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## In this Issue



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*Washington Focus: Common Dreams, a publication of the Center for Biological Diversity, reports on recent moves by the Department of Interior to obstruct public access to its records. Secretary Ryan Zinke signed Secretarial Order 3371 naming acting solicitor Dan Jorjani as the chief FOIA officer. That position was previously held by the agency's chief information officer, a career agency employee rather than a political appointee. Secretarial Order 3371 also created the FOIA Assistance Coordination Team, designed to "provide strategic direction for selected FOIA requests that impact Department-level interests." Common Dreams also reported that Western Values Project, an environmental advocacy group, had submitted comments to the National Archives opposing an Interior request to destroy certain categories of records. Chris Saeger, executive director of WVP, told Common Dreams that "it's unacceptable that Interior is already turning their efforts to destroying documents when they can't even respond to public records requests they have coming in." Saeger told Common Dreams that the Trump administration has only responded to 10.5 percent of the 132 FOIA requests submitted by WVP.*

## Court Finds Increased Number Of Requests Merits Stay

Recognizing the huge increase in FOIA requests at the Department of Justice since the beginning of the Trump administration, Judge Amit Mehta has granted the agency a temporary stay to process a request from the Democracy Forward Foundation pertaining to records sent to the Office of Legal Policy by or on behalf of individuals nominated for judgeships on federal courts of appeals since the beginning of the Trump administration. Mehta's admission confirms the recent FOIA Project statistical analysis of the filing of FOIA suits by non-profits that found that while 209 non-profits had filed suit in 2016, the last year of the Obama administration, that number grew at a rate of 100 new suits every six months since the beginning of the Trump administration, reaching more than 500 suits by July 2018.

In response to DFF's request, the Office of Information Policy told the organization that its request had been referred to OLP and that it had been placed on the complex track for processing. Several weeks later, OIP told DFF that because of

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the need to consult with another office, unusual circumstances existed warranting a further extension of time for processing the request. In response, DFF agreed to narrow the request to six individuals who had been nominated to serve on the D.C. Circuit or the Fifth Circuit. Four months later, OIP filed a motion to stay the proceedings, arguing that it had experienced an unanticipated increase in FOIA requests. Seven other public interest organizations – American Oversight, CREW, National Security Counselors, Openthegovernment.org, the Project on Government Oversight, Public Citizen, and Sunlight Foundation – filed an amicus brief supporting DFF.

Mehta began by explaining that recognition of a stay of proceedings stemmed from the D.C. Circuit's 1976 decision, *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), holding that an agency could be granted a delay in processing a FOIA request when an agency is deluged with a volume of requests vastly in excess of that anticipated by Congress, its existing resources are inadequate, and it is exercising due diligence in responding to requests. The *Open America* standard was codified in the 1996 EFOIA amendments with the caveat that a routine, predictable agency backlog of FOIA requests did not constitute exceptional circumstances. Mehta noted that the predictable backlog limitation meant that "it is not enough that an agency receives a high number of FOIA requests, or even that an agency has a large backlog of requests to which it must respond. Rather, an agency must show that the number of requests received in the relevant period was truly unforeseen and remarkable."

DFF disputed whether the increase in FOIA requests received by OIP was unanticipated. Mehta found the agency's affidavit persuasive. OIP provided a chart showing the number of FOIA requests it received from FY08 through FY18. In FY08, OIP received 904 requests, which had doubled in eight years to 1,803 requests in FY16, the last year of the Obama administration. But OIP's requests increased by more than a thousand, to 2,818 in FY17 and jumped further in FY18 to 3,396. Mehta remarked that "the average annual increase from FY 2008 to FY 2016 was 100 requests. Compare that to the spike experienced in the last two years. From FY 2016 to FY 2017, the number of FOIA requests increased by 1,015 – a *ten-fold* increase over the average increase over the prior nine years. The number of requests is expected to increase by 578, a more than *five-fold* increase over the pace seen from FY 2008 to FY 2016. What these large spikes mean is that OIP has seen a near doubling of FOIA demands over a *two-year* period, when it previously took *eight* years for the number of requests to double. Congress surely could not have anticipated such a dramatic acceleration of the number of requests for information made of OIP."

