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Washington Focus: A provision in H.R. 3548, a bill introduced to provide $10 billion to fund the building of a wall on the U.S.-Mexican border, was removed by Rep. Martha McSally (R-AZ), after open government advocates in Arizona noticed it would effectively remove U.S. Customs and Border Protection from having to disclose any information under FOIA dealing with its operations within 100 miles of the border. Dave Cullier, head of the University of Arizona's School of Journalism, called the provision "incredibly awful." Commenting on the potential effect of the provision, Dan Barr of the First Amendment Coalition of Arizona observed that "the need for CBP transparency becomes more vital as we spend billions of dollars to further secure our border, whether it will be constructing a new wall or not."

Court Limits Scope of Suit on Affirmative Disclosure of OLC Opinions

Judge Ketanji Brown Jackson has limited the relief available in a suit brought by the Campaign for Accountability to force the Justice Department to make publicly available the opinions of the Office of Legal Counsel because, even though Jackson found she had the authority under FOIA to provide some kind of injunctive relief, CfA had failed to state a claim for which Jackson could grant relief. The case, which is a direct follow-on to CREW's earlier litigation concerning the same records, leaves intact the modicum of relief the D.C. Circuit granted earlier this year – which was so limited to be nearly worthless – but leaves completely unanswered the level of agencies' obligation to affirmatively disclose information outside a direct FOIA request. To that extent, it is hard to discern any difference between the requirements outlined in Section (a)(2) – the affirmative disclosure section of FOIA – and Section (a)(3) – which requires the disclosure of non-exempt records in response to a FOIA request.

Even though FOIA turned 50 this year, FOIA's affirmative disclosure requirements have rarely been litigated and to the extent that the CREW and CfA cases provide some interpretive guidance, they are valuable for that alone. But they represent such a niggardly interpretation of the remedies available to enforce the affirmative disclosure requirements – which on paper seem quite expansive and open-ended –

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that it is clear that the courts do not consider it their job to enforce those provisions. One of the ironies of the current state of judicial interpretation is that congressional staff spent the years leading up to the passage of the 1996 EFOIA amendments trying to nudge agencies towards disclosing more information without the need of filing a FOIA request. Several years before Congress passed the EFOIA amendments, there was serious discussion of using the Paperwork Reduction Act as a vehicle for forcing agencies to disclose more information electronically. Those changes failed to pass, but they certainly informed the policy discussions that ultimately led to the EFOIA amendments, including such ideas as requiring agencies to make relevant Federal Register notices available electronically, as well as the requirement that agencies post frequently requested records online. Because of the ubiquity of electronic records today, it is hard to remember that a primary motivation for the EFOIA amendments was to provide a legal obligation for agencies to disclose electronic records. Both the 2007 OPEN Government Amendments and the 2016 FOIA amendments contained further requirements obligating agencies to disclose electronic information.

In comparison to the policies set by Congress, judicial progress has been glacially slow. When CREW originally filed its suit, neither it nor the Department of Justice believed there was any remedy under FOIA at all. As a result, CREW brought its suit under the Administrative Procedure Act, claiming OLC's failure to post its opinions was arbitrary and capricious. It was not until 2016 when Judge Amit Mehta ruled in the case that a court recognized a remedy directly under FOIA. The appeal to the D.C. Circuit primarily challenged Mehta's ruling that FOIA provided a remedy and that the APA was the wrong statute under which to bring a claim. However, while upholding Mehta's conclusion, the D.C. Circuit relied on *Kennecott Utah Copper v. Dept of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), to find that a cause of action to enforce the affirmative disclosure requirements of Section (a)(2) only existed when the plaintiff had made a FOIA request and, further, that the only remedy was to require the agency to provide the records to the requester.

