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Washington Focus: The Office of Information Policy has issued guidance on how agencies should count the number of records subject to a FOIA request in the aftermath of the D.C. Circuit's recent ruling in American Immigration Lawyers Association v. Executive Office for Immigration Review, 830 F.3d 667 (D.C. Cir. 2016). In its AILA ruling, the D.C. Circuit rejected the common practice of withholding records because they were deemed non-responsive. Instead, the court pointed out that FOIA requires that once agencies determine what records are responsive to a FOIA request the only reason for withholding records is if the information falls within an exemption. Noting that the D.C. Circuit had identified the definition of "record" in the Privacy Act as a useful analogy, OIP recommended agencies view records responsive to FOIA requests as an "item, collection, or grouping of information" on the topic of the FOIA request. OIP suggested that, while an agency could separate responsive parts of a larger document from other non-responsive portions of the document, each responsive portion would become a "record" for purposes of responding to the FOIA request. OIP added that since each portion of a larger record would become a separate record, agencies should count them individually in keeping track of the number of records processed as a result of the request.

Court Reverses Earlier Decision On Waiver of Confidentiality

After previously ruling that several non-human primate importers had waived any Exemption 4 (confidential business information) protection by failing to provide objections to the Centers for Disease Control, Judge Colleen Kollar-Kotelly has reversed herself after agreeing with CDC that the companies had not responded because they were unaware that the information was part of a FOIA request submitted by People for the Ethical Treatment of Animals until after receiving Kollar-Kotelly's initial ruling. After the agency contacted the three NHPs, all of them indicated that they were unaware of the original pre-disclosure notification letter and had not intended to waive their confidentiality claims. CDC asked Kollar-Kotelly to reconsider her earlier ruling, providing declarations from all three companies that they considered the information confidential. Although PETA argued that the agency did not qualify for reconsideration under Rule 60

ACCESS REPORTS

because the agency knew the three NHPs had not responded before Kollar-Kotelly's original ruling and, thus, had provided no basis for a claim that new evidence existed requiring reconsideration. Kollar-Kotelly agreed that Ruled 60(b)(2), requiring the existence of new evidence, did not apply, but pointed out that Rule 60(b)(6), which allows reconsideration for "any reason that justifies relief," was broad enough to encompass these circumstances. She pointed out that "the case for reconsideration is especially strong where the effect of the error, if not corrected, would be to harm the interests of third parties, as opposed to the erring litigant."

She indicated that "here, the Court has become aware of precisely such a 'previously undisclosed fact,' and to ignore it would render its original opinion inherently unfair to the third parties whose business information is at risk. The court found that seven of the ten importers at issue would face 'substantial competitive injury' if four categories of their confidential business information were disclosed. However, the Court did not apply this finding equally to all ten importers at issue. The Court noted that 'three of the ten NHP importers submitting the requested information *have elected not to object to the disclosure of that information*.' Based only on this lack of objection, the Court held that 'the three companies that chose not to object to the disclosure of their information. . .have not proffered that disclosure would harm their companies.' The Court found that there was a 'reasonable inference that these three companies have not objected to the disclosure of their records because they do not believe that they will face substantial harm by the disclosure of such records.'" She noted that "as it turns out, this inference was not correct. Defendant has now provided declarations from representatives of these three importers which state that the companies at issue did not fail to object because they did not believe disclosure would cause harm. Instead, the Rule 60(b) Declarations indicate that they failed to object because they *were not aware* that their information had been requested and was subject to disclosure."

Accepting the Rule 60(b) declarations, Kollar-Kotelly observed that "a basic premise upon which that decision rested was mistaken. Other than the inference the Court drew from their lack of objection, there was no material difference between [those importers] and the other importers. The reasoning underlying the Court's decision that disclosure of the four categories of information at issue would cause substantial harm to the others applied equally to [the non-responding importers]." She indicated that "if anything, the harm to these importers would be greater, considering they would now be at a competitive disadvantage in relation to the importers whose information the Court ordered was properly withheld. There is no longer any just reason to treat the records of the previously non-objecting importers differently than the other importers at issue. In fact, to do so would be inherently unfair."

PETA argued that CDC had not done enough to contact the three non-responding importers. But Kollar-Kotelly pointed out that "defendant complied with the procedures for notifying the importers of Plaintiff's FOIA requests that is laid out in [agency regulations] by sending pre-disclosure notices to [the importers]. Defendant accordingly acted reasonably and was required to do nothing more." PETA argued the agency should have followed up after the three importers did not respond. Kollar-Kotelly noted, however, that "defendant presumably assumed, as did this Court, that [the non-responding importers] silence meant that they had received the pre-disclosure notices and simply did not object to the release of their records. Defendant accordingly had no reason to contact [the non-responding importers] for evidence of commercial harm in the process of preparing its motion for summary judgment. The Court does not find Defendant's behavior in this sense unreasonable."

PETA had also filed a Rule 60 motion, arguing that two other importers had failed to claim in their responses that animal quantity or crate information was confidential. After reviewing those statements, Kollar-Kotelly agreed. She noted that "despite [the two importers'] statements regarding the importance of such information, both demonstrated that they are not, in fact, sufficiently concerned about the release of this information on their own records for the Court to hold that such information is confidential. As a result, the

Court will grant Plaintiff's motion in part, in that it now finds that quantity and crate information for [the two importers'] records is not confidential information protected under Exemption 4." PETA argued that the two importers' failure to claim confidentiality for their own quantity and crate information suggested that such information was not considered confidential within the industry. Kollar-Kotelly refused to go that far. Instead, she pointed out that the two importers' declarations "are still probative in that they explain the reasons why the release of such information would cause competitive harm in the NHP industry as a general proposition."

