Volume 48, Number 6
March 23, 2022

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: Reviews by both the Reporters Committee for Freedom of the Press and Lawfare give President Joe Biden's Supreme Court nominee Ketanji Brown Jackson mixed reviews on her large number of FOIA decisions while a district court judge in the D.C. Circuit. The Reporters Committee found that several of Brown Jackson's decisions were reversed by the D.C. Circuit on appeal, although one of those – AquAlliance v. Bureau of Reclamation – was a rare Exemption 9 case in which Brown Jackson found that the exemption applied to water wells as well as oil wells, a decision in line with the case law on Exemption 9. She was also the first district court judge to rule that the only remedy for an agency's violation of the expedited processing provisions was to allow the requester to file suit immediately.

Court Faults Agency's Search, Exemption Claims

Judge Rudolph Contreras has ruled that various components of the Department of Homeland Security failed to conduct an adequate search for records responsive to requests from the American Immigration Council and the Tahirih Justice Center concerning a program that used Customs and Border Protection agents to conduct credible fear interviews, which is part of the asylum-seeking process. Contreras found that CBP's search was inadequate, that its Exemption 5 (privileges) claims had not yet been justified and that its Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records) were inappropriate.

Beginning in the spring of 2019, DHS began a pilot program in which CBP agents received training to conduct, and subsequently did conduct, credible fear interviews, which are normally conducted by U.S. Citizenship and Immigration Services officers. According to some evidence produced by the organizations, CBP officers found credible fear at a lower rate than the USCIS asylum officers. At least some CBP officers conducting fear interviews were instructed not to inform the asylum seeker, or their attorneys, that they were CBP officers, and would not clarify when asked. On August 31, 2020, Judge Richard Leon granted a preliminary injunction

against allowing DHS to continue to use CBP officers to conduct credible fear interviews because it was likely to violate the Immigration and Nationality Act. The American Immigration Council and the Tahirih Center submitted three FOIA requests to CBP, focusing on seven categories of records. The agency conducted searches and located responsive records, some of which were produced in full, some which were produced with redactions, and some of which were withheld in full. However, CBP only searched for records in categories 1 and 5. The agency argued that its involvement in the program was limited to providing personnel. When Contreras ruled on the case, the only issues remaining were (1) the adequacy of CBP's search, (2) DHS's deliberative process privilege withholding of four records, (3) USCIS's deliberative process privilege withholdings of six records, and (4) USCIS's withholding of the names of CBP officers in an email.

Contreras first found that CBP's search was inadequate. He noted that "defendants have not 'demonstrated beyond material doubt that their search was reasonably calculated to uncover all relevant documents.' Although CBP may ultimately lack responsive documents for categories 2-4 and 6-7, Plaintiffs have raised substantial doubts about whether this is the case. This is not a case of requesting documents from an agency that is clearly unrelated to the subject matter. By providing the personnel alone, CBP played a facially nontrivial role in this program. Defendants have not provided sufficient evidence demonstrating that CBP's role was so limited such that failing to have CBP search for categories 2-4 and 6-7 could be reasonably calculated to uncover all relevant documents." He observed that "even if CBP's headquarters personnel may have limited responsive documents, CBP does not explain why the dozens of its personnel that took part in the program would not have responsive documents."

Contreras also found that the agency had not provided a sufficient explanation of how it conducted the search. He indicated that "CBP's description of its search is insufficient." He pointed out that "these descriptions do not state which files were searched, state who performed the search, or describe a systematic approach. They do not even clearly state that a search occurred, merely implying as much by referencing consultations with subject matter experts, a determination that no documents were responsive to category 5, and CBP's location of one document for category 1. This is akin to stating in a conclusory fashion that the agency performed a 'systematic search for records,' which this Court has found insufficient." He noted that "plaintiff has shown that CBP's search was insufficient as a matter of law. . .CBP is ordered to conduct a search reasonably calculated to uncover all relevant documents from the expedited requests, and the parties are ordered to file a proposed schedule for further proceedings within ten days of the issuance of this opinion."

Turning to the Exemption 5 withholdings, Contreras found none of them qualified at this juncture. He noted that "if Defendants continue to assert the deliberative process privilege over this document (and any others discussed herein), they must more clearly 'show (1) "what deliberative process is involved," and (2) "the role played by the documents in issue in the course of the process," and 'should also explain (3) the "nature of the decisionmaking authority vested in the officer or person issuing the disputed document" and (4) the "relative position in the agency's chain of command occupied by the document's author and recipient.'" He explained that "as part of this showing, Defendants must necessarily explain whether they assert that the document *contains* evidence of a deliberative process – for example, a policy documented therein or comments and highlighting about various statuses – or whether the document *reflects* a deliberative process – for example, the process of creating the document which may reveal editorial judgements. Defendants' briefing must leave the Court with a clear understanding of what deliberative process is asserted and the relationship between the document and that deliberative process."