CfA had asked Jackson to order DOJ to make available all OLC opinions because they constituted the working law of the agencies that requested them. The agency argued that courts did not have the jurisdiction to consider such a request. Referring to the D.C. Circuit's decision in *CREW v. Dept of Justice*, 845 F.3d 1235 (D.C. Cir. 2017), as providing a "well-marked roadmap for analyzing the government argument," Jackson noted that "while a FOIA plaintiff – like any other plaintiff – certainly must plead allegations that are specific enough to state a plausible claim for relief, the FOIA presents no *jurisdictional* impediment to a court entertaining a request for a broad injunction that is not tethered to specific records." She pointed out that "per *CREW*, this Court cannot order OLC to 'make available for public inspection and copying' all documents that are subject to the reading-room provision, which is one of the remedies that CfA is seeking. However, this Court *is* authorized to order that OLC produce any documents that it has improperly withheld in violation of the reading room provision *to CfA*." She observed that "the instant complaint seeks an order requiring OLC produce to CfA any opinions that are subject to the reading-room provision – a type of relief that the D.C. Circuit has found to be available under the FOIA's remedial provision." She added that "of course, the fact that such relief is *available* as a categorical matter does not answer the question of whether CfA is correct on the merits when it argues that such relief is *warranted*."

The agency argued that CfA' s claim was not ripe for adjudication because it was too broad. But Jackson explained instead that "what it appears that OLC is actually saying with its 'ripeness' contention is that CfA cannot possibly mean what its complaint suggests – 'that *all* of OLC's controlling legal advice documents fall within § 552(a)(2)(A) or (B)' – and that if the truth lies somewhere short of that – *i.e.*, that *some* OLC opinions do – this Court cannot possibly identify which opinions must be made public 'in the absence of concrete and granular facts about the circumstances under which any given OLC advice document was prepared.' In this way, the government appears to fault CfA for seeking to advance a claim that is unduly categorical, when OLC's (a)(2) publication duties necessarily involve nuanced, contextual assessments of various types of legal opinions that OLC renders and the circumstances under which it does so."

Although Jackson found DOJ's ripeness claim did not hit the mark, she agreed with the agency that the breadth of CfA's request that she order the agency to make available all OLC opinions ran afoul of the D.C. Circuit's ruling in *EFF v. Dept of Justice*, 739 F. 3d 1 (D.C. Cir. 2014), in which the D.C. Circuit found that an OLC opinion prepared for the FBI did not constitute the working law of the FBI because the agency was free to accept or reject its advice. As a result, Jackson noted that "in order to state a claim that OLC is violating the FOIA, CfA's complaint needs to identify an ascertainable set of OLC opinions *that plausibly constitute the law or policy* of that agency to which the opinion is addressed, and thus far, CfA's complaint fails to do so."

Jackson was satisfied that CfA had since identified two subsets of OLC opinions it contended constituted the working law of the agencies for which they were prepared – (1) opinions that settled inter-agency disputes pursuant to an Executive Order requiring agencies to submit such disputes to the Attorney General, and (2) opinions for independent agencies for which OLC requires an upfront commitment from the agency to abide by its opinion. She allowed CfA to amend its complaint to ask that those subsets of opinions be made available under Section (a)(2). (*Campaign for Accountability v. U.S. Department of Justice*, Civil Action No. 16-1068 (KBJ), U.S. District Court for the District of Columbia, Oct. 6)

Views from the States…

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

Kentucky

A trial court has ruled that the federal Family Educational Rights and Privacy Act does not preclude the Attorney General from conducting an *in camera* review of records pertaining to investigations conducted by Kentucky State University into allegations by students of sexual misconduct by university employees. The Kentucky Kernel, the student newspaper at the University of Kentucky, requested the records from KSU. KSU denied the request, claiming that FERPA prohibited the disclosure of such information. The Kernel complained to the Office of the Attorney General, which found that KSU had failed to provide sufficient evidence to support its case. The Attorney General ordered KSU to provide the information for *in camera* review, but KSU refused to comply, arguing again that FERPA prohibited that kind of disclosure as well. After KSU filed suit to block disclosure to the AG, the trial court sided with the AG. The court distinguished between a disclosure to a requester and disclosure to the Attorney General. The court pointed out that "in this case, the Attorney General's request for documents falls within his power to conduct a review of substantiating documents to evaluate the agency's denial of an Open Records request. The Attorney General is not acting as another public entity seeking to reveal the substantiating records to public purview. Rather, the Attorney General's statutorily authorized *in camera* review of substantiating documents merely seeks to better determine if the University erred in denying the Kentucky Kernel's request for documents." The court added that "the Attorney General then issues an opinion outlining the appropriateness, or lack thereof, of the denial of the citizen's Open Records inquiry. At no time are the educational documents disclosed to the public, therefore the *in camera* review cannot violate FERPA by revealing confidential student information to the public." (*Kentucky State University v. The Kernel Press, Inc.*, No. 17-CI-199, Franklin Circuit Court, Commonwealth of Kentucky, Oct. 13)

