Volume 44, Number 17
September 5, 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: As part of opposition research into former CIA officer Abigail Spanberger, the Democratic challenger to Rep. Dave Brat (R-VA), America Rising received an unredacted version of Spanberger's SF-86 form submitted years earlier as part of a background check to obtain a security clearance for a job as a postal inspector in response to its FOIA request to the National Personnel Center. NPC referred the request to the Postal Service, which apparently disclosed an unredacted version to America Rising. Spanberger herself did not learn about the disclosure until an Associated Press reporter covering the campaign told her he had received the material as part of a backgrounder from the Congressional Leadership Fund, which works on behalf of Republican candidates.

Court Rules Physician Data Not Protected by Exemption 4

Judge Raymond Moore of the U.S. District Court for the District of Colorado, after conducting a rare Exemption 4 trial has ruled that records containing the zip codes for board-certified physicians in Colorado used by the Department of Labor in assessing workers compensation claims are not protected by Exemption 4 (confidential business information) because Elsevier, the company from whom the agency obtained the information as part of a subscription database, failed to show that the information was not available to the public under the *Critical Mass* standard. However, Moore rejected the argument made by Blake Brown, the lead plaintiff for a group of individuals who had suffered on-the-job injuries while working for the federal government, that the information was in the public domain because even though such information might be available online or in published directories the plaintiffs had not shown that the information on these specific physicians was publicly available.

In an attempt to find out more about how the agency decided which physicians to use, Brown and the other plaintiffs requested records showing the names and geographical locations of referee physicians in Colorado. The agency withheld much of the information under Exemption 4 and Exemption 6 (invasion of privacy). Moore originally ruled in favor of the agency on both claims, but on appeal the Tenth

ACCESS REPORTS

Circuit ruled that there were enough unanswered questions about whether the information was confidential that the district court should hold a trial. The agency claimed that the physician data was confidential because it came from Elsevier's proprietary database, which restricted subscribers from sharing information with non-subscribers. Joann Amore, the director of Elsevier's professional certification directory business, testified Elsevier's database included information on physicians who did not want their data shared with subscribers.

Moore faulted the agency for waiting until the beginning of the trial to drop its Exemption 6 claims altogether, and, further, to agree to disclose to Brown and the other plaintiffs all of the data points it had previously claimed were protected. The agency argued that its willingness to disclose all the records made the case moot. Moore, however, drew a distinction, noting that *Anderson v. Dept of Health and Human Services*, 3 F.3d 1383 (10th Cir. 1993), made clear that "a FOIA case is moot when the government produces all requested documents. *Anderson* does not say that a FOIA case is moot when the government decides to throw in the towel but not produce documents. Obviously, ordinarily the two go hand-in-hand – the government drops its arguments and produces documents at the same time. Unfortunately for defendants, this is the odd case in which the two are not hand-in-hand." As a result, Moore decided the case was not moot and proceeded to address the Exemption 4 claims.

Moore surprised the government by announcing that the *National Parks* test, which analyzes whether or not disclosure will cause substantial competitive harm to the submitter and applies when information is submitted because it is required, did not apply in these circumstances because the information in Elsevier's database had been supplied to the government voluntarily under a subscription agreement. Instead, Moore explained that the *Critical Mass* standard -- adopted only by the D.C. Circuit and the Ninth Circuit but referenced by the Tenth Circuit in its decision in this case—was a more logical way to analyze the issue of confidentiality. Under *Critical Mass*, information provided voluntarily is confidential "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Although the agency had relied solely on *National Parks*, arguing that Elsevier had provided its information under a contractual agreement restricting disclosure, Moore found the principles underlying the *Critical Mass* test much more applicable here. Moore emphasized that the basis for the *Critical Mass* standard "is that of encouraging cooperation with the Government by persons having information useful to officials." However, the agency argued that it needed "continued reliability" of data, while Moore pointed out that the value of Elsevier's database services was its "continued availability," which would not be impaired by whether or not the information was publicly available. Moore indicated that "defendants *purchase* information from Elsevier. The licensing agreement provides that Elsevier is *granting* defendant a license to use the Database. The licensing agreement does not provide that the license is being granted because defendants or the law require it, but, instead, because defendants are paying for it. In no reasonable sense can purchasing the Database from Elsevier or Elsevier granting defendants the right to use it be considered Elsevier involuntarily turning the Database over to defendants."

One of the rationales for the bifurcated voluntary/involuntary distinction in *Critical Mass* was to make it easier to withhold information that was not required to be submitted. Soon after the *Critical Mass* decision, the Justice Department took the position that the majority of information provided to obtain a government contract was required and should be considered submitted involuntarily. Nevertheless, the government still receives a considerable amount of information submitted voluntarily which could qualify under the more lenient *Critical Mass* standard defaulting to the submitter's customary practice of confidentiality as the measure for non-disclosure.

But here, Moore concluded that Elsevier's printed and online directory sales to public libraries indicated that Elsevier was not concerned with keeping such information confidential. Moore recognized that licensing to institutions like hospitals qualified as limited protected disclosures that could not be considered public disclosures. However, Moore pointed out that Elsevier licensed online directories to public libraries with the only restriction on access being that an individual was a patron of the library. He explained that "whatever restrictions there may be would seem insufficient to consider information available in a public library as not having been released to the general public." He added that "the fact of the matter is, though, that defendants did not argue that information available in a public library should not be considered a release to the general public." Based on Amore's testimony that Elsevier sold its products to public libraries, Moore observed that "as far as the Court is concerned, those are customs."