PETA also argued that the importers had misrepresented the confidentiality of these records since the importers often cooperated with each other. But Kollar-Kotelly noted that "competitors may buy and sell from each other, or work together on a particular joint venture, but that does not undermine the Court's finding that as a general matter they are competitive with, and keep key business-model information confidential from, each other." (*People for the Ethical Treatment of Animals v. United States Department of Health and Human Services*, Civil Action No. 15-309-CKK, U.S. District Court for the District of Columbia, Jan. 5)

Views from the States…

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

California

The supreme court has ruled that bills provided to Los Angeles County from private law firms representing the county in law suits alleging excessive force used against jail inmates are not per se privileged under the attorney-client privilege, but that any such itemized billing submitted during pending litigation is privileged because disclosure could reveal trial strategy. The ACLU requested billing invoices for such litigation. The county refused to disclose the records, claiming they were privileged, and the ACLU filed suit. The trial court ruled in favor of the ACLU, but the court of appeals reversed, finding such billing records were categorically privileged. The supreme court, however, found the privilege was far more limited. The supreme court noted that "while a client's fees have some ancillary relationship to legal consultation, an invoice listing amounts of fees is not communicated for the purpose of legal consultation. The mere fact that an attorney transmitted a communication to his or her client confidentially (in the sense that no one other than the recipient could see the communication) does not end the inquiry into whether the communication's contents are protected by the attorney-client privilege." The court observed that "what the inquiry turns on instead is the link between the content of the communication and the types of communication that the attorney-client privilege was designed to keep confidential. In order for a communication to be privileged, it must be made for the purpose of legal consultation, rather than some unrelated or ancillary purpose." But, the court pointed out that "when a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees." Distinguishing closed litigation from pending litigation, the court explained that "asking an agency to disclose the cumulative amount it spent on long-concluded litigation—with no ongoing litigation to shed light on the context from which such records are arising—may communicate little or nothing about the substance of legal consultation." (*Los Angeles County Board of Supervisors v. Superior Court of Los Angeles County; ACLU of Southern California, Real Party in Interest*, No. S226645, California Supreme Court, Dec. 29, 2016)

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A court of appeals has ruled that the trial court erred in ruling that Deborah Camou was required to communicate with the City of Montclair concerning its delayed and redacted response to her request for records about former city manager Ed Starr before she filed suit and that the categories of records she was requesting were vague and unclear. The appeals court noted that the Public Records Act placed the burden on the city to contact Camou if it had questions as to the meaning of her request. Instead, the appeals court pointed out that Camou's request for records showing any salary increase to Starr was perfectly clear. The court observed that "simple logic tells us that, by necessity, any council agenda or minutes that showed an increase in compensation to the executive management employees would, by necessity, show an increase to Starr and therefore be responsive to that category." (*Deborah Camou v. Superior Court of San Bernardino County; City of Montclair, Real Party in Interest*, No. E066325 California Court of Appeal, Fourth District, Division 2, Jan. 13)

Iowa

A court of appeals has ruled that the Utman Drainage District violated the Open Meetings Act when it closed a meeting to discuss a legal matter without a written opinion from its counsel. The trial court found that the Drainage District had acted in good faith, but the court of appeals noted that "there is no doubt that the [trial court] believed the trustees' actions were well-intended. But good intentions do not equate to a 'good reason to believe' and 'good faith belief' in 'facts' that, 'if true would have indicated compliance with all the requirements of this chapter." (*James W. Olinger and Larry C. Meyer v. Robert Smith, et al.*, No. 15-1837, Iowa Court of Appeals, Dec. 21, 2016)

Kentucky

The Finance and Administration Cabinet improperly denied requests from Mark Sommer and Tax Analysts for non-identifying tax rulings that had not been appealed to the Board of Tax Appeals. While disclosing those ruling that had been appealed, the Finance and Administration Cabinet claimed disclosure of rulings that were not appealed would identify the parties involved. Sommer complained to the Attorney General, which agreed with the Cabinet. After Sommer sued, the trial court ruled the Cabinet was required to disclose those rulings that had not been appealed after redacting identifying information and awarded Sommer and Tax Analysts attorney's fees. The Cabinet disclosed the disputed rulings and paid the attorney's fees award, but continued to insist that the rulings that had not been appealed were not subject to disclosure under the Open Records Act. The appeals court noted that "the Department of Revenue has taken an unreasonably and overly broad view of the [exemptions claimed] as to how those provisions relate to the nature of material sought by Sommer and Tax Analysts." The court added that "the substantive part of the rulings contain a wealth of information relative to the implementation of our tax laws. This is the very information that Sommer and Tax Analysts had sought to inspect." Noting that the Department of Revenue had used such redacted rulings in support of its position in litigation against taxpayers, the court observed that "the Department's use of its final rulings in this fashion clearly undermines and contradicts the position it has taken throughout these proceedings." (*Finance and Administration Cabinet, Kentucky Department of Revenue v. Mark F. Sommer and Tax Analysts*, No. 2015-CA-001128-MR, Kentucky Court of Appeals, Jan. 13)

New Hampshire

The supreme court has ruled that an exemption for internal personnel records similar to that of the federal FOIA's Exemption 2 covering internal practices and procedures does not apply to a joint state-federal investigation of Rockingham County Attorney James Reams. While Reams' suit challenging the investigation was ongoing, the investigation ended without any charges against Reams. Reams was subsequently reinstated

as Rockingham County Attorney. Thomas Reid, who had been Deputy Rockingham County Attorney, submitted a Right-to-Know Law request to the Attorney General. The AG provided some records, but redacted records under the personnel practices exemption. Reid sued and the trial court sided with the AG. The supreme court noted that the U.S. Supreme Court's decision in *Milner v. Dept of Navy*, 562 U.S. 562 (2011), had explained that the personnel practices exemption applied only to personnel matters. The supreme court pointed out that "while we treat an investigation into employee misconduct as a personnel matter, we now clarify that the investigation must take place within the limits of an employment relationship." The court noted that "because the relationship between the attorney general and the county attorney lacks the usual attributes of an employer-employee relationship, we agree with [Reid] that the defendant was not Reams' employer. We further conclude that the attorney general's supervisory authority over criminal law enforcement by the county attorney is not sufficient. . . to warrant treating the defendant as Reams' employer for purposes of the 'internal personnel practices' exemption." Nevertheless, the supreme court found that the invasion of privacy exemption might well apply. The court sent the case back for application of the balancing test to determine the extent to which records might be protected by the invasion of privacy exemption. (*Thomas Reid v. New Hampshire Attorney General*, No. 2015-0499, New Hampshire Supreme Court, Dec. 23, 2016)