DFF argued that the increase was not dramatic, pointing out that OIP's recent increases were in line with steady increases in the past years. Mehta disagreed, noting that "while the number of FOIA requests steadily increased from 2008 to 2016, the increases in the last two years have far exceeded what OIP experienced during that earlier period." DFF also argued that Congress had increased DOJ's budget in the last three fiscal years, implying that Congress had increased the agency's budget to off-set any anticipated increase in requests. Mehta was not convinced. He observed that "Congress, however, can increase an agency's appropriations for any number of reasons that have nothing to do with FOIA. A general increase in appropriations for the Department of Justice thus tells the court nothing about what Congress actually foresaw as to the future rate of FOIA requests."

Mehta found OIP had made efforts to deal with the sudden increase in requests. According to OIP, it "reorganized its staff to create a dedicated team to handle less time-consuming matters such as new requests, search initiation, requester negotiations, and 'simple track' requests (as opposed to 'complex' or 'expedited' track requests). The reorganization resulted in improved processing time for 'simple track' requests. Correspondingly, 'complex' and 'expedited' track processing times likewise improved because staff assigned to such requests could concentrate on those types of cases." Although OIP did not get more funding to increase its staff, Mehta noted that "OIP has responded by reassigning other OIP staff to FOIA processing on

an ad hoc basis, and it has made modest staff additions to the FOIA team." DFF complained that DOJ had actually requested less funding and had tried to reduce the number of employees funded through the agency's general appropriations, under which OIP operated. Saying "these are fair criticisms," Mehta pointed out that "it is not the role of the judiciary to question how executive agencies request and allocate resources, absent some compelling evidence of purposeful conduct." He observed that "the court simply is not in a position, at this point, to fairly judge whether the agency's budgetary decision-making reflects an indifference to its FOIA obligations or is attributable to other political facts to which the court is not privy." Mehta found the agency had shown that a sudden unanticipated increase in requests was the primary reason for its delay. He granted OIP a stay until the end of January 2019. (*Democracy Forward Foundation v. Department of Justice*, Civil Action No. 18-000734 (APM), U.S. District Court for the District of Columbia, Dec. 7)

## Judge Finds Questions Remain About Whether Clinton Tried to Evade FOIA

Judge Royce Lamberth has granted Judicial Watch discovery to explore whether or not former Secretary of State Hillary Clinton purposefully tried to evade FOIA by using a private email server while she was Secretary. In response to Judicial Watch's 2014 request for records concerning talking points used by then UN Ambassador Susan Rice defending the Obama administration's response to the attack on the U.S. Embassy in Benghazi, Lamberth accused State of telling Judicial Watch that it had conducted an adequate search even though it then knew Clinton had turned over 55,000 pages of missing emails that were likely to contain responsive records. A few weeks later, State filed a status report in which it still failed to acknowledge the unsearched emails and instead suggested that the case could be settled. One month later, the agency filed another status report admitting that it needed to conduct a further search.

Livid, Lamberth lambasted the agency, noting that "at best, State's attempt to pass-off its deficient search as legally adequate during settlement negotiations was negligence born out of incompetence. At worst, career employees in the State and Justice Departments colluded to scuttle public scrutiny of Clinton, skirt FOIA, and hoodwink this Court." The current DOJ attorneys told Lamberth that State's initial search was not misleading because the agency did not realize at the time that Clinton's emails were missing. Saying such explanations "strain credulity," Lamberth pointed out that "even before this recent chicanery, the Court found enough signs of government wrongdoing to justify discovery, including into whether Clinton used her private email to intentionally flout FOIA."

Lamberth explained that he had waited until investigations by the State Department's Inspector General, the FBI, and the House Select Committee on Benghazi were concluded and indicated that he was now going to "order the parties to develop a discovery plan limited to three issues: whether Clinton used a private email to evade FOIA, whether State's attempts to settle the case despite knowing the inadequacy of its initial search constituted bad faith, and whether State's subsequent searches for responsive records have been adequate."