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Oregon

The supreme court has ruled that the Privacy Rule in the federal Health Insurance Portability and Accountability Act protecting the confidentiality of health information prohibits the Oregon Health and Sciences University from disclosing redacted tort claim notices because they still contain identifying information about patients, their attorneys, and the date of the claim. Although it acknowledged that HIPAA allowed disclosure when required by law, including a state public records statute, the supreme court found that the Oregon statute implementing HIPAA contained a parallel confidentiality provision that acted as an exemption for purposes of the Oregon Public Records Law. The case involved a request for non-identifying information concerning tort claims filed against OHSU submitted by the Oregonian. OHSU created a spreadsheet that contained the requested information but still contained identifiers. OHSU claimed the identifying information was protected either by HIPAA or the Federal Educational Rights and Privacy Act when information related to students. The trial court ruled in favor of the Oregonian, finding that the identifying information was not protected. The court of appeals found that the trial court had used the wrong standard under both HIPAA and FERPA and sent the case back for further determination. But the supreme court granted review instead on the issue of whether identifiers of patients and their attorneys was protected by HIPAA. The supreme court found the identifying information constituted health information and was exempt under the state law implementing HIPAA, even though the Oregonian had asked OHSU to redact identifiers. The supreme court pointed out that "the patient identifiers would not be sufficiently obscured as undifferentiated data in the requested record to satisfy the privacy interests in protected health information with which HIPAA and the Privacy Rule are concerned. Nothing in HIPAA or the Privacy Rule indicates that the creation by redaction of a document that still contains such identifiers can somehow alter their status as protected health information." The court noted that even though a public records law could serve as the basis for a "required by law" disclosure, that exception did not apply because Oregon already had its own parallel health information exemption, meaning that disclosure was not required under the Public Records Law. The supreme court sent the FERPA claims back for further consideration after concluding that neither party had provided a sufficient record to rule on the issue. (*Oregon Health and Science University v. Oregonian Publishing Company*, No. SC S064249. Oregon Supreme Court, Oct. 19)

Tennessee

A court of appeals has ruled that the Nashville Police Department violated the requirement in the Tennessee Public Records Act that records be provided promptly when it adopted a new policy allowing requesters to obtain only three accident reports per request and making the rest of the reports available several weeks later. Bradley Jetmore had been receiving accident reports for years, but complained that the police department changed its policy, making it impossible to get all reports promptly. The trial court ruled in favor of Jetmore. At the court of appeals, the police department defended its policy change by explaining that its accident reports are stored on an electronic database maintained by the Tennessee Highway Patrol. The police department argued that a provision in the TPRA that allowed an agency to take up to seven days to respond if a shorter response time was impracticable applied in these circumstances. The appeals court pointed out that "by systematically denying any request for more than three copies of public records at a time, [the police department] was not complying with the Act's mandate that records be made available promptly." The police department also contended that the promptness requirement only applied to inspection of records, not to copies of records. The court of appeals disagreed, noting that "if a requestor is entitled to inspect public records promptly, and if the requestor is entitled to make copies of the records inspected while they are in the possession, custody, and control of the records custodian, it naturally follows that the requestor is entitled to obtain copies of the records promptly." The court found the police department's violation was willful and concluded that Jetmore was entitled to attorney's fees. (*Bradley Jetmore v. Metropolitan Government of Nashville & Davidson County*, No. M2016-01792-COA-R3-CV, Tennessee Court of Appeals, Oct. 12)

Vermont

The supreme court has ruled that emails in private accounts of public employees that relate to the conduct of public business are public records under the Public Records Act and that the Attorney General must ask nine named individuals to search their personal accounts and provide any such emails. Brady Toensing requested emails between the nine state employees and 44 named individuals and entities. The Attorney General searched its records, locating 13,629 responsive emails, which were consolidated into 1129 email chains. Toensing only challenged the Attorney General's failure to require the nine employees to provide any responsive records from their private email accounts. The Attorney General argued those emails did not qualify as agency records and were not subject to the PRA. The trial court agreed, but the supreme court reversed, finding instead that emails in private accounts reflecting the conduct of public business qualified as public records. The supreme court noted that "the definition of 'public record' in the PRA does not exclude otherwise qualifying records on the basis that they are located in private accounts." The supreme court observed that federal courts and courts in other states had reached a similar conclusion. But the court pointed out that the definition of a public record was considerably more limited than the expansive interpretation suggested by Toensing. The court agreed with a procedure adopted recently by the Washington Supreme Court and the California Supreme Court that requires public agencies to ask relevant staff members to search their private email accounts for emails that qualify as public records, provide any emails meeting that definition to the agency for review, and then providing an affidavit explaining its search, review, and exemption claims for such records. (*Brady C. Toensing v. Attorney General of Vermont*, No. 2017-090, Vermont Supreme Court, Oct. 20)