New York

The Committee on Open Government has advised State Sen. Brad Hoylman that a recently adopted Senate Rule restricting the use of cell phones in the Senate Gallery for taking pictures or videos violates the Freedom of Information Law. Executive Director Bob Freeman explained that a 1979 ruling had concluded that a tape recorder could be banned from an open meeting only when its size could be considered obtrusive and potentially distracting to deliberations. Noting that the early decisions involved large-sized tape recorders, Freeman indicated that "it is clear that the Senate, or any public body, may prohibit activity that would be disruptive. " He added that "however, when the cellular telephone is used to record public proceedings silently and unobtrusively, as is the case of its use in the Senate gallery, a prohibition on its use in that situation would, in my opinion, be contrary to the Open Meetings Law. . ." (Opinion to Senator Brad Hoylman from the New York Committee on Open Government, Jan. 9)

Ohio

The supreme court has ruled that a series of requests for the body-cam video taken by a University of Cincinnati police officer during a traffic stop that resulted in the shooting death of Samuel DuBose were either sent to the wrong agency or are now moot because the media requesters had received the video. The *Cincinnati Enquirer* and several local TV stations requested the body-cam video from the Cincinnati Police and the University of Cincinnati Police. The University of Cincinnati Police eventually released all records about the incident except for the body-cam video. The prosecuting attorney's office also refused to disclose the body-cam video, but released the video several days after the media requesters filed suit. Finding that a number of the requests had been sent to the wrong agencies, the supreme court noted that "although the Enquirer, WCPO, and WPIX submitted public records requests to the University of Cincinnati or the Cincinnati Police Department or both, they never submitted a public records request to the prosecuting attorney. Because this lawsuit was brought against only the prosecuting attorney, these [plaintiffs] are not 'aggrieved' by the prosecutor's failure to produce the body-camera video." As to the other media plaintiffs, the court found the case was now moot because the video had been released. The court also found that the six days the prosecutor had taken to respond did not provide sufficient justification to award the plaintiffs attorney's fees. (*State ex rel. Cincinnati Enquirer, et al. v. Joseph Deters*, No. 2015-1222, Ohio Supreme Court, Dec. 20, 2016)

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Pennsylvania

A court of appeals has ruled that the Department of Corrections has not fully responded to a request filed by reporter Christina Haines for non-identifying diagnosis data of inmates at the State Correctional Institution at Fayette. As a result of a 2014 report by the Abolitionist Law Center correlating health problems of inmates at the Fayette facility to nearby toxic coal waste, DOC's Bureau of Health Care Services began an investigation. Several months later, DOC issued a press release indicating that the Department of Health was conducting its own investigation, which was not yet complete. DOH completed its investigation several months later and provided its findings to DOC. Based on the publication of the Abolitionist Law Center report, Haines filed a request with DOC before any investigation had been initiated for non-identifying data about illnesses—particularly cancer and respiratory ailments—contracted by inmates or staff at the Fayette facility. The agency denied the request, claiming the records were protected under the medical records and noncriminal investigation exceptions. Haines complained to the Office of Open Records, which found that neither exception applied. DOC then disclosed some statistical records concerning the incidence of various types of cancer at Fayette, the investigative summary of DOH's report, as well as DOH's investigative results. After the Uniontown Newspapers filed suit, the trial court found there were still disputed issues of material fact. The appeals court noted that it was required to base its review on OOR's determination. OOR had concluded that Haines was asking for non-identifying data, while the agency claimed it could not disclose information because it would identify inmates. The court pointed out that "we reject DOC's narrow response and hold inmate diagnosis data, particularly as to types of illness and number of inmates so diagnosed, are comprised in the Disclosure Order." The court found that "it appears that some investigation-related records and records pre-existing the investigation remain outstanding." But the court observed that DOC "is not required to disclose inmate medical files, even in redacted form, or to create new records compiling data from those inmate files." Haines argued she was entitled to attorney's fees because the agency had acted in bad faith. The court indicated that "bad faith is a matter of degree, implicating the extent of noncompliance. As the extent of DOC's noncompliance is unclear, we decline to make findings of bad faith at this time. Further, the duration DOC withheld responsive records may also weigh in favor of awarding civil penalties." (*Uniontown Newspapers, Inc. v. Pennsylvania Department of Corrections*, No. 66 M.D. 2015, Pennsylvania Commonwealth Court, Dec. 19, 2016)

Washington

The supreme court has ruled that the Woodland Park Zoo in Seattle, run by a non-profit organization, is not the functional equivalent of an agency and is not subject to the Public Records Act. Activist Alyne Fortgang brought suit against the Woodland Park Zoological Society when it refused to disclose records concerning its care of elephants at the zoo. Both the trial court and the court of appeals had ruled against Fortgang before the case arrived at the supreme court. Rejecting the Zoo's argument that a private entity could never qualify as a public agency under the Public Records Act, the supreme court instead approved the use of a four-factor test borrowed from case law from other states recognizing the concept of functional equivalency first enunciated in *Telford v. Thurston County Board of Commissioners*, 974 P.2d 886 (1999). Those four factors consider whether the entity performs a governmental function, the degree of government funding, the degree of government control, and the extent to which government helped create the entity. The court observed that "amici may be correct that some entities are unambiguously private, but neither explains how we could determine that without applying the *Telford* factors or some substantially similar analysis." Applying the *Telford* test, the supreme court found that the extent to which WPZS performed a government function, the extent of government control, and the extent of government involvement in creating the entity all weighed in favor of concluding that WPZS was not an agency. On the issue of government funding, the court indicated that WPZS never received more than 30 percent of its total funding from government sources and

pointed out that "to the extent courts look beyond percentage and consider the nature of a public funding scheme, they hold that a fee-for-service model weighs *against* functional equivalency even where an entity received all or most of its funding from public sources." (*Alyne Fortgang v. Woodland Park Zoo*, No. 92846-I, Washington Supreme Court, Jan. 12)