Moore turned to a determination of when information customarily disclosed by companies qualified as "of a kind" for purposes of the *Critical Mass* standard. Relying on *Center for Auto Safety v. NHTSA*, 244 F.3d 144 (D.C. Cir. 2001), the only D.C. Circuit case discussing the meaning of terms like "customary" and "of a kind" in the context of the *Critical Mass* standard, Moore found that "the information available to the general public, particularly in Elsevier's printed books, is evidence of the customary release of the [name and geographical location] information licensed to defendants because the latter is 'of a kind' with the former. For sure, the information available in Elsevier's printed books is not in every sense identical to the information licensed to defendants. . .The information, though, does not need to be identical." He added that "merely because Elsevier's printed books may have contained information on less doctors, does not mean that the type of information provided as to those doctors was different to the type of information provided to defendants." Moore observed that "ultimately, *Critical Mass* asks whether the information provided to the government is 'of a kind' with information that would customarily not be released. Here, the Court concludes that the answer to that question is 'no' because the information Elsevier licensed to the government is 'of a kind' with information that Elsevier has released to the general public." Moore dismissed Brown's public domain argument, finding that D.C. Circuit case law on official acknowledgement required the plaintiffs to show the information in the public domain was identical to that being withheld by the agency. (*Blake Brown, et al. v. United States Department of Labor, et al.*, Civil Action No. 13-01722-RM-NRN, U.S. District Court for the District of Colorado, Aug. 31)

Views from the States…

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

Florida

After ruling in July that a coalition of media plaintiffs was entitled to the surveillance video taken at Marjory Stoneman Douglas High School during a school shooting in which 16 students and teachers were killed, the same court of appeals has rejected the media coalition's request for attorney's fees, finding that the school district did not act unreasonably in denying access based on the security plans exemption. The appeals court also found that although the state attorney's office had also argued that the videotape was protected by the ongoing criminal investigation exemption because the state attorney's office never had custody and control of the videotape it could not have disclosed it independently. Noting that the threshold requirement for an award of attorney's fees was if the public body had unlawfully withheld records, the appeals court pointed out

ACCESS REPORTS

that "the School Board's objection to the video footage was not 'unlawful' because it was based on the 'security plan' exemption from disclosure. . .The School Board's refusal to permit disclosure was required by statute; it could not therefore be 'unlawful' within the meaning of the [statute]. Only a 'court of competent jurisdiction' may determine whether the 'good cause' statutory exception applied to require disclosure. The School Board's conduct did not become 'unlawful' because it pursued this unsettled area of the law on appeal." Turning to the state attorney's office, the appeals court observed that "the State Attorney did not violate a provision of the Public Records Act in failing to permit a public record to be inspected or copied because the State Attorney was never the agency responsible for maintaining the public record or complying with Public Records requests." (*State Attorney's Office of the Seventeenth Judicial Circuit, et al. v. Cable News Network, Inc., et al.*, No. 4D18-1335 and No. 4D18-1336, Florida District Court of Appeal, Fourth District, Aug. 8)

Minnesota

A court of appeals has ruled that a video of an altercation between two students in the hallway at St. Louis Park High School captured by the school's security camera qualified as an educational record under the Minnesota Government Data Practices Act and need not be disclosed to the Echo newspaper. The day after the altercation took place, Echo requested the footage. While the school district does not archive such videotapes, it keeps the video footage until the tape needs to be re-looped. As a result, the school district downloaded the footage, but then denied access under both the Data Practices Act and the Federal Educational Rights and Privacy Act. Echo sued and the trial court ruled in favor of the school district. On appeal, the appellate court upheld the trial court's decision. Echo argued that the video footage did not qualify as educational data because the school district did not routinely maintain the footage. The appeals court disagreed, noting that "here, because the hallway video was stored and accessible for at least one day after the incident, we conclude that the security video was 'maintained' within meaning of the MGDPA." Echo also argued that the term "relates to a student" was ambiguous. The appeals court, however, concluded that "'relates to a student' is not ambiguous and that it covers data that has a relationship or connection with a student. We also conclude that a security video depicting identifiable students allegedly involved in an altercation 'relates to a student' within the meaning of the statute." (*Echo Newspaper v. St. Louis Park Public Schools*, No. A17-1967, Minnesota Court of Appeals, Aug. 13)

New Jersey

The supreme court has ruled that a video of a traffic incident in which a motorist was attacked by a police dog that was captured on a mobile video recorder used by police officers of the Barnegat Township pursuant to an order issued by the local chief of police is not a public record under the Open Public Records Act because its creation is not required by law. After a motorist failed to stop when signaled by a Tuckerton Borough police officer, the failure resulted in a police chase that was joined by officers from nearby Barnegat Township. The driver pulled into the Barnegat Township municipal building parking lot, where she was accosted by a police dog accompanying a Tuckerton police officer. That incident was captured by the Barnegat Township MVR. After reading about the incident in a local newspaper, John Paff requested the video. The Ocean County Prosecutor's Office denied access to the video, arguing that its creation was not required by law, and that it was protected under the ongoing investigation and personal privacy exemptions. The trial court rejected all three claims. At the appeals court, the majority agreed with the trial court, noting that a statute recognized local police orders as having the effect of law. The dissent, however, found that such a local order did not have the force of law and that, thus, the videos were not subject to disclosure under OPRA. But when the case reached the supreme court, a majority of justices sided with the dissent from the appellate court, finding that the local order did not have the effect of law, although also agreeing that neither the ongoing investigation nor the privacy exemption applied. The supreme court majority noted that the

statute cited by the appellate court majority to support its conclusion that the local police order had the force of law "empowers a municipality to create a police department, and to appoint a police chief as the head of that department, and generally describes the duties of a police chief. It does not grant to a municipal police chief authority analogous to the Attorney General's statutory power to adopt guidelines, directives, and policies that bind law enforcement throughout our State." The supreme court majority also rejected the claim made by the dissent that a 1981 amendment to the statute provided such authority. Instead, the majority pointed out that "it does nothing to invest police chiefs with the authority to impose binding legal obligations on their subordinates." The majority added that expanding the binding authority of local orders would mean that the criminal investigatory records exemption "would be limited to criminal investigatory records that are not addressed in any order or instruction from a police chief to his or her officers. In short, the vast majority of criminal investigatory records would fall outside of the exemption for such records." The majority noted that the ongoing investigation exemption did not apply in these circumstances because the Prosecutor's Office had not shown that there was no public interest in the disclosure of this particular video. The majority also rejected any claim that the driver had an expectation of privacy. Having found that the records were not subject to disclosure under OPRA, the majority remanded the case back to the trial court to consider whether or not Paff had a common law right of access. (*John Paff v. Ocean County Prosecutor's Office*, No. 1-17-16, New Jersey Supreme Court, Aug. 13)

