchers being awarded attorney's fees. LRC then appealed that ruling to the court of appeals. The appeals court rejected LRC's arguments. It noted that "the General Assembly's policy of nondisclosure does not supplant its

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enactment of [a specific statute], and the facts do not implicate the attorney-client privilege nor the attorney work-product doctrine. And, finally, the award of attorney's fees and costs was not clearly erroneous." (*Jay Hartz v. McClatchy Company, LLC*, No. 2021-CA-0634-MR, Kentucky Court of Appeals, Feb. 4)

## Maryland

A court of appeals has ruled that the Baltimore Police Department properly withheld records on open criminal investigations but that it improperly denied a fee waiver to Open Justice Baltimore. OJB requested records on criminal investigations from the Baltimore Police Department and asked for a fee waiver. After OJB filed suit, BPD indicated that it was willing to disclose records on closed criminal investigations but would not disclose records on open criminal investigations. BPD also denied OJB's request for a fee waiver. The trial court ruled in favor of BPD on both counts, finding that the agency had properly withheld records on open investigations and had properly denied OJB's request for a fee waiver. OJB appealed that decision. The appeals court agreed with the trial court on the issue of disclosure of records concerning an open criminal investigation. The appeals court noted that "given that appellant did not enjoy the favorable status afforded to a person of interest and the presumption that disclosure of such information would interfere with ongoing investigations, the BPD's denial of appellant's requests for those records was neither arbitrary nor capricious." Turning to the denial of OJB's request for a fee waiver, the appeals court pointed out that it recently granted a fee waiver to a similar advocacy group in *Baltimore Action Legal Team v. Office of State's Attorney of Baltimore, et al.* The court indicated that "consistent with our holding in that case and in accordance with the rule of stare decisis, we therefore hold that appellees arbitrarily and capriciously denied appellant's fee waiver requests associated with reproducing those records to which it was entitled." (*Open Justice Baltimore v. Baltimore City Police Department, et al.*, No. 122, Sept. Term, 2021, Maryland Court of Special Appeals, Feb. 7)

## Michigan

The supreme court has reversed a ruling by the trial court and the appeals court finding that Calhoun County properly withheld records from the ACLU of Michigan under a federal regulation allowing the County to withhold records about its jailing of a detainee on behalf of U.S. Immigration and Customs Enforcement. After Calhoun County detained U.S. citizen Jilmar Benigno Ramos-Gomez under an Intergovernmental Service Agreement between ICE and the Calhoun County jail, the ACLU of Michigan requested records on his three-day detention. The Calhoun County jail denied the request because the records related to an ICE detainee. The trial court ruled in favor of Calhoun County. The ACLU of Michigan appealed to the court of appeals, which agreed with the trial court, finding that the regulation at issue had been promulgated under the Immigration and Nationality Act. However, when the ACLU of Michigan appealed to the Michigan Supreme Court, it reversed, finding that the exemption in the Michigan FOIA allowing a public body to withhold records protected by a statute did not apply because the provision was a regulation, not a statute as required by the plain language of the exemption. The supreme court noted that "the Court of Appeals erred by holding that 'exempted from disclosure by statute' really means 'exempted from disclosure by statute *or regulation*.' In reaching this conclusion, the Court of Appeals relied on the fact that a federal regulation has the legal force of a federal statute. But it does not logically follow that a federal regulation therefore *is* a federal statute. More importantly, the Court of Appeals holding is at odds with the plain language of [the exemption]." The supreme court observed that "a regulation promulgated by an executive-branch agency is therefore not a statute. If the Legislature wanted a regulation to be a basis for exemption, it would have included language to that effect. But it did not, and we interpret the statute as written." (*ACLU of Michigan v. Calhoun County Sheriff's Office*, No. 163235, Michigan Supreme Court, Feb. 4)

### Montana

The supreme court has ruled that Barry Usher, chair of the Montana House Judiciary Committee, did not violate the Open Meetings Act when he recessed a committee meeting and met privately with nine Republican members of the committee, which was less then a quorum of the whole committee. The Associated Press and a coalition of other state media filed suit for a declaratory judgment, arguing that the closed session constituted a constitutional violation and asking the court to prohibit Usher from closing such meetings in the future. Usher's response was that because the private meeting constituted less than a quorum of the committee, it did not constitute a meeting. The supreme court explained that it was concerned about the effects of considering partisanship of the committee members in determining what constituted a quorum for meeting purposes. The supreme court observed that "while it is true that Usher's gathering was deliberately convened to include just under a quorum of committee members and was certainly a larger group than one might encounter for elevator chit-chat, the group's posture was more in kind with typical, unofficial legislative chatter than with formal public business. Only by scrutinizing the partisan make-up of the participants and speculating about how the conversation might influence the in-session work of the committee could one reach the AP's conclusion about the group's level of 'control.'" (*The Associated Press, et al. v. Barry Usher*, No. DA-21-0392, Montana Supreme Court, Feb. 8)