Suggesting that "the government's response to [this] FOIA request smacks of outrageous misconduct," Lamberth noted that "the Court takes no pleasure questioning the intentions of the nation's most august executive departments. But it still remains unknown whether Clinton used a private email to duck FOIA requests." State argued that former FBI Director James Comey had told the House Select Committee on Benghazi that "our best information is [that] she set it up as a matter of convenience." Lamberth observed that "but that's not quite the full-throated refutation State makes it out to be. Rather, telling Congress – under penalty of perjury – what he couldn't say for sure was an understandably equivocal assessment of the evidence at the time. It was not a conclusive repudiation of what many people familiar with the Presidential Records Act have long wondered."

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Although he pointed to evidence that many people knew Clinton used a private email server, Lamberth was puzzled by the conclusion of State's Inspector General that "although dozens of department officials emailed Clinton's personal account, the employees responsible for FOIA compliance didn't know the account existed."

Lamberth questioned State's attempt to justify its initial search as adequate by explaining that the agency believed it did not have an obligation to search records not in its possession. Lamberth indicated that "that admission is significant for two reasons: Factually, it implies State thought settling this case would absolve the Department of any duty to search Clinton's missing emails in response to this request. And legally, it is wrong. Though agencies need not retrospectively search records they failed to retain, agencies violate FOIA when they fail to search records an employee improperly secreted from the agency's control." Emphasizing the serious doubts that remained, Lamberth noted that "to preserve the Department's integrity, and to reassure the American people that their government remains committed to transparency and the rule of law, this suspicion cannot be allowed to fester."

State argued that many of the questions posed by Lamberth had already been answered by subsequent disclosures of Clinton's emails. Lambeth disagreed, pointing out that "in fact, State even concedes it has yet to search emails [Cheryl] Mills, [Huma] Abedin, and [Jake] Sullivan turned over in August 2015. Moreover, the Court is unaware of any public information shedding light on State's attempts to settle this case in late 2014 and early 2015." He also disparaged Judge James Boasberg ruling in *Judicial Watch v. Tillerson*, 293 F. Supp. 3d 33 (D.D.C. 2017), finding that State had done everything required by the Federal Records Act in its attempt to recover Clinton's emails. In a footnote, Lamberth pointed out that "taking no position on the merits of that conclusion, the Court notes that the Federal Records Act employs a very different standard than FOIA, requiring agencies take only more-than-minimal action to remedy a federal record removal or destruction" and added that Boasberg's decision was currently on appeal to the D.C. Circuit. (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 14-1242, U.S. District Court for the District of Columbia, Dec. 6)

# Views from the States…

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

## Illinois

A court of appeals has ruled that the Chicago Board of Education acted properly when it denied three requests from the Sargent Shriver National Center for Poverty Law for records concerning complaints filed against school security officers because the requests were unduly burdensome. The Shriver Center requested the complaint records and the Board quickly responded, taking an additional five days to respond to the request, and then denying the request because it was unduly burdensome. The Board told the Shriver Center that it could narrow the scope of the its request. The Shriver Center submitted two more requests, narrowing the time frame to complaints received in 2014. The Board rejected these requests as well, claiming they would require the Board to review and redact 600 individual complaints. The Shriver Center filed suit, claiming that the Board had a policy of denying large requests without any further consideration. The Shriver Center also alleged that the Board had the burden of proving that the records were exempt. The trial court ruled in favor of the Board and after the Shriver Center filed an appeal, the appellate court upheld the trial court's ruling. The Board argued that Section 3(g), which allowed public bodies to reject requests that were unduly

burdensome, differed from the exemptions in Section 7 and was not subject to court review. The appeals court disagreed with that characterization but noted instead that public bodies could successfully claim Section 3(g) as long as they provided sufficient evidence that the request was unduly burdensome. The appeals court explained that "a public body asserting a section 3(g) exemption must make a clear and convincing showing that the burden of compliance outweighs the public interest in the disclosure of the requested records. This need not always – or even in most cases – necessitate an evidentiary hearing or the filing of detailed affidavits. Where, as here, the pre-suit communications attached to the complaint demonstrate that the public body has complied in good faith with section 3(g) by providing a written explanation for its noncompliance and has given the requesting party an opportunity to test the scope of that explanation by clarifying or narrowing its request, the [trial] court may not need any additional information to weigh the burden of compliance against the public's interest in disclosure." (*Sargent Shriver National Center on Poverty Law v. Board of Education of the City of Chicago*, No. 1-17-1846, Illinois Appellate Court, First District, First Division, Dec. 3)

