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Washington Focus: POLITICO reporter Alex Guillen wrote earlier this month that EPA political appointees have been delaying FOIA responses by reviewing records set to be disclosed concerning Administrator Scott Pruitt. Thomas Cmar, an EarthJustice attorney involved in several FOIA suits against the agency, told Guillen that "political staff appear to be keeping a very close eye on what information is being requested and released to the public. It raises concerns and questions that need to be answered about whether EPA is living up to its obligations to make basic information about its activities available to the public that it's supposed to be serving." Meanwhile, the EPA Inspector General started another investigation into Pruitt's use of five different email accounts to see if those actions violated FOIA. . .According to Talking Points Memo, the FOIA backlog reduction project at the State Department started by former Secretary of State Rex Tillerson has quietly ended, including reassignment of some mid-level officials from FOIA duties to work more consonant with their professional training.

Court Finds Choice of Format Applies to Original Format Requests

Addressing his complaints pertaining to the Transportation Security Administration's handling of his multiple requests concerning two incidents at Boston and San Francisco airports, Judge Randolph Moss has ruled that there remain unanswered questions concerning the agency's legal obligation to provide records in Sai's choice of format, as well as issues related to the adequacy of the agency's searches. Moss's decision provides more discussion of the choice of format provision than any court ruling so far, although he relied primarily on *Scudder v. CIA*, 25 F. Supp. 3d 19 (D.D.C. 2014), the only other case to discuss the provision in detail. Even though Moss concluded that the parties needed to supplement their arguments, he raised serious questions about whether or not an electronic records universe that depends heavily on scanned PDF files is sufficient to satisfy the choice of format provision.

Sai submitted a total of six FOIA requests to TSA in 2013 for records concerning incidents at TSA checkpoints at Boston and San Francisco airports, as well as previous incidents at

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New York's LaGuardia and Chicago's O'Hare airports. He also submitted a request for all TSA policies and procedures that were not already posted in TSA's electronic reading room. The agency told Sai that request was too broad and invited him to narrow the request. When Sai did not respond, the agency administratively closed his request. However, about a year after Sai filed suit, the agency searched 15 offices for the types of documents that were discernible from the text of his closed request. As a result, the agency initially disclosed 1,416 pages with redactions and a further 1,623 pages a month later. Sai's fifth and sixth requests asked for records about the Boston and San Francisco incidents, including those that had been created since his prior requests. Sai, who has a disability, claimed that the agency had violated both FOIA and the Rehabilitation Act, although Moss quickly concluded that he had no cause of action under the Rehabilitation Act and dismissed that claim.

Since Sai had requested records in electronic format, he claimed the agency had failed to provide them in discrete useful formats. He complained that the agency had used a "rasterized" PDF format – scanning paper documents that irreversibly rendered text into an image format – rather than a "fully digital text PDF." Sai had requested records in "native" format, such as Word documents or Excel spreadsheets. In its defense, the agency pointed out that it used FOIAXpress software for processing FOIA requests, which did not have the capability to process records in native formats. Moss noted that "at least on the present record, the Court is unconvinced that these justifications satisfy the requirements of 5 U.S.C. § 552(a)(3)(B)." He explained that Congress added the choice of format provisions in the 1996 EFOIA Amendments specifically to overturn *Dismukes v. Dept of Interior*, 603 F. Supp. 760 (D.D.C. 1984), which held that the agency was not required to disclose a computer tape of the list of participants in the Bureau of Land Management monthly oil and gas lease lotteries because those records were available on microfiche instead. In essence, *Dismukes* held that the choice of format was determined by the agency, not the requester. Congress changed this by requiring agencies to disclose records in formats that are "readily" reproducible and to consider the "technical feasibility" of doing so, according substantial weight to the agency's determination of technical feasibility. Moss observed that "but 'technically feasible' is not 'synonymous' with 'readily reproducible' and the Court must also 'consider the burden on the defendant' in producing records in a format that, although 'technically feasible,' is not 'readily' achieved." Moss pointed out that Sai's requests were not so much for a new format as for an existing format. He explained that "Congress adopted the 'readily reproducible' requirement in response [to *Dismukes*], leaving little doubt that the 'readily reproducible' requirement applies both to records that require conversion to a new format and to records, like those at issue here, that are sought in their original format, notwithstanding the fact that the agency can more easily release the records in a different format."