A court of appeals has ruled that the Department of Social and Health Services must disclose the state contact information of childcare providers in the database of the Family Friends and Neighbors program to the Freedom Foundation, an organization that advocates for anti-union policies, because there is no evidence that the organization plans to use the data for commercial solicitation. After the Service Employees International Union, Local 925 learned that the agency planned to disclose the data, it was granted a temporary restraining order, but was subsequently denied a permanent injunction against disclosure. SEIU then appealed, arguing that disclosure would violate the prohibition against using such information for commercial purposes, as well as the exemption protecting personal information of children. The SEIU argued the Freedom Foundation was requesting the data for commercial purposes. The appeals court rejected the claim, noting that "the Foundation's stated purpose in requesting the lists was to attempt to correspond with the individual providers and notify them of their constitutional right to refrain from union membership and fee payments." The court indicated that "we hold that the Foundation's purpose for requesting the information is not a commercial purpose because the Foundation does not intend to generate revenue or financial benefit from the direct use of the information." Although the identical issue had already been litigated in *SEIU Healthcare 775NW v. Dept of Social & Health Services*, in the present litigation SEIU alleged additionally that the Freedom Foundation was mentioning its use of the lists in its fundraising materials. The appeals court pointed out that "the mere mention of the provider information in fundraising materials is not a direct use of the information to generate revenue. The financial benefits garnered from mentioning the provider information in order to publicize the Foundation's work is too attenuated to constitute a direct use amounting to a commercial purpose." The court also rejected SEIU's claim that disclosure would allow the Foundation to learn the identities of children. The appellate court observed that under the PRA "we cannot look to what information *could be* discovered beyond the four corners of the records requested to determine if an exemption applies." The court added that the "FFN provider information is not the same as personal information of individual children." (*Service Employees International Union Local 925 v. Freedom Foundation*, No. 48522-2-H, Washington Court of Appeals , Division 2, Dec. 20, 2016)

A court of appeals has ruled that the City of Lynnwood violated the requirement in the Public Records Act that an agency respond within five days or provide an estimated date of response, but that otherwise the City responded properly to Theodore Hikel's request for electronic and hard-copy records of the council president's communications for a year and a half. The City initially concluded Hikel's request encompassed 137,000 records. The City contacted Hikel within five days and asked for clarification based on the large number of records and indicated that it might need to respond in installments. Hikel responded that he wanted to see all the records and would be amenable to viewing them in installments. Several weeks later, the City revised its original estimated number of responsive records to 27,500, still one of the largest requests the City had ever processed. Hikel was informed of the revised number and was told a first installment would be available in several more weeks. Because the City initially believed that it could not convert the emails to a PDF file, it prepared the records for Hikel to review. Since Hikel had not asked to review the records, he rejected the proposal and filed suit. The City was subsequently able to convert the records to PDF files and disclosed all the records to Hikel. Hikel argued the City had failed to provide an estimated date of completion. The City argued that its request for clarification was appropriate. But the court observed that "the language and structure of the statute do not identify requesting clarification as a fifth alternative to the four choices listed." The court added that "based on the request, the City calculated an initial number of responsive records—albeit a very large number. The City makes no claim that it could not estimate the time it needed to

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produce these records. It requested clarification only to reduce the number of records it had to provide Hikel." The court noted that "the City identifies no reason it could not provide an initial estimate in its first response and then amend if necessary. Under these circumstances, the PRA required the City to provide a reasonable estimate within five days, and its failure to do so violated the Act." The court concluded that Hikel was entitled to fees for prevailing on the estimated date issue. The court observed that "if the only remedy for failing to provide a reasonable estimate is to treat the violation as an aggravating factor in calculating a penalty, where the agency does not withhold the records, and is therefore subject to no penalty, it has no incentive to provide a reasonable estimate. For these reasons, we conclude that the legislature intended always to provide for an award of fees and costs when an agency fails to comply [with the estimated date of completion provision]." (*Theodore Roosevelt Hikel, Jr. v. City of Lynnwood*, No. 74536-1-I, Washington Court of Appeals, Dec. 27, 2016)

Wisconsin

The supreme court has ruled that a common law privilege for prosecutorial files protects two videos of training sessions on prosecuting sexual assault cases given by Brad Schmiel at two Wisconsin State Prosecutors Education and Training conferences. Cory Liebmann, Research Director for the Democratic Party of Wisconsin, requested the videos for use in opposition research against Schmiel. The Justice Department denied access to the videos, claiming the prosecutorial files privilege as well as the need to protect children discussed in the training sessions. The court pointed out that "the public policy interest in protecting the privacy of victims of crime—especially *children* affected by very sensitive crimes—weighs heavily in favor of nondisclosure." Finding the prosecutorial privilege applied, the court noted that "because the video consists almost entirely of police tactics and specific prosecution strategies in cases involving sexual exploitation of children, disclosure would result in public harm. The public policy factors favoring nondisclosure thus overcome the presumption in favor of disclosure." Discussing the second video, which dealt with a single high-profile sexual exploitation case, the court observed that "although we cannot always protect victims from the re-traumatization or additional suffering, the circumstances here clearly allow us to do so." Justice Shirley Abrahamson dissented, arguing the majority had eviscerated the public records act. Suggesting that the videos be remanded for redaction of personal information, she pointed out that "by concluding that the protection of crime victims in the instant case overcomes the legislatively created presumption of openness, the majority opinion offers no workable limits on when protection of crime victims will or will not outweigh the presumption of openness." (*Democratic Party of Wisconsin v. Wisconsin Department of Justice*, No. 2014-AP-2536-FT, Wisconsin Supreme Court, Dec. 28, 2016)