Contreras rejected the agencies foreseeable harm claim as well. He noted that "for withholdings based on the deliberative process privilege, it is not enough to explain how disclosure 'could impair internal deliberations; the agency 'must concretely explain how disclosure "would" impair such deliberations. It is insufficient to merely state that disclosure "would jeopardize the free exchange of information between senior

leaders within and outside of the" agency. There must be a context-specific 'focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward."

Contreras rejected USCIS's attempt to withhold the email addresses of CBP agents that participated in the program. He noted that "the public interest in disclosure comes from the value that the specific information released would provide in aiding the public's understanding of government operations." He added that "this is not a case of a poorly reasoned justification for disclosing officers' names. Here, the names appear to be necessary for the public to understand the government's operations." (*American Immigration Council, et al. v. U.S. Customs and Border Patrol*, Civil Action No. 19-2965 (RC), U.S. District Court for the District of Columbia, March 11)

Views from the States…

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

New Jersey

The supreme court in two separate cases has ruled that personnel records requested under the Open Public Records Act are exempt under the statute but that a redacted version of the records must be disclosed under the common law right of access to records. The first decision involved a request from Libertarians for Transparent Government for records concerning Tyrone Ellis, a former corrections officer, who admitted to having forcible sex with female prisoners and was allowed to retire with a reduced pension after agreeing to cooperate in the investigation of four other accused officers. Libertarians requested records from the Board of the Police and Firemen's Retirement System that considered Ellis's application for special retirement. Libertarians specifically requested "the name, title, position, salary, length of service, date of separation, and the reason thereof," data elements required to be disclosed as an exception to the personnel records' exemption. The Board denied the request and Libertarians filed suit. The trial court ruled in favor of the Board, but the appellate court reversed, siding instead with Libertarians. The supreme court also sided with Libertarians, noting that "a settlement agreement that includes those [specified data elements] must therefore be made available to the public once it is redacted. OPRA enables the public to play a role in guarding against corruption and misconduct. Here, the [Board] stated that Ellis was terminated. In reality, he was allowed to retire in good standing with only a partial pension forfeiture. Without access to actual documents in cases like this, the public can be left with incomplete or incorrect information. Libertarians is entitled to a redacted version of the actual settlement document. . ." (*Libertarians for Transparent Government v. Cumberland County*, No. A-34-20, New Jersey Supreme Court, March 7)

In its second decision, the supreme court ruled that the Union County Prosecutor's Office must disclose a redacted version of the investigation of a complaint against then Elizabeth Police Director James Cosgrove, a civilian director of the Department for more than two decades, for using racist and sexist language to refer to employees on multiple occasions. An investigation conducted by the Office of the Attorney General sustained the complaint and Cosgrove resigned. Richard Rivera filed an OPRA request for the record, which was denied under the personnel records' exemption. The trial court ruled in favor of Rivera and the appellate court reversed. The supreme court sent the case back to the trial court to determine how to redact and disclose it. The supreme court pointed out that "considering the interests here, the Court notes that the public interest in disclosure is great. Racist and sexist conduct by the civilian head of the police department

ACCESS REPORTS

violates the public trust in law enforcement. . . Public access helps deter instances of misconduct and ensure an appropriate response when misconduct occurs. Access to reports of police misconduct promotes public trust." (*Richard Rivera v. Union County Prosecutor's Office*, No. A-58-20, New Jersey Supreme Court, Mar. 14)