A court of appeals has ruled that although the Passaic County Prosecutor's Office violated the Open Public Records Act when it initially refused to disclose a redacted version of a 911 call that resulted in the Wayne police negotiating with a young man who experienced a psychotic event and held his mother hostage at knifepoint and ended with the police accidentally wounding the hostage. The 911 call was made by the young man's sister, who was not at her mother's home at the time of the call but was worried about her brother's potential behavior. After the North Jersey Media Group requested the 911 call, the prosecutor refused to disclose it, contending that because it involved domestic violence it was protected from disclosure under the Domestic Violence Act. After NJMG sued, the trial court reviewed the transcript of the call *in camera* and found that all but the sister's name, who was the only person identified in the call, could be disclosed under NJMG's common law right of access. But the trial court concluded that NJMG was not entitled to attorney's fees because the redactions made by the prosecutor's office were appropriate. NJMG appealed. The appellate court largely agreed with the trial court's ruling except to note that a redacted non-identifying version of the 911 call should have been disclosed at the beginning. To the extent that the delayed disclosure violated OPRA, the appellate court found that NJMG was entitled to attorney's fees. Remanding the case back to the trial court for a determination of attorney's fees, the appeals court noted that "if the requestor prevails in an OPRA proceeding, the requestor is entitled to counsel fees even if the custodian acted in good faith, did not willfully violate OPRA, applied a reasonable if erroneous interpretation of the statute, or faced conflicting judicial decisions. . .If the custodian incorrectly applies the exemption or balancing test, there is an OPRA violation and counsel fees are appropriate." (*North Jersey Media Group v. Passaic County Prosecutor's Office*, No. A-2016-16T1, New Jersey Superior Court, Appellate Division, Aug. 17)

Tennessee

A court of appeals has ruled that the Solid Waste Board of Hamblen County/Morristown violated the Tennessee Public Records Act when it delayed responding to Linda Noe's request for various documents in electronic format to be discussed at the Board's June 17, 2016 public meeting. The director of the board told Noe that because his assistant was on vacation until June 14, he could not get the records together before then. Noe went to the Board office June 14 and filled out a records request form. She appeared at the office again on June 15 and June 16 but was unable to get all the records. She then filed suit. Several days later, the Board's attorney provided all 77 pages of records. The trial court dismissed the suit, finding that under the

circumstances the Board had responded as soon as practicable. The appeals court reversed, noting that "the three documents that Ms. Noe initially sought. . .could easily be located in the office, such that access or an opportunity to inspect them should have been granted." The court observed that "given their ready availability, access to [the documents Noe requested] was practicable. [The director's] failure to make these documents available for inspection and copying when they were easily accessible in the Board's office when Ms. Noe went to his office three consecutive days prior to the June 17 Board meeting does not fulfill the purpose or requirements of the TPRA." (*Linda C. Noe v. Solid Waste Board of Hamblen County/Morristown*, No. E2017-00255-COA-R3-CV, Tennessee Court of Appeals, Aug. 8)

The Federal Courts...

Judge Amit Mehta has ruled that the Trump-approved declassification of two conflicting memos from the House Intelligence Committee – one written by chair Devin Nunes (R-CA) and the other by ranking minority member Adam Schiff (D-CA) – constitute public acknowledgement that the FBI had a copy of the Steele Dossier and had briefed Trump on the allegations while he was President-elect. Mehta admitted that he was caught in a procedural bind because the James Madison Project and Politico reporter Josh Gerstein had already appealed Mehta's earlier ruling that Trump's tweets as of that time did not provide public acknowledgement that the FBI had briefed Trump on the contents of the Dossier to the D.C. Circuit. Having done that, Mehta no longer had jurisdiction over the case until the D.C. Circuit had considered it. But because of the intervening events pertaining to the disclosure of the Nunes and Schiff memos, he agreed to address how he would rule if the case was remanded by the D.C. Circuit. This time, as he had done a few weeks earlier in a case involving a libel suit brought against BuzzFeed for revealing the contents of the Dossier, he indicated that the Nunes and Schiff memos constituted public acknowledgement of the role played by the FBI in assessing the allegations in the Dossier. The Nunes memo confirmed that former FBI Director James Comey briefed President-elect Trump regarding a summary of the Steele Dossier. Mehta observed that "it is true that the Nunes Memo does not use the word 'synopsis.' But that is not fatal. The context in which the official acknowledgement was made leads to the obvious inference that the FBI possesses the two-page synopsis Plaintiffs seek. Is it reasonable to conclude that the synopsis does not exist or that the FBI does not possess it, even though the FBI has, in the words of the Nunes Memo, undertaken a 'rigorous process to vet allegations from Steele's reporting?' Of course not. No reasonable person would accept as plausible that the nation's top law enforcement agency does not have the two-page synopsis in light of these officially acknowledged facts of its actions." JMP and Gerstein has also requested any evidence that the FBI had attempted to validate Steele's claims. The Justice Department argued that neither the Nunes nor the Schiff memo actually confirmed what steps the FBI took. Mehta found that position untenable. He pointed out that "it is simply not plausible to believe that, to whatever extent the FBI has made efforts to verify Steele's reporting, some portion of that work has not been devoted to allegations that made their way into the synopsis. After all, if the reporting was important enough to brief the President-elect, then surely the FBI thought enough of those key charges to attempt to verify their accuracy." Having rejected the FBI's ability to issue a *Glomar* response, Mehta pointed out that finding did not prevent the intelligence agencies that were not identified in the Nunes or Schiff memos from issuing a *Glomar* response. He noted that "the court does not read Circuit precedent to go so far as to say that the President's acknowledgement of the existence of records by one agency categorically precludes *every* part of the Executive Branch from asserting a *Glomar* response. Rather, if an official acknowledgment is limited to a single component of the Executive Branch, as is the case here, other unrelated components may still invoke *Glomar*." (*James Madison Project, et al. v. Department of Justice, et al.*, Civil Action No. 17-00144 (APM), U.S. District Court for the District of Columbia, Aug. 16)