## Michigan

A court of appeals has ruled that the trial erred in finding that the Township of Grosse Ile police department properly denied Aaron Cox, the attorney for Wyatt Garner who had been arrested for drunk driving, access to Garner's arrest records because his blood test had not yet been finished when Cox made the request. After Cox requested the records, the FOIA coordinator for the Grosse Ile police department confirmed that Garner's blood test had not come back yet and until he was charged the investigation would be considered open. She denied Cox's request and the trial court ruled in the police department's favor. On appeal, the court of appeals reversed, finding that the police department had neither justified its claim that the criminal law investigation exemption applied nor that it had considered whether or not some records were disclosable. The appeals court noted that "because [the police department] failed to establish that the law-enforcement-proceedings exemption applied, disclosure of the records requested by plaintiff is required." The court added that "because plaintiff was forced into litigation and successful on his central issue that the materials were not exempt, and therefore subject to disclosure, plaintiff has 'prevailed' within the meaning of the statute." The appeals court faulted the police department for failing to disclose non-exempt records. The court pointed out that "the trial court erred in ruling that the requested information was exempt, and defendant failed to separate any non-exempt material for disclosure." *Aaron Cox v. Township of Grosse Ile*, No. 34518, Michigan Court of Appeals, Nov. 29)

## New York

The Court of Appeals has ruled that a statutory exemption for personnel files prohibits disclosure of any qualifying records even if those records are redacted and cannot be associated with an individual police officer. The case involved a request by the New York Civil Liberties Union for records concerning all final opinions of the New York City Civilian Complaint Review Board adjudicating charges that had been substantiated against a member of the police department. The New York Police Department denied the request, but after the NYCLU filed an administrative appeal, the NYPD disclosed more than 700 pages with redactions. However, it refused to disclose the final opinions. The NYCLU filed suit, and after reviewing five opinions, the trial court ruled that the redactions were adequate to protect the identities of individuals. On appeal, the appellate court reversed. The NYCLU then appealed to the Court of Appeals, which upheld the appellate court's decision. The Court of Appeals found that the police personnel records were covered by a provision in the state Civil Rights Law providing that personnel records used to evaluate employee performance "shall be considered confidential and not subject to inspection or review" unless disclosure was ordered by a court after finding that the records were relevant to the litigation. The NYCLU argued that the protection was limited to actual or potential litigation. The Court of Appeals indicated that its coverage was

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considerably broader, noting that "in determining whether a personnel record is exempted from FOIL disclosure under Civil Rights Law § 50-a is 'the *potential use* of the information' rather than 'the specific purpose of the particular individual requesting access,' or 'whether the request was actually made in contemplation of litigation.'" Rejecting the notion that redaction was an acceptable alternative, the court observed that "the parties' proposal would, instead, enable an agency to circumvent the host of statutory protections belonging to covered officers by simply applying redactions that the agency, in its sole discretion, deems adequate. This scheme would transform Civil Rights Law § 50-a into an optional mechanism applicable only when (and if) the agency chooses to invoke it." The court pointed out that "the FOIL exemption at issue, applies not only to 50-a personnel records, but to *all* records covered by various 'state or federal statutes' that serve to protect the confidentiality of countless categories of individuals." The court added that "Civil Rights Law § 50-a provides the exclusive means for disclosure of confidential personnel records. The parties cannot sidestep its mandate through the expedient of redacted FOIL disclosure." Justice Jenny Rivera dissented, noting that such an interpretation of the required coverage of an exemption undercut the FOIL's requirement to segregate and disclose non-exempt information. (*In the Matter of New York Civil Liberties Union v. New York City Police Department*, No. 133, New York Court of Appeals, Dec. 11)