Wyoming

The supreme court has ruled that the Employee Investment Study Implementation Team, created by the Cheyenne City Council by resolution to consider alternative means of implementing recommendations on staffing and compensation, is not an agency subject to the Wyoming Public Meetings Act. After creating the EIS Team, the city council acknowledged that if and when it considered the Team's recommendations, those discussions would be subject to public meetings requirements. However, the Cheyenne *Tribune Eagle* filed suit before the EIS Team ever met, arguing that its meetings were also subject to the public meetings act. The trial court ruled in favor of the city and the newspaper appealed. The city argued that the EIS Team was not subject to the public meetings act requirements because it had not been created by a statute or ordinance. The newspaper argued that it had been indirectly created pursuant to a statute granting the city authority to set and pay salaries. The supreme court disagreed. It noted that "the Tribune-Eagle's definition of 'pursuant to' as encompassing anything that is within the City's power would obliterate any limit to the reach of the Act and defeat the balance sought by the legislature. We hold that 'pursuant to' has a more restrictive interpretation, 'equivalent to "in conformity with" and implying that what is done is in accordance with an instruction or

direction.'" The court observed that "the EIS Team's mandate, as set forth in the two resolutions, was to recommend alternatives which the City Council would then act upon following a series of public meetings. The EIS Team's function is of a special and temporary character." (*Cheyenne Newspapers, Inc. v. City of Cheyenne*, No. S-16-0103, Wyoming Supreme Court, Dec. 23, 2016)

The Federal Courts…

Judge Amit Mehta has ruled that the Department of Energy properly withheld records under **Exemption 4 (confidential business information)** concerning an Inspector General's investigation of allegations that Sandia Laboratory, run by Lockheed-Martin, improperly used government funds to pay for a lobbying scheme designed to convince the government to renew its contract without competitive bidding. The OIG investigation found Sandia had acted improperly and Sandia agreed to pay $4.7 million to resolve the alleged violations. The Center for Public Integrity requested the investigation report and all related records. OIG disclosed 71 documents. Forty-one documents were referred to the National Nuclear Security Administration, of which 39 documents were disclosed with redactions. Determining whether or not the records had been submitted voluntarily, Mehta observed that "the so-called seven-day notice letter sent here by NNSA offered Sandia no real choice—Sandia either could produce the records 'voluntarily' or OIG would compel their production. The very real specter of government compulsion renders Sandia's production here involuntary for purposes of Exemption 4." The Center for Public Integrity argued that disclosure of the information could not cause Sandia competitive harm because it related to illegal activity. But Mehta noted that "plaintiff cites no authority for the proposition that corporate wrongdoing automatically disqualifies an agency from invoking Exemption 4 on behalf of a company. Defendant has demonstrated that, if the information at issue—as distinct from the misconduct itself—was disclosed, that disclosure would likely harm Sandia's competitive position with respect to future bids for government contracts and negotiations for consultant services." He rejected Sandia's claim that an email was privileged under Exemption 4, but gave it an opportunity to supplement its affidavit. Turning to the agency's claims under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, Mehta pointed out that the degree of privacy protection for employees depended on (1) the seniority of the employee, (2) the employee's relative degree of culpability, (3) the seriousness of the misconduct, and (4) the level of public awareness of the employee's identity and actions. While OIG had divided its redactions under Exemption 7(C) into three categories, Mehta found the categories too broad to make relevant distinctions. Allowing the agency to supplement its affidavit based on his observations, Mehta indicated that "this is not to say that Defendant may not group employees together when appropriate. Such a grouping, however, must be accompanied by an attestation that the declarant has considered the individual characteristics of each employee within the group and that the facts common to those employees, such as their level of employment and relative roles in Sandia's illegal lobbying activities, tilt the balancing in favor of non-disclosure." In contrast to the descriptions supplied by OIG under Exemption 7(C), Mehta found that NNSA's affidavit claiming Exemption 6 "contains a level of detail about lower-level employee conduct that is lacking in the [OIG declaration]." (*Center for Public Integrity v. U.S. Department of Energy*, Civil Action No. 15-01314 (APM), U.S. District Court for the District of Columbia, Jan. 17)

A federal court in California has ruled that the DEA's claims under **Exemption 5 (privileges)** and **Exemption 7 (law enforcement records)** are insufficiently detailed to grant summary judgment. As a result, Magistrate Judge Maria-Elena James decided to conduct an *in camera* review of its **Exemption 7(E) (investigative methods and techniques)** and Exemption 5 claims. The case involved a request by EFF for

ACCESS REPORTS

records concerning the Hemisphere program, a partnership between AT&T and law enforcement agencies that allows law enforcement agencies to access call detail records and conduct analysis and data mining of those records. The existence of the program had been revealed by the *New York Times* in 2013 and had prompted requests and subsequent litigation by EPIC as well as EFF. James noted that Judge Emmet Sullivan had issued an opinion in the EPIC litigation in June 2016, but that the litigation was still ongoing and under review. She pointed out, that, in some cases, DEA had applied different exemptions to the same documents at issue in the EFF case and those in the EPIC case. While Sullivan had accepted the agency's attorney-client privilege claims, James found that "the Government is essentially asking the Court to presume that because it uses the world 'subpoenas' and states that attorneys wrote or received emails, these documents therefore reveal attorney-client communications of a confidential nature. Merely reiterating the elements of the privilege, however, does not satisfy the Government's burden of establishing the privilege applies to this document." She rejected the agency's claim that a draft memo from the Office of Chief Counsel was privileged legal advice. Instead, she pointed out that "the Government does not articulate why this information is confidential or contains legal advice. While it asserts that this document contains 'confidential legal advice,' again, this merely states the element without explaining the basis of that confidentiality." Explaining the government's burden to show the applicability of the attorney-client privilege, James indicated that "the Court is not asking the Government to make a herculean effort, merely something beyond regurgitation of the elements." James found the agency's attorney work-product privilege claim inadequate as well. She noted that "the Government merely recites the elements necessary to establish the privilege, but it does not explain *why* they are met, such as explaining why these particular documents relate to some anticipated litigation." James found the same lack of explanation for the agency's claims of the deliberative process privilege. She noted that "the Government does not explain how the disclosure of these documents would affect its deliberative process by preventing or discouraging DEA employees or affiliates from giving their honest opinions, recommendations, or suggestions on how to develop policy decisions." Turning to Exemption 7, James found the agency had failed to show that AT&T and other providers were promised confidentiality under **Exemption 7(D)(confidential sources)**. The agency had withheld information related to state and local governments, private companies, and other sorts of agencies under Exemption 7(E). Finding the agency's justification insufficient, James observed that "while it is tempting to make assumptions as to why the Government believes such information is protected, the Government ultimately has not provided the Court with enough support to be able to determine on a *de novo* basis whether the Government properly withheld these documents." (*Electronic Frontier Foundation v. Department of Justice*, Civil Action No. 15-03186-MEJ, U.S. District Court for the Northern District of California, Dec. 22, 2016)