The Federal Courts…

Judge John Bates has ruled that the FBI properly dismissed two FOIA requests submitted by Gun Owners of America because they were either **too vague to conduct a search** or required the agency **to create records** but has found that a third request sufficiently described the requested records to allow the agency to conduct a search. Gun Owners of America submitted four FOIA requests. The first request asked for communications between the FBI and the Governor, Lt. Governor, and Attorney General of Virginia between January 2014 and the date the request was processed. The second request asked for communications between the FBI and the Virginia State Police involving the so-called voluntary background check established by state law between July 2015 and the date of processing the request. The third request asked for records related to whether Virginia's voluntary background check system and its implementation complies with state law. The fourth request asked for copies of the last four National Instant Background Check System audits conducted by the FBI's Criminal Justice Information Services Division with respect to Virginia. The FBI accepted the fourth request for processing but denied the other three requests as improperly vague or asking for the creation of records. Gun Owners of America filed an administrative appeal but after hearing nothing further from the agency, Gun Owners of America filed suit. Bates first found that the first request for communications between the FBI and state officials in Virginia was indeed too vague to search. But he rejected the agency's argument that it could not conduct a search because the request did not identify the specific officeholders by name. He pointed out that "defendant's attempt to manufacture ambiguity in this way is unavailing. There is only one reasonable interpretation of this request: plaintiffs seek communications between the FBI and then-incumbent officeholders and their staffs. An agency's claim that it is hopelessly torn between a reasonable and an unreasonable reading of a FOIA request will not support a conclusion that the request is deficient." But he agreed with the agency that the language of the request was too vague. He indicated that "by using a vague catch-all instead of identifying a discrete agency or set of employees, Request 1 embeds an intractable uncertainty preventing even the most conscientious and diligent processor from 'determining precisely what records are being requested.'" Bates observed that GOA's attempt to explain in their appeal and brief why the request was actually searchable did nothing to resolve the situation. He pointed out that "plaintiff's recommendation of email domains to search does not grapple with the inherent vagueness of the phrase 'agents and employees of the same.' Even if Request 1 were limited to the email domains plaintiffs suggest, their catch-all request for communications with all 'agents and employees' would still be impermissibly imprecise." He noted that 'more generally, however, plaintiffs cannot point to suggested strategies as evidence that their request is narrower than its terms. A brief cannot amend a FOIA request and subsequent communication with an agency 'must be reasonably clear that its sender intends it to be a new request' in order to limit the scope of the previous request." He observed that "in this case, far from submitting a new request or specifically seeking a narrower set of documents, plaintiffs' administrative appeal plainly asserts that their original request is not overly broad, but instead must be processed as submitted." The second request, which asked for communications between the FBI and the Virginia State Police involving two Virginia background check programs, had also been rejected by the FBI as too vague to conduct a search because it did not identify specific email addresses to search. Bates rejected the claim, noting that "a FOIA request is not deficient just because it does not provide the name or email address of every individual whose communications are sought – the request's description need only be 'reasonable' to implicate the agency's obligations under the statute." Bates also dismissed the FBI's contention that the term "involving" was too vague and that "there is a categorical rule barring *all* requests that use the phrase 'relating to' (or similar

phrases)." Bates flatly noted that "this is not the law. That the reasonable description requirement should not be reduced to a categorical test is evident from its terms: courts should rarely deploy a bright-line rule – and particularly not one this expansive – when determining whether something is 'reasonable.'" He observed that "FOIA requesters are frequently in no position to know how an agency classifies its documents or what terminology the agency might have used – that is often why they are making a request in the first place." Bates pointed out that "while agency personnel are not required to deploy clairvoyance, they are obligated to use 'reasonable effort' in fulfilling requests. As such, an agency may not refuse even to begin searching for documents just because the requester did not spell out its requested search parameters." The third request asked for records related to whether Virginia's voluntary background check system and its implementation complied with 28 C.F.R. Section 25.6. The FBI argued that to respond to this request required the agency to create records. Bates indicated he disagreed with the agency, noting that "an agency may not reject a FOIA request that on its face seeks only pre-existing documents just because it *implicitly* asks a question." Reviewing the relevant case law, Bates observed that "in other words, what matters is not the form of the request but whether compliance would require the creation of new documents." He added that "in short, the Court finds no support in the caselaw for the proposition that an agency may refuse to process a request which, on its face, seeks only pre-existing documents and does not require the creation of new documents." But Bates agreed with the FBI that Request 3 fell afoul of the untethered "related to" description. Finding it too broad to search, Bates indicated that "when a FOIA request is framed using the kind of intrinsically expansive terms used in Request 3, these kinds of limitations are far from superfluous – they are essential to give the FBI adequate guidance in locating responsive documents." (*Gun Owners of America, Inc., et al. v. Federal Bureau of Investigation*, Civil Action No. 21-1601 (JDB), U.S. District Court for the District of Columbia, March 23)