### Ohio

The supreme court has ruled that the Ohio Department of Health properly withheld a list of deaths from Covid-19 in response to a FOIA request from Rosanna Miller. ODH denied Miller's request and she filed suit. A special master appointed by the court of claims to hear the case recommended that ODH be forced to disclose the records. The court of claims accepted the special master's recommendation and ordered ODH to disclose the records. ODH then filed an appeal with the supreme court. The supreme court reversed, noting that its recent holding in *Walsh v. Ohio Dept of Health*, precluded disclosure of the records. The supreme court noted that "in *Walsh*, this court held that ODH had no duty to grant the public records request for ODH's death records database, which includes cause of death and other information for each decedent, because R.C. 3701.17 precluded ODH's release of protected health information within that database, despite the information being on death certificates obtainable by the public pursuant to R.C. 3705.23. For the reasons discussed in *Walsh*, the records Miller requested contain information that is exempt from the definition of 'public records' under R.C. 149.43. Thus, ODH properly denied Miller's public records request." (*Rosanna Miller v. Ohio Department of Health*, No. 21AP-267, Ohio Supreme Court, Feb. 8)

## The Federal Courts…

Judge Amit Mehta has ruled that the Department of Justice has justified its categorical use of **Exemption 7(A) (interference with ongoing investigation or proceeding)** to withhold all records requested by Johnmark Majuc and Joseph Jok, two Sudanese refugees who are members of a class action lawsuit against BNP Paribas, seeking to hold the bank responsible for its role in human rights abuses committed by the Sudanese government from 1997 to 2009. In response to a detailed FOIA request asking for 33 categories of records, the agency initially invoked 7(A) to withhold all the records. After Mehta ordered DOJ to search for records, the parties agreed to narrow the scope of the request and prioritize certain categories. The winnowing still produced more than 100,000 potentially responsive records. The agency told Majuc and Jok that it had reviewed 888 pages of records but intended to withhold them all under a number of exemptions, including 7(A). The agency also reviewed an additional 825 pages but told Majuc and Jok that it intended to withhold

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them all under several exemptions, but not 7(A). Majuc and Jok argued that the agency's *Vaughn* index was impermissibly broad. However, Mehta disagreed, noting that "by any measure, the *Vaughn* Index in this case is detailed and comprehensive. It easily satisfies the requirements of the categorical approach." Mehta found that six of eight disputed categories were categorically exempt under 7(A). He noted that "the agency has established that there are law enforcement proceedings as to which the records pertain. These proceedings are ongoing." Majuc and Jok's primary response was that the law of the case doctrine, which relates to whether certain previous rulings have locked in one of the parties' judicial positions, applied. Mehta disagreed, noting that "the court therefore denied *both parties'* motions for summary judgment. Those denials were without prejudice. That case posture should have been apparent at the status conference held after the ruling." He indicated that "the court's initial denial therefore did not foreclose Defendant from reasserting Exemption 7(A)." Mehta then found that the two remaining categories were protected by **Exemption 4 (commercial and confidential)** and **Exemption 6 (invasion of privacy)**. Majuc and Jok argued that Exemption 4 did not apply to protect illegal behavior on the part of the bank. Mehta again disagreed, noting that "the last two categories of withheld records consist of internally drafted memoranda concerning BNPP's compliance program and memoranda drafted by outside counsel concerning the application of U.S. sanctions regimes to the bank. Plaintiffs have not shown that any such records are themselves 'unlawful or the product of inherently illegal activity.' They do not, for example, point to any portion of the detailed factual accompanying BNPP's plea to suggest that such memoranda were used or relied upon to commit illegal acts." (*Johnmark Majuc and Joseph Jok v. U.S. Department of Justice*, Civil Action No. 18-566 (APM), U.S. District Court for the District of Columbia, Jan. 28)