Due to the lack of any D.C. Circuit case law on choice of format, the *Scudder* court relied on a standard articulated by the Ninth Circuit in *TPS, Inc. v. Dept of Defense*, 330 F. 3d 1191 (9th Cir. 2003), finding that whenever an agency converted documents to a certain format – in response to a FOIA request, under a contract or during the ordinary course of business – the agency was required to provide documents in that format to others absent a showing of an unnecessarily harsh burden. Based on that standard, Moss found TSA had not yet shown that the records Sai had requested in their original format could not be readily produced. He indicated that "there is no question that the TSA has the technical capacity to format the records in the manner requested; indeed, that is how the records were originally formatted and used by the agency." The agency argued that its FOIA software, as well as the need to review records for sensitive security information, made such a disclosure unduly burdensome. On the record before him, Moss rejected that claim. He pointed out that "the TSA's primary contention that the request was incompatible with the agency's then-existing FOIA processing software is in tension with the language and purpose of the E-FOIA amendments. The statute asks whether the record at issue 'is readily reproducible by the agency in' the requested format, and not whether reproducing the file in that format would complicate the agency's FOIA review process." He added that "because the TSA has yet to show that Sai's format request posed a 'significant interference or burden' beyond increased FOIA-processing costs, and because it has yet to show that administrative costs of that type

constitute a legally sufficient basis for rejecting a format request, the TSA is not entitled to summary judgment with respect to the format of the records released in response to Sai's [requests]." Moss also agreed with Sai's contention that certain records were illegible. He pointed out that "FOIA requesters are entitled to a legible copy of responsive agency records."

Moss upheld the adequacy of the agency's searches except as they applied to four offices, including the FOIA Office and the Office of Legislative Affairs. Moss noted that Sai had provided sufficient evidence that records responsive to his requests existed in those offices to require the agency to search them as well. Moss also found that the agency had not sufficiently explained the time frame of its searches as well as the failure of certain offices to use keywords in their searches. Moss agreed with the agency that Sai's request for unpublished policy and procedure documents was far too broad. Sai argued that once the agency decided to provide some responsive records to his policy and procedures request, it was obligated to respond fully. Moss noted that "if that nothing-or-all approach were to prevail, agencies would have a strong incentive to reject wildly overbroad FOIA requests, like Sai's Policies Request, and to refuse to make any effort to provide what they reasonably can. Nothing in FOIA or the governing law requires agencies, or the court adopt such a counterproductive approach."

TSA withheld records under Exemption 3 (other statutes), citing the Aviation and Transportation Security Act, which allows the agency to withhold sensitive security information. Moss had previously found that under the statute, challenges to the designation of sensitive security information had to be brought in the D.C. Circuit Court of Appeals, not the district court. However, he did examine Sai's contention that while TSA had disclosed SSI in a case brought by the ACLU, it had withheld the same information from him. TSA argued that it had subsequently unredacted some SSI information in the ACLU litigation after it had responded to Sai. Moss indicated that the public disclosure doctrine "does not – and could not reasonably – apply to information that was confidential at the time the agency responded to the plaintiff's FOIA request and was only subsequently officially released." Sending the issue back for further briefing, Moss indicated that Sai would have the burden of showing information disclosed to the ACLU was now public. Upholding most of the agency's claims under Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records), Moss found the agency had not sufficiently shown why names and contact information of agency employees that had dealt with Sai's disability complaints should be withheld. He also questioned whether the agency had shown that a handful of records claimed under Exemption 5 (privileges) qualified as deliberative. (*Sai v. Transportation Security Administration*, Civil No. 14-403 (RDM), U.S. District Court for the District of Columbia, May 24)

EPA's Non-Acquiescence Decision Waives Prior Privilege Claims

Judge Ketanji Brown Jackson has ruled that while most of the EPA's claims under Exemption 5 (privileges) are appropriate, the agency decided within a matter of months after losing *Iowa League of Cities v. EPA*, 711 F. 3d 844 (8th Cir. 2013), that the agency would consider its holding limited to those states within the Eighth Circuit, an administrative decision known as non-acquiescence, thus adopting it as a final agency decision. Hall & Associates, a consulting group representing clients challenging environmental regulations, had requested all records concerning the agency's decision to not apply the *Iowa League of Cities* ruling nationwide. The agency located 10 responsive documents. It disclosed one document in full, seven documents with redactions, and withheld two documents entirely, citing Exemption 5 (privileges). Hall & Associates filed suit, arguing that the agency had made its decision to limit the ruling to the Eighth Circuit when it decided in August 2013 not to seek certiorari from the Supreme Court in the case. By contrast, the agency claimed it had never made a decision one way or the other.

