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Washington Focus: Congress has removed three FOIA exemptions from the National Defense Authorization Act FY 2017. Of primary concern to the FOIA community was an exemption for information that could reasonably be expected to risk impairment of the effective operations of the Department of Defense. Praising the congressional action, Openthegovernment.org. Executive Director Patrice McDermott noted that "the removal of the Pentagon's proposed FOIA carve-out from the NDAA marks an important win for the defense of the public's right to know." McDermott added that "now more than ever, it is critically important to protect the integrity of the FOIA, which we will continue to defend and rely on as a central tool, as we prepare to challenge secrecy and defend against government overreach going forward."

Court Finds Confidential Source Protected by Exemption 7(D)

Sometimes even the most impressive victories for plaintiffs in FOIA cases turn out at the end of the litigation to be considerably less than they originally appeared to be. Often one apparently insurmountable obstacle is overcome, only to be replaced by another impenetrable claim further down the road. Such is the case in a decade-old suit against the Justice Department brought by William Pickard, who was convicted of manufacturing LSD. Pickard's suit first came to national attention in 2011 when the Ninth Circuit ruled that the government could not issue a *Glomar* response neither confirming nor denying the existence of records for Gordon Skinner, a confidential source who had testified at Pickard's trial. The Ninth Circuit found that because Skinner had been publicly identified as a confidential source, his identity could not be protected by a *Glomar* response.

The case continued to go through several district court decisions in Kansas and California. Magistrate Judge Nathaniel Cousins of the Northern District of California recommended that Judge Charles Breyer rule in favor of Pickard's request for access to Skinner's name, his DEA NADDIS informant number, and any information Skinner provided during his public testimony because the agency had

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not shown the information was protected by Exemption 7(D) (confidential sources). However, although Pickard appeared to be poised to get everything he could probably have hoped for, Breyer rejected Cousins' recommendation, finding instead that all the information—including Skinner's name—was protected under Exemption 7(D).

Breyer first reviewed exactly what the Ninth Circuit had said in *Pickard v. Dept of Justice*, 653 F.3d 782 (9th Cir. 2011). He agreed that the Ninth Circuit had rejected the agency's use of a *Glomar* response, but explained that the Ninth Circuit's ruling relied on *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007), for the proposition that "official acknowledgment relates only to the existence or nonexistence of records, and that the government was to either disclose any officially acknowledged records or establish that the contents are exempt and that exemptions have not been waived." He pointed out that the Ninth Circuit had also cited *Benavides v. DEA*, 968 F.2d 1243 (D.C. Cir. 1992), the first appellate decision to interpret the subsection (c) exclusions contained in the 1986 amendments, as recognizing that "Congress intended to permit the DEA to withhold documents under 7(C) and 7(D), even if the agency must, under subsection (c)(2) acknowledge their existence."

Pickard argued that the cited language in the Ninth Circuit's decision was either dicta or the result of a drafting error. Finding Pickard's argument implausible, Breyer observed that the Ninth Circuit "explained that, having officially confirmed Skinner as an informant, the government was to produce a Vaughn index, 'raise whatever other exemptions may be appropriate, and let the district court determine whether the contents, as distinguished from the *existence*, of the officially confirmed records may be protected from disclosure under the DEA's claimed exemptions.' The government is therefore correct that the ruling in this case defeats the argument that official confirmation of Skinner as a confidential informant merits the disclosure of all the information Pickard seeks."

Breyer next noted that under *Davis v. Dept of Justice*, 968 F.2d 1276 (D.C. Cir. 1992), the plaintiff bore the burden of showing that the exact information requested was already in the public domain. He indicated that Pickard had failed to make that showing and proceeded to examine the applicability of Exemption 7(D). The government argued that Exemption 7(D) could not be waived, while Pickard contended that the government's confirmation of Skinner as a confidential informant waived the exemption. Breyer agreed with the government, but indicated that because there was no relevant Ninth Circuit precedent on 7(D) he would rely instead on *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989), the leading appellate decision on waiver of Exemption 7(D). The plaintiff in *Irons* argued that the FBI waived its ability to protect any information provided by a confidential source once that source had testified in public. Rejecting that argument, the First Circuit ruled that public testimony of a confidential source did not waive the FBI's ability to claim Exemption 7(D) for information provided by the confidential source. Breyer emphasized that *Irons* did not stand for Pickard's contention that Exemption 7(D) did not apply to the identity of the source or public information disclosed by the source's public testimony.