Wisconsin

A court of appeals has ruled that notes taken at two meetings by three staff members of the Animal Care and Use Committee at the University of Wisconsin were not taken for personal use and are public records that must be disclosed to the Animal Legal Defense Fund. In responding to ALDF's request, the university denied access to the notes, claiming they were personal and not public records. The trial court sided with the university, but the court of appeals reversed. Acknowledging that the word "note" was the best way of describing the record, the appeals court nonetheless indicated that the notes were not prepared for personal use. Six notes were written by Holly McEntee and four notes were written by Christine Finney. Even though the university claimed the notes were taken for use in refreshing their staffers' memories, the appeals court observed that the evidence showed this was not true. The court of appeals pointed out that "Finney testified that after the Animal Care and Use Committee meeting, McEntee gave her notes to Finney, who used McEntee's notes, along with Finney's own notes, to create a draft of the final minutes." The court added that "the only reasonable inference to be drawn is that McEntee gave the notes she created to Finney for Finney to review and use when drafting the official minutes of the meeting. The notes created by McEntee were distributed to Finney 'for the purpose of communicating information,' and were, therefore, not prepared for McEntee's personal use." As to Finney's notes, the court indicated that "Finney's primary job function was to write down who was present and what was said at the Animal Care and Use Committee meetings." The court pointed out that "no reasonable inference can be drawn from the evidence that Finney's creation of the notes at the meeting was voluntary, at her own initiation, and for her own convenience." (*Animal Legal Defense Fund v. Board of Regents of the University of Wisconsin*, No. 2016AP869, Wisconsin Court of Appeals, Oct. 19)

The Federal Courts…

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Judge Christopher Cooper has ruled that a 1984 memo written by Ted Olson when he worked at the Justice Department's Office of Legal Counsel concerning the constitutionality of electronic surveillance is covered by **Exemption 5 (attorney-client privilege)**. The Olson memo, which was prepared for the National Security Agency and had been referenced in congressional testimony in the past, was requested by *New York Times* reporter Charlie Savage. Although the memo was classified, the agency relied on Exemption 5 as the basis for withholding it. Savage argued that the attorney-client privilege had been waived because of the public references and DOJ's failure to ensure its confidentiality, and, alternatively, because it constituted the agency's working law. Savage emphasized that Olson's memo was technically written for the Attorney General, not the NSA, but Cooper found that argument too much. He noted instead that "the agency is the client who sought and ultimately received OLC's legal advice regarding its proposed activities. And that protection for the agency's confidential communications to its attorney is not lost simply because one attorney (the Attorney General) consults with another (the Assistant Attorney General for OLC)." Cooper pointed out that Savage's argument would undermine the value of the privilege. "Without a guarantee of confidentiality, executive branch agencies, like all legal clients, would hesitate to share private details about planned agency actions with the Attorney General when seeking legal advice." To support his argument that the agency had failed to maintain the memo's confidentiality, Savage pointed to two instances in which OLC attorneys referred to the memo, one in a 2007 memo from OLC to the National Security Division, and the other in the context of supporting the agency's privilege claim in this litigation. Cooper indicated that "neither of these documents evince the sort of sharing of confidential information with unaffiliated third parties that destroys the attorney-client privilege." Savage also noted that the Olson memo came up during the Senate confirmation hearings for former Attorney General Loretta Lynch when Sen. Dianne Feinstein asked Lynch to provide a copy. Cooper explained that "the fact that members of the relevant Senate Committee did not have copies of the memo in 2015 cuts against the conclusion that the Olson Memo has been disseminated to third parties." Cooper found Savage's working law argument had been severely curtailed by the D.C. Circuit's ruling in *EFF v. Dept of Justice*, 739 F. 3d 1 (D.C. Cir. 2014), in which the D.C. Circuit rejected EFF's claim that a memo prepared by OLC for the FBI constituted the FBI's working law because the agency was not required to adopt OLC's advice. Cooper observed that "as with the FBI, OLC 'is not authorized to make decisions about' the NSA's activities or the Attorney General's approval thereof. And like the FBI, the Attorney General and NSA were 'free to decline to adopt' the reasoning or conclusions of the OLC opinion. Therefore, absent additional evidence that the Attorney General or NSA has affirmatively adopted the Olson Memo as their own policy and reasoning, the Olson memo does not constitute working law." (*The New York Times Company, et al. v. U.S. Department of Justice*, Civil Action No. 17-00087 (CRC), U.S. District Court for the District of Columbia, Oct. 20)

