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Washington Focus: The Chief FOIA Officers Council met for the first time July 22. Major topics of discussion at the meeting were the “release to one, release to all” policy, which has gotten mixed reviews from journalists concerned about records they receive from their FOIA requests being made public before they had an opportunity to analyze and report on them. Another major topic was how more records could be put online while ensuring their accessibility was compliant with Section 508 of the Rehabilitation Act. Agency concerns about their inability to make records readily and easily compliant have been a serious drag on moving forward with posting more records online.

D.C. Circuit Rules Agencies Cannot Claim Records Are Non-Responsive

The D.C. Circuit has answered a question that could well have a significant impact on the way agencies make disclosure decisions short of claiming an exemption. In a case brought by the American Immigration Lawyers Association against the Executive Office for Immigration Review at the Department of Justice, the D.C. Circuit has ruled that agencies may not withhold records solely because they are deemed non-responsive to the specific FOIA request. Instead, the court found that the only basis for withholding a record is that it falls within the scope of an exemption. Writing for the court, Circuit Court Judge Sri Srinivasan explained that “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure. To the contrary, in expressly allowing for—and only for—‘deletion of the portions’ of a responsive record ‘which are exempt,’ the statute reinforces the absence of any authority to delete portions of a responsive record which *are* not exempt.”

The case involved a request from AILA for records concerning complaints filed against immigration judges and the resolution of those complaints. AILA also asked EOIR to provide an index of the records to the extent that they constituted final opinions in the adjudication of cases under subsection (a)(2). EOIR disclosed more than 16,000 pages,

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encompassing 767 complaint files. The agency redacted information under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**, including the names and identifying information of all the immigration judges. EOIR also redacted information from responsive records that it concluded was non-responsive to AILA's request. The district court upheld the agency's decision and AILA appealed. The D.C. Circuit reversed on the issue of whether the agency could categorically withhold the names and identifying information of immigration judges under Exemption 6 and found as well that there was no statutory basis for redacting information within a responsive record because it was non-responsive. The D.C. Circuit sided with the agency as to whether subsection (a)(2) required publication of the adjudication of the complaints.

Srinivasan recognized that Exemption 6 required courts to balance individuals' privacy interests against the public interest in disclosure. He noted that "AILA argues that ongoing concerns about the complaint process and disciplinary action (or lack thereof) imposed on immigration judges are relevant to understanding what the agency 'is up to.' We agree with AILA as a general matter. . . [but] we also note that EOIR has disclosed a substantial amount of information concerning the complaint system and the substance of actual complaints, and has made efforts to ensure that its disclosures are accessible and useful (including establishing a system to identify judges by anonymous three-digit codes, thereby enabling AILA—and the public—to track repeat offenders even without knowing the names of individual judges)." He pointed out that rather than assess the public interest in disclosure in the abstract, the relevant question was whether disclosure of the names would provide incremental value that outweighed individuals' privacy interests.

He explained that Exemption 6 did not typically support a categorical application because individual privacy interests could vary so greatly. He observed that "the question, then, is whether there has been a sufficient showing that the balancing analysis under Exemption 6 would yield a uniform answer across the entire proffered category, regardless of any variation among the individual records or persons falling within it. We cannot say that is true here." Srinivasan indicated that "the records at issue encompass all complaints received during the relevant time period: whether substantiated or unsubstantiated, whether related to serious issues or comparatively trivial ones, and whether about immigration judges' conduct on the bench or their conduct outside the workplace. . . Given the variety in types of complaints and circumstances of individual judges, not every judge has the same privacy interests at stake and not every complaint would equally enlighten the public about 'what their government is up to.'"

Acknowledging the variety of types of complaints, Srinivasan noted that "by enabling the public to make such connections, knowing the identity of [the judges] could shed considerably more light on 'what the government is up to' than simply knowing about the existence of some anonymous judge with a certain number of complaints against her." He pointed out that "variations in the privacy and public interests at stake leave us unable to find, at least as a blanket matter, that the Exemption 6 balance tips in favor of withholding immigration judges' names in all circumstances." He indicated on remand EOIR could provide individualized reasons for withholding names.

Turning to the issue of non-responsive records, Srinivasan noted that "responsive records are generally subject to the [statute's] disclosure obligation." He then described the process for identifying responsive records: "first, identify responsive records; second, identify those responsive records or portions of responsive records that are statutorily exempt from disclosure; and third, if necessary and feasible, redact exempt information from the responsive records." He added that "the statute does not provide for withholding responsive, but non-exempt records or for redacting non-responsive information within responsive records."