Judge Reggie Walton has ruled that Catholic Charities may pursue its **policy and practice** claim against U.S. Citizenship and Immigration Services for failing to **segregate** factual information from assessment to refer reports prepared by asylum officers after interviews with asylum seekers, but that several asylum applicants who have been represented by Catholic Charities can no longer pursue policy and practice claims because they have now received the factual portions of their assessments. The agency consistently denied that it had a practice of failing to provide segregable factual portions of assessment reports, but Walton agreed with Catholic Charities that USCIS's FOIA guide stated that assessment to refer reports should be withheld entirely under **Exemption 5 (privileges)**. Catholic Charities represented a number of asylum seekers and after USCIS routinely refused to disclose the fact-intensive introductory paragraphs of the assessment reports, it filed suit on their behalf, arguing that the factual materials were not deliberative and that they were not inextricably intertwined with exempt portions. Three other district court judges have ruled that the factual materials were not protected by Exemption 5, starting with *Abtew v. Dept of Homeland Security*, 47 F. Supp. 3d 98 (D.D.C. 2014), continuing with *Gosen v. U.S. Citizenship and Immigration Services*, 118 F. Supp. 3d 232 (D.D.C. 2015), and *Bayala v. Dept of Homeland Security*, 264 F. Supp. 3d 165 (D.D.C. 2017). Walton also ruled that the introductory factual material in assessment reports was not protected in *Gatore v. Dept of Homeland Security*, 177 F. Supp. 3d 46 (D.D.C. 2016). Addressing the cases of the individuals represented by Catholic Charities, Walton found that the factual materials were not protected and that they were not inextricably intertwined with exempt portions. Entering summary judgment on behalf of the individuals, he ordered the agency to disclose those portions of the assessment reports, noting that "after two rounds of summary judgment briefing and the defendant's submission of four declarations, there is no question that the defendant has had ample opportunity to present its arguments and evidence in support of its position on the individual plaintiffs' requests." The agency argued that Catholic Charities did not have **standing** to bring a policy and practice claim. Walton disagreed, pointing out that "it would be logical to infer that the defendant's FOIA reviewers do not routinely make segregability determinations of assessments because a blanket policy of never providing any part of an assessment would render such determinations unnecessary." He noted that Catholic Charities had been adversely impacted by the agency's refusal to segregate and disclose factual information and that unlike individual requesters Catholic Charities continued to file multiple FOIA requests for assessment reports. But because the individual requesters represented by Catholic Charities had been asking only for their own assessment reports, Walton found that once the agency properly responded to their requests they were no longer likely to continue making FOIA requests and, thus, did not qualify for inclusion with Catholic Charities policy and practice claims. Allowing Catholic Charities policy and practice claim to go forward, Walton noted that "the evidence of the defendant's alleged policy or practice of not providing any part of an assessment to FOIA requesters constitutes circumstantial evidence of the defendant's alleged policy or practice of not even attempting to determine if there are reasonably segregable portions of assessments." (*Rica Gatore, et al. v. United States Department of Homeland Security*, Civil Action No. 15-459 (RBW), U.S. District Court for the District of Columbia, Aug. 24)

Judge Christopher Cooper has ruled that 15 documents prepared by the Department of Justice, the Department of Defense, and the Department of State pertaining to the legal basis for the missile strikes President Donald Trump approved against Syria in April 2017 following reports that Syria had used chemical weapons against civilians are protected by **Exemption 5 (privileges)**, although he found that the privilege had been waived as to one talking-point included in a memo on how to address press queries because it had been officially acknowledged. The Protect Democracy Project submitted FOIA requests to DOJ, DOD, and State concerning the legal basis for the attacks. The agencies released some documents in full, some with redactions, and withheld fifteen documents entirely. Cooper decided to review 10 documents containing talking points *in camera*. As a threshold matter, Protect Democracy argued the agencies had waived the privileges because of public statements made by officials after the strike, and by the subsequent disclosure of

ACCESS REPORTS

an Office of Legal Counsel opinion explaining the legal basis for the strikes. Cooper found that the public statements did not waive any privileges, noting that "none of the cited public statements mentioned the existence of a legal memorandum regarding the strikes, not did any officials publicly state a legal rationale particularized enough that one could expect it to duplicate the analysis of a seven-page interagency memorandum." He added that "nor does the recently released 2018 OLC opinion officially acknowledge the contents of the 2017 memorandum." The 2017 interagency memo was sent to the Deputy Legal Advisor at the National Security Council. As a result, Cooper found the memo protected by the presidential communications privilege. Referring to *in re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), in which the D.C. Circuit discussed the application of the presidential communications privilege, he observed that "it is clear that the Deputy NSC Legal Adviser is the sort of staff member that the D.C. Circuit had in mind when setting the scope of the privilege." Protect Democracy argued that the agencies had failed to show what role the memo had on the President's decision. Cooper acknowledged the lack of detail but pointed out that "the government need not make a particularized showing about the role of a certain document in the President's decision." He explained that "even if the legal analysis in the memorandum was not communicated to the President, the circumstances of its solicitation – by the staff of a close national security adviser leading up to an important military decision – shows that the document was created for the purposes of advising the President on that decision." Protect Democracy contended that the talking points could not be predecisional or deliberative because they were created after the air strike. Cooper disagreed, noting that "courts have generally found that documents created in anticipation of press inquiries are protected even if crafted after the underlying event about which the press might inquire. The idea is that these sorts of documents reflect deliberation about the decision of how to respond to the press – or, as relevant in this case, to members of Congress." Protect Democracy argued that the government had waived the privilege by public statements made by various officials. Instead, Cooper found all but one section of the disputed talking point memos was privileged. As to that section, he pointed out that "at least one government official has, in an on-the-record statement, replicated a paragraph that appears in several of the guidance documents. Even though the agencies' formulation of this explanatory paragraph would otherwise be protected by the deliberative process privilege and thus covered by Exemption 5, the government's official acknowledgement renders the exemption inapplicable." (*Protect Democracy Project, Inc. v. U.S. Department of Defense, et al.*, Civil Action No. 17-00842 (CRC), U.S. District Court for the District of Columbia, Aug. 21)