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Jackson found that *Stieberger v. Sullivan*, 738 F. Supp. 716 (S.D.N.Y. 1990) provided the most useful definition of when an agency non-acquiesced by deliberately failing to follow the law of the circuit that had ruled against the agency, either by formally announcing non-acquiescence, or by evidence of substantial differences between agency policy and the court of appeals ruling. Applying this standard, Jackson concluded that the agency had decided to non-acquiesce in the *Iowa League of Cities* and that the agency's decision had been made in November 2013 when it issued a Desk Statement explaining that although *Iowa League of Cities* was binding in the Eighth Circuit, "outside of the Eighth Circuit, the EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment" in a manner that is "*consistent with the Agency's existing interpretation of the regulations*." Jackson pointed out that "this language clearly indicated that the EPA was *not* committing to applying the Eighth Circuit's holding nationwide. Instead, outside of the Eighth Circuit, the EPA intended to follow the existing interpretation of its regulations, which the Eighth Circuit had struck down in *Iowa League of Cities*. What is more, the EPA effectively authorized Bloomberg News to release the statement to the public at large, and thus represented to the relevant regulated parties that the agency intended to non-acquiesce outside of the Eighth Circuit." Jackson pointed out that the EPA confirmed its position at the National Association of Clean Water Act law seminar, shortly after the agency's statement was issued. She observed that "all things considered then, as of November 19 and November 20, 2013, it was reasonably clear to all concerned that the EPA did not intend to apply the *Iowa League of Cities* decision across the board." The EPA contended that its statement that it would consider *Iowa League of Cities* on a case-by-case basis did not constitute a decision to non-acquiesce. Jackson disagreed, noting that "the EPA's reservation of the right to proceed 'consistent with the Agency's existing interpretation' outside the Eighth Circuit on a case-by-case basis necessarily means that the agency has refused to commit to applying *Iowa League of Cities* as its policy in all jurisdictions, which is all inter-circuit non-acquiescence requires."

Hall & Associates claimed that the agency's decision to not acquiesce with the *Iowa League of Cities* decision became final when the government decided not to seek certiorari from the Supreme Court in August 2013. Jackson rejected the claim, noting that "it is well-established in this jurisdiction that a *certiorari* decision and a non-acquiescence determination are not one and the same. Indeed, the D.C. Circuit has made clear that an agency's decision to seek certiorari stands completely apart from a non-acquiescence determination." She explained that "the EPA did not make an announcement that it intended to non-acquiesce at that time, as it did in mid-November, and the evidence H&A points to does not actually indicate that the EPA was engaged in a silent effort to implement a non-acquiescence policy with respect to its permitting decisions as of late October. Rather, the record demonstrates that the EPA was still debating whether or not it should non-acquiesce to the Eighth Circuit's decision in late October."

Having established November 19, 2013 as the date when the agency publicly confirmed its intention to non-acquiesce in the *Iowa League of Cities* decision, Jackson was able to draw a bright-line as to those emails the agency claimed were privileged, finding that almost all the emails written before November 19 qualified for the deliberative process privilege, while those written after that date did not, since they related to a decision that had already been made. She rejected the agency's attorney-client privilege claims, noting as to one claim that "the redaction itself pertains to information regarding the *Iowa League of Cities* case that is readily known to the public at large; thus, it is not itself 'confidential information provided by the client' and otherwise public information does not become confidential solely by virtue of its having been communicated to a lawyer as the basis for seeking legal advice."

Jackson ruled that the agency had not adopted any of withheld records as its working law. She noted that "instead, and if anything, the EPA's working law with respect to the Eighth Circuit's opinion is reflected in the documents that the EPA has already publicly released. Furthermore, the Court's *in camera* review of the disputed documents reveals that these documents do not explain the agency's policy rationale for why it

decided to pursue a non-acquiescence policy." Jackson found that some redacted portions of the documents had been publicly acknowledged because they had been previously disclosed to Hall & Associates as part of a different FOIA request. She pointed out that "the EPA's prior FOIA response constitutes an official and documented disclosure, because the information was previously 'disclosed and preserved in a permanent public record. And because it is the same information that was previously disclosed (word-for-word), the redacted information is every bit as specific as the prior disclosure." (*Hall & Associates, LLC v. U.S. Environmental Protection Agency*, Civil Action No. 15-1055 (KBJ), U.S. District Court for the District of Columbia, May 22)