Srinivasan recognized that agencies, in responding to a request, first had to determine what records were responsive. He noted that "here, the parties have not addressed the antecedent question of what constitutes a distinct 'record' for FOIA purposes, and we have no cause to examine the issue. Rather, for purposes of this

case, we simply take as given EOIR's *own* understanding of what constitutes a responsive 'record' as indicated by its disclosures in response to AILA's request." EOIR complained that it was particularly difficult to process email chains that could contain responsive information interspersed with unrelated information. Srinivasan pointed out that 'under FOIA, agencies in effect define a 'record' when they undertake the process of identifying records that are responsive to a request.' He expressed sympathy for the difficulty such records posed for agencies, but observed that "for our purposes, the dispositive point is that, once an agency *itself* identifies a particular document or collection of material—such as a chain of emails—as a responsive 'record,' the only information the agency may redact from the record is that falling within one of the statutory exemptions." Noting the level of detail of EOIR's redactions for non-responsiveness, he indicated that "we find it difficult to believe that a reasonable understanding of a 'record' would permit withholding an individual sentence within a paragraph within an email on the ground that the sentence alone could be conceived of as a distinct, non-responsive 'record.'"

Srinivasan rejected AILA's claim that the complaints should be published under subsection (a)(2). He noted that "they set no precedent, have no binding force on the agency in later decisions, and indeed have no effect on anyone except the individual immigration judge who is the subject of the particular complaint. We fail to see how the affirmative disclosure of complaint resolution decisions would serve the requirement's core purpose—preventing the creation of 'secret (agency) law.'" (*American Immigration Lawyers Association v. Executive Office for Immigration Review*, No. 15-5201, U.S. Court of Appeals for the District of Columbia Circuit, July 29)

Views from the States...

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

Connecticut

A trial court has ruled that the FOI Commission properly exercised its discretion in deciding not to hold multiple hearings on a number of similar complaints filed by Bradshaw Smith against the Windsor Board of Education for allegedly holding meetings in violation of the open meeting provisions in the Freedom of Information Act. The court agreed that Smith's multiple complaints were frivolous and an "abuse of the commission's administrative process." The court noted that Smith had filed more than 52 complaints in the past two years. The court criticized Smith for filing a new complaint on an issue that had recently been decided against him. The court observed that "under these circumstances, the plaintiff's only purpose in filing the complaint would be harassment of the commission or the school board." Dismissing Smith's complaint, the court indicated that "the commission and its constituencies are not required to tolerate this sort of abuse. The commission is fully entitled to advance its mission without becoming derailed by defiant litigants. Under these circumstances, the commission was fully justified in denying a hearing to the plaintiff on the ground that his complaints represented an abuse of the commission's administrative process." (*Bradshaw Smith v. Freedom of Information Commission*, No. HHB CV16-5017349S, Connecticut Superior Court, Judicial District of New Britain, July 20)

North Carolina

A court of appeals has ruled that the Clerk of the Court for Randolph County did not violate the Public Records Act when she refused to allow The Estates, a Utah-based company that buys and sells distressed

properties, to use its own equipment to scan foreclosure records. Court Clerk Pamela Hill then turned down The Estates' request to have the records provided electronically as PDF files. Hill offered instead to provide the company with 15 to 20 records on a weekly basis. The Estates sued, alleging Hill's refusal violated the Public Records Act. The appeals court noted that "while the Court recognizes that there may be circumstances where public officials deny access to records on the grounds of resources as a pretext for frustrating the intent of the law to provide open access, we hold under these circumstances no such factual question has been raised. Under the limitations of the Clerk's Office and the availability of its employees, Defendants made reasonable accommodations to allow Plaintiffs access to the documents in a timely manner." (*Craig Brooksby and Pam Gunderson, et al. v. North Carolina Administrative Office for the Courts, et al.*, No. COA15-1397, North Carolina Court of Appeals, Aug. 2)