He added that *Davis* provided further confirmation that plaintiffs like Pickard were required to do far more to defeat a legitimate government exemption. Indeed, the facts in *Davis* bore some similarity to those in Pickard's case. *Davis* involved an argument that audiotapes of testimony during the BRILAB trial should be disclosed because they were in the public domain. But the D.C. Circuit found that Davis, rather than the government, bore the burden of showing that information had been publicly disclosed. Breyer indicated that "*Davis* therefore shows the D.C. Circuit recognizing the application of the official acknowledgement doctrine in to Exemption 7(D)." Breyer expressed concerns that "Pickard's request, which would require the government to compile a subset of the in camera documents in a form that is presently unavailable to the public, is problematic under *Dept of Justice v. Reporters Committee*." Breyer observed that "because it does not know which portions of which of the documents in the in camera materials are 'information Skinner has

publicly disclosed,' the Court cannot independently verify whether all such information is covered by Exemption 7(D). However, because the government represented to the Court at the motion hearing that all of the 'information Skinner has publicly disclosed' is covered by Exemption 7(D), the Court's in camera review of the broader set of responsive materials gives it no reason to doubt this characterization, and—though he contends that the government/Skinner has *waived* Exemption 7(D)—Pickard has not disputed that the relevant materials 'could reasonably be expected to disclose the identity of a confidential source' or constitute 'information furnished by a confidential source.'"

The agency also claimed Skinner's NADDIS informant number was protected by Exemption 7(E) (investigative methods and techniques). Pickard argued that the technique was generally known to the public, while the government argued that "the DEA uses a particular method to assign NADDIS numbers and that the more NADDIS numbers get out, the more people will be able to discern that methodology." Noting that a number of courts had found NADDIS numbers protected, Breyer concluded that "disclosing Skinner's NADDIS number would reveal techniques and procedures that are not generally known to the public." (*William Leonard Pickard v. Department of Justice*, Civil Action No. 06-00185 CRB, U.S. District Court for the Northern District of California, Nov.15)

Court Both Affirms And Faults CIA Claims

Wrapping up most of the remaining outstanding issues in a suit against the CIA brought by National Security Counselors and three other requesters contesting multiple claims made by the CIA, Judge Beryl Howell has ruled in favor of the agency on most counts, but has rejected the agency's position as to others. A primary thread connecting the multiple claims was the plaintiffs' attempts to force the agency to provide more information about how it processes FOIA requests and other related public information requests. While the case is very agency-specific, it raises interesting questions as to how to handle such challenges.

Howell first addressed NSC's challenge to the CIA's policy for charging fees for mandatory declassification reviews, a process for requesting the declassification of specific identified records that is included in the Executive Order on Classification. MDRs have become more common with sophisticated requesters seeking discrete documents through an ISCAP review and dissatisfied with the likely results of overcoming an Exemption 1 (national security) claim. The CIA policy required requesters seeking an MDR to commit to paying all applicable fees before proceeding. NSC contended such a policy posed a barrier to public interest groups who might not be able to afford such fees. They asserted that the fee policy violated the Independent Offices Appropriations Act and was thus a violation of the Administrative Procedure Act's arbitrary and capricious standard. Howell found that "in processing a particular MDR request, the CIA performs 'specific services to [a] specific individual or company, namely, the requester," a standard found by the D.C. Circuit to qualify under the IOAA. Howell explained that "where records subject to an MDR request are ultimately released more broadly, the CIA's review of these records is a specific service performed expressly for the individual requester."

She also rejected NSC's claim that the fee policy harmed public interest requesters. She pointed out that "even assuming that, as a policy matter, agencies should treat MDR requests and FOIA requests similarly, the plaintiffs point to no statutory or other provision requiring such parity. While both regimes undoubtedly were designed with the public's interest in open and transparent government in mind, Congress saw fit in enacting the FOIA fee provision to provide relief for non-commercial requesters seeking to advance identifiable public interests. By contrast, neither E.O. 13526 nor the implementing NARA regulations require agencies to adopt a parallel fee regime for MDR requests. As a policy matter, such a regime has much to commend it, but

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imposing such policy, absent any statutory or regulatory mandate to do so, is beyond the purview of this Court."

Turning to the agency's search, Howell found one of the disputed searches was adequate, while the other was not. She approved of the agency's search for records referred to in other records found by the agency. But she found the agency had not conducted an adequate search for records pertaining to search tools used by agency personnel to locate records. She observed that "the agency has provided no explanation of the fact that NSC's original request, which sought search materials from IMS—a subcomponent of the Director's Area—yielded more results than NSC's present, more broadly framed request for such materials from the entire Director's Area."

