Volume 44, Number 15
July 25, 2018

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: Jake Lucas, writing for the Times Insider section of the New York Times, explained recently how important FOIA has become to the Times' effort to cover the Trump administration, particularly the EPA. The first real glimpses of how the EPA was functioning under former Administrator Scott Pruitt came after documents disclosed to the Sierra Club were analyzed by reporters. Times reporter Lisa Friedman told Lucas that "in the case of Scott Pruitt's EPA, were it not for FOIA, we certainly would not have been able to do as much as we did or tell the kinds of stories that we were able to tell." Times reporter Eric Lipton agreed, telling Lucas that "you assemble all of the FOIA responses for multiple players, and all of a sudden you basically have a whole conversation around the topic. You put them in chronological order and it's almost as if you're in the room."

Prolonged Delay in Responding Basis for Policy or Practice Claim

In a decision that produced separate opinions from all three judges, the D.C. Circuit has recognized that a failure to routinely respond to FOIA requests months after the statutory time limit has expired may provide the basis for a policy or practice claim that can be remedied by the court. Writing for the majority, Circuit Court Judge Judith Rogers found that Judicial Watch had sufficiently pled a policy or practice claim that the Secret Service had consistently failed to respond to its requests for presidential travel expenses to survive the government' motion to dismiss. She was joined by Circuit Court Judge Cornelia Pillard, who wrote a concurrence highlighting why Judicial Watch's claim survived. But Sri Srinivasan dissented, concluding that Judicial Watch had not provided enough evidence to support its policy or practice claim, suggesting that Congress had condoned agency backlogs by requiring agencies to report the number of requests falling into various time-frames far in excess of the statutory time limit for responding. Perhaps the best way to reconcile these conflicting views is that Rogers and Pillard recognized that a plaintiff's burden of proof at the pleading stage is substantially less than later when the court considers the merits of the case, while Srinivasan focused more on Judicial Watch's likely inability to make its case if its claim survived.

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The case involved a series of 19 requests Judicial Watch made between July 2014 and August 2015 to the Secret Service for records showing the cost of travel by President and Michelle Obama, Vice President Joe Biden, and former President Jimmy Carter. The agency assigned numbers to 17 of the requests, but beyond that Judicial Watch heard nothing further from the agency. It filed suit in November 2015, asking the court to order the agency to disclose the records and alleging that the agency had a policy or practice of violating FOIA by ignoring requests until suit was filed. After the agency disclosed the responsive records, the district court found Judicial Watch's claim for records was now moot. Ruling on Judicial Watch's policy or practice claim, the district court concluded that Judicial Watch had "failed to allege sufficient facts" establishing that the Secret Service had "adopted, endorsed, or implemented some policy or practice that constitutes an ongoing failure to abide by the terms of FOIA." Judicial Watch appealed that ruling to the D.C. Circuit.

The D.C. Circuit first recognized a policy or practice claim in *Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1988), and reaffirmed it in *Newport Aeronautical Sales v. Dept of Air Force*, 684 F.3d 160 (2012). Both cases involved Air Force policies denying access to data under Exemption 4 (confidential business information) resulting in delay for the requesters who had to challenge the denials administratively or, in *Newport Aeronautical Sales*, use a more cumbersome alternative process, before getting the data. Recognizing that access delayed was often tantamount to access denied, the D.C. Circuit in *Payne* ruled that requesters could seek equitable relief for such agency behavior. But courts have been reluctant to equate backlogs with a policy or practice.

The government has often attempted to stretch the D.C. Circuit's holding in *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), that if an agency missed the 20-day statutory time limit in which to respond to a request or to respond to an administrative appeal, a requester had constructively exhausted his or her administrative remedies and could file suit in district court to force the agency to comply. too far, arguing that going to court early is the relief available when agencies miss the deadlines. Here, Rogers pointed out that "the Secret Service interprets FOIA the same way as any statute affording a right that may be vindicated by judicial enforcement; enacting FOIA's directives on pre-litigation requirements thus was unnecessary." Rogers, instead, rejected that notion, pointing out that "as in *Payne*, the plaintiff must allege a pattern of prolonged delay amounting to a persistent failure to adhere to FOIA's requirements and that the pattern of delay will interfere with its right under FOIA to promptly obtain non-exempt records from the agency in the future." Applying that standard to Judicial Watch's complaints, she explained that there was a reasonable inference that "the Secret Service has adopted a practice of delay, contrary to FOIA's two-part scheme, by repeatedly standing mute over a prolonged period of time and using Judicial Watch's filing of a lawsuit as an organizing tool for setting its response priorities."

Rogers criticized Srinivasan for "misreading the record and speculating on how the government might have responded had the complaint not been dismissed, thereby placing a pleading burden on Judicial Watch beyond what Rule 8 requires and flipping to the requester the burden that FOIA places on the agency to explain its delay." She added that "by conjuring up the notion Judicial Watch's requests were 'complex,' our colleague again fails to read the record as it must at this Rule 8 stage. Even on appeal the Secret Service has not characterized Judicial Watch's requests as complex."

In her concurrence, Pillard explained that "in sum, Judicial Watch has plausibly alleged a persistent practice of delay that violates FOIA's mandate to make records 'promptly available.' At the pleading stage, no more is required to support the district court's jurisdiction to consider, in view of the agency's potential justification, any need for equitable relief." She also criticized Srinivasan's dissent, indicating that "his main point is that agencies cannot be expected to respond *post haste* to every one of the thousands of FOIA requests that agencies today receive." However, Pillard noted that "but to assume at the pleading stage that an agency

faces hurdles and can offer rationales that were never pleaded or provided contravenes both Federal Rule of Civil Procedure 12(c) and FOIA itself."