Judge Rosemary Collyer has ruled that the Agricultural Marketing Service conducted an **adequate search** for records concerning its National Organic Program certification investigations of Shamrock Farm Dairies, Oskri Organics, and JAV Food Corporation in response to the Cornucopia Institute's request and that it properly withheld records under a variety of exemptions. The Cornucopia Institute had previously filed a complaint against Shamrock and the agency initially claimed those records were protected under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. However, after the Cornucopia Institute provided an email from the agency indicating the Shamrock investigation had been closed in 2011, the agency searched for records of the Shamrock investigation as well. Besides challenging the adequacy of the search, the Cornucopia Institute limited its claims to redactions in 34 documents and asked Collyer to conduct an *in camera* review of those records. The Cornucopia Institute contended that the agency's failure to provide the Shamrock investigation records until nearly four years after its initial FOIA request was evidence that the search was not adequate. Collyer, however, pointed out that "a delay in response time allows a requester to appeal in order to obtain requested records. Cornucopia appealed and, eventually, AMS turned over the responsive records. While the delay may be extended, it is not an issue for which this Court can provide a

remedy at this time, and does not invalidate the search." The Cornucopia Institute also complained that some records that it knew existed were not turned over. Here, Collyer noted that "the fact that documents mentioned in the released records were not included in the agency response set does not itself indicate that the search was unreasonable and does not rebut the presumption of good faith afforded to the agency's declarations. Therefore, even assuming *arguendo* that Cornucopia did not receive every record related to the Shamrock investigation, that assumption does not prove the inadequacy of the search." The Cornucopia Institute argued that records created after the agency's investigation of Shamrock was closed could not qualify as predecisional under **Exemption 5 (privileges)**. Collyer observed that the letter to Cornucopia from the agency "only indicates that Cornucopia's complaint against Shamrock was closed in 2010, not that all investigations into Shamrock were closed. AMS states that Shamrock was still under investigation under July 2014. Thus, any records before July 2014 could well be pre-decisional, as the descriptions of the records demonstrate." The Cornucopia Institute also argued that information shared with Quality Assurance International, a USDA-approved accredited certifying agent, did not qualify as interagency memoranda. Collyer pointed out that "QAI functions as an agent of USDA and therefore is 'enough like the agency's own personnel' for records shared between the two to be considered interagency and qualify for Exemption 5." However, Collyer rejected claims that QAI could be considered a confidential source for purposes of **Exemption 7(D) (confidential sources)**. She noted that "an agency must do more than simply state that a source provided information on a confidential basis." She added that "the 'crime' at issue is a failure to comply with USDA organic certification requirements, which does not weigh in favor of a finding of confidentiality because there is no indication that companies seek retribution from individuals who investigate organic certifications." Nevertheless, she observed that since she had found the same information was covered by **Exemption 6 (invasion of privacy)**, it was something of a pyrrhic victory. Having found that she was able to rule on the basis of two *Vaughn* indices the agency had submitted, Collyer rejected the Cornucopia Institute's request for *in camera* inspection. (*The Cornucopia Institute v. United States Department of Agriculture*, Civil Action No. 16-215 (RMC), U.S. District Court for the District of Columbia, Oct. 17)