A federal court in New York has ruled that while videos of the force-feeding of Mohammad Salameh, convicted for his role in the 1993 terrorist attacks on the World Trade Center in New York City are protected by **Exemption 7(F) (harm to a person)**, the Bureau of Prisons failed to follow the judge's previous order to redact further information and disclose **segregable** portions. As the result of a 34-day hunger strike by Salameh in November 2015, BOP staff at the Maximum-Security Facility in Florence, Colorado decided to forcibly rehydrate Salameh. On November 4, a BOP lieutenant, accompanied by two camera operators, went to Salameh's cell to tell him they were going to forcibly rehydrate him. Salameh failed to respond, allegedly because he was too weak to come to the cell door. The BOP lieutenant and the two camera operators entered his cell, identified themselves on camera, and told Salameh what they intended to do. The BOP staff that would perform the forced rehydration then entered the cell and identified themselves. When Salameh refused to cooperate, he was restrained and was forcibly rehydrated. He was rehydrated a second time on November 11, but did not resist as strenuously as the previous time. Investigative journalist Aviva Stahl made two FOIA requests for the video tapes made of the two rehydration episodes. The agency located 13 responsive tapes – six for the November 4 forced rehydration and seven for the November 11 forced rehydration. Judge Brian Cogan of the Eastern District of New York indicated that the video tapes could be divided into three separate segments. The first segment included the identification of BOP personnel who participated in the forced rehydration. The second segment was the performance of the forced rehydration, where participants wore protective gear and could not be identified. The third segment was a debrief session where participants appeared in a separate room and discussed the performance of the forced rehydration. BOP withheld the tapes under Exemption 7(F). Cogan agreed that Exemption 7(F) applied to portions of the performances of the forced rehydration but found that some more information showing Salameh's reactions to the forced rehydration could be disclosed by further redaction of the personnel in the videos. Cogan explained that the agency's video editor had testified that he thought all the performance videos were exempt and thus did not consider anything but blurring the images, which he decided was not feasible. Cogan indicated that "presumably placing a black box or circle around BOP staff would be a far easier and more complete way to

ACCESS REPORTS

obscure their identity as opposed to merely blurring out portions of a frame. One could envision blacking out everything around an oval of Salameh and then placing a black box over any BOP staff member's hand or body part that entered the remaining frame." Cogan noted that "other courts have required the government to edit videos to obscure identifying information in order to comply with FOIA." He added that "more broadly, video editing has become commonplace in litigation." He told BOP to try once again to redact the videos to provide more footage of Salameh. (*Aviva Stahl v. Department of Justice and Federal Bureau of Prisons*, Civil Action No. 19-4142 (BMC), U.S. District Court for the Eastern District of New York, March 11)

A federal court in New York has ruled that U.S. Immigration and Customs Enforcement has now shown that data requested by the Transactional Access Records Clearinghouse is either not retrievable using the identifiers requested by TRAC or would require the agency to **create a record**. TRAC made two FOIA requests for Form I-247, anonymous person-by-person data relating to individuals subject to ICE detainers and notices, including their demographic characteristics, immigration history, and criminal background. Although TRAC had been submitting requests for Form I-247 since 2011, TRAC alleged that since January 2017 ICE had refused to provide much of the information included in previous responses. In response to TRAC's two requests, ICE provided some responsive data but did not produce information on what happened following each detainer, including whether the subject of the detainer was taken into ICE custody, whether the individual had ever been charged with or convicted of a crime, what any such offenses were, and whether the individual was deported. TRAC then filed suit, arguing that ICE had failed to **conduct an adequate search**. In her previous decision in the case, Judge Brenda Sannes found that ICE had not sufficiently explained why it could not search its Enforcement Integrated Database and its Integrated Decision Support System as a whole from the outset rather than search for data from pre-generated populations. This time ICE submitted a supplemental affidavit from Patricia de Castro, an operations research analyst within Enforcement and Removal Operations, explaining that the database "can only be used to query the EID *one individual at a time*," that it was primarily used by ICE officers in the field," and that it required the 'manual entry of an identifier" – a process that would not be feasible for the request sought here. Further, de Castro's affidavit indicated that there were no responsive records in the EID database and that the agency had searched the entire IIDS database and disclosed all responsive records short of creating a record. Sannes then agreed with ICE that providing the data elements requested by TRAC would require ICE to create a record. She noted that "the Court finds that the process of linking disparate data populations in the IIDS to produce the information Plaintiffs request constitutes the 'creation of a new record' within the meaning of FOIA. The parties agree that 'sorting a pre-existing database of information to make information intelligible data does not involve the creation of a new record,' even where such a search 'requires the application of codes or some form of programming to retrieve the information.' Here, however, given the lack of common identifiers for individuals across enforcement events, the steps ICE must take to provide all of the information requested by Plaintiffs go beyond mere sorting, compiling, or extracting records that exist in the IIDS." (*Susan B. Long and David Burnham v. United States Immigration and Customs Enforcement*, Civil Action No. 17-5065 (BKS/TWD), U.S. District Court for the Northern District of New York, March 9)