Srinivasan's dissent emphasized that failing to respond within 20 days was not itself a violation of FOIA. He pointed out that "agencies often (and lawfully) take significantly longer than twenty days to process a FOIA request. But an agency that does so, under the court's rationale today, would routinely be subject to an ostensibly viable claim that it has a policy or practice of violating the statute." The lesson Srinivasan took from *CREW v. FEC* was that "an agency invariably will be able to process a request within the twenty-day period. That 'timeline is not absolute.' It is instead only a 'default.' After all, 'it would be a practical impossibility for agencies to process all FOIA requests completely within twenty days.'" In support, he pointed out that the statute allowed agencies to extend their time for responding to a request by claiming unusual or exceptional circumstances. He indicated that "given that the agency can lawfully take additional time to process a request, the mere lapse of the twenty-day period does not establish that the agency has violated FOIA." Srinivasan also found support in the annual report provisions requiring agencies to report requests older than 200-300 days, 300-400 days, or greater than 400 days. These reporting requirements were evidence that "Congress thus envisioned that an agency might, with some regularity, take several hundred days or more – not just twenty days – to process a request." Srinivasan criticized the majority's conclusion that Judicial Watch's requests had been unlawfully prolonged. He observed that "at what point (beyond twenty days) did the agency's response times for the requests in this case become unlawfully prolonged? My colleagues do not say. And it is unclear how a district court is to make that determination." (*Judicial Watch, Inc. v. United States Department of Homeland Security*, No. 16-5339, U.S. Court of Appeals for the District of Columbia Circuit, July 17)

Court Upholds D.C. Circuit Ruling On Agency Control of Visitors' Records

A federal court in New York has accepted the D.C. Circuit's rationale that logs showing visitors to presidential and vice-presidential residences are presidential records subject to the Presidential Records Act and not agency records subject to FOIA because the Memorandum of Understanding creating the records indicates that the White House intended to exercise control over the records after they had been used by the Secret Service for the limited purpose of granting entry to visitors. Judge Katherine Polk Failla of the Southern District of New York found that the 2006 MOU that had convinced the D.C. Circuit of the extent of White House control over the records had since been revised to emphasize that point even more emphatically. Failla noted that visitors' records for Trump's Mar-a-Lago residence did not qualify as agency records either. She also dealt with the impact of settlement in a case brought by Public Citizen against the Secret Service for visitors' logs for EOP agencies – like OMB and the Office of Science and Technology Policy – that are subject to FOIA.

Whether information about who visits the White House is subject to public access was largely untested until both CREW and Judicial Watch separately filed suit challenging the Obama administration's decision to provide limited access to visitors' logs on a three-month time delay. While the Bush Administration had categorically refused to disclose such information, arguing that they were presidential records not subject to FOIA, the Obama administration pursued a compromise, still insisting that the records were presidential records, but exercising its discretion to release on a delayed basis. CREW and Judicial Watch challenged that policy, arguing that the Secret Service created and used Access Control Records under the Worker and Visitor Entrance System, and exercised custody and control of those records. The district court judges hearing their cases ruled that the Secret Service's use of the records for agency purposes made them agency records, although they might be subject to redaction under Exemption 5 (privileges). The government appealed to the

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D.C. Circuit, which ruled in *Judicial Watch v. Dept of Homeland Security*, 726 F.3d 208 (D.C. Cir. 2013), that although the Secret Service had obtained the records for purposes of the Supreme Court's four-factor standard in *Dept of Justice v. Tax Analysts*, there was no evidence that the agency intended to continue its control over the records. Despite the ruling in *Judicial Watch*, the Obama administration continued to make visitors' logs public on a delayed basis. However, the Trump administration indicated that visitors' logs would no longer be made public and would be treated as presidential records instead. In an attempt to avoid the effects of the D.C. Circuit decision, the National Security Archive, CREW, and the Knight First Amendment Institute filed suit in the Southern District of New York, urging the court to find that visitors' records were subject to FOIA. Their request for visitors' logs included any meetings at Trump Tower after Trump was elected, as well as records of meetings at Mar-a-Lago.

The National Security Archive, CREW, and the Knight First Amendment Institute argued that the D.C. Circuit's holding in *Judicial Watch* was inconsistent with the Supreme Court's four-factor test from *Dept of Justice v. Tax Analysts* for determining whether a record qualified as an agency record, particularly on the issue of intent to control the records. But Failla indicated that the Supreme Court's ruling in *Kissinger v. Reporters Committee*, 445 U.S. 136 (1980), as well as the Second Circuit's ruling in *Main Street Legal Services v. NSA*, 811 F.3d 542 (2d Cir. 2016), "looked to the President's intent in determining whether a governmental entity created in part by the President is an agency subject to FOIA." She also rejected the argument that *Judicial Watch*'s consideration of the extent to which an agency could use and dispose of a record as it saw fit would undercut the application of Exemption 1 (national security) and Exemption 3 (other statutes). She pointed out that the argument "fails to displace the probative value of considering an agency's ability to use and disclose of a record in determining whether that agency controls such record."

Failla found that a new MOU from 2015 made clear that the White House intended to control the records. She quoted from the 2015 MOU, which states that "all records created, stored, used, or transmitted by, on, or through the unclassified information systems and information resources provided to the President, Vice President, and EOP" – which includes WAVES and ACR records – "shall remain under the executive ownership of the President, Vice President or originating EOP component." She pointed out that "these considerations, and particularly the later restrictions on the Secret Service, compel a finding that the White House (rather than the Secret Service) controls the WAVES and ACR records, as they indicate that the Secret Service's ability to utilize and dispose of these records is subject to constraints imposed by the White House that were not present at the time that the D.C. Circuit decided *Judicial Watch*."

Having found that the Public Citizen settlement with the Secret Service for access to visitors' records for EOP components subject to FOIA did not affect her ability to address those records here, Failla agreed with the general parameters of the settlement. She noted that "although the Secret Service does not exert sufficient control over WAVES and ACR records of visits to the President or EOP components that advise and assist the President, the reasoning underlying that conclusion does not extend to WAVES and ACR records of visits to members of EOP components that are themselves subject to FOIA." She added that "to the extent that any WAVES or ACR record from an EOP Agency Component contains information that would not constitute agency records in light of its connection to the President, Defendants may redact such information."