Judge Rosemary Collyer has ruled that three FD-302 forms prepared by the FBI during its investigation of corruption charges by former Illinois Governor Rod Blagojevich are protected by **Exemption 7(A) (interference with ongoing investigation or proceeding)** because Blagojevich's certiorari petition of his conviction to the Supreme Court is still pending. Judicial Watch requested any interviews the FBI conducted with Barack Obama, Rahm Emanuel, or Valerie Jarrett concerning Blagojevich. Although Collyer never described the contents of the FD-302s, certainly an inference exists that the FD-302s pertain to Obama, Emanuel, and Jarrett. The agency denied access to the FD-302s, citing Exemption 7(A) and **Exemption 5 (privileges)**. Since Collyer found the FD-302s were entirely protected by Exemption 7(A), she did not analyze whether Exemption 5 applied as well. Judicial Watch argued that Blagojevich's cert petition to the Supreme Court was too attenuated to show that the case was still ongoing. Collyer disagreed. She noted that "the fact remains that (1) the FD-302s are records contained in a law enforcement investigative file that (2) is currently being directly appealed. That appeal may be very short-lived, but it is not the Court's role to guess how or when Rod Blagojevich's appeal may be resolved. Until that appeal is fully exhausted, disclosure of investigative materials could be reasonably expected to interfere with whatever occurs going forward. Rod Blagojevich has not exhausted his options for appeal before the courts, and, until that time at least, the government is entitled to preserve the strategies, theories, and impressions found in its investigative files." Collyer expressed concern that some of the investigative file could have entered the public domain during Blagojevich's trial. She pointed out that, here, that did not appear to be a concern, explaining that "had DOJ withheld its entire file, it may have been appropriate for it to detail which, if any, records had passed into the public domain as a result of the trial. However, in this instance, only three records are at issue, none of which is alleged to have been introduced as an exhibit, or otherwise passed into the public domain." (*Judicial Watch,*

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Inc. v. U.S. Department of Justice, Civil Action No. 16-1888-RMC, U.S. District Court for the District of Columbia, Oct. 20)

Judge Amy Berman Jackson has ruled that the State Department's failure to initially claim **Exemption 1 (national security)** for two redactions Jackson previously had found were covered by **Exemption 5 (privileges)** was the result of human error during the agency's rush to review the Clinton emails in response to an onslaught of requests, that it was not an attempt to be deceptive, and that disclosure of the redacted information would threaten national security. In response to requests from Judicial Watch concerning Benghazi, the agency located eight identical paragraphs in two different emails summarizing calls between President Obama and the Presidents of Libya and Egypt shortly after the attack. The State Department claimed the summaries were protected by the deliberative process privilege, which Jackson, after reviewing the records *in camera*, rejected. State then asked Jackson to reconsider whether the redactions were protected by Exemption 1. Jackson noted generally that agencies were required to claim all exemptions at the same time, but that "so long as the government's failure to invoke the proper exemption was a result of 'human error' and 'was not an effort to gain a tactical advantage,'" courts could reconsider the applicability of a newly raised exemption. She found it appropriate to reconsider the redactions in this case. She pointed out that "in light of the substantiation of the important security interests at stake, it does not appear that the agency's failure to invoke Exemption 1 was part of an effort to gain a tactical advantage, but rather, that it stemmed from inefficiencies at and extraordinary burdens placed upon defendant's FOIA unit." Finding that Exemption 1 applied here, Jackson observed that "plaintiff does not appear to challenge defendant's assertion of Exemption 1 to [the emails], just as it did not challenge the application to the same information withheld in [another document]. In any event, the Court is independently satisfied that Exemption 1 applies to the redacted information." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 14-1511 (ABJ), U.S. District Court for the District of Columbia, Oct. 24)

The D.C. Circuit has ruled that Judge Gladys Kessler did not have the authority under FOIA to require the Centers for Medicare and Medicaid Services to provide future final versions of the rates insurers would charge for health insurance available through the Affordable Care Act. In 2013, Consumers' Checkbook requested the agency provide the insurers' plans as soon as the agency itself received them. The agency denied the request under **Exemption 4 (confidential business information)** and Consumers' Checkbook sued. In 2015, Kessler ruled the agency had not shown that the plan information was protected by Exemption 4, particularly after insurers' plan information was considered final by the agency. In 2016, Kessler resolved the case by ordering the agency to disclose its final version of insurers' plans, and since Consumers' Checkbook intended to ask for the plans each year, she ordered "that the Government shall release the requested benefits data each year immediately after the Lock Down/final Data Submission Deadline," apparently even if Consumers' Checkbook did not file a FOIA request each year. Writing for the court, Circuit Court Judge Judith Rogers noted that Kessler's order went too far, even under the equitable remedies allowed by *Payne Enterprises v. U.S.*, 837 F.2d 486 (D.C. Cir. 1988) or *CREW v. Dept of Justice*, 845 F.3d 1235 (D.C. Cir. 2017). Rogers pointed out that there was no evidence that injunctive relief was necessary under the circumstances. She observed that Kessler was concerned that the agency's delay in providing the information to Consumers' Checkbook would harm the organization's public education purpose. But she explained that "delay ensued, but what occurred here was not the sort of agency delinquency under FOIA that our precedent contemplates could be appropriate grounds for injunctive relief, or at least the district court did not so find." She noted that "this court has required, even in the face of conceded agency recalcitrance in complying with FOIA, that the district court address, in determining whether injunctive relief would be appropriate, the likelihood of continued delinquent conduct by the agency. . .[A]n order directing the agency to release the requested plan-year data would have been sufficient to ensure Consumers' Checkbook's lawful