Views from the States…

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

Illinois

` The supreme court has ruled that amendments to laws pertaining to professional licensing exempting all confidential information contained in complaints do not apply to FOIA suits brought by Christopher Perry, a professional engineer, and the Institute for Justice, which had requested complaints concerning cosmetologists and hair braiders, because their suits were brought before the amendments became effective. Perry had requested records concerning a complaint against him from the Department of Financial and Professional Regulation. The agency denied the request, telling Perry that disclosure would reveal confidential sources. Perry then requested the records again with all confidential information redacted. The agency once again denied the request. Perry filed suit and the trial court ruled that two attachments could be disclosed. In dealing with the parties' motion to reconsider, the trial court concluded that the amendment exempting confidential information had now become effective and dismissed the case, including Perry's request for attorney's fees. The Department also denied the Institute for Justice's FOIA request. After the Institute filed suit, the new amendment became effective. Regardless, the trial court ruled in favor of the Institute and awarded the Institute $35,000 in attorney's fees. The two cases were consolidated on appeal. The appellate court ruled in favor of the agency, finding that the new amendment applied retroactively. The supreme court reversed, finding that the amendment constituted a substantive change in law that adversely affected Perry and the Institute. Explaining its ruling, the supreme court noted that "Illinois's retroactivity analysis governs where a change of law becomes effective during the pendency of a lawsuit. Because the legislature did not clearly prescribe its intent as to whether [the exemptions] should be applied to pending lawsuits, we consider whether under section 4 of the Statute on Statutes, the changes in law are procedural or substantive. As both [exemptions] are substantive changes to the law, [the exemptions] are to apply prospectively only." The supreme court sent the case back to the trial courts to determine fees. (*Christopher J. Perry and Institute of Justice v. Department of Financial and Professional Regulation*, No. 122349 and No. 122411, Illinois Supreme Court, May 24)

Pennsylvania

A court of appeals has ruled that the Office of Open Records erred when it found that a detailed affidavit submitted by Major Douglas Burig, a state police officer with 20 years' experience, explaining redactions the agency made to its policy for using social media as an investigative tool in response to a request from the ACLU of Pennsylvania was conclusory and ordered the state police to disclose the unredacted portions. After reviewing the document *in camera*, the OOR found Burig's affidavit had not carried the agency's burden of

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showing that disclosure would jeopardize public safety if disclosed. The state police appealed. The appeals court reversed, noting that Burig "stated there is a reasonable likelihood that disclosure would threaten PSP's public protection activity of conducting investigations and other valid law enforcement activities. Where, as here, the affiant bases his conclusion that such harm is reasonably likely on his extensive experience, such conclusion is not speculative or conclusory." The appeals court rejected the ACLU's request to conduct an *in camera* review. The appeals court pointed out that such a review was unnecessary. The appeals court noted that "here, the actual words on the page are not at issue; rather, the issue is whether disclosure of those words 'would be "reasonably likely" to threaten public safety or a public protection activity.' As stated, Major Burig's Affidavit sufficiently addresses that issue." (*Pennsylvania State Police v. American Civil Liberties Union of Pennsylvania*, No. 1066 C.D. 2017, Pennsylvania Commonwealth Court, May 18)

South Carolina

The supreme court has ruled that the Hilton Head Island-Bluffton Chamber of Commerce is not a public agency for purposes of the South Carolina Freedom of Information Act even though it is a designated marketing organization under the A-Tax Statute, which provides a portion of the sales tax collected on hotels for use in promoting tourism. Domain News Media, a website company based in Beaufort County, made a FOIA request to the Chamber of Commerce for records concerning meetings and other activities to promote tourism. The Chamber declined to respond, arguing that it was not a public agency. The trial court ruled in favor of Domains, citing *Weston v. Carolina Research & Development Foundation*, 401 S.E. 2d 161 (1991), in which the supreme court ruled that an entity primarily supported by public funds would qualify as a public agency. The supreme court reversed, finding instead that "contrary to Domains' suggestion, the receipt and expenditure of these accommodation tax funds in no manner allows the Chamber (or any DMO) to spend public funds free from public accountability and oversight. We fully appreciate the need for some measure of transparency and public accountability in the expenditure of public funds. Yet, in this case, the A-Tax statute and Proviso 39.2 set forth the General Assembly's determination of the required level of oversight, transparency, and accountability." (*DomainsNewsMedia.com v. Hilton Head Island-Bluffton Chamber of Commerce*, No. 27803, South Carolina Supreme Court, May 23)