Turning to the Mar-a-Lago records, Failla indicated that Presidential Schedules for visitors to Mar-a-Lago did not qualify as agency records. Further, she found that the plaintiffs did not have a remedy under either the Federal Records Act or the Presidential Records Act for operational records concerning record-keeping practices at Mar-a-Lago. (*Kate Doyle, the National Security Archive, Citizens for Responsibility and Ethics in Washington, and Knight First Amendment Institute at Columbia University, v. U.S. Department of Homeland Security, et al.*, Civil Action No. 17-2542 (KPF), U.S. District Court for the Southern District of New York, July 26)

Views from the States…

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

California

A court of appeals has ruled that under the California Public Records Act, a requester may only recover attorney's fees from a public agency and cannot recover fees as a result of litigation against a third-party that sues to block disclosure by asserting privacy rights or legal privileges. The case involved a request by the *Sacramento News and Review* for records concerning former Sacramento Mayor Kevin Johnson's use of city resources in the take over and eventual bankruptcy of the National Conference of Black Mayors. In processing the request, the City found emails sent to Johnson by the law firm of Ballard Spahr, which represented the National Conference in its bankruptcy proceedings and Johnson and the National Conference during litigation related to Johnson's contested election as the president of the National Conference. The City contacted Ballard Spahr and informed the law firm that it might consider some of the emails privileged in the context of its representation of Johnson, but that since the City had no authority to claim the privilege on behalf of the law firm the City would be required to disclose them if ordered to do so by a court. The law firm contacted the newspaper and asked if it would agree to allow the City to claim privilege for the emails. The newspaper refused, and the law firm filed for an injunction on behalf of Johnson and the National Conference to block disclosure of 158 records it considered privileged. That figure was narrowed to 113 records, and after an in camera review, the trial court ordered disclosure of 58 emails in full and 17 with redactions. The trial court found 38 emails were privileged. The newspaper then filed for attorney's fees, arguing that Johnson's role as Mayor of Sacramento was integral to his involvement with the National Conference. The trial court ruled against the newspaper, finding that the PRA only allowed for recovery of fees against a public agency. On appeal, the newspaper argued that *Fontana Police Dept v. Villegas-Banuleos* (Cal. App. 1999), in which a court of appeals ruled that prohibiting a fee award when the requester successfully prevailed against a third party trying to block disclosure would allow agencies to circumvent the statute. But the appeals court pointed out that the California Supreme Court's decision in *Filarsky v. Superior Court*, 49 P. 3d 194 (2002), finding that litigation under the PRA could only be brought by the requester against a public agency, served to overrule the finding in *Fontana*. The appeals court observed that "here, the City did not withhold public records from the newspaper, thus the newspaper could not initiate litigation under the exclusive procedure provided in the Act. Because the newspaper did not bring an action against the City to compel disclosure of public records, it is not entitled to attorney fees under those provisions." The newspaper argued that the City should have opposed Johnson's action to block disclosure. But the court of appeals noted that "the City's determination that it must disclose the requested emails was a determination of its own responsibilities under the Act, not a determination of an interested party's ability to keep the records from disclosure." The court rejected the newspaper's contention that Johnson's position as Mayor overlapped with his role with the National Conference. The court of appeals pointed out that "the inter-related positions, however, did not transform all of Johnson's actions with regard to the National Conference into actions of Johnson the public official. Johnson's claim of privilege over the emails stemmed from his position as the president of the National Conference and not from his position as mayor of the City. Johnson did not abandon his right to privacy or his right to assert the attorney-client privilege when he was elected mayor." (*National Conference of Black Mayors, et al. v. Chico Community Publishing, Inc.*, No. C083956, California Court of Appeal, Third District, July 25)

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Louisiana

A court of appeals has ruled that a trial court did not err when it found that the St. Tammany Parish Government occasionally acted dismissively towards multiple requests from Terri Stevens. The appeals court noted that "with regard to [one of Stevens' requests], the trial court determined that the Parish arbitrarily withheld contracts and insurance certificates. The contracts were produced three months after the Parish offered to produce them, and the insurance certificates were ultimately produced at trial. . .[U]pon our review, we cannot say that these findings are manifestly erroneous or clearly wrong." While disagreeing with the trial court's ruling awarding Stevens $20,000 in attorney's fees, noting that "under the unique facts of this case, we would not have found an award of attorney fees appropriate if sitting as the trial court, we are unable to say that the trial court abused its discretion in making said award. Further, with regard to the amount of attorney fees awarded, we cannot say the trial court abused its vast discretion." Upholding most of the trial court's decision, the appellate court awarded Stevens an additional $6,234 for her appeal. (*Terri Lewis Stevens, et al. v. St. Tammany Parish Government*, No. 2017 CA 0959, Louisiana Court of Appeal, First Circuit, July 18)

Maryland

In its third decision concerning multiple requests by Gary Glass, whose 2010 traffic ticket from off-duty Anne Arundel County police officer Mark Collier engendered a flurry of requests, followed by litigation, from Glass pertaining to, first, Collier's personnel records, and then personnel records for all Anne Arundel County police officers, a court of appeals has ruled that, while named police officers' internal affairs investigation reports are protected by the personnel records exemption, Anne Arundel County has not yet sufficiently explained why Glass' request for personnel records more broadly are categorically exempt, and, further, why those records cannot be disclosed after being redacted. The appeals court noted that "the underlying requests were *not* directed to a specifically identified [Internal Affairs] file, nor did they focus on any particular person or even such that production of redacted records could not conceal the identity of an individual officer. Mr. Glass requested every IA report compiled over the span of nearly a decade. Thus, the [Maryland Public Information Act's] personnel records exception which permits the County to deny an IA report *in its entirety* without a severability review is inapplicable to Mr. Glass' broad, unspecific records request." As to the issue of severability, the court observed that the agency's affidavit "was overly conclusory and that the County failed to satisfy its burden of particularizing which sections of the IA reports were exempt under which provisions of the MPIA. The County also failed to demonstrate that severability was not practical to justify the nondisclosure of the entirety of each of the 748 records." (*Gary Glass v. Anne Arundel County, et al.*, No. 918 Sept. Term 2015, Maryland Court of Special Appeals, July 18)