Judge Rudolph Contreras has ruled that the U.S. Marshals Service has not yet shown that it properly processed a request from Mario Dion Woodward, currently on death row for the murder of Officer Keith Houts of the Montgomery Police Department in 2006. Woodward was identified as a suspect in the shooting and was located and arrested by USMS in Atlanta the next day. He was indicted, tried, and convicted of murder in Alabama and sentenced to death. Woodward believed that the investigation that preceded his arrest may have involved a cell-site simulator and that the technology was used without a warrant. Woodward submitted a FOIA request concerning the investigation. USMS located and disclosed 300 pages, withholding or redacting records under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(E) (investigative methods or techniques)**, and **Exemption 7(F) (harm to any person)**. The only remaining disputes were the withholding of names and contact information for law enforcement officers, references to cell phone-tracking technology, and 80 pages withheld entirely. Contreras noted that *Roth v. Dept of Justice*, 642 F.3d 1161 (D.C. Cir. 2011), created an exception to the general rule that identifying information of law enforcement officers was exempt by explaining that the need of certain requesters – particularly death row inmates – could tip the balance in favor of disclosure. However, after assessing Woodward's claims here, Contreras noted that "the Court is able to determine that the disclosure of the names and personal identifying information of the law enforcement officers in this case would not further the public in understanding 'what their government is up to' with respect to this conviction or any other. Because the disclosure of law enforcement officials' names would not actually further the asserted public interest, it does not outweigh the privacy interests at stake." Contreras found that USMS could not withhold identifying information about cell simulator technology under Exemption 7(E), noting that "but the mere fact that telephonic data was collected does not merit redaction. Perhaps in 2006 such a technique might not have been 'well known to the public,' but in 2022 it is safe to say that that the potential for phones to double as tracking devices is common knowledge. Because the 'general contours' of cell data tracking is 'publicly known,' the USMS cannot redact the section of the document indicating its existence, but it may redact the 'confidential details' of what was tracked, specifically, the numbers that were investigated." Contreras then assessed the collection of pages withheld in full. Contreras indicated he was concerned about the issue of **segregability**. Contreras observed that he was persuaded by "the combination of

the USMS's justification and its own review of the printouts that the collective detail maintained in the database may be more than the sum of its parts. Other courts have accepted similar reasoning that 'knowing what information is collected, how it is collected, and more importantly, when it is *not* collected, is information that law enforcement might reasonably expect to lead would-be offenders to evade detection.' Accordingly, much of the non-personal information maintained in the database is also permissibly withheld under Exemption 7(E)." He added that "once all the information that is permissibly withheld under 7(C) or 7(E) is redacted, all that would be left is 'an essentially meaningless set of words and phrases.' Therefore, the Court holds that these documents were not reasonably segregable and grants summary judgment to the USMS for this page range." (*Mario Dion Woodward v. U.S. Marshals Service*, Civil Action No. 18-1249 (RC), U.S. District Court for the District of Columbia, Feb. 1)

Judge Carl Nichols has ruled that the CIA properly withheld records concerning the nomination of Gina Haspel to serve as the director of the CIA in response to a FOIA request from the ACLU for records provided to Congress by the agency intended to portray Haspel in the best light and underplay her potential conflict of interests concerning her participation in the detainee torture program. The agency disclosed hundreds of records but withheld or redacted others. During this period, the agency re-reviewed 129 entries and Nichols reviewed 12 documents listed in the agency's *Vaughn* index *in camera*. Nichols approved of the agency's withholdings under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**, including the National Security Act and the CIA Act. The CIA also withheld records under **Exemption 5 (privileges)**, specifically the deliberative process privilege and the attorney-client privilege. The ACLU argued that the agency failed to show that disclosure would cause **foreseeable harm**. Nichols disagreed, noting that "the Court's in camera review of the material underlying [various entries], which all involve withholdings pursuant to the deliberative process privilege, supports the conclusion that disclosure of the material would harm and impede the agency going forward." Turning to the CIA's **segregability analysis**, Nichols showed sympathy to the ACLU's argument that the agency should not have been required to do multiple reviews if the documents had been processed correctly in the first place. Nichols noted that "after all, the CIA should not have had to conduct multiple 'line-by-line' reviews to locate all the segregable and non-exempt information (and the CIA's original position of course, was that it had already done so). But the CIA did, to its credit, identify additional material upon further review and has on multiple occasions segregated non-exempt information and provided an accounting for its determinations. Based on the entire record, the Court concludes that the CIA has satisfied its segregability obligations." (*American Civil Liberties Union v. Central Intelligence Agency*, Civil Action No. 18-2784 (CJN), U.S. District Court for the District of Columbia, Feb. 2)