## Pennsylvania

A court of appeals has ruled that a school bus surveillance video showing an altercation involving a parent grabbing the wrist of a member of the Central Dauphin East High School girls' basketball team after the team returned from a game is not protected by either the federal Family Educational Rights and Privacy Act or the Right to Know Law's non-criminal investigation exemption and must be disclosed to Fox News Reporter Valerie Hawkins. Hawkins requested the video after charges were brought against Erica Rawls, wife of the high school principal, for harassment. The school district denied Hawkins' request, claiming it was a student record protected by FERPA or, alternatively, protected by the non-criminal investigation exemption. Hawkins complained to the Office of Open Records OOR ruled in favor of Hawkins, finding that the video was not a student record under FERPA and that it was at best incidental to any non-criminal investigation. The school district filed suit challenging OOR's decision. After hearing testimony from Assistant Superintendent Karen McConnell, who was the school district's open records officer, the trial court upheld OOR's decision. The school district then appealed. The appeals court first considered whether the video constituted a student record. Here, the court pointed out that "the school bus video reveals nothing about a student-specific file, whether academic or disciplinary in nature." The court added that "ultimately, it was the School District's burden to establish that the video directly relates to a student." Noting that a further requirement under FERPA was that the record be maintained by an educational agency or institution, the appeals court observed that "the School District does not have a maintenance protocol for school bus videos. That absence supports the conclusion that they are not education records for purposes of FERPA." Turning to the school district's non-criminal investigation exemption claim, the appeals court noted that "the school bus video served many purposes, such as discouraging student misbehavior. It is unlikely that the School District could have based its discipline on the 'video-only' images, and the video depicts images that were seen by many bystanders. The mere fact that a record has some connection to an investigation does not automatically exempt it under the [non-criminal investigation exemption]." (*Central Dauphin School District v. Valerie Hawkins, et al.*, No. 1154 C.D. 2017, Pennsylvania Commonwealth Court, Dec 10)

## Virginia

The supreme court has ruled that attorney-client and attorney work-product privilege claims made by the City of Virginia Beach are too broad. Dr. Allan Bergano, who was involved in litigation with the City, sent a request for records concerning costs incurred by the City for outside counsel and expert witnesses. The City sent him 63 pages of heavily redacted invoices for outside counsel, and 16 redacted pages of invoices for

expert witnesses, claiming the information was protected by the attorney-client and the attorney work-product privileges. At the trial court, the City explained that the breadth of its claims was necessitated because of Bergano's pending litigation. After reviewing the documents *in camera*, the trial court agreed that they were exempt under the Virginia Freedom of Information Act. After reviewing the privilege claims for itself, the supreme court found the City's claims were overbroad. The court first explained that "we note as a threshold matter that a court's *in camera* review of the records constitutes a proper method to balance the need to preserve confidentiality of privileged material with the statutory duty of disclosure under VFOIA." The court agreed that billing records could be privileged "if they reveal confidential information, including the motive of the client in seeking representation, of if they reveal litigation strategy. Records indicating the specific nature of the services provided, such as researching particular areas of law, may also fall within these exceptions when the disclosure would compromise legal strategy. Disclosure that would reveal analytical work product or legal advice are exempt from disclosure under VFOIA." But the court noted that "the City's redactions were too broad and included items that are not shielded from disclosure by the attorney-client or work-product exceptions." The supreme court remanded the case back to the trial court, indicating that "the [trial] court allowed the City to withhold some entries from disclosure when those records plainly do not fall within the VFOIA exceptions for work-product and attorney-client privilege. We therefore remand for further *in camera* review and for disclosure of unredacted billing records consistent with this opinion." The City has also argued that it should not be liable for attorney's fees because of special circumstances. The supreme court sent that issue back to the trial court for determination as well. (*Allan L. Bergano v. City of Virginia Beach*, No. 171183, Virginia Supreme Court, Dec. 6)