access to benefits information and to avoid the prospect of relitigating the same controversy for future years." (*Center for the Study of Services v. United States Department of Health and Human Services, et al.*, No. 16-5296, U.S. Court of Appeals for the District of Columbia Circuit, Oct. 24)

Judge Reggie Walton has ruled that because the Department of Justice's Tax Division has now given Cause of Action Institute an unredacted version of an email chain the agency had previously withheld in part as being non-responsive the case is now **moot** and it would cause the agency undue surprise if Walton now allowed Cause of Action Institute to amend its complaint to include a **pattern or practice** claim. The Tax Division originally withheld parts of the email chain as non-responsive. As a result, Cause of Action Institute filed a follow-up request asking for the entire email chain. While the litigation was pending, DOJ updated its FOIA policy to adopt the Privacy Act's definition of a record, meaning that "each 'item, collection, or grouping of information' on the topic of the request can be considered a distinct 'record.'" Using the updated definition of a record, the Tax Division separated the email chain into nine distinct records and withheld eight of them as non-responsive. Regardless, the Tax Division ultimately disclosed the entire email chain to Cause of Action Institute. Intending to challenge the updated definition of records, Cause of Action Institute asked Walton to allow it to amend its complaint to include a pattern or practice claim. The Tax Division argued that to allow Cause of Action Institute to add a completely new issue constituted undue surprise. Walton agreed. He noted that "while it may be true that the Institute's proposed policy-or-practice claim relates to the same FOIA request, it does so only tangentially, as the Institute's Complaint is entirely predicated on the improper withholding of responsive records through the designation of those records as 'non-responsive.'" He added that "the Institute never asserted that the Department's action was pursuant to an improper policy or practice that violates the FOIA." Cause of Action contended that its pattern or practice claim fit into the exceptions for voluntary cessation of the challenged behavior or capable of repetition but evading review. However, Walton found neither exception applied and ruled that the suit was now moot. (*Cause of Action Institute v. U.S Department of Justice*, Civil Action No. 16-2226 (RBW), U.S. District Court for the District of Columbia, Oct. 10)

Judge Rosemary Collyer has ruled that the IRS properly invoked **Exemption 7(A) (interference with ongoing investigation or proceeding)** to withhold records about how the agency learned of an expert report prepared by an Italian criminal prosecutor concerning Jehan Agrama's foreign income. Jehan Agrama faced a $900,000 tax penalty from the IRS. Agrama believed the tax penalty was based on the Italian report, which she hoped to show violated her rights and should not be admissible in a U.S. court. She requested records that would show that she had a taxable interest in Byram Enterprises. During its search, the IRS contacted two IRS agents in Los Angeles, who located 89 pages. The agency, however, withheld 86 pages. Agrama appealed and the agency's decision was upheld. Agrama told the agency that she had a translation of the Italian report and the IRS, after determining the report was substantively identical to 83 of the originally withheld pages, disclosed them to Agrama. The agency also located an additional 27 pages that were contained in a file that was part of an investigation of another taxpayer. Ultimately, the agency withheld 30 pages under Exemption 7(A). Collyer had recently ruled in a case brought by Agrama's father Frank that Exemption 7(A) applied to records that were part of an agency investigation that involved other taxpayers aside from him. In this case, Jehan argued that records Frank Agrama received as part of his FOIA request supported her claim that the tax penalty levied against her was incorrect. But Collyer noted that "the purpose, creation, and use of agency records are beyond the scope of a FOIA suit, as is the records' intended use by Ms. Agrama. At issue before the Court is the very narrow question of whether IRS met its FOIA obligations in responding to the Request." Agrama challenged the **adequacy of the search** by pointing out that records her father received should have been uncovered in the search for her request. Collyer rejected the claim, noting that "her Request does not