Judge Colleen Kollar-Kotelly has ruled that the IRS **conducted an adequate search** in response to John Anthony Castro's FOIA requests for records concerning why his status as an Enrolled Agent, who may represent taxpayers before the IRS, was temporarily rescinded and then restored six months later. Castro was told by an IRS employee to contact someone named Tony Woods in the agency's Office of Professional Responsibility concerning the status of his license, specifically to submit evidence of completed continuing legal education requirements. According to Castro, his license was inexplicably suspended in 2019 but then reinstated in January 2020. Castro submitted two FOIA requests to find out more about the incident. His first FOIA request asked for emails sent or received by Tony Woods pertaining to John Anthony Castro between

January 2019 and February 28, 2020, as well as emails regarding Castro or his Enrolled Agent License Number. His second FOIA request asked for all non-email records concerning the incident involving Woods and Castro. The IRS conducted a search for both requests which yielded 143 pages of potentially responsive records. Of the responsive pages, the agency partially redacted 11 of them. Castro argued that the agency had improperly limited its search based on information he had provided in his requests to help guide the agency's searches. The agency responded that without that information it would have been unable to conduct a search because the requests were too vague. Kollar-Kotelly agreed with the agency, noting that "here, Plaintiff is suggesting that the IRS should have ignored *his own* description of the records he sought. This argument makes little sense. The Court agrees that IRS's interpretation of the scope of the Plaintiff's requests as seeking records 'in connection with' the alleged cancellation of his EA license was not only reasonable, but also appropriate in light of Plaintiff's inclusion of this information in his requests, and the IRS's duty to read a FOIA request 'as drafted.'" Although Castro's FOIA requests asked for records involving Tony Woods, the IRS located no such employee but did locate a female employee named Antoinette Wood. She was contacted to see if she had any responsive records but indicated she did have any such records. The agency then contacted the Enrolled Agent Policy and Management department, within the Return Preparer Office, which was the office that dealt with Enrolled Agents' licenses. That department conducted a search in its e-Trak Practitioner database under Castro's name and located 143 pages. Kollar-Kotelly found the agency's search was adequate. She noted that "the 'reasonableness' of IRS's FOIA search 'is necessarily "dependent upon the circumstances of the case."' During the time period identified in Plaintiff's FOIA Requests, the IRS employed 70,000 across many business units. Any suggestion that some sort of 'search' could be run across all records maintained by the IRS is unfounded. Moreover, Plaintiff explicitly indicated that he was seeking records 'in connection' with his claim that his enrolled agent license was 'impermissibly cancelled' and 'later reinstated' and associated with a particular IRS employee. The steps taken by [the IRS search team] demonstrate reasonable efforts to identify such responsive records." Castro also challenged the agency's failure to look for records in other units whose email correspondence was occasionally referred to in responsive documents. But Kollar-Kotelly pointed out that "plaintiff offers only conclusory speculation that searches of these employees would have yielded records responsive to his FOIA requests – which explicitly sought information related to the cancellation of his EA credential. Absent any 'countervailing evidence,' Plaintiff's mere speculation that the additional email recipients 'might' have additional responsive information is insufficient to undermine the Court's finding that IRS conducted a reasonable search for records responsive to his FOIA requests." Kollar-Kotelly found that the agency had appropriately claimed both **Exemption 7(A) (interference with ongoing investigation or proceeding)** and **Exemption 3 (other statutes)**, citing §6103(e)(7), which protects taxpayer return information. While Castro agreed that the redacted records related to tax return information, he argued that disclosure would not impair the administration of tax laws. She noted that "as the Court finds that the IRS has provided sufficient detail to demonstrate that Plaintiff is under investigation by the IRS, and that disclosure of the redacted portions of these 9 pages of records would impair its investigation, it also finds that the IRS has discharged its obligation to demonstrate that the redacted information would 'seriously impair Federal tax administration' pursuant to § 6103(e)(7)." (*John Anthony Castro v. Internal Revenue Service*, Civil Action No. 20-1843 (CKK), U.S. District Court for the District of Columbia, March 22)

Judge Timothy Kelly has ruled that the IRS properly withheld tax return-related information in response to a request from the Southern Poverty Law Center and the National Immigration Law Center for records concerning the agency's criminal investigation of the owner of a Tennessee slaughterhouse for violations of the tax code. In April 2018, law enforcement officers seized evidence at the slaughterhouse and arrested employees who allegedly were not lawfully present in the United States. In February 2019, SPLC and NILC filed a tort action on behalf of the employees of the slaughterhouse against various law enforcement officers involved in the raid. A few months later, SPLC and NILC submitted an eight-part FOIA request concerning