# The Federal Courts…

Judge James Boasberg has ruled that the Department of State properly withheld portions of a five-page report on the work of the United Nations Relief and Works Agency for Palestine Refugees in the Near East under **Exemption 1 (national security)**. The American Center for Law and Justice requested a State Department report concerning UNRWA aid to Palestinian refugees. The agency disclosed most of the five-page report but withheld portions under Exemption 1. ACLJ filed suit, challenging both the substantive and procedural classification of the report. The original report was classified as confidential by Anne Richard, Assistant Secretary for the Bureau of Population, Refugees, and Migration. To support its classification claim, State also provided an affidavit from Eric Stein, the FOIA Officer, attesting that the withheld portions of the report were properly classified. ACLJ argued that Richard's original classification was improper because it did not show that she had complied with the classification procedures and that she did not provide an adequate rationale for classifying the report. Boasberg rejected both claims. He noted that "the [Executive Order on Classification] says nothing about a classifier's need to 'make certain' that procedural requirements were met. As State correctly asserts, moreover, there are no magic words required to meet this standard. Rather, in the absence of bad faith, general statements of procedural compliance may suffice." ACLJ also claimed that Richard had only cited § 1.4(d) pertaining to foreign relations when she classified the report while Stein had added § 1.4(b) which pertained to foreign government information as a second reason when he reclassified the report, suggesting that Richard's original classification decision was incorrect. Boasberg observed that "this makes little sense. The fact that the original Report held one fewer classification rationale has no bearing on whether the information was properly classified originally." But ACLJ suggested that Richard's single rationale meant that she had improperly underestimated the harm to national security. Boasberg pointed out that "this position holds no water. Plaintiff misinterprets the Order to mean that Richard must have articulated possible threats initially. ACLJ cites no caselaw to support this proposition, and with good reason – it does not exist. State properly asserts that the determining factor is whether a present-day original classification

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authority (in this case, Stein) is able to certify, based on his own independent review of the information, that it *presently* meets the standards for classification." ACLJ challenged Stein's personal knowledge of the need to classify the report as well as his rationale. Referring to the "plethora" of reasons Stein provided for his classification decision, Boasberg noted that Stein's "declaration also explains specific harms that would likely occur as a result of the information's release. . .These statements are thus sufficient because they demonstrate that 'the withheld information logically falls within the claimed exemptions' – namely the ones identified in both § 1.4(b) and § 1.4(d)." ACLJ argued that a letter from members of the House of Representatives urging President Trump to declassify the report undercut State's decision that it remained properly classified. Boasberg concluded otherwise, noting that "it is a dangerous proposition indeed that executive-branch determinations should be overruled by a simple missive from a few members of the legislature. Such a theory would overturn years of deference to executive affidavits in matters of national security and potentially implicate separation of powers. It is the Executive, not Congress and not the Court, who has the expertise to make such determinations." (*American Center for Law and Justice v. United States Department of State*, Civil Action No. 18-944 (JEB), U.S. District Court for the District of Columbia, Dec. 4)

A federal court in Missouri has dismissed part of Jack Jordan's FOIA suit against the Department of Labor after finding it was duplicative of litigation Jordan brought in the D.C. Circuit. Jordan brought suit in Missouri contending the agency had failed to respond to two FOIA requests he had submitted. The first FOIA request was for letters concerning Jordan's allegations of misconduct by administrative law judges that heard his case. The second FOIA request asked for emails sent by DynCorp International that were in the possession of DOL's Benefits Review Board. The agency asked the court to dismiss the second request because it was duplicative of litigation Jordan had brought in the D.C. Circuit. In that case, Judge Rudolph Contreras had found that an email sent by DynCorp to its attorney was privileged under Exemption 4 (confidential business information). Contreras' decision was upheld by the D.C. Circuit. The federal court in Missouri agreed that the current litigation was duplicative, noting that "Plaintiff seeks to relitigate whether Defendant properly redacted the [disputed] email, asserting arguments he did or could have made before the D.C. District Court." Dismissing Jordan's second FOIA request, the court observed that "the conservation of judicial resources, comprehensive disposition of litigation, and the progress of that action weigh in favor of this Court deferring to the D.C. District Court. Plaintiff does not contend, much less set forth evidence, his rights were not adequately protected in the D.C. District Court lawsuit." (*Jack Jordan v. U.S. Department of Labor*, Civil Action No. 18-06129-SJ-ODS, U.S. District Court for the Western District of Missouri, Dec. 14)