Michigan

A court of appeals has ruled that records sent by an engineering consultant to the city attorney for the Village of Clarkston do not qualify as agency records because they were never read or relied upon by the city attorney. Susan Bisio argued that the city attorney acted as the agent for Clarkson, meaning that his work was considered that of the city itself. Dismissing Bisio's claim, the appeals court noted that "the records at issue in this case have remained in possession of the city attorney. There is no evidence suggesting that he has shown them to the city council, that council members have used them for the basis of a decision, or even that the letters sent and received have resulted in an agreed-upon proposal that the city attorney could submit for the council's consideration." (*Susan Bisio v. City of the Village of Clarkston*, No. 335422, Michigan Court of Appeals, July 3)

The Federal Courts…

Judge Christopher Cooper has ruled that the Department of Justice may not invoke a ***Glomar* response** neither confirming nor denying the existence of records for documents concerning whether there had been any attempts to revisit earlier Office of Legal Counsel opinions pertaining to the scope of presidential authority to revoke a predecessor's monument designation under the Antiquities Act, particularly in light of a 2017 report prepared for the American Enterprise Institute by former OLC attorney John Woo arguing that OLC opinions from 1938 and 2000 interpreting the Antiquities Act were incorrectly decided. In responding to requests from Western Values Project, DOJ based its *Glomar* response on **Exemption 5 (privileges)**. Cooper began by noting that "the Department's assertion of a *Glomar* response here is unusual. There is no ruling on – let alone approving – a *Glomar* response relying on Exemption 5. Indeed, the government cites only one case in which the government even *asserted* such a response. The absence of authority alone does not doom the Department's argument. But it is a striking absence given the frequency of requests for records (and subsequent litigation) about OLC's legal opinions. If disclosing the mere existence of OLC's and other agencies' legal opinions is harmful, then why does the Department so frequently issue standard FOIA responses identifying responsive documents?" The agency defended its *Glomar* claim here by arguing that the universe of clients and the subject matter was so specific that even admitting the existence of records would harm legitimate legal privileges. DOJ claimed that acknowledging the existence of the records was protected by the attorney-client privilege, the presidential communications privilege, and the deliberative process privilege. Cooper proceeded to reject all three claims. He noted that the attorney-client privilege would only be breached if the records revealed a communication between OLC and a client agency. He observed, however, that "it would not. The *nonexistence* of a responsive record would reveal no such communication: the fact that a client never requested advice about an issue does not expose anything remotely approaching a protected attorney-client communication." He pointed out that "even if the request were in fact limited to a narrow set of clients, the mere existence of a communication between OLC and *some unspecified agency* about efforts to revisit an old OLC opinion is not privileged. (By the Department's logic, the fact that an attorney consulted with one of his many clients about a certain issue would be privileged. That is simply not the case)." He indicated that instead of claiming *Glomar*, the agency should redact the name of the client under Exemption 5. Cooper found the presidential communications privilege – which protects communications from and to White House staffers formulating advice for the President—did not apply either. He pointed out that "that fact might reveal something about the executive branch's view of presidential power under the Antiquities Act, or about how the President arrived at any decisions related to national monuments. But the privilege is not so broad as to cover information that merely sheds light on presidential decision-making." Turning to the agency's deliberative process privilege claim, Cooper indicated that "the existence of a responsive record here would show only that OLC engaged in some deliberation, full stop. It would not necessarily reveal the *content* of any deliberations – any details about the agency's 'give-and-take' – surrounding a decision of whether to rescind a prior opinion." He indicated that "the privileges. . .differ in their specifics but share a common purpose: encouraging free and frank communications within the government. That purpose is a mismatch with the justification for allowing *Glomar* responses: that disclosing the *existence* of certain information is harmful." He added: "In short, the Department has not shown that the very fact of these records' existence is privileged so as to fall within Exemption 5." In response to Western Values' request for communications with AEI and Woo, the agency conducted two searches and found no records. Rejecting Western Values' claim that OLC's description of its searches was insufficiently detailed, Cooper found instead that the searches were adequate. (*Western Values Project v. U.S. Department of Justice*, Civil Action No. 17-1671 (CRC), U.S. District Court for the District of Columbia, July 18)