ACCESS REPORTS

the IRS involvement in the raid. The IRS declined to process the request, arguing that it was protected by **Exemption 3 (other statutes)**, citing § 6103(a), which prohibits disclosure of identifiable tax return information. The IRS upheld its decision on appeal and SPLC and NILC filed suit under FOIA. SPLC and NILC then served the IRS with a subpoena in its tort claim against law enforcement officials asking for the same records. In response to the subpoena, the IRS provided thousands of pages of records, 521 photographs, five video files, and four external hard drives containing video footage. When the IRS moved for summary judgment in the FOIA action, SPLC and NILC argued that the disclosure pursuant to its discovery request meant that the records were now in the public domain and were no longer protected by § 6103(a). Kelly agreed with the agency that the records requested under FOIA qualified as "return information" under FOIA, noting that "at bottom, Plaintiffs – without the consent of the taxpayer – seek confidential taxpayer-specific records related to the taxpayer's alleged criminal liability under the tax code." Kelly rejected the plaintiffs' argument that the records were now in the public domain. He indicated that "to begin with, the IRS's production of documents to Plaintiff in the [torts] suit was not a public disclosure of that material, and no case suggests otherwise. As courts in this district have repeatedly held, the government's production of documents to private parties during discovery does not place them in the public domain for FOIA purposes. And Plaintiffs' efforts to turn around and make those documents public does not do so either." SPLC and NILC also argued that the agency should be estopped from arguing that the records did not fall within an exception providing for disclosure in cases involving tax administration. Kelly pointed out that "a FOIA suit does not pertain to tax administration, as other courts have held. True, this suit seeks tax records. But if a FOIA plaintiff could force the IRS to disclose records otherwise covered by § 6103(a) under this exception, then § 6103(a) would have no force, and the two statutes would hardly be 'entirely harmonious.'" (*Southern Poverty Law Center, et al. v. Internal Revenue Service*, Civil Action No. 9-2501 (TJK), U.A. District Court for the District of Columbia, March 9)

Judge Colleen Kollar-Kotelly has ruled that U.S. Customs and Border Protection has not shown that it **conducted an adequate search** for records concerning Fleta Sabra's encounter with CBP agents at a port of entry in California in September 2015 and the CBP's subsequent investigation of the incident. Sabra alleged she had been unlawfully detained at Otay Mesa or San Ysidro port of entry in Southern California. In May 2017, she submitted a FOIA request for records of the incident and asked for expedited processing. The agency's search yielded 14,170 pages of records, three audio files, and eight video files potentially responsive to her request. The agency determined 430 pages and all audio and video filed were responsive to Sabra's request. Of those responsive materials, 24 pages were determined to already be in Sabra's possession, 11 pages were withheld in full under **Exemption 5 (privileges)**; 395 pages, as well as the audio and video fields were released with partial redactions under **Exemption 6 (invasion of privacy)** and **Exemption 7 (law enforcement records)**. The agency also submitted two *Vaughn* indices. Kollar-Kotelly pointed out that "although '[the agency's] declarations indicated that particular offices within CBP were searched because they were 'likely' to have responsive records, they *do not* contain any averments that all locations 'likely to contain responsive materials' were searched. To be sure, an agency 'need not search every one of its record systems.' But it must provide a 'reasonably detailed affidavit. . .averring that all files likely to contain responsive materials . . .were searched' to 'afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgement.'" She noted that "'where the government has not made such an attestation, courts have typically found that an issue of material fact exists as to the adequacy of the search.' Courts in this jurisdiction have consistently denied summary judgment to an agency when its supporting affidavit fails 'to aver that all locations likely to contain responsive records were searched.'" Addressing the CBP's affidavit here, Kollar-Kotelly observed that the agency's declaration "indicates only that certain offices within CBP would 'likely' have responsive records, but neither declaration indicates that CBP searched 'all files likely to contain responsive materials.' This deficiency precludes the Court from granting summary judgment in CBP's favor

as to the adequacy of its search for records responsive to Plaintiff's FOIA request." (*Fleta Christina C. Sabra v. United States Customs and Border Protection*, Civil Action No. 20-681 (CKK), U.S. District Court for the District of Columbia, March 14)