Judge Amit Mehta has ruled that that the Criminal Division at the Department of Justice and EOUSA have explained that they conducted an **adequate search** for records concerning prisoner Victor Rodriguez's capital murder conviction in the Eastern District of Pennsylvania. In an earlier opinion, Mehta found that the Criminal Division had not justified why it limited its search to its Capital Case Section and whether it requested records from the U.S. Attorney's Office for the Eastern District of Pennsylvania. This time, Mehta concluded that the Criminal Division had provided an adequate explanation. He pointed out that "because plaintiff sought information about his death penalty case, the Criminal Division contacted CCS, a unit within the Division that reviews requests made by U.S. Attorney's offices to pursue the death penalty and makes recommendations to the Attorney General on whether to authorize a capital case." As to why the Eastern District was not searched, Mehta noted that "plaintiff asked the Criminal Division for records 'in your office' pertaining to the capital aspect of his case. Thus, on its face, the request does not reach the prosecuting U.S. Attorney's Office, as that office is not a section within the Criminal Division's 'office.'" He added that "plaintiff sent his request to the Criminal Division, so it was proper to limit its search to documents within its control." Mehta agreed with the agency's **Exemption 5 (privileges)** claims. He observed that "the Criminal Division's role in Plaintiff's prosecution was two-fold. It reviewed the request and made a recommendation to

the Attorney General about seeking the death penalty, and it evaluated and decided whether to authorize racketeering charges. To carry out those functions, the Criminal Division engaged in deliberations, both within the Division and with the local federal prosecutors, about final charging decisions. Nearly all the documents responsive to Plaintiff's FOIA request reflect the agency's decision-making and therefore easily fall under the deliberative process privilege." (*Victor Rodriguez v. Federal Bureau of Investigation, et al.*, Civil Action No. 16-02465 (APM), U.S. District Court for the District of Columbia, Dec. 14)

Judge Trevor McFadden has ruled that the Bureau of Prisons properly responded to prisoner Melvin Anderson's request for records concerning a classification decision pertaining to his sentence. The agency disclosed nine pages entirely and 30 pages with redactions and withheld 18 pages under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(E) (investigative methods and techniques),** and **Exemption 7(F) (harm to any person)**. Noting that Anderson had not filed an opposition to the agency's summary judgment motion, McFadden explained the coverage of the exemptions and found the agency had properly applied them. As to the agency's Exemption 7(E) claims, he pointed out that "the D.C. Circuit has 'set a relatively low bar for the agency,' requiring it only [to] demonstrate logically how the release of the requested information might create a risk of circumvention of the law.' The Bureau has done that and so is entitled to summary judgment on exemption 7(E)." (*Melvin Anderson v. Federal Bureau of Prisons*, Civil Action No. 18-617 (TNM), U.S. District Court for the District of Columbia, Dec. 13)

Judge Timothy Kelly has ruled that a challenge under the Administrative Procedure Act to OSHA's suspension of its Electronic Reporting Rule requiring employers to submit annually three forms containing data on workplace injuries and worker health by Public Citizen Health Research Group, the American Public Health Association, and the Council of State and Territorial Epidemiologists may continue because the plaintiffs had shown an informational injury and the potential for redress if the suit was successful, but dismissed the plaintiffs' request for a preliminary injunction after finding they had not shown irreparable harm if the suit proceeded at a normal pace. OSHA had previously required employers to prepare the three forms but had collected them only on an *ad hoc* basis either during inspections or through industry-specific surveys. In May 2016, OSHA issued a new rule requiring certain employers to submit the forms electronically each year. In June 2017, the agency announced it was suspending the electronic submission of the forms, and in July 2017 the agency issued a notice of proposed rulemaking to rescind the electronic submission requirement altogether. Public Citizen Health Research Group and the other two public health organizations filed suit, alleging that rescinding the electronic reporting requirement would rob them of access to worker health data that was valuable to their organizations and members. In opposing the APA suit, OSHA argued that since the data would not be publicly available even under FOIA since the privacy exemptions would apply to all personally-identifiable data the organizations did not have **standing** because they could not show that their alleged injury could be redressed by requiring the continued electronic submission of the forms. Kelly first noted that "the mere fact that Plaintiffs would have to use FOIA to obtain the collected data if Plaintiffs are successful in this action does not alone defeat Plaintiffs' claim of redressability." He pointed out that he saw "no reason why the extra step of bringing a FOIA claim would *necessarily* mean Plaintiffs cannot allege a likelihood of redress." Noting that FOIA's privacy exemptions applied only to personally-identifying information, Kelly observed that "plaintiffs, in conducting research on matters of occupational health and safety, seek only the de-identified data and descriptions from these forms regarding workplace injuries and illnesses. This information is contained, in particular, in the fields requesting incident descriptions and outcomes, and nothing in the form instructions requires employers to include any identifying information about the employee or employer there." He noted that "furthermore, these fields are unquestionably