Judge Rudoph Contreras has ruled that the Department of Justice properly responded to two FOIA requests from the Louise Trauma Center, a non-profit organization dedicated to helping immigrant women who have experienced gender-based violence apply for asylum. The first request asked for Office of Immigration Litigation training materials for lawyers in the appellate section. OIL-App searched for responsive records and located 4,363 pages. DOJ released 172 pages in full and 24 pages with redactions and withheld 4,168 pages and 12 videos in full pursuant to **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. The second request asked for records concerning how the agency determined the foreseeable harm that disclosure of a specific record would entail. That request was routed to the Office of Information Policy, which responded by supplying a link to a previously processed request on the same topic along with six redacted pages. The Civil Division searched its T Drive but found no records. OIL-App relied primarily on the attorney work product privilege, arguing that its training materials dealt with potential litigation. However, Contreras pointed out that most of the training materials involved how to respond to appeals of asylum denials. He noted that "although many of the documents described in the *Vaughn* Index are likely protected, DOJ's

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broad assertions do not do enough to convince the Court that every withheld document would risk revealing protected litigation or legal theory. At least some of the items listed in DOJ's *Vaughn* Index seem closer to the 'neutral, objective analyses' of the relevant law that is not protected." He was particularly skeptical of the 2019 and 2020 New Attorney training that appeared to be more administrative in nature than pertaining to potential litigation. Contreras pointed out that "the fact that the information. . .in the new attorney training materials here 'happens to apply in agency litigation' does not bring it within the scope of the work product privilege." Contreras also expressed skepticism of the agency's **segregability analysis** which normally does not apply to attorney work product privilege claims because a successful assertion of such claim means that all covered records are protected. However, Contreras pointed out that "the training materials here in many instances appear to apply the law to the hypothetical or generalized scenarios, or include at least some large sections that are 'neutral, objective analyses' of the relevant law that is not privileged. DOJ should therefore evaluate in its second opportunity whether each document is in fact '*fully* protected as work product,' or whether it contains more neutral and educational portions that could be partially released." Contreras also faulted DOJ's assertion that the records were protected by the deliberative process privilege or the attorney-client privilege. Noting that the training materials did not appear to involve any back and forth discussions characteristic of the deliberative process privilege, he observed that "the Court considers it unlikely that all of the prepared training documents such as agendas, handouts, and slides themselves contain this type of iterative process." He found the training materials were unlikely to contain attorney-client privilege advice, noting that "the agency is not communicating any legal advice or confidential facts to its new attorneys when instructing them on internal logistics for case management." Turning to the foreseeable harm test materials, Contreras agreed with DOJ that because the foreseeable harm standard had originated at DOJ and codified in its AG's Memo on FOIA in 2009, it was quite probable that the Civil Division did not have records interpreting the foreseeable harm standard as a result of the 2016 FOIA Improvement Act. Contreras explained that "but the standard adopted by Congress in 2016 had already originated with DOJ. The legislative history of the FOIA Improvement Act likewise makes clear that Congress was codifying a standard that had been intermittently applied and withdrawn by prior administrations and had been reinstated in 2009." (*Louise Trauma Center, LLC v. Department of Justice*, Civil Action No. 20-3517 (RC), U.S. District Court for the District of Columbia, Jan. 30)

The Second Circuit has reversed District Court Judge Alvin Hellerstein's order requiring the CIA to disclose much of the information about references mentioned in the Senate Report on Torture. Hellerstein found that much of the information had already been disclosed. But the Second Circuit noted that "the district court erred in ordering disclosure. The CIA offered a plausible reason for nondisclosure to avoid associating the CIA with intelligence activities undertaken during a specific time and a specific place. There is no basis in the record for the district court's assessment that the information is 'too old' to remain classified." The appeals court indicated that "we find nothing in the record to support the district court's conclusion that the information is already well known. Even assuming the district court knew the information prior to reading the Draft OMS Summary, it does not follow that the information is so well known as to justify disclosure." (*American Civil Liberties Union v. Central Intelligence Agency*, No. 18-2265, U.S. Court of Appeals for the Second Circuit, Feb. 2)

Judge James Boasberg has issued a split decision in ruling on the remaining issues in a case involving a suit brought by Cause of Action Institute against the Export-Import Bank of the U.S. COA had submitted two FOIA requests to Export-Import for records. The first request asked for records reflecting communications involving four senior EXIM officials regarding a series of individuals and business entities. The second request asked for communications among EXIM employees during congressional hearings about Kimberly Reed's nomination to be the Bank's President, as well as information relating to certain General