Judge John Bates has ruled that the Army properly responded to Nancy Swick's FOIA/PA requests for records concerning her psychiatric evaluation report and personnel records from her former employment at Fort Belvoir Community Hospital. Swick was an OB/GYN nurse practitioner at FBCH from 2011 to 2013. She submitted two FOIA requests – (1) a psychiatric evaluation report from an evaluation she underwent in 2012, and (2) any documents with her name, social security number, or date of birth stored in her OPM personnel file. FBCH denied both requests. Swick then filed suit. Bates found the agency had **conducted an adequate search** for the psychiatric evaluation report but not for the personnel-related records. The agency then told Bates that it had located 229 pages from Swick's personnel records. Subsequently, Bates came to question whether the agency had labeled Swick's psychiatric evaluation report as a medical record that could have been filed somewhere else. Swick argued that the agency's search for her personnel files was inadequate because it did not include a medical certificate. But Bates observed that "in this case, however, Swick's assertion that the Army's production is missing a medical certificate is more for posterity's sake than it is substantive. Swick explicitly states that she 'is not attempting to widen the Army's search' for records responsive to her FOIA request. Instead, she appears to merely want it noted for the record that the Army's production did not include this document. Regardless of whether this omission exists, because Swick is otherwise satisfied with the Army's production and 'is not attempting to widen [the Army's] search,' the litigation surrounding Swick's request for her personnel records is now moot." However, Bates found the issue of whether the Army had produced Swick's MCMI-III test data was still a live issue. Regardless, he concluded that "ultimately, the Court need not resolve this issue because. . .even if Swick's FOIA request does encompass her MCMI-III data, the Army satisfied its FOIA obligations by conducting an adequate search for this information." He indicated that "the Army submitted two detailed declarations summarizing the reasons for its conclusion that Swick's data must be on one of three computers and its failed attempts to locate Swick's data from the computers' hard drives." He added that "though the Army was unable to locate Swick's data, the Army has satisfied its FOIA obligations and is entitled to summary judgment." (*Nancy J. Swick v. United States Department of the Army*, Civil Action No. 18-1658 (JDB), U.S. District Court for the District of Columbia, March 15)

Judge Randolph Moss has finally ruled in favor of the U.S. Postal Service in a case brought by Hassan Ali Pejouhesh for records concerning his prosecution and conviction for aiding and abetting bank fraud, possession of stolen mail, and identity theft. The agency located 61 pages, released 37 pages with redactions, and withheld 17 pages in full. In his earlier decisions in the case, Moss faulted the **adequacy of the agency's search** as well as some of its exemption claims. The agency withheld third-party statements under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. But after reviewing them, Moss concluded that the agency appeared to have already disclosed them in a public docket. He noted that the agency's affidavit "contains account numbers, email addresses and home addresses, none of which are redacted. If the affidavits that the Postal Service has withheld in part from Plaintiff is already 'a permanent record,' and the Postal Service's invocation of Exemption 7(C) precluded by the public domain doctrine." He sent the withheld records back to the agency to compare them to the records already disclosed in the public docket. He reviewed the Operation Plan *in camera* and concluded that it was entirely protected by **Exemption 7(E) (investigative methods and techniques)**. Moss pointed out that "having reviewed the Plan, the Court finds that it served the law enforcement purpose of memorializing a common plan for Postal Inspection Service officers to follow when arresting Plaintiff and executing a search warrant." He added that "although

ACCESS REPORTS

in a general sense, the kinds of techniques described in the Plan may not be novel or secret, but the details contained in the Plan, if disclosed, could assist criminals in evading detection or arrest." (*Hassan Ali Pejouhesh v. United States Postal Service*, Civil Action No. 17-1684 (RDM), U.S. District Court for the District of Columbia, March 14)

Judge Tanya Chutkan has ruled that the Executive Office for U.S. Attorneys properly withheld records concerning Germaine Cannady's co-defendant in their conviction for intent to distribute cocaine and heroin. Cannady submitted a FOIA request for records concerning items seized from the residence and/or vehicle of Michael Barrett and notes or interviews involving the FBI and "CI" Michael Barrett. EOUSA issued a *Glomar* response neither confirming nor denying the existence of records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Cannady filed an administrative appeal with the Office of Information Policy, which upheld EOUSA's *Glomar* response. Cannady then filed suit. When preparing its answer to Cannady's complaint, EOUSA realized that Barrett was not a confidential source, but Cannady's co-defendant and told Cannady that Barrett's records could not be disclosed without third-party authorization. Canady argued that disclosure of Barrett's records would be in the public interest and that his conviction meant his privacy interests were diminished. However, Chutkan pointed out that "while a conviction weakens a person's privacy interest, it does not eliminate it." Cannady also argued that the government had withheld information from him during trial and that while he had been granted a new trial, the Fourth Circuit ruled that the oversight was immaterial. Chutkan noted that "but these facts are not enough for Cannady to meet his burden to adduce evidence that would lead a reasonable person to believe that wrongdoing had occurred." She added that "Cannady has therefore failed to show a public interest in disclosure. And while Barrett's privacy interest in the records sought might be somewhat diminished, that privacy interest is still enough for the records to be subject to categorical exclusion from disclosures under Exemption 7(C). This categorical exclusion also moots Cannady's arguments that EOUSA was required to reasonably segregate any non-exempt information it possessed." (*Germaine Cannady v. Executive Office for United States Attorneys*, Civil Action No. 19-2832 (TSC), U.S. District Court for the District of Columbia, March 23)