Virginia

The supreme court has ruled that Marian Bragg's allegation in her complaint that the Board of Supervisors of Rappahannock County violated the Freedom of Information Act by systemically holding closed meetings is sufficient to state a claim for relief to survive a motion to dismiss by the county. After Bragg filed suit alleging the open meetings violations, the court challenged the sufficiency of her affidavits, claiming that they did not adequately state a claim. The trial court agreed and dismissed the case. Bragg's motion for reconsideration was denied. Bragg then appealed to the supreme court. Ruling for Bragg, the supreme court observed that "the Bragg Affidavit did not, as the [trial] court stated, exclude the allegations in the petition 'stated to be on information.' Rather, Bragg swore that the allegations based on her personal knowledge were true, and she believed the remaining allegations, which were 'stated to be on information,' were also true. The Bragg Affidavit therefore supported all of the underlying allegations because, consistent with [the code], Bragg swore that they were either true or believed to be true." The supreme court also rejected the trial court's finding that Bragg's affidavit was insufficient because "she did not identify the basis of her 'information.' Bragg's allegations that the Board violated FOIA during the closed meetings were necessarily based 'on information and belief' because she was excluded from the meetings and consequently did not have personal knowledge of what transpired. However, the 'information' upon which Bragg based her allegations was apparent from the face of the petition, which specifically asserted that [board member Ronald] Frazier admitted the Board improperly discussed public business matters during closed sessions. Bragg based her allegations upon Frazier's admissions, which were further incorporated into the petition via the Frazier

Acknowledgement." (*Marian M. Bragg v. Board of Supervisors of Rappahannock County*, No. 171022, Virginia Supreme Court, May 17)

The Federal Courts…

The Ninth Circuit has ruled that an electronic request filed using the agency's abbreviated online form clearly identified that Cheryl Brantley made the request on behalf of A Better Way for BPA, an environmental advocacy group and, as a result, the organization has **standing** to sue the Bonneville Power Administration. Brantley submitted the request by using the agency's online form, in which she listed herself under "Name" and listed A Better Way for BPA under "Organization" and included A Better Way's mailing address. The form also required requesters to check one of four categories for fee purposes. Brantley checked "an individual seeking information for personal use and not commercial use" since it was the only applicable choice listed. In response to the form's inquiry about the requester's ability to disseminate information to the public, Brantley indicated that she had access to technical advisors who could help disseminate information to A Better Way's membership. When a BPA FOIA Public Liaison contacted Brantley, Brantley put the liaison in touch with the organization's attorney. After talking to the organization's attorney, the agency granted A Better Way a fee waiver. The agency continued to communicate with the organization's counsel. A Better Way filed suit after BPA failed to disclose any records. BPA sent a final response addressed to Brantley at A Better Way, disclosing some records and withholding others. BPA then filed a motion to dismiss A Better Way's suit for lack of subject matter jurisdiction, arguing that Brantley, not A Better Way, was the proper plaintiff. The district court agreed with the agency and dismissed the case. However, the Ninth Circuit reversed. The Ninth Circuit noted that "viewing the form as a whole, it is clear that the request was made on behalf of A Better Way, that the request was not for commercial purposes, that there was an obvious public interest related to BPA's I-5 Corridor Reinforcement Project, and that the requester had 'members,' hardly a characteristic of an individual requester. Any confusion in the electronic form was of BPA's own making and could easily be fixed by including a place to check that the request is made 'on behalf of' an organization or adding 'public interest organization' or 'other' options under Type of Requester. Indeed, the use of FOIA requests by nonprofit public interest organizations is well known and the options for fee waivers specifically anticipates requests in the public interest." The Ninth Circuit pointed out that "in the end, common sense must prevail in determining who is a requester under FOIA. . .The online form clearly identified A Better Way as the requester – in the "Organization" field and in its reference to 'our members' – and BPA acknowledged as much in corresponding with the group. We are left with the firm conclusion that the suit should not have been dismissed for lack of standing." (*A Better Way for BPA v. United States Department of Energy Bonneville Power Administration*, No. 16-35414, U.S. Court of Appeals for the Ninth Circuit, May 25)