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The Eleventh Circuit has ruled that the Department of the Navy may not refuse to release 12 pages of records to author Thomas Sikes because it had previously disclosed the records in response to an earlier request. The Eleventh Circuit also held that a suicide note left by Adm. J.M. Boorda to his wife is protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)** because the family's privacy interest far outweighs any public interest in shedding more light on the Navy's investigation of Boorda's suicide. Boorda was Chief of Naval Operations when he committed suicide in 1996. He left behind two suicide notes at his home, one addressed to his sailors – which was subsequently made public – and the other addressed to his wife. During its investigation of his suicide, the Navy also recovered six pages of handwritten notes regarding official business in the backseat of his official vehicle. Sikes, who was writing a book on the pressures of holding military office in which Boorda's death figured prominently, filed two FOIA requests with the Navy – one for a list of invitees to Boorda's swearing-in ceremony, and the other for records found in Boorda's vehicle. The Navy provided a copy of the list with names of invitees redacted and refused to disclose the records recovered from Boorda's vehicle as part of its investigation into Boorda's death. After Sikes filed suit, the Navy disclosed an unredacted copy of the list and 11 pages of records, including the notes found in Boorda's vehicle. Sikes then filed eight more FOIA requests for records concerning Boorda, including one for all records retrieved from his vehicle and another for an unredacted version of the Navy's investigation report on Boorda's suicide, which included a copy of his note to his wife. The Navy told Sikes it was not required to respond to his request for all records recovered from Boorda's vehicle because it had already provided those records in response to his previous requests. The Navy also withheld Boorda's suicide note to his wife under Exemption 7(C). The Eleventh Circuit acknowledged that the Navy's argument that it was not required to provide another copy of the records had some "commonsense appeal," noting that "why, after all, should an agency be obliged repeatedly to give the same materials to the same person? The problem for the Navy, however, is that FOIA itself contains nothing that would allow an agency to withhold records simply because it has previously given them to the requester." The Eleventh Circuit pointed out that "the Navy's proposed rule turns principally on *who* has asked for the records. The Navy does not dispute that it would be obligated to produce the records again if someone other than Sikes requested them. The Navy argues that Sikes' second request may be treated differently only because he also made the first request for such documents. But the Supreme Court has made clear that 'the identity of the requesting party has *no bearing* on the merits of his or her FOIA request.'" Rejecting the Navy's claim that it was not required to disclose the records again because Sikes already had access to the records, the Eleventh Circuit observed that "once again, the Supreme Court has rejected the notion that an agency may base its response to a FOIA request on the requester's perceived ability to retrieve records from other sources." Turning to Boorda's suicide note to his wife, the Eleventh Circuit rejected Sikes' claim that further disclosure was in the public interest. Pointing out that Boorda's note to the sailors had already been made public, the Eleventh Circuit explained that "whatever amount the additional note might contribute to the understanding of such issues likely pales in comparison to the degree to which the note would invade the Boordas' privacy." (*Thomas W. Sikes v. United States Department of the Navy*, No. 17-12421, U.S. Court of Appeals for the Eleventh Circuit, July 19)

Judge Colleen Kollar-Kotelly has ruled that the Department of State did not **waive Exemption 5 (privileges)** for records pertaining to its decision to allow David Kendall, attorney for former Secretary of State Hillary Clinton, to maintain a flash drive containing emails from Clinton's private server at his law firm. In a case brought by David Brown, Kollar-Kotelly first explained that because Judge Amy Berman Jackson had ordered the agency to conduct further searches in a nearly identical case brought by the James Madison Project she had ordered State to submit the same materials for Brown's litigation as well. Having now received those affidavits, Kollar-Kotelly found that State had not **officially acknowledged** the contents of Clinton's emails by providing them to Kendall in his role as Clinton's attorney and that State had properly withheld records under the deliberative process privilege. Kollar-Kotelly rejected Brown's claim that the

emails were now in the public domain because the agency had provided a copy to Kendall, an outside third-party. She noted that "all Plaintiff has shown is that the State Department disclosed the information to the private attorney for the former Secretary of State at a single outside law firm. There is nothing in the record to suggest that this limited disclosure resulted in the information becoming known to anyone else, let alone to the general public. In fact, the emails in question appear to have been sent to Mr. Kendall as part of a decision to *secure* information at his firm's office. Plaintiff, or any other FOIA requester, would apparently have no way to obtain this information from the public domain despite its having been provided to Mr. Kendall. The logic behind the public-domain doctrine – that FOIA exemptions serve no purpose if the information sought is already public – is simply not applicable under these circumstances." Kollar-Kotelly was not persuaded by Brown's argument that State had improperly withheld records under the deliberative process privilege because they were created by other agencies like the Department of Justice or the National Archives. Instead, she noted that "the involvement of other agencies does not prevent Defendant from invoking Exemption 5 and the deliberative process privilege. Exemption 5 does not apply only to correspondence sent within a single agency. It expressly applies to 'inter-agency' as well as 'intra-agency memorandums or letters.' It is not limited to communications only within one agency within the Executive Branch. Accordingly, the fact that this document constitutes a communication between members of two agencies does not preclude the application of the deliberative process privilege." As to an email from NARA to DOJ that was forwarded to the State Department, Kollar-Kotelly pointed out that "even assuming that the portions of the documents were written by an attorney outside of the State Department, that simply does not defeat the assertion of the privilege. Legal advice does not lose its protected status simply because it incorporates statements from outside sources. Attorney work product and attorney-client communications do so routinely." (*David W. Brown v. Department of State*, Civil Action No. 15-01459 (CKK), U.S. District Court for the District of Columbia, July 12)

Judge Christopher Cooper has ruled that the Department of Labor ultimately conducted an **adequate search** for records concerning an investigation of a fire at an Ohio natural gas facility that killed Sheila Butler's husband and properly withheld information under **Exemption 4 (confidential business information), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)**, although he ordered the agency to segregate and disclose the appendix of a Master Service Agreement after finding it did not qualify under Exemption 4. Butler's husband was killed while working for Buffalo Gap Instrumentation and Electrical Company at a facility owned by Caiman Energy. The Occupational Safety and Health Administration investigated the fire. Butler had filed a wrongful death suit against Caiman Energy. As a result, she requested copies of records related to the OSHA investigation of the fire. The agency withheld records pertaining to Caiman Energy's "Lockout/Tagout" procedures – safety protocols designed to ensure that industrial equipment is disabled while it is being serviced – claiming disclosure would cause Caiman Energy competitive harm. DOL provided an affidavit from Caiman Energy's chief executive to support its competitive harm claim. Butler argued that because the lockout/tagout procedures had been adopted as a result of OSHA regulations their existence was not confidential. But Cooper observed that "just because the Department's regulation and standards are known to the public does not mean the methods by which companies meet those standards are public knowledge as well." The agency also withheld the Master Service Agreement because it contained pricing and cost data. Butler argued that she was entitled to the appendix with the proprietary data redacted. Noting that FOIA required agencies to segregate and disclose non-exempt information, Cooper agreed, pointing out that "Butler does not say how the appendix would be meaningful without the pricing and cost data. But nor does the Department explain how Buffalo Gap is likely to be harmed by the release of the document in redacted form." Butler challenged the applicability of Exemption 7, arguing that the records were not compiled for law enforcement purposes. Cooper sided with the agency, noting that "for Exemption 7 to apply, the agency must have carried out the investigation to determine whether there was 'an identifiable possible violation of law.' OSHA clearly met