Ohio

The supreme court has ruled that the Springfield City School District must provide student directory information for students whose parents have consented to disclosure of such information to School Choice Ohio, a non-profit organization that contacts parents to provide information about alternatives to public schools. Springfield identified nine categories of student information as directory information the disclosure of which would not violate the Family Educational Rights and Privacy Act. Its student directory information policy covered both former and current students. It changed its policy so that the nine categories only applied to former students. Current student information would not be disclosed unless a parent signed a consent form. The revised policy indicated that once consent had been obtained it would be presumed to be in force unless parents revoked their consent. School Choice Ohio requested current student directory information from the Springfield School District. Springfield denied the request based on its new policy. However, Springfield did disclose student directory information to several other organizations over the course of the school year. School Choice Ohio then filed suit and the case was transferred to the supreme court. The supreme court noted that "because Springfield did not notify parents that their consent would be presumed unless they opted out, Springfield would violate FERPA by releasing the directory information of any students whose parents failed to sign the consent form. But Springfield would not violate FERPA by releasing personally identifiable information of students whose parents *had* signed the consent form." The supreme court found School Choice Ohio had not shown that Springfield's student information policy was improper. However, it awarded School Choice Ohio \$1,000 in statutory damages for Springfield's failure to respond to the request in a timely fashion. (*State ex rel. School Choice Ohio, Inc. v. Cincinnati Public School District, et al.*, No. 2014-0749, Ohio Supreme Court, July 21)

Pennsylvania

A court of appeals has ruled that handwritten notes concerning two unsolicited telephone calls received by Clearfield County Commissioner Joan Robinson McMillen urging the county not to replace the existing contractor for removing hazardous waste with Bigler Boyz Enviro are not public records subject to the Right to Know Law. BBE requested records concerning why the board of commissioners did not consider its contract proposal. McMillen identified the notes as the only records she had relevant to BBE's request. However, because the board of commissioners did not consider BBE's contract proposal, the county decided the notes were not used for any board action. BBE initially complained to the Office of Open Records, which found the notes relevant to the county's decision not to take action on BBE's proposal. The county appealed the decision to the trial court, which ruled in its favor. BBE then appealed. Dismissing the appeal, the appeals court noted that "we believe that the County accurately characterizes the notes at issue as documenting citizen input, which was communicated to an individual commissioner, who did not rely on the information to make a decision, who did not share the notes or their contents with other Commissioners, and who was not authorized to speak for or bind the County regarding a proposal that was never acted upon." The appeals court observed

that “because the notes do not document an agency transaction or activity, the trial court properly concluded that the notes do not fall within the RTKL’s definition of public record.” (*Clearfield County v. Bigler Boyz Enviro, Inc.*, No. 2204 C.D. 2015, Pennsylvania Commonwealth Court, July 28)

The Federal Courts...

Judge Colleen Kollar-Kotelly has granted OMB an *Open America stay* to process a request from the Energy Future Coalition after finding the Coalition’s request had overwhelmed the agency’s ability to process the number of responsive records within the statutory time limits. The Energy Future Coalition submitted a request to OMB and the Office of Information and Regulatory Affairs at OMB for records pertaining to tailpipe emissions, air toxins, and other particulate matter from January 2009 to May 2010. Several months later, a paralegal from OMB contacted counsel for the Coalition to discuss possibly narrowing the scope of the request. The paralegal told the Coalition’s counsel that she would touch base with her supervisor. After hearing nothing further from the agency, the Coalition filed suit. After it began processing the request, OMB located 4,900 potentially responsive emails and suggested it could review them at a rate of 500 per month. OMB also indicated it would exclude attachments to emails and that the Coalition could request any of those attachments after OMB had reviewed the emails to which they were attached. OMB said if the Coalition requested a *Vaughn* Index, it would be able to furnish one within 60 days after such a request. In response, the Coalition urged the agency to process its request more rapidly. At that time, OMB filed a motion with the court for an *Open America stay*. Kollar-Kotelly found OMB had shown that exceptional circumstances existed and that the agency was exercising due diligence in addressing its backlog. She noted that “OMB has faced a significant increase in the number of FOIA requests, which has resulted in a growing backlog in the processing of such requests. At present, OMB is in litigation in two other FOIA cases and is in the process of reviewing approximately 68 additional FOIA requests. Of these 68 requests, 27 of them predate Plaintiffs’ FOIA request and concern complex matters and/or comprise significant numbers of documents. OMB has only two full-time employees devoted to processing FOIA requests. According to the agency’s declaration, OMB’s staff is able to review only 575 documents per day to keep up with current requests as well as ongoing litigation. In light of the foregoing, the Court finds that OMB has demonstrated that ‘exceptional circumstances’ exist, and that OMB is burdened with an ‘unanticipated number of FOIA requests’ and its ‘resources are inadequate to process the requests within the time limits set forth in the statute.’” She found the agency was exercising due diligence as well. She noted the OMB had completed its review of approximately 2,000 of the 4,900 potentially responsive emails. She observed that “at its current staffing capacity, OMB is able to review approximately 575 documents per day, or approximately 12,650 documents per month. If OMB were to allocate its resources evenly across those 28 [complex] requests, OMB would be reviewing, on average, approximately 450 documents per request each month—slightly less than the 500 documents per month that OMB is reviewing in response to Plaintiffs’ FOIA request. In light of the foregoing, the Court finds that OMB is making ‘reasonable progress’ in reducing the backlog of FOIA requests.” Based on the number of emails remaining, Kollar-Kotelly granted the agency a six-month stay. (*Energy Future Coalition, et al. v. Office of Management and Budget*, Civil Action No. 15-1987 (CKK), U.S. District Court for the District of Columbia, July 25)

