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Washington Focus: As a result of the omnibus appropriations bill passed recently by Congress, non-confidential Congressional Research Service reports will be publicly available through a Government Printing Office website within 90 to 270 days after the bill was passed. Public availability of CRS reports has been a top priority for open governments advocates for at least the last 20 years. Daniel Schuman of Demand Progress led the most recent attempt to gain passage. He noted that "Congressional Research Service reports are the gold standard when it comes to even-handed, non-partisan analysis of the important issues before Congress. For too long they've only been primarily available to the well-connected and the well-heeled. At long last, Congress will make the non-confidential reports available to every American for free."

State Department Claims Fall Short On Privileged Status of Press Briefings

A recent decision involving the State Department explores some interesting issues concerning when and why records may be privileged. In a case brought by journalism professor Charles Seife for records pertaining to background briefings for journalists provided off-the-record by a variety of senior officials at the department, Judge Gregory Woods of the Southern District of New York has questioned whether such discussions are privileged. Whether or not such discussions qualify under the deliberative process privilege is not yet settled, although the weight of case law certainly leans towards the conclusion that as long as such discussions are legitimately predecisional and deliberative they are eligible for the privilege.

Seife made two FOIA requests to the State Department in July 2014 for records about recent background briefings, as well as briefings from December 2012 and November 2015. His second request asked for transcripts of any background briefings between January 2009 and July 2014. He indicated that he wanted to know the identity of the briefer by name. The State Department located 96 documents. It disclosed 15 documents in full, redacted another 80 documents, and withheld one document entirely under Exemption 5 (privileges) and Exemption 6 (invasion of privacy).

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Although the State Department transcribes such briefing sessions, the agency told Woods that the transcripts never include the name of the briefer. The agency indicated that non-identifying transcripts were publicly available on the agency's website, but concluded that it would have no records responsive to Seife's second FOIA request because it asked for identifying information. Seife argued State's interpretation of the request was too restrictive since "his request does not limit the transcripts he seeks to those that *do* identify the briefers by name. Rather, his use of the phrase 'should identify' expresses his *expectation* to receive transcripts containing the briefers' identities." Woods observed that 'because an agency responding to a FOIA request is mandated to construe the request broadly, the State Department should have interpreted the [second] request as one for unredacted transcripts. . . regardless of whether the transcripts identified by name the government official providing the briefing." The agency argued that a search for transcripts other than those on the website would require a burdensome search of a number of employees' email accounts. Woods found the explanation insufficient, noting that the agency's affidavit "provides no information regarding the total number of email accounts that would need to be searched, or the level of difficulty of, or amount of time required by, the search process itself. Absent such or similar information describing with reasonable specificity the actual burden imposed by the [second] request, the Court cannot conclude that a response to Mr. Seife's request would in fact be unduly burdensome."

Most of the agency's redactions were based on Exemption 5, citing the deliberative process privilege. My own case, *Access Reports v. Dept of Justice*, 926 F.2d 1192 (D.C. Cir. 1991), has some relevance here. In that case, the document at issue was a DOJ analysis of a Congressional Research Service report listing instances in which the media cited FOIA as the source of the information for the story. The DOJ analysis was prepared to rebut allegations that FOIA amendments that had already been introduced in Congress by the Reagan administration would further restrict access as a result of the new amendments. From my perspective, the report was intended to support the introduction of the amendments, a decision which had already taken place. Although the district court agreed with me, the D.C. Circuit found instead that the report was predecisional to DOJ's efforts to lobby Congress for passage of the legislation. To the extent that the *Access Reports* decision is applicable here, it underscores not only that deliberations can be a fluid, shifting process, but also that messaging efforts can be considered deliberative.