A federal court in New York has ruled that neither the CIA, the Department of Defense, nor the Office of the National Director of Intelligence have shown that they conducted an **adequate search** for records concerning an incident during proceedings of the military commissions in Guantanamo when the audio available to the press and public attending the commission hearings was cut off for 40 seconds without the direction of the judge. Judge Allyne Ross rejected the Defense Department's claim that a security presentation was protected by **Exemption 7(F) (harm to a person)** but found that the CIA properly withheld records, or issued a *Glomar* response, under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Freelance journalist Mattathias Schwartz requested records concerning the incident from various intelligence agencies for an article he was writing about the military commissions. By the time of the court's ruling, Schwartz challenged the agencies' searches and only a handful of exemption claims. Ross noted that ONDI's was insufficient because it only indicated the agency had searched offices "most likely" to have records, pointing out that [the agency's affidavit] "is thus facially inadequate because it does not state that all locations likely to have responsive records were searched." Ross faulted ONDI's affidavit for failing to adequately describe the methods used for the search. She observed that "absent any understanding of the file system utilized by the office and the relationship of the two searched files to this file system, there is no basis to find

that ODNI's search of the Office of the General Counsel was reasonably likely to produce records responsive to plaintiff's request." Although DOD's search yielded more than 500 pages of records, Ross found the agency's description of its search also fell short. Ross indicated that "the result of the search is irrelevant to determine whether it was adequately conducted. [The agency's affidavit] describes the second search so generally that the court can only infer that certain unnamed individuals in various offices may have conducted some unidentified searches of some unidentified files using some unidentified method." As to the CIA's affidavit, she noted that it "fails to describe the CIA's methodology in a manner that would allow summary judgment to be granted in the CIA's favor." Ross rejected DOD's Exemption 7(F) claim that a security presentation, which was created for security training, was related to national security. She pointed out that "the DOD has in no way suggested that the information redacted has any specific link to national security. Further, the Second Circuit has been clear that Exemption 7(F) cannot be used by agencies as an end-run around established procedures for classification of material that poses a risk to national security and so courts should closely scrutinize an agency's claim that non-classified national security information was compiled for law enforcement purposes." She upheld the redactions made by the CIA under Exemption 1, noting that "it is plausible that even 'superficially innocuous' information relating to the [past detention] program must be kept secret in order to preserve the efficacy of the CIA's future intelligence-gathering efforts." Schwartz focused his challenge on five bullet points the agency had redacted. Ross found four of them were appropriate, but pointed out that the agency's explanation that the fifth bullet point "included" information about intelligence was insufficient. Ross observed that "but 'includes' is not specific enough: [the agency's affidavit] states that the withheld information as a whole 'includes' information that relates to the capture, transfer, and interrogation of detainees, but [it] nowhere states that each redaction contains this information." Ross approved the agency's use of a *Glomar* response concerning records about the 40 second audio gap. She noted that disclosure of the records would infer that the agency was somehow involved in the incident. She pointed out that "if the CIA has records responsive to plaintiff's request, it would be logical to infer that the CIA has some role in the interruption of the feed, which the CIA asserts is a classified fact—and which certainly constitutes an intelligence method." Schwartz argued that records disclosed by DOD had confirmed the role of the CIA in monitoring the audio interruption. But Ross observed that "the facts that the plaintiff points to, if true, would indicate only that the CIA is a classification authority that has an interest in monitoring proceedings at Guantanamo—not that the CIA has in fact done so." She added that "the distinction between official disclosure by the government and 'publicly available information' seems to elide the plaintiff. Plaintiff argues that the CIA's showing is inadequate because relevant information is 'publicly available.' [However], the fact that information is publicly available does not contravene the CIA's showing that it is properly classified." (*Mattathias Schwartz v. Department of Defense, et al.*, Civil Action No. 15-7077 (ARR) (RLM), U.S. District Court for the Eastern District of New York, Jan. 6)

Judge Amit Mehta has ruled that the FBI properly withheld all records concerning the investigation of unauthorized disclosures made by Bradley Manning to Wikileaks under **Exemption 7(A) (interference with ongoing investigation or proceeding)** because they relate to other ongoing investigations concerning unauthorized leaks by federal employees. Manning, who is now known as Chelsea, pled guilty of some charges and was subsequently convicted of espionage, theft, and computer fraud, and sentenced to 35 years in prison. She requested records concerning the FBI's investigation of her, as well as its investigation of alleged civilian co-conspirators. The FBI searched for records on Manning and denied her access based on Exemption 7(A). Manning appealed to the Office of Information Policy, which upheld the FBI's denial. Manning then appealed to the Office of Government Information Services, which also agreed that the FBI's records pertained to an ongoing investigation. Manning questioned how records concerning herself could be involved in an ongoing investigation since she had been convicted and sentenced. Explaining that he was required to give "substantial weight" to the agency's affidavits, Mehta pointed out that "the court has no reason to doubt