In the latest of his multiple rulings dealing with prisoner Jeremy Pinson’s various FOIA requests, Judge Rudolph Contreras has ruled on several of Pinson’s requests that were referred by the Bureau of Prisons to the Office of Information Policy. One request involved Special Administrative Measures imposed on two

prisoners other than Pinson. Based on BOP's recommendation, OIP withheld 32 pages in full under **Exemption 6 (invasion of privacy)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, **Exemption 7(E) (investigative methods and techniques)** and **Exemption 7(F) (harm to any person)**. OIP also redacted information citing the privacy exemptions from responsive records for two requests—one pertaining to the selection of BOP Director Charles Samuels and the other pertaining to the deaths of inmates in federal custody. Contreras found that personally-identifying information in the SAMs was properly withheld under Exemption 6. But he noted that “the public does have an interest in disclosure of the circumstances surrounding the imposition of the SAMs and in learning the terms of those measures.” Contreras rejected the agency's claim that the SAMs were protected by Exemption 7(E), noting that BOP's own regulations “require that staff disclose the terms of SAMs to the inmate subject to the measures. That requirement suggests that the BOP is *not* concerned that disclosure of the measures to the inmate will pose a risk of circumvention and, therefore, it is unclear why disclosure to other, third-party individuals would nonetheless pose such a risk. If, on the other hand, DOJ's concern is that *other* investigatory techniques beyond the SAMs will be disclosed, it has wholly failed to describe those techniques or that concern, in any detail.” He likewise rejected BOP's Exemption 7(F) claim. He pointed out that “DOJ's claim that it can withhold any information that could serve as a ‘blueprint’ for future crimes, out of a concern for a generalized risk of future danger, is overbroad.” Finding no evidence that disclosure to Pinson would risk circumvention of any regulation, Contreras indicated that “any risk that disclosure of the SAMs memorandum's contents will endanger individuals' lives or physical safety might be accommodated through a more limited redaction.” He explained that “in the context of its renewed motion for summary judgment addressing Exemptions 7(E) and 7(F), DOJ must consider whether non-exempt material can be **segregated**, or further justify its claim that categorical treatment is appropriate in this instance.” Contreras found BOP had properly redacted records responding to Pinson's other two requests. He agreed with the agency that a memo from former BOP Director Harley Lappin recommending a candidate to succeed him was protected by **Exemption 5 (privileges)**. He pointed out that “because the Lappin Memo was drafted in advance of the decision regarding whom to select as the next BOP Director, and prepared in order to provide input on this decision, it satisfies the ‘predecisional’ prong of the [deliberative process privilege] test.” (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, July 29)

Judge Colleen Kollar-Kotelly has ruled that the Bureau of Prisons failed to **segregate** and unredact non-exempt information from a confidential informant report used to discipline prisoner Dennis Berard. BOP located a five-page report and withheld three pages entirely, releasing two pages with redactions. Because Berard challenged whether the five-page document was the report he was requesting, Kollar-Kotelly conducted an *in camera* review. Her *in camera* review convinced her that the document was what Berard had requested, but she also found the agency had failed to provide all non-exempt material. She agreed that some information was properly withheld under **Exemption 7(D) (confidential sources)**. She noted that “third parties provided information concerning the activities of Plaintiff when he was an inmate at the Lewisburg Prison Camp and attempting to introduce contraband into the prison facilities. These third parties and the their families would be exposed to significant harm, whether it be physical or mental, if they were identified as cooperators or informers even in a minimum-security prison camp as Lewisburg Prison Camp.” She also found the agency had properly claimed **Exemption 7(F) (harm to any person)**. She pointed out that “in light of the violent nature of the charges at issue in this case, disclosure of information provided to BOP by the confidential informant concerning the alleged conduct described could reasonably be expected to endanger the life or safety of that individual.” She also approved withholdings under **Exemption 7(E) (investigative methods and techniques)**. She indicated that one page “contains database information, which if produced, could reveal techniques used by law enforcement investigators when sharing information across agencies. There is a reasonable risk that disclosure of this information would weaken BOP's effectiveness and potentially aid in circumvention of the techniques.” But because she found much of the information in the