Ruling in a case in which Judge Colleen Kollar-Kotelly initially found that a business submitter's confidential information was not protected because it had not responded to a predisclosure notification from the Centers for Disease Control, the D.C. Circuit has ruled that much of the information about the shipment of primates by import-export companies, as well as airlines, qualifies for protection under **Exemption 4 (confidential business information)**. Circuit Judge Thomas Griffith also commented on the potential for competitive harm posed by the cumulative disclosure of data points that provide more opportunities to draw inferences about business operations. The case involved a request from PETA to the CDC for information about the importation of non-human primates. The agency sent predisclosure notifications to ten importers, seven of whom responded and asked for confidentiality. CDC withheld the same kinds of information for all ten importers. Kollar-Kotelly initially agreed that the information was confidential, but then found that because three importers had not responded, they had waived confidentiality. After her first opinion, CDC notified the other three importers, who told the agency that they had not received the original notice and also wanted confidentiality. Based on that series of events, Kollar-Kotelly reconsidered and found that all the information considered confidential by the importers was protected. PETA then appealed. Writing for the court, Griffith agreed that disclosure of information about crate size and shipment-by-shipment quantities would cause competitive harm. PETA argued that inventory snapshot information was already publicly available. But Griffith pointed out that "we see a material difference between inventory snapshots, posted periodically as part of inspection reports by the USDA, and the number of nonhuman primates contained in

various shipments." PETA also argued that because two importers had not designated certain information as confidential it was a tacit admission that disclosure would not cause competitive harm. Here, Griffith noted that "their failure to do so does not prevent HHS, the district court, or us from finding their reasoning persuasive. . ." PETA questioned the extent to which airline carriers considered their participation to be confidential. But Griffith observed that "knowing in the abstract which airlines transport nonhuman primates is very different than knowing which importers have relationships with which airline carriers, and which airline carriers are willing to transport which species of nonhuman primate along which routes and from which countries." Commenting on the cumulative effects of data, Griffith pointed out that "requiring disclosure of multiple types of information provides a more comprehensive picture of each importer's supply chain, importation patterns and capacity, and business relationships." PETA also challenged Kollar-Kotelly's decision to reconsider her original ruling. Griffith found Kollar-Kotelly's decision to reconsider appropriate, noting that "when the district court realized it was mistaken to assume that silence meant disclosure would be harmless for the nonresponding importers in particular, the district court simply applied its objective conclusion that such information was confidential. The district court did not allow HHS to withhold anything just because the importers claimed it was confidential." (*People for the Ethical Treatment of Animals v. United States Department of Health and Human Services*, No. 16-5269, U.S. Court of Appeals for the District of Columbia Circuit, Aug. 17)

Judge Trevor McFadden has ruled that the Department of Justice properly withheld records concerning risk assessment tools under **Exemption 5 (privileges)**. EPIC made a request for five categories of records pertaining to risk assessment tools. DOJ disclosed 231 pages entirely and 128 pages with redactions. It withheld an additional 2, 363 pages, characterized as a Predictive Analytics Report prepared for the White House, under the presidential communications privilege and the deliberative process privilege. EPIC challenged the invocation of the presidential communications privilege, arguing that the agency could not invoke the claim unilaterally. McFadden rejected this claim, noting that "a categorical approach to the presidential communications privilege depends on the nature of the document and not on how the privilege is invoked. Thus, the Court concludes that the Department has adequately invoked the privilege without any action by the President or his staff." McFadden also rejected EPIC's claim that the presidential communications privilege only applied to documents sent to the President or his immediate advisors and that sending the predictive analytics report to an associate White House Counsel was insufficient. Instead, McFadden observed that "whether or not an Associate White House Counsel is 'an immediate White House adviser,' she is a member of the staff of the White House Counsel, who is certainly himself an immediate White House adviser." EPIC argued that the deliberative process privilege did not apply to factual materials. Noting that *Mapother v. Dept of Justice*, 3 F.3d 1533 (D.C. Cir. 1993) and *Ancient Coin Collectors Guild v. Dept of State*, 641 F.3d 504 (D.C. Cir. 2011), recognized that disclosure of factual material could sometimes reveal deliberations, McFadden pointed out that DOJ's affidavit explained that "research and briefing materials it seeks to withhold assemble relevant facts and disregard irrelevant facts, reflecting the judgment of the Department employees and consultants who prepared the materials to help the Department decide what to report to the White House about evidence-based assessment tools. This places the research and briefing materials within the scope of the deliberative process privilege. . ." EPIC also challenged the agency's use of the consultant's corollary, citing *Competitive Enterprise Institute v. Office of Science & Technology Policy (CEI)*, 827 F.3d 145 (D.C. Cir. 2016) to argue that the agency had not shown that the consultants were not advocating their own point of view. Finding *CEI* was not on point, McFadden indicated that "in *CEI* there was affirmative evidence suggesting that the consultant had a professional, reputational, and financial interest in promoting her theory. . .to the agency that consulted her, while here there is nothing to overcome the presumption of good faith that the agency's declaration enjoys." (*Electronic Privacy Information Center v.*

Department of Justice, Civil Action No. 17-00410 (TNM), U.S. District Court for the District of Columbia, Aug. 15)