Addressing the remaining exemption claims, Howell rejected NSC's contention that the existence of a CIA office in the World Trade Center had been publicly acknowledged by implication. She observed that "put simply, confronted with the agency's explicit disavowal of any formal disclosure, the plaintiffs' reliance on stray references in four documents prepared by sources outside the agency over the course of thirteen years is insufficient to demonstrate that the agency has *in fact* disclosed information it now seeks to withhold." She found the Office of the National Director of Intelligence had properly claimed Exemption 1 to protect classified information used in processing certain FOIA requests. She pointed out that "given that the withheld records would, by their very nature, include a detailed description of the nature of a particular FOIA action and the national security interests at play in each underlying FOIA request, it is not illogical that any non-exempt information included in these documents would not be reasonably segregable."

Howell once again reminded the agency that the Exemption 3 (other statute) provision in the CIA Act was limited to records that would reveal information about agency personnel. Although the agency tried to couch its explanations in terms of how records related to personnel, Howell rejected those claims, noting that "for today, however, the agency's exclusive reliance on the CIA Act to withhold material that does not pertain to CIA personnel is misplaced." NSC questioned whether information contained in several decades-old *in camera* affidavits should remain classified. Considering the question, Howell noted that "the plaintiffs are certainly correct that information properly classified in the past is not necessarily properly classified today. Nonetheless, their suggestion that because the documents they seek *may* no longer be properly classified, those documents are automatically subject to public disclosure, misses the mark. In fact, even assuming that the declarations the plaintiffs seek are no longer classified, the agency has presented ample evidence to demonstrate that these documents were properly withheld under the National Security Act."

Howell was skeptical about the agency's decision to withhold citations to publicly available articles originally attached to an agency employee's memorandum. The memorandum had originally been withheld in litigation, but was subsequently disclosed with minor redactions. The agency claimed disclosure of the public citations might be considered public acknowledgement of their contents. Finding the agency's argument ultimately unpersuasive, Howell noted that "the materials the plaintiffs seek are public, unconfirmed news reports of agency activities abroad." She added that "the agency offers little support for the proposition that the release of unconfirmed, publicly available media reports would, without more, reveal such information." By contrast, she found that disclosing information about why a former CIA employee's discrimination suit should be transferred risked harming national security. She noted that "in this context, there is little reason to doubt the agency's assertion that information withheld in these materials would reveal intelligence methods and activities."

The agency had redacted information instructing employees to get approval when using certain template language when responding to a FOIA request, claiming it was protected by Exemption 5 (deliberative process privilege). Howell dismissed the claim, noting that "the line is most clearly understood as an

instruction to obtain approval, directed to personnel processing those FOIA requests for which the template language contained in the document may be applicable. Thus, by redacting this information, the agency seeks to withhold general information regarding the manner in which FOIA requests are processed by the CIA. This it cannot do. Directions to deliberate do not themselves constitute deliberation. Such directions reflect agency protocol, not the 'advisory opinions, recommendations, and deliberations' protected by Exemption 5." (*National Security Counselors, et al. v. Central Intelligence Agency, et al.*, Civil Action No. 12-284 (BAH), U.S. District Court for the District of Columbia, Nov. 14)

Views from the States…

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

Indiana

The supreme court has ruled that the campus police at Notre Dame University are not acting as agents of state government when they enforce the criminal code on campus. ESPN requested records concerning police incident reports. The university denied the request, arguing that it was a private university and not subject to the Access to Public Records Act. However, the Public Access Counselor concluded that the campus police were acting under color of law by enforcing the criminal code and, thus, were performing a government function. The trial court sided with the university, but the court of appeals reversed. The supreme court reversed the appellate court's ruling, finding the Notre Dame police department was not a public agency subject to the Access to Public Records Act. The supreme court noted that "the Department is not exercising the power of the State; rather, the trustees are exercising power granted to it by the State to appoint police officers to protect and oversee their campus. While the trustees permit those officers to perform some traditional police functions, they are also tasked with many University-specific duties, for example, enforcing the student code, escorting students late at night, and acting as student caretakers. For the Department to be a 'public agency,' it must be exercising its functions pursuant to government control; mere interconnections between a public and private entity are insufficient. In other words, a grant of arrest powers enabling university police departments to keep order on their private campuses does not transform those officers or the trustees who oversee them into public officials and employees subject to APRA." (*ESPN, Inc. and Paula Lavigne v. University of Notre Dame Police Department*, No. 71S05-1606-MI-359, Indiana Supreme Court, Nov. 16)