report had previously been disclosed to Berard, she concluded the agency had failed to disclose all non-exempt **segregable** portions. Noting that “it is puzzling why BOP did not find it necessary to release that information, particularly in light of the fact that throughout this case—and throughout the underlying disciplinary action—Berard has disputed the very existence of both the confidential informant and the informant report at issue in this FOIA request. In addition, BOP should have disclosed pertinent, non-exempt information in the document’s introductory paragraph, which set out the purpose of the memorandum. Such information would further authenticate the document and its disclosure would not be exempt under any FOIA provision.” She provided a sealed version of the redacted records to allow BOP to file any objections. She indicated that if BOP had not objected within seven business days she would disclose the unredacted information. (*Dennis Berard v. Federal Bureau of Prisons*, Civil Action No. 15-0891 (CKK), U.S. District Court for the District of Columbia, July 21)

A federal court in Louisiana has ruled that U.S. Citizenship and Immigration Services properly processed immigration attorney Michael Gahagan’s FOIA request, although the court found the agency’s claim that emails involving two non-attorneys were protected by **Exemption 5 (attorney-client privilege)** was incorrect. The issues remaining in the case involved several records that been referred to the Department of State. By the time of this decision, State had processed those records and the court found the agency had properly redacted them. Gahagan urged the court to find the agency had acted in bad faith by claiming the attorney-client privilege for emails involving non-attorneys. Declining to find bad faith on the part of the agency, the court noted that “because USCIS specifically cited the deliberative process privilege in its initial *Vaughn* indexes, and because the agency produced the [non-attorney] emails after it withdrew its deliberative process privilege claim, the Court does not interpret USCIS’s initial invocation of exemption five as an implicit claim that [the two non-attorney agency staffers] are attorneys for USCIS.” (*Michael Gahagan v. United States Citizenship and Immigration Services*, Civil Action No. 15-2540, U.S. District Court for the Eastern District of Louisiana, July 26)

A federal court in New York has ruled that there remain questions as to whether the Department of the Treasury conducted an **adequate search** for records concerning any governing legal protocol pertaining to whether the notice provisions of the Foreign Intelligence Surveillance Act applied to sanction decisions made by the Office of Foreign Assets Control. OFAC told *New York Times* reporter Charlie Savage that it found a draft containing legal analysis but because the memo was merely a draft it was protected under **Exemption 5 (privileges)**. The *Times* challenged the basis for the agency’s conclusion for withholding the document, asking for discovery. Instead, the court told OFAC to provide a better explanation of how it concluded that the memo was exempt. Apparently accepting that the memo was protected by Exemption 5, the *Times* contended the agency’s search was incomplete. The *Times* argued that that an agency attorney had not actually conducted a search and that there was no information about searches conducted by four other agency officials. The court indicated that “regarding the four specific factors that the Times raises, the first two go to the adequacy of the search, and Treasury should address these issues in its supplemental submissions. But the last two, while perhaps illuminative of why the search did not produce a document containing ‘governing legal protocol,’ do not necessarily speak to whether the search’s *methodology* was reasonable, and Treasury is not required to address them in supplemental submissions. That said, additional context about whether ‘governing legal protocol’ exists in document form may very well buttress Treasury’s defense of its search methodology.” (*New York Times Company and Charlie Savage v. United States Department of the Treasury*, Civil Action No. 15-5740, U.S. District Court for the Southern District of New York, Aug. 2)

the memo in redacted form. Indeed, since much of the court's decision relied on its *in camera* review of the memo, portions of its opinion discussing the still-classified material was redacted until after any further appeals by the government were completed.

The case involved two consolidated suits for essentially the same set of documents. *New York Times* reporters Scott Shane and Charlie Savage requested the memo separately, while the ACLU requested not only the memo but other records related to the drone attack policy. While the plaintiffs argued that both exemptions had been waived by a number of references to the legal analysis made in speeches and congressional testimony by Attorney General Eric Holder, CIA Director John Brennan, then-DOD Counsel Jeh Johnson, and former State Department Counsel Harold Koh, the district court had ruled that none of the public comments sufficiently mirrored the memo's detailed legal analysis to constitute a waiver. But by the time of the appeals court ruling, the disclosure of the detailed DOJ White Paper convinced the court that the cat was out of the bag.