After 15 years of litigation over the disclosure of photos showing detainee abuse by U.S. personnel in Iraq and Afghanistan, the Second Circuit has resolved the case by finding that the Protected National Security Documents Act of 2009 (PNSDA) rather than being assessed under **Exemption 3 (other statutes)** operates as a separate prohibition against disclosure of such photos as long as their disclosure is certified every three years by the Secretary of Defense. In 2005, Judge Alvin Hellerstein of the Southern District of New York ruled that the government had not shown that possible retaliation against U.S. troops and civilians in Iraq and Afghanistan from disclosure of the photos was protected by **Exemption 7(F) (harm to individual)**. The government appealed that decision to the Supreme Court, but before the court heard the case, Congress passed the PNSDA, allowing the Secretary of Defense to withhold the photos on the basis of a three-year certification. When a coalition of public interest groups challenged the adequacy of continued certification, Hellerstein found that the PNSDA was an Exemption 3 statute and that continued withholding under that statute required the agency to review the photos every three years and recertify the harm of disclosure. He concluded that because the agency had relied on a review by officers in the field that was too far removed from the Secretary the agency had failed to support its decision to recertify the photos. The government appealed Hellerstein's decision. The Second Circuit found that even if it reviewed the decision *de novo* the agency's review was more than adequate to show that the photos should remain undisclosed. Pointing out that DOD's multi-layered review resulted in an additional 198 photos being designated for release, the Second Circuit indicated that "the Secretary's decision to certify the withheld photographs was logical and plausible, and the information is reasonably specific to confirm that the withholding decision was supported as to each individual photograph." Having found the PNSDA protected the photos, the Second Circuit explained that it was unnecessary to consider whether Exemption 7(F) applied. Circuit Judge Dennis Jacobs concurred, emphasizing the scope of the agency's review. He pointed out that "the Pentagon undertook rarified labors to satisfy the district judge that, given the PNSDA, the relevant photographs could properly be withheld from disclosure under FOIA Exemption 3. Our holding is that those labors were sufficient as a matter of law to justify the nondisclosure; our holding is not that all (or most, or any) of those labors were required." (*American Civil Liberties Union, et al. v. United States Department of Defense, et al.*, No. 17-779, U.S. Court of Appeals for the Second Circuit, Aug. 21)

Wrapping up the remaining issues in a suit brought by National Security Counselors against the CIA for records concerning its FOIA operations, Judge Beryl Howell has ruled that the agency conducted an **adequate search** and that it properly withheld eight documents under **Exemption 3 (other statutes)** and another one under **Exemption 5 (privileges)**. Howell previously ordered the CIA to conduct a supplemental search, which located another ten documents. Finding the agency's supplemental search sufficient, Howell rejected NSC's argument that the agency had failed to explain how it knew what databases to search. Noting that "a search is not automatically rendered inadequate by an agency's failure to locate a specific document," Howell pointed out "the CIA explained that 'searching a shared drive or SharePoint site does not typically require an instruction manual, nor does a database that allows you to query (or search) using different fields.'" Howell found the CIA had properly withheld all or portions of eight documents under the National Security Act. She agreed with the agency's assertion that databases could qualify as methods and sources. She added that "similarly, classification markings are methods and sources because they help the CIA 'control the dissemination of intelligence-related information and protect it from unauthorized disclosure' by indicating 'the overall classification level, the presence of any compartmented information, and the limits on disseminating this information.' These descriptions adequately explain why withheld material falls within the scope of the National Security Act." The agency withheld a draft of a standard operating procedure document

under the deliberative process privilege. NSC argued that the draft was not privileged because there was no final version of the document. But Howell pointed out that in *National Security Archive v. CIA*, 752 F.3d 460 (D.C. Cir. 2014), the D.C. Circuit had held that "there may be no final agency document because a draft died on the vine. But the draft is still a draft and thus still pre-decisional and deliberative." (*National Security Counselors, et al. v. Central Intelligence Agency, et al.*, Civil Action No.12-284 (BAH), U.S. District Court for the District of Columbia, Aug. 20)

Judge Dabney Friedrich has ruled that the Consumer Financial Protection Bureau properly invoked **Exemption 7(E) (investigative methods or techniques)** to withhold information about its interview questions. Frank LLP, a law firm suing Portfolio Recovery Associates, requested records concerning a CFPB enforcement action against PRA that resulted in a consent order. Frank contended that the techniques and procedures used in interviewing professional affiants could not have included techniques unknown to the public. Friedrich, however, pointed out that two recent district court decisions – *Barouch v. Dept of Justice* 87 F. Supp. 3d 30 (D.D.C. 2015) and *Rosenberg v. Immigration and Customs Enforcement*, 13 F. Supp. 3d 92 (D.D.C. 2014) – held that questions asked by ATF and FBI agents constituted investigative techniques under Exemption 7(E). Friedrich observed that "the redacted materials 'contain the specific questions asked by the Bureau investigators of two PRA affiants' including the specific information and types of information sought, the manner of questioning, the sequencing of questioning, and the manner and sequencing of follow-up questions on specific items of interest'. . ." Frank tried to distinguish *Rosenberg* by arguing that in that case the withheld questions included potential questions as well as the questions actually asked. Friedrich was unconvinced that was much of a distinction, noting that "it is not clear which way that cuts – the fact that the transcripts here contain *actual* instead of *potential* questions may actually reveal more about what the CFPB ultimately considers important. And second, even assuming this fact cuts in Frank's favor, the difference is only in the quantity – not the quality—of information disclosed: even if only *some* rather than *all potential* avenues of CFPB investigative questioning are revealed, they still reveal 'what the [CFPB] deems relevant to investigations.'" Friedrich pointed out that the threshold for inclusion under Exemption 7(E) was not particularly high and that the agency had cleared this "relatively low bar." (*Frank LLP v. Consumer Financial Protection Bureau*, Civil Action No. 16-2105 (DLF), U.S. District Court for the District of Columbia, Sept. 4)

A federal court in Colorado has ruled that while a **pattern and practice** claim against the Bureau of Land Management may go forward, the antagonism between the agency's Farmington Field Office, which has responsibility over the Glade Run Recreation Area, and the San Juan Citizens Alliance, a citizens advisory group dedicated to protecting the natural environment in the Four Corners Area, was so great that the court concluded that neither parties' conduct could be considered reasonable enough to merit summary judgment. Although the agency disclosed 40,152 pages in response to three FOIA requests submitted in 2014 by SJCA, the public interest group became increasingly impatient with the way the requests were being handled while the agency believed SJCA's demands were often unreasonable. SJCA complained about the way the agency searched for records. The court noted that "in this case neither party's conduct can be determined to have been reasonable. The assumption underlying the FOIA is that the requestor and the agency act cooperatively. That appears to have been the case when the prior lawsuit was settled," but tensions between the two parties deteriorated and became adversarial. The court pointed out that "put simply, each party has the burden of proof showing reasonableness and neither party has met that burden." The court added that "neither party has shown that the opposing party has been more unreasonable. This is a case of equal fault." Having refused to grant summary judgment to either party on the search issues, the court agreed that SJCA's allegation of a pattern and practice claim could go ahead, noting that "there are allegations that the FFO has treated SJCA's requests differently from those made by others and that the office has been influenced by a relationship with