Pennsylvania

A court of appeals has ruled that the Office of Open Records improperly extended *Pennsylvania State Police v. Grove*, 133 A.3d 292 (Pa. 2016), which concerned videos from a dashboard camera showing the actions of state police officers at the scene of an accident, to cover a surveillance video recorded by Mt. Airy Casino Resort that came into the possession of the state police as part of a criminal investigation. Jaegeun Kim requested the video tape. The state police denied the request, withholding the tape under the criminal investigation exemption as well as the Criminal History Record Information Act. The court agreed that OOR had improperly extended the interpretation of *Grove*. The court pointed out that "the dash-cams or body-cams that capture PSP's activities and transactions on a daily basis contain non-investigative content relative to PSP's performance of its agency functions. Further, there is an interest in their disclosure as records 'of' PSP showing PSP's activities and transactions" By contrast, the court noted that "the Video was generated by a private party that is not subject to the [Right to Know Act]. . . The Video only became a record 'of' PSP, and

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so accessible through the RTKL, when PSP obtained it from a private party to investigate a criminal offense." (*Pennsylvania State Police v. Jaegeun Kim*, No. 321 C.D. 2016, Pennsylvania Commonwealth Court, Nov. 17)

The Federal Courts…

Judge Gladys Kessler has ruled that EPIC is entitled to **attorney's fees** for its FOIA suit against the Department of Homeland Security, even though it lost on all the issues at summary judgment, largely because the litigation forced the agency to process EPIC's request. EPIC submitted a five-part request to DHS for records concerning whether or not the Defense Industrial Base Cyber Pilot program jointly conducted by DHS and the Department of Defense had complied with federal wiretap laws. EPIC submitted its request in August 2011. DHS acknowledged receipt of the request and told EPIC it was referring the request to its National Protection and Programs Directorate for processing. The agency also notified EPIC that no records had been found responsive to the fifth category of the request. EPIC filed suit in March 2012. In response to EPIC's suit, DHS proposed to collect responsive records by June 2012 and then to begin processing them, with a first response due on July 18, 2012. EPIC asked Kessler to order the agency to completely respond by August 24, 2012. Accepting EPIC's suggestion, Kessler issued a scheduling order requiring DHS to respond by August 24. DHS located 10,000 potentially responsive records and on the last day of the production deadline asked Kessler to stay the proceeding and have EPIC narrow its request. DHS ultimately asked Kessler to grant it until January 2014 to disclose all responsive records. She rejected that as too far in the future and ordered the agency to produce all responsive documents by April 2013. DHS met Kessler's deadline, producing 1,276 pages. The agency disclosed 117 pages entirely and 1,159 pages with redactions. It withheld 362 pages under a variety of exemptions. Kessler ruled in favor of the agency as to the adequacy of its search and its exemption claims, with the exception of Exemption 7(D) (confidential sources); Kessler subsequently ruled in favor of the agency on its Exemption 7(D) claims as well after it submitted a supplemental declaration. EPIC requested attorney's fees, arguing that Kessler's scheduling order qualified as a judicial order under the attorney fees provision and, further, that EPIC's suit had caused the agency to process and respond to its request. The agency opposed both claims. Kessler sided with EPIC. She noted that "the courts in this District have repeatedly held that a FOIA plaintiff substantially prevails where a court issues a scheduling order requiring an agency to produce responsive documents by a date certain. This is true even where the scheduling order adopts the production schedule proposed by the Government, rather than the one proposed by the plaintiff." Kessler pointed out, however, that "the Court did not find in favor of EPIC on a single issue in the Summary Judgment Order. . .Thus, EPIC did not substantially prevail as a result of the Summary Judgment Order." She explained that EPIC's suit caused the agency to respond. She agreed with EPIC that the agency had waited until the last minute to ask for a stay. She observed that "despite these administrative challenges, DHS represented to the Court at the May 24, 2012 status conference that DHS would be able to complete its first production of documents on July 18, 2012, when, in fact, it would later seek to postpone the production deadline by a year and a half." She added that "given these facts, it is hard to believe that DHS would ever have gotten the job done without the Court's supervision." DHS challenged EPIC's entitlement to fees as well. Kessler rejected the agency's claim that the information disclosed was not in the public interest, noting that "much of the public information DHS cites was not public at the time of EPIC's FOIA request and the fact that it was later made public strengthens EPIC's argument that it was of public import." The agency argued that because EPIC had a donation page on its website it had a commercial interest in the request. Kessler pointed out that "a link for donations does not transform a nonprofits' interests from public interest to commercial or self-interest." Finding the agency did not have a reasonable legal basis, Kessler observed that *Davy v. CIA*, 550 F. 3d 1155 (D.C. Cir. 2008). "makes clear that an agency lacks a colorable basis in law where it does not respond to a FOIA request until after a lawsuit has been filed." Kessler approved of the use of the LSI *Laffey* Matrix to determine hourly rates, pointing out that DHS had already recognized EPIC as

qualifying for the higher rates in another recent case. EPIC had requested $86,000 in fees. Kessler found EPIC was not entitled to fees on the summary judgment motion since it had not prevailed on any issue, and that, while it was entitled to fees for litigating the attorney's fees issue, some of its billing was excessive. She ordered EPIC to respond to her concerns, indicating that she would award a final amount after reviewing those responses. (*Electronic Privacy Information Center v. United States Department of Homeland Security*, Civil Action No. 12-0333 (GK), U.S. District Court for the District of Columbia, Nov. 21)