ACCESS REPORTS

that there is an ongoing investigation of individuals other than Plaintiff. The government repeatedly and explicitly states that an investigation is pending. To the court's knowledge, there have been no completed prosecutions since [the agency's supplemental affidavit was filed] which could weaken the agency's reliance on Exemption 7(A)." In response to Manning's claim that the agency had not explained the categories of records, Mehta found the FBI had divided the records into two functional categories and further subdivided those categories. Manning argued the agency should have separated information about her from its investigatory files concerning other investigations. Mehta noted that the FBI's indicated that "information about plaintiff was so commingled with other exempt information that it was inextricably intertwined and could not be reasonably segregated for release." Although the FBI had stated that it considered the **segregability** of the records, Manning argued that its quick denial suggested that it had not considered segregability. Here, Mehta noted, that the FBI "was already familiar with the types of records that were responsive to Plaintiff's request because it had previously reviewed that information in response to another FOIA request [submitted by EPIC]." (*Chelsea Manning v. U.S. Department of Justice*, Civil Action No. 15-01654 (APM), U.S. District Court for the District of Columbia, Jan. 11)

A federal court in California has ruled that FEMA has not shown why the Ecological Rights Foundation should be required to return three documents inadvertently released to the Foundation as part of the agency's response to its FOIA request. The Foundation requested records from FEMA concerning whether it believed it was required to determine if actions taken under its National Flood Insurance Plan might violate the Endangered Species Act. The agency disclosed 417 pages in full or in part. Six months later, the agency decided that it had inadvertently disclosed several privileged documents and asked the court to require the Foundation to destroy them and not rely on their contents. Finding several cases in which courts had exercised their discretion to require requesters to return documents, Magistrate Judge Donna Ryu agreed that such relief was within her discretion. However, she concluded that FEMA had not shown that two letters and an email chain were protected under **Exemption 5 (deliberative process privilege)**. One letter was from the National Marine Fisheries Service, while the other was FEMA's response. Ryu noted that NMFS claimed FEMA was required to comply with Section 7(a)(2) of the Endangered Species Act, while FEMA argued that it was not obligated to comply. She explained that "this does not appear to be predecisional because the letters convey each agency's official policy to the other agency." She added that "defendant does not explain how the NMFS and FEMA letters reflect the 'give-and-take' of the consultative process or reflect FEMA's decisionmaking process in a way that would undermine the agency." Ryu then found the email chain did not qualify for the deliberative process privilege either. However, FEMA also claimed the email chain qualified for protection under the attorney-client privilege, since it constituted legal advice from the agency's Office of Chief Counsel. Ryu found that seven emails qualified as attorney-client material, but concluded the agency had waived the privilege, observing that "in the absence of any information at all about Defendant's efforts to identify and protect privileged material, Defendant has not demonstrated that it took reasonable steps in order to prevent inadvertent disclosure." (*Ecological Rights Foundation v. Federal Emergency Management Agency*, Civil Action No. 15-04068-DMR, U.S. District Court for the Northern District of California, Jan. 3)

Judge James Boasberg has ruled that the U.S. Trustee Program failed to conduct an **adequate search** for records concerning Jeremy Gugino's performance when he served as a private trustee administering Chapter 7 bankruptcies in the District of Idaho. Allen Wisdom declared bankruptcy and Gugino was assigned his case. The two did not get along and Wisdom filed suit in bankruptcy court against Gugino, alleging misconduct in handling his case. Shortly after Wisdom filed his complaint, Gugino resigned as a member of the region's private-trustee panel. Wisdom filed a request for 15 categories of records either concerning his bankruptcy case or Gugino's service as a trustee. The Executive Office for the U.S. Trustees asked Wisdom for clarification and eventually assessed him $411.25 in fees. The agency's initial disclosure consisted of 58

redacted pages. Wisdom filed a second request for records concerning the processing of his first request. The agency told Wisdom it found no records responsive to that request. Although he had originally agreed to limit the search to the Boise office, he later contacted the agency and told it that he wanted a search of other offices as well. The agency treated this as a third request, disclosing 209 pages in response. The agency argued that Wisdom had **failed to exhaust his administrative remedies** because he had not filed an administrative appeal of his third request. But Boasberg pointed out that it was the agency that classified his clarification of the extent of the search for records for his first request as a new request and the Wisdom had protested that action. He noted that "when a defendant has made these particular representations, which reasonably would have deterred a plaintiff from seeking administrative redress with FOIA's attendant deadlines for an administrative appeal, the purposes of FOIA's exhaustion regime would not be advanced by allowing the agency to thus avoid judicial review entirely." Boasberg found the agency's searches for all three requests insufficient, pointing out that "while the government's Motion as to its search fails because it has not properly described its searches, Plaintiff's summary-judgment Motion as to the search likewise falls short, as it remains unclear whether the searches themselves were inadequate or just inadequately explained by the government." However, he found the government's search as to the third request plainly inadequate and granted Wisdom summary judgment on that search. Boasberg rejected the agency's **Exemption 5 (privileges)** claims. As to one claim, he noted that "several courts have found that [performance] reviews are not deliberative, though they may be predecisional, and thus not subject to the deliberative-process privilege." Finding such performance reviews did not qualify for the attorney work-product privilege either, Boasberg added that "the Court cannot ascertain at this point how such routine audits of workplace performance could be considered as produced at the behest of an attorney in preparation of litigation." He agreed that redactions of personal information made under **Exemption 6 (invasion of privacy)** were appropriate, but found that the public interest in disclosure of Gugino's performance evaluation was strong enough to merit an *in camera* review to assess the privacy balance. Boasberg rejected the agency's **Exemption 7(E) (investigative methods and techniques)** claim pertaining to techniques used by the agency to detect illegal activity. Boasberg noted that "there seems to be no law-enforcement purpose undergirding the government's compilation or retention of the information." (*Allen L. Wisdom v. United States Trustee Program*, Civil Action No. 15-1821 (JEB), U.S. District Court for the District of Columbia, Jan. 13)