ACCESS REPORTS

industry." (*San Juan Citizens Alliance, Inc. v. Bureau of Land Management*, Civil Action No. 14-02784-RPM, U.S District Court for the District of Colorado, Aug. 29)

A federal court in Florida has ruled that Spivey Utility Construction Company is not entitled to **attorney's fees** for its FOIA suit against OSHA for copies of the testimony of supervisory-level employees during an OSHA investigation of work-related death. As a result of the work-related death, OSHA began an investigation that included interviews of supervisory employees. Spivey made several informal requests for the interviews but because the investigation was still ongoing, the agency did not respond. Spivey then made a formal FOIA request, which OSHA denied under **Exemption 7(A) (ongoing investigation or proceeding)**. After a negotiated settlement of Spivey's liability, the agency disclosed the interviews. Spivey then filed for attorney's fees, arguing its FOIA litigation caused the agency to disclose the records. The federal court magistrate, siding with OSHA, rejected Spivey's claim that its FOIA litigation caused the disclosure of the interviews. Instead, the magistrate judge pointed out that "initiating the instant FOIA litigation while the enforcement proceedings continued was superfluous, at best, and did not substitute itself for discovery in the enforcement proceedings." Addressing Spivey's entitlement arguments, the magistrate judge rejected Spivey's contention that disclosure was in the public interest, pointing out that "Spivey's interest in the statement solely and distinctly benefits Spivey in defending itself in the enforcement proceedings. In seeking such information, Spivey sought to limit its liability and to reduce the fines assessed against it by OSHA, which it eventually succeeded in doing." The magistrate judge also agreed that OSHA had a reasonable basis for withholding the records originally. The magistrate judge noted that "given the potential issues at stake, OSHA properly withheld the documents under Exemption 7(A) and provided 'a reasonable basis in law' for its actions. Nothing in the record indicates that OSHA was recalcitrant in its opposition to Spivey or otherwise engaged in obdurate behavior, and, thus, this factor likewise weighs against an award of attorneys' fees and costs." (*Spivey Utility Construction Company v. Occupational Safety and Health Administration*, Civil Action No. 16-3123-T-36AEP, U.S. District Court for the Middle District of Florida, Aug. 14)

Judge Christopher Cooper has ruled that OSHA conducted an **adequate search** for records concerning work-related deaths at four D.C.-area construction companies. Ronald Bonfilio made two FOIA requests for records hoping to expose company wrongdoing. The agency found 11 files that might be responsive to Bonfilio's request. A search of the Baltimore-Washington Area Office located 10 of the files, three of which involved work-related injuries, but none of them involved a death. The agency disclosed 273 pages to Bonfilio with redactions under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Dissatisfied, Bonfilio pointed to news reports of the 2012 death of Leroy Cook, who worked for one of the construction companies. The OSHA investigator on that case explained that the company was in compliance with work-safety rules and that the records were thus subject to destruction after three years. Bonfilio filed an administrative appeal, but after the agency failed to respond within the statutory time limit, he filed suit. Bonfilio challenged the agency's search, arguing that since he knew of one death and the agency found no responsive records, its search must be inadequate. Cooper noted that "FOIA does not impose a duty on agencies to keep their records forever. . .[T[he destruction of documents in violation of statute or regulation would be a different story: a requester in that case might well have a remedy under FOIA. But here, the agency's record-retention protocols appear to allow it to destroy records related to workplace-safety investigations once a case has been closed for over three years." Bonfilio also requested **discovery**, but Cooper found he had not provided any evidence that the agency had acted in bad faith. While Bonfilio had also challenged the agency's redactions under the privacy exemptions in his administrative appeal, since he failed to raise them in his summary judgment motion Cooper found he had forfeited any claim that the exemptions were inappropriate. (*Ronald J. Bonfilio v. Occupational Safety &*

Health Administration, Civil Action No. 17-282 (CRC), U.S. District Court for the District of Columbia, Aug. 21)

Judge Royce Lamberth has ruled that Department of Justice conducted an **adequate search** for records concerning Kabil Djenasevic, who had been convicted of possession of heroin, and properly withheld records under **Exemption 3 (other statutes)** and **Exemption 7 (law enforcement records)**. Lamberth also rejected Djenasevic's **Privacy Act** requests for correction of his records and access to records pertaining to him. After having his original conviction thrown out by the Eleventh Circuit for ineffective counsel, Djenasevic was retried and convicted. He then made a number of FOIA and Privacy Act requests to various DOJ components. Lamberth found that his Privacy Act allegations failed to state a claim since the correction allegation was filed after the two-year statute of limitation had expired and that his access claim was also barred because all his records were in exempt systems of records. As to the FOIA claims, Lamberth agreed that grand jury records were properly withheld under Rule 6(e) on grand jury secrecy. Approving the agency's redactions under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, Lamberth noted that "DEA withheld the identifying information of third parties, such as law enforcement personnel, witnesses, suspects, co-defendants, and confidential sources under Exemption 7(C). The court agrees with the agencies that withholding information pertaining to third-parties implicates an important privacy interest. And there is no conceivable public interest, let alone a significant one, that warrants overriding the third-parties' privacy interest in having their identities protected." (*Kabil A. Djenasevic v. Executive Office of United States Attorneys, et al.*, Civil Action No. 16-2085-RCL, U.S. District Court for the District of Columbia, Aug. 14)