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that standard here. It investigated a workplace accident that resulted in Mr. Butler's death to determine whether there were safety-related legal violations at the work site." The agency withheld the witnesses' names and addresses under Exemption 7(C). Upholding that decision, Cooper noted that Butler had articulated no public interest in disclosure of the identifying information. He observed that "indeed, she admits that she seeks the names and addresses not to open up OSHA's activities to public scrutiny, but to aid her wrongful death action against Caiman Energy. And regardless of Butler's personal motivation for seeking this information, the Court concludes that disclosing the witnesses' names and addresses would do nothing to shed light on OSHA's actions." Cooper found the agency had clearly indicated that the witness interviews would be considered confidential. Butler argued that a note indicating that a Caiman Energy attorney requested to be present at OSHA's interview with the company's counsel, waived the confidentiality of the interviews. Cooper disagreed, pointing out that "that note does not support Butler's claim that a Caiman Energy attorney was present at OSHA interviews with Caiman Energy *employee-witnesses*." (*Sheila Darlene Butler v. United States Department of Labor, et al.*, Civil Action No. 16-1115 (CRC), U.S. District Court for the District of Columbia, July 26)

Judge Dabney Friedrich has ruled that the National Archives has not shown that it conducted an **adequate search** for records concerning a decade-old complaint by former NARA employee Maryellen Trautman that then Archivist Allen Weinstein engaged in inappropriate or improper conduct. Trautman's complaint triggered a joint criminal investigation between NARA and the Department of Justice, but no criminal charges were filed. Trautman and author Anthony Clark filed FOIA requests with NARA and Justice. By the time Friedrich ruled, the only remaining issue was whether NARA had conducted an adequate search of its Office of General Counsel, Equal Employment Opportunity Office, and Office of Human Capital. After conducting searches of all those offices, NARA's FOIA Officer concluded that the Office of Inspector General was the only office with responsive records. Trautman and Clark challenged that conclusion, arguing that NARA had failed to sufficiently explain how it searched the other offices. Friedrich noted that the recent D.C. Circuit ruling in *Reporters Committee v. FBI*, 877 F. 3d 999 (D.C. Cir. 2017), "makes clear that an agency declaration's failure to identify both the type of search performed and the terms used to search electronically-stored materials results in a 'principal flaw' even when components, offices, units, or divisions within an agency conduct searches as part of a broader agency search." She explained that based on the reasoning of *Reporters Committee* "NARA must set forth the search terms and the type of search performed with specificity." NARA argued that since it had determined that OIG was the only office with responsive records the searches of the other offices were no longer germane. Friedrich disagreed, noting that "NARA's assertion that the records from the Office of the Inspector General were the only records responsive to the plaintiffs' FOIA request is derived, at least in part, from the searches conducted by NARA's Office of General Counsel, Equal Employment Opportunity Office, and Office of Human Capital. But the Court concludes that it has insufficient information to assess the adequacy of those searches, and if additional searches wind up being necessary, there remains the possibility that NARA might find additional responsive records." (*Maryellen Trautman, et al. v. Department of Justice, et al.*, Civil Action No. 16-1629 (DLF), U.S. District Court for the District of Columbia, July 17)

Judge Trevor McFadden has ruled that the CIA conducted an **adequate search** for records concerning a study of the assassination attempt on Adolph Hitler and properly redacted the one document it located under **Exemption 1 (national security), Exemption 3 (other statutes), Exemption 5 (privileges),** and **Exemption 6 (invasion of privacy)**. The Assassination Archives and Research Center requested the records because of a mention in 1963 Joint Chiefs of Staff briefing that the plot to kill Hitler was being studied in detail as part of then ongoing attempts to overthrow Fidel Castro. The agency located a single 69-page document entitled "Propagandist's Guide to Communist Dissensions" from 1964. The agency redacted the record under a

variety of exemptions. AARC argued that the CIA's historian should have submitted an affidavit rather than its FOIA Officer. But McFadden pointed out that "it is not the duty of this court to 'micro-manage' search efforts (or litigation strategy), particularly when an agency has met its burden of demonstrating a systematic good faith search effort. No statutory provision or court precedent requires affidavits from all government employees involved in the search or dictates who among them should be the affiant." AARC claimed the record should have been subject to automatic declassification. McFadden noted that the CIA had followed its properly adopted declassification guide allowing it to continue to withhold older records that might reveal an active intelligence source. He rejected AARC's claim that Exemption 3 did not apply because most of the guide was public and because of its age, observing that "again, this claim is irrelevant to the legal issue. Even though large portions of the guide are public, the CIA withheld specific information in order to 'protect intelligence sources and methods from unauthorized disclosure.'" AARC argued that Exemption 6 did not apply because of the interest in records related to the Kennedy assassination. However, McFadden pointed out that "the connection between these records and President Kennedy's assassination are tenuous at best, resting on Plaintiff's theory that the Kennedy assassination was motivated by U.S. efforts to assassinate Fidel Castro, efforts that prompted the CIA to study assassination attempts on Adolph Hitler. So this case is two assassinations removed from the assassination of President Kennedy." Finally, AARC argued that the CIA had violated President Donald Trump's statement ordering NARA to complete its disclosure of the remaining JFK Assassination records. McFadden noted that "President Kennedy's assassination records are held by the National Archives, not by the CIA, and so the President's order does not even apply to this case." (*Assassination Archives and Records Center, Inc. v. Central Intelligence Agency*, Civil Action No. 17-00160 (TNM), U.S. District Court for the District of Columbia, July 17)