Accountability Office oversight activities. The agency disclosed more than 7,633 pages of records, many of which were partially or completely redacted. In his first decision in the case, Boasberg ordered EXIM to provide more support on some of its exemption claims. The agency abided by Boasberg order, disclosing many records that it had previously withheld in full or in part. COA indicated that it would challenge 41 documents that had been withheld under **Exemption 4 (commercial and confidential)** and **Exemption 5 (privileges)**. Boasberg first dispensed with EXIM's claim that a portion of an email chain constituted a presidential record not subject to FOIA, finding instead that the record was indeed controlled by EXIM and should be disclosed. COA claimed that EXIM records provided to GAO dis not qualify as inter-agency records under Exemption 5 and thus must be disclosed. Boasberg found one disputed record was indeed created solely for GAO's congressional oversight role and was not inter-agency but that other disputed records did qualify because they related to EXIM's deliberative process, not that of GAO. Turning to its Exemption 4 claims, Boasberg indicated that EXIM failed to justify its claim that records were obtained from a person for purposes of Exemption 4 coverage as to some documents but not others. He ultimately agreed that EXIM had also shown that the information was confidential. He noted that "although EXIM would ideally have solicited input from the specific exporters discussed in these reports, the Court finds that it may rely on its 'decades of accumulated experience and interaction with participants on the question of confidentiality' to conclude that 'this type of information is customarily kept confidential by the parties that submit to EXIM.'" (*Cause of Action Institute v. Export-Import Bank of the United States*, Civil Action No. 19-1915 (JEB), U.S. District Court for the District of Columbia, Jan. 27)

Judge Dabney Friedrich has ruled that Jennifer Lombrano sufficiently stated a claim under the **Privacy Act** to show that the Department of the Air Force violated the statute by disclosing her personal medical information, which led to her termination as a part-time employee. Lombrano was a commissioned officer in the U.S. Public Health Service and served as an oral and maxillofacial surgeon, working for the SouthCentral Foundation in Anchorage, Alaska, which serves 65,000 Alaska Native and American Indian people. Lombrano started experiencing panic attacks and visited an on-call outpatient mental health care provider at Joint Base Elmendorf-Richardson, to whom she indicated that she intended to seek treatment at a ten-day alcohol and drug rehabilitation treatment facility in Seattle. Lombrano was checked in overnight and hospital officials seized three 2 milligram Gummy Bears infused with THC, the metabolite for marijuana. The next day, she was seen by Col. Christine Campbell, USAF, the attending psychiatrist, who told Lombrano that she had contacted SouthCentral and disclosed her medical condition, telling SouthCentral that she was mentally unstable and had an alcohol and drug problem. As a result of Campbell's disclosures about Lombrano's medical condition, SouthCentral terminated Lombrano. Lombrano then sued the Air Force under the Privacy Act, alleging that its disclosures were the cause of her termination. The Air Force argued that Lombrano had not shown that the disclosure of her medical records led to her termination. But Friedrich pointed out that her assertion that "Campbell 'could only have' obtained the disclosed information 'by reading the medical record that was created when Plaintiff entered the hospital at Joint Base Elmendorf-Richardson' is plausible." She observed that "it is true that Lombrano's inference will likely be 'inadequate to sustain a Privacy Act claim on the merits.' But Lombrano is not required to connect all the dots here." Friedrich also rejected the Air Force's claim that Campbell did not learn of Lombrano's condition from her medical records. She indicated that "even though Campbell may have obtained Lombrano's disclosed information without assessing any medical records, a dismissal of her complaint is not warranted at this early stage. . .But Lombrano has offered a plausible explanation for how Campbell learned the relevant information." The Air Force also argued that disclosure was appropriate under the routine use exception. She rejected the claim that disclosure was permitted under the law enforcement exception, noting that "the Public Health Service is not a law enforcement agency, and the Air Force has not suggested that it is charged with enforcing or implementing laws prohibiting marijuana." She also rejected a second routine use exception dealing with hiring decisions of

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a component, noting that neither SouthCentral nor the Public Health Service were parts of the Department of Defense. She indicated that "even if this routine use applied, the Air Force has forfeited this argument by raising it for the first time in its reply brief. It is well-settled that the exceptions to the Privacy Act are affirmative defenses, which defendants must either timely raise or eventually forfeit." Friedrich also agreed that Lombrano had sufficiently stated a claim for damages, pointing out "clearly, the loss of employment creates at least some pecuniary harm." (*Jennifer L. Lombrano v. Department of the Air Force*, Civil Action No. 21-872 (DLF), U.S. District Court for the District of Columbia, Feb. 9)

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Master Card / Visa / American Express
Card # _____-_____-_____-_____ Expiration Date (MM/YY):_____/_____
Card Holder:_____ Phone # (_____) _____-_____

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