Judge Trevor McFadden has ruled that the IRS conducted an **adequate search** for records concerning Crestek, Inc.'s tax liabilities from 2006 through 2014 and that it properly withheld records under **Exemption 5 (privileges)**. In response to Crestek's request, the agency located 14,482 pages and disclosed 12,467 entirely. It withheld 920 pages entirely and redacted portions of 1,095 pages. Crestek challenged the adequacy of the agency's search, arguing that the author of one of the agency's affidavits had relied on others to identify responsive records even though he had identified records that others did not have. McFadden disagreed, noting that "but the [affidavit] – and Crestek's observation that [the affiant] identified responsive records that others overlooked – shows that he did not simply rely on others." The agency withheld a number of records citing the deliberative process privilege. Crestek claimed that six redacted emails dealing with whether Crestek qualified for Fast Track were not deliberative. McFadden pointed out that "these communications were about whether the issues in Crestek's case were suitable for Fast Track settlement and about how the IRS might withdraw the Fast Track application if it wished. They were predecisional and deliberative because they helped the IRS decide whether to pursue a Fast Track settlement or withdraw the Fast Track application." Crestek also challenged redactions in emails concerning Crestek's request for assistance from the Taxpayer Advocate Office, which has significant power over employees' decisions. McFadden noted that "the IRS exam team discussed 'what the IRS could do in the Crestek audit while it was uncertain whether the Taxpayer Advocate office would intervene' in the team's denial of Crestek's Application for Fast Track Settlement. These are deliberations that preceded a decision about what next steps the team should take, and they enjoy the protection of the deliberative process privilege." McFadden found the agency's claims of attorney work product were also appropriate. Crestek challenged four documents showing timelines because they did not specify the name of the author, sender, or recipient. McFadden observed that "the IRS has stated that the timelines were prepared at the direction of IRS counsel to help respond to allegations of misconduct. This shows that the timelines were prepared by or for a party – the IRS – and by or for a party's representative –

ACCESS REPORTS

IRS counsel." (*Crestek, Inc. & Subsidiaries v. Internal Revenue Service*, Civil Action No. 17-00200 (TNM), U.S. District Court for the District of Columbia, Aug. 27)

A federal judge in Illinois has ruled that the U.S. Forest Service conducted an **adequate search** for records concerning measures it took to protect long-eared and Indiana bats from being killed after coming in contact with wind turbine blades set up near their habitat in Griffith Cave in Shawnee National Forest. The agency searched for emails and after Turner filed suit the agency disclosed 529 pages. The agency admitted a clerical error had been responsible for its failure to disclose an additional 433 pages, which it then also disclosed to Turner. Turner argued that Matthew Lechner, who signed the agency's affidavit did not have direct personal knowledge of the search. The court disagreed, noting that "Mr. Lechner was [Shawnee National Forest's] FOIA coordinator at the time of the search. . . Mr. Lechner's declarations describe, with specificity, the employees who participated in the search, the dates of the search, the places searched, the terms used in the electronic search, and the responsive records identified in the search. Mr. Lechner has demonstrated that he was familiar with the search and the records identified from it." Turner claimed the agency failed to pursue clear leads uncovered in the records. The court disagreed, noting that the agency had pursued one such lead and pointing out that "there are no other clear and certain leads Defendant should have followed." (*Seth Turner v. United States Forest Service*, Civil Action No. 16-00635-NJR-DGW, U.S. District Court for the Southern District of Illinois, Aug. 24)

Judge Christopher Cooper has ruled that federal prisoner Hector Sandoval **failed to exhaust his administrative remedies** in response to no records responses from the FBI and the Bureau of Prisons and that Sandoval no longer had a claim against the Executive Office for U.S. Attorneys after the U.S. Attorney's Office for Central Illinois provided Sandoval with 100 free pages. Sandoval was convicted of kidnapping in 2007. He made FOIA and Privacy Act requests to the FBI, BOP, and EOUSA for records related to his criminal investigation and prosecution. Neither the FBI, BOP, nor EOUSA found any responsive records. Sandoval did not file an administrative appeal with either the FBI or BOP, but did appeal EOUSA's decision, which was affirmed. Sandoval then filed suit against all three agencies. After modifying its search, EOUSA located 101 pages and Sandoval agreed to receive 100 pages free. Cooper agreed with the agencies that Sandoval's failure to file an administrative appeal meant he had failed to exhaust his administrative remedies against both agencies. He noted that "the Court thus concludes that Sandoval has failed to exhaust his administrative remedies and will dismiss the FOIA and Privacy Act claims against the FBI and BOP on that basis." Turning to the claims against EOUSA, Cooper pointed out that Sandoval "simply argues the Office should have produced more documents. But Sandoval indicated he wanted only the 100 free pages to which he was entitled under FOIA and did not wish the Office to search further. The Office's search was able to uncover 100 responsive pages, which is all that Sandoval was entitled to under the statute and DOJ regulations. That fact is fatal to Sandoval's unlawful-withholding argument under both FOIA and the Privacy Act." (*Hector Sandoval v. U.S. Department of Justice, et al.*, Civil Action No. 17-567 (CRC), U.S. District Court for the District of Columbia, Aug. 27)

Judge Beryl Howell has rejected a series of claims made by reporter Jason Leopold and the Reporters Committee in refusing to reconsider her earlier ruling finding that Leopold and the Reporters Committee did not have a First Amendment right of access to sealed cases involving government access to telecommunication providers' records pertaining to closed criminal investigations, but that the plaintiffs did have a limited common law right of access to some of that information going forward. Leopold and the Reporters Committee contended that Howell had erred in finding that third-party orders under the Stored Communication Act or the Pen Register Act were more akin to subpoenas than to warrants. Rejecting that claim, Howell pointed out that

"as a matter of function and substance, an SCA warrant is more like a subpoena than a traditional search warrant. The petitioners do not explain why 'labels,' rather than function and substance should govern analysis of whether SCA warrants should 'be evaluated by the tradition of access to' traditional search warrants or subpoenas." She observed that providers had the ability to move to quash a defective order. She agreed that solution was "not a perfect substitute for a target's ability to do the same. The question, however, is not whether an SCA warrant is identical to a subpoena in every respect, but merely whether an SCA warrant is more like a subpoena or a traditional search warrant." (*In the Matter of the Application of Jason Leopold to Unseal Certain Electronic Surveillance Applications and Orders*, Misc. No. 13-00712, U.S. District Court for the District of Columbia, Aug. 16)

# #