Although there were a handful of district court decisions in the Second Circuit finding that discussions pertaining to how an agency should respond to press or public inquiries were not protected by the deliberative process privilege, Woods pointed out that the Second Circuit in *American Civil Liberties Union v. Dept of Justice*, 844 F.3d 126 (2d Cir. 2016), implicitly approved of coverage of such inquiries under the deliberative process privilege. Embracing the D.C. Circuit's approach, he noted that "even when an underlying decision or policy has already been established by the agency, the decision of how, and to what extent, to convey that policy to the public may require input by many working components within the agency, or even an analysis of the underlying policy itself."

Having concluded that the press background records were subject to the deliberative process privilege, Woods found that in many cases they were neither predecisional nor deliberative. He noted that "while several of the emails appear to temporally pre-date the State Department announcements and background briefings that they relate to, some of the emails are dated the same date as the announcement to which they relate." He explained that "even if the emails could all be considered predecisional, the Court cannot conclude that they are deliberative. . .There is no indication in the [agency's] *Vaughn* index, for example, that the emails concerning the text, timing, and modalities of certain agency announcements include recommendations or proposals, or that they reflect the views of the authors rather than of the agency."

The State Department withheld the names of the background briefers under Exemption 6 (invasion of privacy). Woods noted that "the State Department has not provided evidence of a 'real' threat of harassment

to the background briefers. . .The link connecting the disclosure of these briefers' identities to the alleged harassment is missing. . .The briefers appear to hold positions that are known, or knowable, to the general public. Therefore, it is not apparent from the [agency's] submission how a foreign counterpart's knowledge that the briefer – holding an official position known to his counterpart – delivered what became a public message would expose that briefer to unwarranted harassment in either his or her official duties or personal life." By contrast, Woods agreed that Seife had identified a public interest "in knowing that the government is deceiving the public regarding the officials who are permitted to remain anonymous in giving background briefings." While State had told Woods that such interactions with the press were rare, "Mr. Seife has affirmed that he has personal knowledge of approximately a dozen briefings for which the briefers' identities were leaked, and in each case, the briefer was an official spokesperson or was otherwise 'well-acquainted with briefing the press.'" He observed that "the evidence, submitted by sworn affidavit, suggests that the assertion in the [agency's] Declaration that the background briefers do not interact frequently with the press was not made in good faith and raises questions regarding the presumption of good faith that the Court otherwise affords to the State Department submissions." Woods agreed with the State Department that the names of low-level Defense Department employees and email addresses and phone numbers were properly withheld under Exemption 6. (*Charles Seife v. United States Department of State*, Civil Action No. 16-7140-GHW, U.S. District Court for the District of New York, Mar. 26)

Views from the States…

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

California

A trial court has awarded $170,000 in attorney's fees to the public interest organization Jobs to Move America Coalition for its intervention in a reverse-FOIA suit brought by New Flyer of America to block disclosure of pricing data in a contract New Flyer had with the Los Angeles County Metropolitan Transportation Authority. In response to JMAC's request for records related to the contract, LACMTA decided to disclose the pricing data. New Flyer then filed suit under the California Public Records Act for a declaratory judgment to block the disclosure. JMAC intervened and the trial court ruled against New Flyer. Ruling on JMAC's request for attorney's fees, the court explained that although attorney's fees were not available under the CPRA in a reverse-FOIA action, such fees could still be available under other provisions in the statute. Finding that JMAC's request was in the public interest, the trial court rejected New Flyer's contention that the records benefited JMAC's personal interests. The court noted that "there is no evidence that JMAC, a non-profit research and advocacy organization, has any financial or competitive interest in defending this action." The court found JMAC's attorneys were entitled to hourly fees between $400 and $500 and that its claim that it spent 414 hours on litigating was appropriate. The court also found JMAC was entitled to recover a $3,000 fee for Westlaw research, bringing the total to $170,000. (*New Flyer of America, Inc. v. Los Angeles County Metropolitan Transportation Authority*, No. BC621090, California Superior Court, Los Angeles County, Mar. 26)

District of Columbia

A court of appeals has ruled that the District of Columbia properly redacted emails under the deliberative process privilege from discussions by the Advisory Neighborhood Commission. In 2009, a restaurant named Ghana Café sought a liquor license, which was contingent on a settlement agreement between the restaurant's