seek records related to IRS's separate investigation of her father." She added that "in any event, overlap or no, each person is an individual taxpayer with individual tax responsibilities." Agrama claimed that because the Italian report referenced the four documents the IRS was withholding their existence had been publicly confirmed and the Exemption 7(A) was inapplicable. Collyer disagreed, observing that "even if the gist of the documents were described by the Report, that would not be sufficient to trigger the public-domain doctrine. Ms. Agrama has not met her burden, and the government is not obligated to 'prove the negative.' It would also not mean that the government did not have a valid law enforcement interest in withholding the full documents themselves, which may contain much more information than just a summary included in another report." (*Jehan Agrama v. Internal Revenue Service*, Civil Action No. 16-751-RMC, U.S. District Court for the District of Columbia, Oct. 20)

Judge Amy Berman Jackson has ruled that although DEA's *Glomar* response to pro se prison litigator Dajuan Wren's request for records concerning Special Agent Bryan Satori was hasty considering the existence of court transcripts in which Satori testified to several of the items involved in Wren's request, the agency properly responded to Wren's request for a list of cases in which Satori had testified by explaining that it had no ability to search for a list of cases, meaning that Wren was not entitled to **costs** for his suit against the agency. In response to Wren's request for records about Sartori, the agency issued a *Glomar* response neither confirming nor denying the existence of records. Wren appealed to OIP, which upheld the DEA's *Glomar* response. Wren then filed suit and attached copies of the transcript from his trial in which Sartori testified about various aspects of his employment. As a result, the agency agreed to provide that information, but continued to tell Wren that it had no ability to create a list of cases in which Sartori has testified. Wren did not challenge DEA's response, but he filed a motion for attorney's fees, arguing that bringing the suit had forced the agency to provide the information. Jackson sided with the agency, noting that "there is no database where that information would be found and the DEA is not required to undertake research in response to a FOIA request." Turning to the issue of fees, Jackson pointed out that "while it is true that plaintiff obtained relief in this lawsuit when defendants unilaterally changed their position and produced information, the Court questions whether one can characterize plaintiff's attempt to probe the veracity of the Special Agent's testimony about his own background and credentials as a 'not insubstantial' claim." She observed that DEA's initial inclination that Sartori's employment information was protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)** "may not have been fully justified, because the Special Agent testified in open court, and there is a transcript of those proceedings," but added that "the government's argument is sufficiently 'colorable'" enough to be considered reasonable without further evidence. (*Dajuan Lamark Wren v. U.S. Department of Justice, et al.*, Civil Action No. 16-2234 (ABJ), U.S. District Court for the District of Columbia, Oct. 19)

Judge Richard Leon has resolved the remaining issues in a ten-year-old suit brought by Donald Friedman against the U.S. Secret Service for records concerning direct energy weapons. As an indication of how long the case had been pending, Leon dismissed claims made under the circumvention prong of **Exemption 2 (internal practices and procedures)** because it was rejected in 2011 by the Supreme Court in *Milner v. Dept of Navy*, 562 U.S. 562 (2011). Noting that the Air Force continued to assert the risk of circumvention prong to email addresses, he pointed out that "this position is untenable in light of [*Milner*]." The agency withheld some information provided by Raytheon under **Exemption 4 (confidential business information)**. Since Friedman had not contested the claims under Exemption 4, Leon found he had conceded the issue. He pointed out that "insofar as the Raytheon records list the company's government clients, describe the types of directed energy weapons that the clients had purchased or in which they have shown an interest, and depict 'proprietary applications and scenarios' of Raytheon's technology, the Court concludes that the information withheld includes trade secrets. And in light of Raytheon's stated commercial interest in

the development and sale of its ADS technology, the Secret Service properly withholds the information under Exemption 4." Leon also upheld the agency's withholdings under **Exemption 6 (invasion of privacy)** and **Exemption 7 (law enforcement records)**. (*Donald Friedman v. United States Secret Service*, Civil Action No. 06-2125 (RJL), U.S. District court for the District of Columbia, Oct. 20)

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