Judge Colleen Kollar-Kotelly has finally resolved 30-year-old FOIA litigation brought by Carl Oglesby for records concerning General Reinhard Gehlen, who ran a Nazi spy ring during World War II and was allowed by the Allies to continue his network in West Germany for ten years after the war, wrapping up the final items identified by the D.C. Circuit in its most recent remand concerning the processing of Army records held by the National Archives. Oglesby filed suit against the Department of the Army and various other agencies in 1987. Although the district court ruled against him, the 1998 signing of the Nazi War Crimes Disclosure Act breathed new life into his request, forcing agencies to reprocess the records under the standards of the NWCDA. The case went back and forth to the D.C. Circuit three times. Oglesby himself died in 2011 and his daughter and domestic partner took over the litigation. During its last review of the case, the D.C. Circuit concluded that the government was required to make determinations for 2,863 pages of digitized Army records at the National Archives. At the time of Kollar-Kotelly's ruling, only 10 redacted pages remained in dispute. Aron DiBacco argued that the Army had not conducted an adequate search because it had not explained the disappearance of some records and had only processed the 2,863 pages rather than the 9,000 pages that allegedly existed. The Army told Kollar-Kotelly that it had no idea what had happened to records that had been removed decades ago. She pointed out that "the relevant question remains, as in all FOIA cases, merely whether the Army has conducted an adequate search for responsive records" and added that "if the documents replaced by these 'Replacement Sheets' still exist, and if they are in fact responsive to Oglesby's FOIA requests, the Army presumably would have found them in its searches, which it

ACCESS REPORTS

declared covered all 'locations that might contain responsive records.' This is all FOIA requires of the Army." She observed that the "the files referenced in [the D.C. Circuit's opinion]. . .and the only records at issue here, consisted only of *digitized* files. Digitized files constituted only a small portion of the overall universe of Army records that were transferred to NARA and the 9,000 records referenced by Plaintiff apparently were not limited to digitized files." Rejecting Oglesby's substantive and procedural challenges to the Exemption 1 redactions, Kollar-Kotelly indicated a provision of the executive order required agencies to justify the need for continued classification for records beyond 25-years to the Information Security Oversight Office. She noted the provision "does not require that this information be given to *Plaintiffs* or any other individuals who request the exempted documents." (*Aron DiBacco, et al. v. U.S. Department of the Army, et al.*, Civil Action No. 87-3349 (CKK), U.S. District Court for the District of Columbia, Jan. 18)

A federal court in Minnesota has ruled that the DEA has failed to show why it cannot **segregate** non-exempt information from spreadsheets containing data on oxycodone distribution levels in Georgia for four companies. Christopher Madel requested information concerning sales and distribution for oxycodone for 2006-2012. After the district court agreed that the data was protected by **Exemption 4 (confidential business information)**, Madel appealed to the Eighth Circuit, which ruled that the DEA was required to conduct a segregabiliity analysis and disclose any non-exempt information. By the time the case came back to the district court, the agency had made public a report providing drug distribution by zip code, which the agency had previously withheld from Madel. Ruling on the spreadsheets for the four companies, the district court criticized the agency's intransigence, noting that "whether by refusing to negotiate with Madel in good faith, or by publicly releasing data that they had mere months before insisted was too sensitive to ever make public, Defendants have lost their credibility with this Court. The Eighth Circuit was clear: it is Defendants' burden to show that information responsive to Madel's requests is not reasonably segregable from information not subject to disclosure. Broad pronouncements and general explanations will not suffice to meet this burden, and Defendants have offered nothing more than that that here." (*Christopher W. Madel v. United States Department of Justice*, Civil Action No. 13-2832 (PAM/FLN), U.S. District Court for the District of Minnesota, Jan. 11)

The Ninth Circuit has ruled that the district court erred when it rejected claims by the Department of Defense that certain information in Sikorsky Aircraft Corporation's Comprehensive Small Business Subcontracting Plan was protected by **Exemption 4 (confidential business information)** and **Exemption 6 (invasion of privacy)**. Addressing the Exemption 4 claims, the court noted that "the Department submitted a declaration from Sikorsky's director of supply management (1) identifying the entities with which Sikorsky competes for government defense contracts and (2) averring that those entities could use the redacted information to gain a significant competitive advantage over Sikorsky. Nothing more is required to gain protection from disclosure under Exemption 4, and the district court erred in ruling otherwise." Finding that Sikorsky employees' contact information was protected under Exemption 6, the court pointed out that "although the employees' privacy interests in that information are small, they are not trivial because culprits could use the information for such purposes as harassment or forgery." (*American Small Business League v. Department of Defense*, No. 15-15121, U.S. Court of Appeals for the Ninth Circuit, Jan. 6)

Judge Amit Mehta has ruled that records of Kenneth Buholtz's stay at the Fannin County Detention Center are not **agency records** under FOIA. When the U.S. Marshals Service told Buholtz that it did not have the records, he filed suit. Mehta agreed with the agency that the records were not agency records. He noted that "the fact that the Fannin County Detention Center was a USMS contract facility does not convert its records into records created or controlled by USMS." Buholtz argued the agency should retrieve the records

from the county detention center, but Mehta pointed out that "FOIA imposes no obligation upon USMS to, as Plaintiff suggests, pick up the phone and request the records." He indicated that "because the USMS is not required to retrieve documents from a third party to comply with FOIA, the court rejects Plaintiff's argument that USMS must do so." (*Kenneth Buholtz v. United States Marshals Service*, Civil Action No. 16-00943 (APM), U.S. District Court for the District of Columbia, Jan. 16)

A federal court in Montana has ruled that the FBI properly withheld 11 pages from David Braun concerning its investigation as to whether Braun had threatened several government officials under **Exemption 3 (other statutes)**, **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods and techniques)**. Braun requested the information under the **Privacy Act**, but after the FBI concluded that the records were in an exempt system of records, it processed Braun's request under FOIA. Finding that the FBI had properly applied all its claimed exemptions, the court also dismissed Braun's motion to include OMB as a party. Braun claimed that his allegations against OMB were the same as those against the FBI. But the court decided it did not have **jurisdiction** over OMB. The court noted that "because the Court recommends dismissal of Braun's claims under the Privacy Act and FOIA—claims over which the Court has original jurisdiction—the Court declines to exercise supplemental jurisdiction over Braun's claims against the OMB." (*David Steven Braun v. Federal Bureau of Investigation*, Civil Action No. 16-40-BU-BMM-JCI, U.S. District Court for the District of Montana, Dec. 28, 2016)