A federal court in Washington has ruled that while the State of Washington has not shown its **pattern or practice claim** applies to the failure of the National Archives and Records Administration, the General Services Administration, and the Office of Management and Budget to respond within the statutory time limit to the State's requests for records as to why the government was closing the National Archives building in Seattle, the agencies have not yet provided a sufficiently detailed *Vaughn* index explaining their exemption claims. The court explained that "the Parties worked cooperatively at least until the Plaintiff decided to file this motion, to identify the universe of documents that would be reviewed for responsiveness and exemption based on the results of those searches. Thus, Plaintiff was fully aware of the scope of the records involved in its request. Further, having produced a subset of those records upon which exemption determinations were made, Defendant appears to have met its obligation as to the scope of potential exemptions in *CREW v. FEC*." The court observed that "at no point was Washington left completely in the dark as to whether the Agency would respond to its request. To the contrary, Washington was kept informed of the Agency's progress along the way." The court added that "while there is no doubt that the Agency failed to meet the statutory deadline for providing a complete determination, its actions do not rise to the level of egregious delay as to warrant injunctive relief." Washington challenged the agencies' failure to provide a *Vaughn* index to better explain its exemption claims. To resolve that issue, the court ordered the agencies to provide a *Vaughn* index within ten days. (*State of Washington v. United States National Archives and Records Administration*, Civil Action No. 21-00565-TL; *State of Washington v. U.S. General Services Administration*, Civil Action No. 21-00794-TL; and *State of Washington v. Office of Management and Budget*, Civil Action No. 21-00564-TL, U.S. District Court for the Western District of Washington, March 18)

The D.C. Circuit has remanded a request from the *Los Angeles Times* to unseal a search warrant related to an SEC investigation of Sen. Richard Burr (R-NC) for insider trading because of further acknowledgement by Burr of the existence of the investigation and because the district court misapplied the relevant *Hubbard v. United States* factors for weighing the public interest in unsealing such documents. In February 2020, Burr and his wife sold stocks worth about $1 million. Soon after, the stock market fell sharply on news that the COVID-19 pandemic had spread. Because Burr had received a congressional briefing on the pandemic in his role as a Senator shortly before these sales, Burr's trades quickly garnered public attention and media scrutiny. In May 2020, the *Los Angeles Times* reported that Burr's cellphone records were subpoenaed as part of a Justice Department investigation into his stock trades. Eight months later, Burr issued a statement that the investigation had been closed without charges. In February 2021, the *Los Angeles Times* filed a motion in the D.C. Circuit district court to unseal the search warrant allegedly issued to Burr for his cell phone records, arguing that it had a common law and First Amendment right to the records. The district court ruled that even if a common law or First Amendment right of access applied, the fact that the investigation was closed without charges meant that Burr's privacy interest outweighed the public interest in disclosure. Several months after the district court decision, the SEC filed an enforcement action in U.S. District Court for the Southern District of New York for a subpoena issued to Sen. Burr's brother-in-law, Gerald Fauth, which paralleled the DOJ investigation of Burr's stock trade and disclosed further information. Writing for the D.C. Circuit, Circuit Court Judge Judith Rogers observed that "because the SEC's parallel investigation released details after the district court had denied the L.A. Times' motions, the district court judge on remand should re-evaluate and re-weigh the *Hubbard* factors to determine whether it is still appropriate to seal the hypothesized search warrant materials and the government's opposition memorandum. To the extent the hypothesized search warrant materials exist. . . The district court should reconsider whether sealing is still justified in view of the *Hubbard* factors or whether redaction would be an appropriate alternative." Rogers concluded by noting that "the court remands the case to the district court to reconsider its *Hubbard* analysis in light of the public disclosures in the SEC investigation, the Senator's public acknowledgment of the Justice Department's investigation, and the court's precedent governing the application of the *Hubbard* test." (*In re: Application of Los Angeles Times LLC to Unseal Court Records; Los Angeles Times Communications LLC v. United States*, No. 21-5128, U.S. Court of Appeals for the District of Columbia Circuit, March 18)

# #

ACCESS REPORTS

ACCESS REPORTS

1624 Dogwood Lane, Lynchburg, VA 24503 (434) 384-5334

Please enter our order for Access Reports Newsletter and/or Reference File, the two-volume, loose-leaf Reference Service. It will help us stay on top of developments in FOI and privacy. We may cancel for any reason and receive a refund for the unmailed issues.

- ❑ Access Reports Newsletter for $400
- ❑ Bill me
- ❑ Check Enclosed for $_____

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

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