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segregable. No one file is so 'inextricably intertwined' with another as to prevent OSHA from releasing a non-exempt field without compromising any privacy interest in another." Kelly acknowledged that the agency's claim that some personally-identifying information could be re-identified was plausible, but he rejected it by noting that "Defendants cannot rely on that speculation wholesale to withhold each and every form." He observed that "to satisfy the redressability requirement, Plaintiffs need not show that their requested relief will grant them all that they seek. Obtaining only some helpful information compiled under the Electronic Reporting Rule would be enough provided that it would 'significantly – rather than completely – redress [Plaintiffs'] injuries.' The Court finds it exceedingly unlikely that OSHA would be able to justify withholding, on the basis that each form raised more than a mere possibility that the information contained therein would be 're-identified,' so substantial a portion of the forms submitted under the Rule as to prevent Plaintiffs from engaging in meaningful research and analysis of the data that they seek." Nevertheless, Kelly rejected the public health organizations' request for a preliminary injunction. He pointed out that "Plaintiffs make no claim in their motion that delayed access to the information would prevent them from conducting the same research and outreach activities they describe in their respective declarations." (*Public Citizen Health Research Group, et al. v. Alexander Acosta, et al.*, Civil Action No. 18-1729 (TJK), U.S. District Court for the District of Columbia, Dec. 12)

Judge Ellen Segal Huvelle has ruled that since an infrastructure council created by President Donald Trump to advise him on what proposals to fund under his proposed infrastructure plan was subsequently revoked it does not qualify as a "de facto" advisory committee for purposes of the **Federal Advisory Committee Act**. In April 2017, Trump mentioned that New York real estate developers Richard LeFrak and Steven Roth were going to be members of the infrastructure council. In July 2017, he signed E.O. 13805 creating the Presidential Advisory Council on Infrastructure. But in September 2017, he signed E.O. 13811 revoking E.O. 13805 and dissolving the infrastructure council. Food & Water Watch filed a request for the council's records under FACA. After the council was dissolved, FWW amended its claim to assert that the infrastructure council was a "de facto" FACA committee. Huvelle ordered limited discovery on the issue of whether or not she had jurisdiction. FWW argued that the infrastructure council was subject to FACA because it had an organized structure, a fixed membership, and a specific purpose. Huvelle acknowledged these factors were characteristic of advisory committees, but noted that "however, these factors, while potentially useful, are not sufficient to determining the existence of a FACA advisory committee. Rather, they are only tools that a court may use to analyze the determinative question of whether a group was in a position to render collective advice on issues of public policy." Instead, she pointed out that to qualify as a FACA committee, members must have either a vote or a veto in committee decisions. She observed that "this principle of a 'vote' or 'veto' in committee recommendations or decisions is premised on the notion that the committee is expected to make substantive group recommendations or decisions, and that it does so at the behest of the executive. Absent any indication that such a structure exists, there can be no FACA obligation." Huvelle found that to the extent the infrastructure council held any group meetings they only concerned preliminary discussions on how the council would operate. She pointed out that "the purpose of any group discussions that did occur never progressed from the preliminary work of establishing a FACA committee to the actual work of such a committee, for E.O. 13805 was revoked before the group was ever in a position to 'render collective advice or produce any other type of collaborative work product.'" FWW argued that subsequent administration actions mirrored the suggestions of members of the infrastructure council Huvelle found this was insufficient to support FWW's claim that the infrastructure council was a "de facto" advisory committee. She pointed out that "to the extent that the Administration's actions reflect advice allegedly received from LeFrak or others, there is no evidence that the Administration's policy course was influenced by group recommendations from the Infrastructure Council. Even assuming *arguendo* that the facts suggest a causal relationship, there is no reason to believe that any recommendations were made as a group, rather than by

LeFrak or others as individuals." (*Food & Water Watch v. Donald J. Trump*, Civil Action No. 17-1485 (ESH), U.S. District Court for the District of Columbia, Dec. 10)

**Editor's Note:** *Access Reports* will take a break for the holidays. The next issue of the newsletter will be dated January 9, 2019, v. 45, n. 1.



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