The Second Circuit has wrapped up litigation brought by the ACLU and the *New York Times* concerning the extent of **official acknowledgment** of drone strikes during the Obama administration by ruling that a fact that remained redacted in District Court Judge Colleen McMahon's public opinion pending a government appeal to the Second Circuit should remain redacted because its disclosure would cause harm to national security interests. McMahon had found that the fact had been officially acknowledged, but left it redacted in her public opinion with the expectation that it would be disclosed after the government had exhausted its appeal. The government's appeal asked the Second Circuit to vacate McMahon's ruling on whether the fact had been publicly acknowledged and to delete those portions of her ruling concerning the public acknowledgment of the fact, as well as the fact itself. The Second Circuit noted that "the fact that the ruling was unnecessary, however, is not a sufficient reason for granting the Government's request to vacate the ruling or leave it redacted from the District Court's public opinion. Appellate courts would rarely have a sufficient reason for vacating a District Court's ruling that has no effect on any operative aspects of the judgment being appealed." But in this case, the court observed, "on balance, vacating and redacting the District Court's official acknowledgment ruling is of minimal significance compared to the risk of injury to important national security interests of the United States in the event that the ruling is upheld and made public." (*American Civil Liberties Union v. Department of Justice, et al.*, No. 17-157, U.S. Court of Appeals for the Second Circuit, July 5)

Judge John Bates has ruled that the Environmental Integrity Project is not eligible for **attorney's fees** for its litigation against the EPA to obtain former Administrator Scott Pruitt's calendars and travel vouchers because EIP's litigation did not cause the agency to disclose them. Although the EPA did not disclose Pruitt's calendars within FOIA's 20-day time limit, it disclosed the travel voucher a month after EIP filed suit and the revised calendars two months later. In the following months, EIP raised questions about some of the redactions and the EPA re-released four revised calendar pages that had been redacted in error, as well as

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removing other redactions as a matter of discretion. At that point, EIP filed a motion for attorney's fees, arguing that its litigation had caused EPA to disclose the records. After reviewing the agency's original summary judgment motion, Bates indicated that "here, it does not appear that EPA did in fact change its position, mush less that the lawsuit caused such a change. . . Nothing in EPA's answer suggests that the agency refused to search for or release responsive documents to EIP prior to EIP's filing of the complaint. Absent evidence in the record to support that EPA only complied because of the lawsuit, the natural inference is that EPA was simply responding to EIP's request by releasing responsive records." EIP argued that EPA's release after it filed suit suggested that its lawsuit caused the agency to disclose the records. Bates, however, pointed out that "EIP does not claim any causal nexus between the Amended Complaint and EPA's disclosures besides temporal proximity, which is insufficient to prove causation." He added that "here EPA did not defend its redactions throughout administrative proceedings and litigation; instead, EPA promptly conferred with EIP and sought to address EIP's concerns. Hence, the connection between this suit and EPA's release of redacted documents is too attenuated to indicate that EIP substantially prevailed and is eligible for attorney's fees." EIP claimed that the agency had not exercised due diligence by failing to respond within the statutory time limit. Rejecting that claim, Bates observed that "given that EPA has not relied on the administrative exhaustion requirement to bar this lawsuit and has been processing and responding to EIP's request before EIP filed its complaint, EPA's failure to adhere to statutory mechanisms does not establish that EIP's lawsuit caused EPA's release of responsive documents." Bates also rejected EIP's contention that his scheduling order constituted a court order. Instead, he noted that "unlike mandating the production of documents by a specific date, ordering the parties to confer on a briefing schedule does not change their legal relationship." *Environmental Integrity Project v. United States Environmental Protection Agency*, Civil Action No. 17-1203 (JDB), U.S. District Court for the District of Columbia, July 25)

Judge James Boasberg has ruled that the Bureau of Land Management has not shown that it conducted an **adequate search** or that it properly claimed **Exemption 5 (privileges)** in response to a request by the Wild Horse Freedom Federation for records concerning the implementation of its Wild Horse and Burro Program. WHFF challenged the agency's search, claiming that the agency had failed to use sufficiently appropriate keywords. Noting that the agency had failed to file any opposition to WHFF's summary judgment, Boasberg ordered the agency to conduct a new search for two subparts of WHFF's request, indicating that "since BLM has never filed any opposition to WHFF's Motion, the Court has no information with which to refute Plaintiff's argument." Turning to the Exemption 5 claims, Boasberg explained that he had conducted an *in camera* review of the records, but because BLM had provided unredacted copies only for a portion of the contested records, he ordered the agency to provide a sufficient explanation for those records for which it had not supplied unredacted copies. He found that three redactions in the documents for which the agency had supplied both a redacted and unredacted copy qualified as deliberative and could be withheld and that one was a factual statement that could not be redacted. As to another redaction, he noted that it "might be covered by the attorney-client privilege, but that has never been invoked, and so it must be turned over as well." (*Wild Horse Freedom Federation v. U.S. Department of the Interior, Bureau of Land Management*, Civil Action No. 17-2237 (JEB), U.S. District Court for the District of Columbia, July 18)

A federal court in New Hampshire has ruled that the FBI properly withheld records from Richard Villar, who was convicted of bank robbery and conspiracy to commit bank robbery, concerning Shauna Harrington, one of Villar's co-conspirators who testified against Villar at his trial under **Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods and techniques)**. Villar requested records about himself, as well as records about Harrington. The FBI divided his request into two separate requests and began processing the request on Villar but declined to process the request on Harrington without her authorization. In response to