A federal court in California has ruled that the term "individual" in the **expedited processing** provisions does not include animals. The Animal Legal Defense Fund filed a request with the Animal and Plant Health Inspection Service for records about the results of an inspection of Tony the Tiger, a Siberian-Bengal Tiger kept in captivity at a gas station in Iberville Parish, Louisiana, for violations of the Animal Welfare Act. ALDF also asked for expedited processing, arguing that failure to obtain records on an expedited basis "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." APHIS denied ALDF's request for expedited processing, telling the organization that "Tony the Tiger is not considered an 'individual' under the FOIA because "the term 'individual' in this matter only encompasses human beings." ADLF filed suit, arguing that the definition of individual applied to discrete definable groups and was not limited to human beings. APHIS argued the court did not have jurisdiction to

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hear the claim. Judge Phyllis Hamilton disagreed, finding ADLF had stated a **policy or practice** claim. She noted that "here, plaintiff alleged that defendants failed to properly expedite a records request based on a consistent, repeatable legal position that defendants have asserted; plaintiff sought a declaration from the court that the statute applies to nonhuman animals; and plaintiff sought a permanent injunction requiring defendants to apply the statute to nonhuman animals in all cases – not just to Tony. The court finds that plaintiff sufficiently pled a policy or practice claim under Rule 8 [of the Federal Rules of Civil Procedure]." Hamilton observed that "the exercise of the court's equitable power in this situation does not lead it to review a denial of a request to expedite – which might be cured more expeditiously by an agency's tardy production than by a court's review – but instead provides primarily prospective declaratory or injunctive relief based on an agency's past practice and, importantly, its likely future practices." Having found ADLF's suit should not be dismissed for lack of jurisdiction, Hamilton then concluded ADLF was wrong on the merits. She pointed out that "every dictionary consulted by this court includes a definition of 'individual' as a person or human being. . .That ordinary common meaning fits naturally with a plain reading of the statute: a request for records is expedited in the face of an imminent threat to the life or physical safety of a human being." A second definition of "individual" described the word as referring to a group of beings or things. Rejecting the applicability of the second definition, Hamilton pointed out that "the statute explicitly concerns individuals whose lives or physical safety could face imminent threat, so a definition of 'individual' that applies equally to beings without 'lives' capable of facing threats would be an awkward fit within the overall statutory text." Hamilton observed that "the plain meaning of Section 552(a)(6)(E)(v)(1) has potentially unforeseen and troubling consequences. Because defendants are administrative bodies with responsibilities primarily relating to nonhuman animals, Congress may have nearly excused them from the FOIA's expedited review requirement without specifically intending to do so. The proper solution, if any, is for Congress to alter the statute's text – not for this court to do so." (*Animal Legal Defense Fund v. United States Department of Agriculture*, Civil Action No. 17-03903-PJH, U.S. District Court for the Northern District of California, May 25)

Judge Amy Berman Jackson has ruled that beef checkoff program records submitted to the Department of Agriculture by the National Cattlemen's Beef Association are not **agency records**. The Physicians Committee for Responsible Medicine sued USDA after it withheld documents related to the government's dairy and beef checkoff programs. Jackson allowed Dairy Management, Inc. to intervene in the suit to argue whether records it had submitted to the agency concerning the daily checkoff program qualified as agency records. Jackson determined DMI's records were agency records and ordered the agency to process more than 8,000 documents. The only claim remaining was whether records provided by the National Cattlemen's Beef Association pertaining to the beef checkoff program also qualified as agency records. This time, Jackson decided the NCBA records were not agency records. She observed that "there is no dispute that neither [the Agricultural Marketing Service] nor the Beef Board has requested or received any responsive NCBA records, and NCBA records have never been in AMS's or the Board's possession, custody, or control." PCRM argued that the agency had an unfettered right to obtain the NCBA records. But Jackson pointed out that was not enough. She explained that the "Supreme Court held in *Forsham v. Harris* that documents an agency has the right to acquire would not become agency records subject to FOIA 'unless and until the right is exercised.'" She indicated that "by ordering the agency to 'exercise its right access,' the Court 'effectively would be compelling the agency to "create" an agency record,' and thus would 'extend the reach of [FOIA] beyond what. . .Congress intended.'" Jackson found AMS had not exercised control of the NCBA records. She pointed out that "it is undisputed that 'AMS has no knowledge of any USDA personnel having either read or relied on the records in question.' 'Where an agency has neither created nor referenced a document in the "conduct of its official duties," the agency has not exercised the degree of control required to subject the document to disclosure under FOIA.'" (*Physicians Committee for Responsible Medicine v. United States*