A judge in California has ruled that the CIA, the NSA, and the FBI all conducted **adequate searches** for records pertaining to Tania McCash. The court also approved the FBI's redactions under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, but found the agency had not yet shown why two withheld pages could not be **segregated**. McCash requested her records from all three agencies without providing any further information about why she thought the agencies might have records on her. Both the CIA and the NSA issued *Glomar* responses, neither confirming nor denying the existence of records, while the FBI searched its central records system and found no records. McCash told the CIA that she had sent letters by fax to the agency and the agency located those records and disclosed them. McCash told the FBI that she had filed several different complaints and, through a cross-reference search, the agency located 44 pages of records. The FBI disclosed 10 pages in full and 32 pages with redactions, withholding two pages entirely. McCash argued the searches conducted by all three agencies were inadequate because they had not found communications she had with the agencies. Addressing the CIA's search, the court noted that "the CIA's failure to identify or flag these communications as responsive to Plaintiff's FOIA request does not suggest that the entirety of the search itself was inadequate." The court approved the NSA's search as well, observing that "pursuant to protocol, the NSA does not conduct a search for prior correspondence from the requester as part of a regular FOIA search unless the requester specifically asks that the NSA do so, or provides additional 'amplifying' information in their FOIA request. Plaintiff made no such request in this case." Explaining that the FBI conducted three separate searches, the court pointed out that "the CRS search did locate certain documents responsive to Plaintiff's request, but the FBI identified nothing in those documents or its other records to suggest that additional responsive information would result from another search." The court found the *Glomar* responses issued by the CIA and the NSA were appropriate under **Exemption 1 (national security)**. The court indicated that "both agencies provided detailed declarations identifying and explaining the potential threat to national security posed by confirming or denying the existence or nonexistence of classified records responsive to Plaintiff's request." The court found the FBI's Exemption 7(C) redactions of agency personnel appropriate, but faulted the agency for its superficial explanation of why the two withheld documents could not be redacted instead. The court noted that "an agency may not simply conclude that there is no segregable information without explaining its reasons for such a conclusion. While the agency is not required to provide 'such a detailed justification that would itself compromise the secret nature of potential exempt information,' it must provide some explanation for why non-exempt portions of the documents cannot be segregated and released. The FBI has offered no such explanation here." (*Tania McCash v. Central Intelligence Agency, et al.*, Civil Action No. 15-02308-EJD, U.S. District Court for the Northern District of California, Nov. 10)

Judge Amy Berman Jackson has ruled she does not have **jurisdiction** over prisoner Vernon Earle's FOIA suit because Earle **failed to state a claim** for relief. Earle sent a request to EOUSA for the tax number for the D.C. grand jury that indicted him in 1986. After being told by the U.S. Attorney's Office in D.C. that D.C. grand juries did not have tax numbers, EOUSA also queried the Office of Information Policy as to the existence of such numbers. Based on research by an attorney-advisor at OIP, the agency concluded tax numbers did not exist and denied the request on that basis. OIP affirmed the denial and Earle filed suit,

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claiming that a prisoner who was considered a jailhouse lawyer had told him that all grand juries were required to have tax numbers. Jackson agreed with the agency that the records did not exist. She noted that "here, defendants have submitted a declaration amply demonstrating that a search would be futile because the documents in question do not exist. [The agency attorney's] conclusion is based on his personal knowledge, as well as information provided by other knowledgeable officials. His own knowledge and experience, coupled with what he learned from each of his inquiries, demonstrates a familiarity with whether the information sought could be retrieved through a search of agency records." Balancing the agency's declaration against Earle's allegations, Jackson observed that "plaintiff supplies no facts that would indicate that the source of this information has any personal knowledge of the procedures he was describing, and a statement that lacks any indicia of reliability and is pure speculation does not undermine defendants' proof here." (*Vernon Norman Earle v. United States Department of Justice*, Civil Action No. 16-0629 (ABJ), U.S. District Court for the District of Columbia, Nov. 10)