Villar's request for records about himself, the agency located 615 pages, released 388 pages, 126 of which contained redactions, and withheld 227 pages entirely. In an earlier procedural ruling, the court found the FBI's *Vaughn* index was insufficiently detailed and ordered the agency to provide a new one. This time the court found the level of detail sufficient. Villar argued that the First Circuit's decision in *Union Leader v. Dept of Homeland Security*, 749 F.3d 45 (1st Cir. 2014), held that arrestees had a diminished expectation of privacy. The court found *Union Leader* did not go that far, holding instead that "arrestees possess a diminished privacy interest in information about their arrests and criminal convictions because that information is a matter of public record. Here, Villar points to no specific information that he seeks that is already in the public record, and a review of the FBI's *Vaughn* index demonstrates that much of the withheld information is likely nonpublic." The court also rejected Villar's contention that his co-conspirators waived their privacy interests in their plea agreements. Here, the court noted that "under the plain terms of the provisions on which Villar relies, his co-conspirators waived the right to *request* documents under FOIA, not the privacy rights that FOIA protects." The court found that Harrington and other sources "were operating with an understanding that their participation would remain confidential." The court upheld the FBI's Exemption 7(E) claims pertaining to bank security measures, statistical information, and monetary payments. Addressing the reason for withholding monetary payments, the court pointed out that "were this strategic information to be disclosed, criminals would have knowledge from which they could infer how much resources the FBI devotes to certain crimes or in certain situations. This, in turn, cold result in criminals changing their activities to reduce the risk of apprehension." (*Richard Villar v. Federal Bureau of Investigation*, Civil Action No. 15-270-LM, U.S. District Court for the District of New Hampshire, July 23)

Judge James Boasberg has ruled that a suit brought by CREW and PEER against the EPA under the **Federal Records Act** may continue but has dismissed one of their claims against the Archivist for failing to investigate EPA's records management policies. In September 2017, CREW sent a letter to the Archivist complaining about EPA's current record-keeping practices and requesting that the Archivist conduct an investigation and make recommendations to bring the agency into line with the FRA. NARA told CREW that it had requested a meeting with the EPA within 30 days but after NARA took no further action, CREW and PEER filed suit in February 2018 claiming the EPA was violating FRA's requirement to create and preserve records, that the agency lacked a proper records-management policy, and that NARA had neglected its duty to investigate and remedy EPA's violations. The government asked Boasberg to dismiss the suit for failure to state a claim. Boasberg explained that under D.C. Circuit precedent interpreting the FRA, private parties could not bring suit alleging agencies had improperly destroyed or removed records but could bring suit challenging whether agency guidelines permitting the destruction of certain records were adequate under FRA or alleging that an agency head or the Archivist had improperly refused to seek an enforcement action by the Attorney General. The government argued that because the FRA did not allow a private party to challenge agency destruction of discrete records it also prohibited such challenges to record management policies. Boasberg disagreed, noting that "the Court does not find 'clear and convincing evidence' that Congress intended to preclude judicial review of a practice of refusing to create records." He pointed out that "plaintiffs, prolific FOIA requesters, clearly have an interest in the creation of records, and the availability of such records is critical to their missions. . . Given the multitude of records that may require creation, it is also safe to assume that Congress did not intend the Archivist's monitoring capabilities to completely protect against all improper agency practices." After reviewing EPA's records management policy, Boasberg noted that "plaintiffs pass the pleading hurdle with little effort. . .Plaintiffs' allegations that the program is insufficient under the FRA, therefore, is a plausible claim upon which this Court can grant relief." Boasberg dismissed the third claim against the Archivist for failing to remedy EPA's alleged FRA violations. He noted that the complaint "never alleged that the Archivist made a finding (formal or otherwise) of a *violation*. True, CREW sent a letter notifying him of what *it thought* were FR-compliance issues. The Complaint, however,

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never states that the Archivist replied or indicated in any way that a violation had occurred." He indicated that "plaintiffs' failure to allege that the Archivist made any actual finding of a violation – the condition precedent for [its FRA] obligations – is fatal to Count III." (*Citizens for Responsibility and Ethics in Washington, et al. v. Scott Pruitt, et al.*, Civil Action No. 18-406 (JEB), U.S. District Court for the District of Columbia, July 24)

Judge Trevor McFadden has ruled that the Department of State and the National Archives have shown that since there is no possibility of retrieving emails from former Secretary of State Colin Powell's AOL account, the **Federal Records Act** suit brought by Cause of Action demanding that the Attorney General conduct a forensic search of AOL's servers is pointless and should be dismissed. As part of the search to uncover deleted emails from former Secretary of State Hillary Clinton's email server, Powell admitted that he had conducted agency business using his AOL account. In an FRA suit brought by Judicial Watch, the D.C. Circuit found State had violated the statute by not pursuing an action by the Attorney General, even though the FBI had already conducted its own forensic search in an attempt to recover any more of Clinton's emails. On remand, the district court found that under the circumstances there was nothing more that could be done to retrieve more of the emails and dismissed the case. However, Cause of Action sued to pursue the Powell emails. Even though Oath, Inc., the successor to AOL, told State that Powell's emails no longer existed on AOL's servers, McFadden found that was not enough to defeat Cause of Action's claim. This time, however, Oath, Inc. provided a sufficient explanation to overcome McFadden's earlier reluctance to dismiss the case. Regardless of the futility of its claim at this point, Cause of Action argued that the FBI could have conducted a forensic search of AOL's servers in an attempt to uncover Powell's emails. McFadden indicated this was too much, observing that "but that solution – forensically searching the physical servers of a large company – would be like embarking on a search 'for specific grains of sand on a beach' without even knowing if the relevant grains of sand still exist." Dismissing the case, McFadden pointed out that "by establishing that Secretary Powell's missing emails cannot be obtained through Secretary Powell himself, his devices, or his service provider, the Government has established the fatal loss of these federal records. Although Cause of Action suggests the Attorney General could begin a forensic search of Oath's physical servers to find the lost data, success in that endeavor is speculative, not likely. As with Secretary Clinton's emails, the remote possibility of success is made even more remote because the emails may not exist, and the Government questions whether the Attorney General would have a legal basis for ordering such a search. With these federal records apparently fatally lost, I perceive no substantial likelihood that referral to the Attorney General will yield any fruit." (*Cause of Action Institute v. Michael R. Pompeo and David S. Ferriero*, Civil Action No. 16-02145 (TNM), U.S. District Court for the District of Columbia, July 20)

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