Department of Agriculture and National Cattlemen's Beef Association, Civil Action No. 13-0483 (ABJ), U.S. District Court for the District of Columbia, May 25)

Judge Beryl Howell has ruled that the Grand Canyon Trust is not entitled to **attorney's fees** for its litigation against the Department of the Interior for records concerning policies pertaining to oil and gas leases on federal lands because its suit did not cause the agency to disclose more than 60,000 pages. The Grand Canyon Trust submitted FOIA requests to the Office of the Secretary and the Bureau of Land Management. The Trust filed suit after the agency failed to disclose any records within the statutory time limit. One month after the complaint was filed, OS disclosed 6,366 pages without any court involvement. Two months after that, BLM disclosed a total of 58,987 pages, again without any court involvement. The Grand Canyon Trust then requested $68,047 in attorney's fees. Noting that the question before the court was whether the litigation was necessary to obtain the requested documents, Howell observed that "the plaintiff has not met this standard. Rather, the evidence submitted by plaintiff in support of its fee motion makes clear that both the DOI-OS and BLM had begun processing the plaintiff's request well before this lawsuit was initiated and that both agencies had even made partial responses to the plaintiff before the complaint was filed. Both agencies completed their disclosures within four months of the start of litigation, and these disclosures were satisfactory to the plaintiff." She pointed out that "DOI-OS and BLM had backlogs of 33 and 153 requests respectively. . . The plaintiff's exhibits in support of its fee motion reflect the agencies' preexisting backlog and show that, despite these backlogs, the agencies' FOIA offices diligently worked to satisfy the plaintiff's requests. Thus, the plaintiff has not established that the threat of an adverse court order prompted the disclosures ultimately made in this case. Instead, the record shows that 'an unavoidable delay accompanied by due diligence in the administrative process was the actual reason for the agencies' failure to respond to [the] request.'" Citing *Piper v. Dept of Justice*, 339 F. Supp. 2d 13 (D.D.C. 2004), the Grand Canyon Trust argued that the agency's lack of countervailing evidence undercut its position. Noting that *Piper* dealt with a dispute on rates charged, Howell observed that "neither rates nor calculations nor hours billed is at issue [here], given that the plaintiff has failed to establish eligibility for attorney's fees. Accordingly, the defendants' lack of supporting declarations does not warrant an award of fees for the plaintiff." She explained that "the Senate Judiciary Committee Report accompanying the FOIA noted that 'if the government is forced to pay attorney's fees even if it settles a lawsuit without court action. . .then we may well find that the government is less inclined to settle FOIA lawsuits.' The parties in this case likewise were able to resolve all document production issues without the Court's involvement and 'although it would have been ideal for the defendant to process the plaintiff's request from the very beginning, the government's compliance with the plaintiff's request so early in the litigation is not the sort of agency behavior that Congress intended to prevent by awarding attorney's fees.'" (*Grand Canyon Trust v. Ryan Zinke*, Civil Action No. 17-849 (BAH), U.S. District Court for the District of Columbia, May 24)

Judge Trevor McFadden has ruled that the FBI did not improperly narrow EPIC's request for records concerning cyber-attacks by Russia during the 2016 election and that the agency properly withheld records under **Exemption 7(A) (interference with ongoing investigation or proceeding), Exemption 1 (national security)**, and **Exemption 3 (other statutes)**. EPIC submitted a four-part FOIA request, two parts of which focused specifically on Russian attempts to hack the Republican National Committee, the Democratic National Committee, and the Democratic Congressional Campaign Committee. Another part asked more broadly for records regarding Russian interference in the 2016 election. EPIC argued the agency had improperly narrowed its request by searching only its records concerning its investigation into Russian interference in the 2016 election. McFadden disagreed, noting that "EPIC misunderstands the FBI's statement that it construed the universe of responsive records as co-extensive with the Russian investigation files. In context, this

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statement shows that the FBI assumed EPIC would be interested in every record in those files, not that the FBI assumed EPIC would be uninterested in records stored elsewhere. The FBI limited its search to the Russian investigation files not because it believed EPIC had asked for this limitation but because it determined, based on consultation with subject-matter experts, that this is where the FBI would store responsive records. This decision falls within the scope of the FBI's discretion and expertise in crafting a reasonable search and does not make the search inadequate. Nor do EPIC's speculations about the existence of other files containing responsive communications or records related to the FBI's public reports alter this analysis." EPIC accused the FBI of making a blanket exemption claim under Exemption 7(A) for records pertaining to the Russian investigation. McFadden, however, pointed out that "contrary to EPIC's characterization, the FBI has not claimed a blanket exemption for all documents in the Russia investigation files. Instead, it has claimed three categorical exemptions for specific types of information in those files. And my review of both the public and *in camera* portions of [the agency's] declaration satisfy me that Exemption 7(A) applies to each category." He observed that "the FBI evaluated whether it could produce any records given the reports, indictments, and plea agreements on which EPIC relies, but found that this public information does not match the information withheld at the same level of specificity." EPIC also questioned the propriety of the Exemption 1 claims. McFadden indicated that the FBI's affidavit "goes on to explain that the FBI's redactions prevent the disclosure of 'how the FBI conducts surveillance under the [Foreign Intelligence Surveillance Act], handles FISA-derived information, and otherwise implements and utilizes the technique.' This explanation provides a more specific explanation of why releasing the redacted information would undermine an important method and jeopardize national security. Providing more information would jeopardize the purpose of Exemption 1." EPIC found it "highly implausible" that all of four pages redacted under Exemption 3 contained information protected by the National Security Act. McFadden observed that "the FBI has specified the reasons for its redactions in as much detail as possible on the public record and has accounted for the disclosure of other FISA procedures by explaining that the redacted information 'does not match or mirror any information previously made public by the FBI through an official disclosure.'" (*Electronic Privacy Information Center v. Federal Bureau of Investigation*, Civil Action No. 17-00121 (TNM), U.S. District Court for the District of Columbia, May 22)

The Ninth Circuit has upheld a district court ruling finding that the U.S. Patent and Trademark Office was not required to continue to provide bulk data on approved patents, including the inventors' correspondence addresses, because that information was now available on the agency's website. After the agency refused to provide the bulk data to Renewal Services, the company sued, arguing that because the inventors' correspondence addresses could be retrieved and compiled from the agency's database, Renewal Services had a right to obtain the data in its **choice of format**. The Ninth Circuit rejected that claim, noting that "by its own terms § 552(a)(3) does not apply to records already made available in an electronic format by an agency pursuant to § 552(a)(2). The district court therefore correctly dismissed the complaint." (*Renewal Services v. United States Patent and Trademark Office*, No. 16-56088, U.S. Court of Appeals for the Ninth Circuit, May 18)

Judge Rudolph Contreras has resolved most of the remaining issues in multiple requests submitted by prisoner Jeremy Pinson to the Bureau of Prisons. In his previous rulings, Contreras found BOP had not shown that it conducted **adequate searches** or that it had substantiated some of its exemption claims. This time, however, Contreras accepted the agency's searches, including several where he had ordered the agency to conduct a subsequent search. He also approved of the agency's claims made under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(E) (investigative methods and techniques)**, and **Exemption 7(F) (harm to safety)**. Contreras pointed out that there was a split in the case law on whether or not phone numbers for agency employees could be withheld

under Exemption 6. Here, he indicated "the release of BOP employees' direct telephone extensions could possibly lead to the same sort of harassment that courts have feared other government employees might suffer if their direct work contact information is divulged. Because Pinson has presented no public interest to justify this potential invasion of personal privacy, the Court grants Defendants' motion as to the office telephone numbers and extensions." (*Jeremy Pinson v. Department of Justice, et al.*, 12-1872 (RC), U.S. District Court for the District of Columbia, May 23)

Dealing with two of Jeremy Pinson's requests involving EOUSA, Judge Rudolph Contreras has ruled the agency has not yet shown that it **conducted an adequate search** for records. Contreras had previously found that the agency may not have searched the correct docket number. Finding the agency still had not clarified its search, Contreras observed that "FOIA searches are inadequate when the incorrect search term is used to retrieve responsive records. Discrepancies in the materials DOJ submitted with its renewed motion for summary judgment indicate that the wrong case number may have been used to search for Pinson's requested materials. If so, EOUSA's search was not sufficient to warrant summary judgment." As to another request involving Pinson, Contreras noted that EOUSA had still not clarified whether its search was limited to only public documents and, further, had failed to explain the discrepancy between the 197 pages mentioned in its affidavit and the 200 pages disclosed. As a result, Contreras found EOUSA was not entitled to summary judgment on either request. (*Jeremy Pinson v. U.S. Department of Justice, et al.*, Civil Action No. 12-1872, U.S. District Court for the District of Columbia, May 23)

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