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owners and several concerned parties, including James Kane. In 2014, the Ghana Café asked for changes in the agreement to allow for live music and a cover charge. At a public meeting, ANC 2F voted 6-1 to make the changes. Kane disagreed with ANC's actions and submitted a FOIA request for records about Ghana Café's license and other liquor licenses within the ANC's jurisdiction. The District disclosed several thousand pages, but withheld records under the deliberative process privilege and the privacy exemption. Kane filed suit, but the trial court, after finding the District's *Vaughn* index thorough and descriptive, ruled in favor of the District. Kane then appealed. As it had at the trial court, the District argued that it had no control over the ANC's records. The appeals court disagreed, noting that "the Mayor and the Attorney General have authority to assist ANCs in complying with their FOIA obligations. Even if their exercise of that authority is not without limits, a court may require them to exercise it; as a practical matter, we think it unlikely that an ANC would reject their guidance." The appeals court also rejected Kane's contention that because the ANC was subject to the Sunshine Act, requiring that official action be done in public, that all its discussions were subject to disclosure. Instead, the court observed that "we infer that 'official action' within the meaning of the Sunshine Act must be akin to a 'resolution, rule, act or regulation' – that is, it must be a formal action having some legal or dispositive effect rather than predecisional deliberations or just any action taken in performance of official duties." (*James Kane v. District of Columbia*, No. 15-812, District of Columbia Court of Appeals, Mar. 22)

Montana

The supreme court has ruled that Wolf Point School District violated the open meetings provisions in the Montana Constitution when the Board of Trustees closed a session considering whether or not to terminate Kristine Raap, a new teacher hired on a one-year employment contract, after only four months. Raap had filed a complaint with the U.S. Equal Employment Opportunity Commission, which was then referred to the Montana Human Rights Bureau. Several weeks later, Raap and her union representative appeared before the Board of Trustees, along with the school district superintendent, Raap's supervising school principal, and the Board's lawyer via telephone. Raap was informed that the meeting would be closed to the public unless she waived her right to privacy. Raap waived her right to privacy and indicated that she wanted to tape record the proceeding. Instead, the board chair closed the meeting "to protect the rights of individual privacy of statements and information for those not in attendance." After four hours of testimony, the Board reconvened in public and passed a motion to consider terminating Raap. The Board then went into closed session to discuss unspecified litigation strategy with its lawyer. After an 11-minute closed session, the Board allowed Raap and her union representative back into the room and voted to terminate Raap. After an unsuccessful union grievance, Raap filed suit, claiming the Board had violated the open meetings provisions in the Montana Constitution. The trial court ruled in favor of the Board and Raap appealed. The supreme court reversed, finding the Board had not met its burden for showing why the meeting should have been closed. The court noted that "though the initial burden at the time of closure does not necessarily require the type of formal legal analysis and balancing required of reviewing courts, the law requires something more than cursory reference to undescribed third-party privacy rights and mere recitation of applicable constitutional or statutory language." The court pointed out that "the Board failed to make any *particularized showing* as to the nature of the third-party interests asserted, much less how they balanced out against public disclosure under the circumstances of this case." The supreme court also found that the Board had not justified its claim for going into a closed session to discuss litigation strategy. The court observed that "the Board made no showing that it requested or received advice of counsel regarding its ongoing or contemplated defense against the discrimination complaint, the potential effect of terminating Raap's employment on its defense strategy in that matter, or the potential for its termination decision to result in additional litigation with Raap." The supreme court voided the Board's action, including Raap's termination. (*Kristine Raap v. Board of Trustees, Wolf Point School District*, No. DA 17-0386, Montana Supreme Court, Mar. 27)

The Federal Courts…

Judge Beryl Howell has ruled that the FBI and U.S. Customs and Border Protection conducted an **adequate search** for records concerning Laura Poitras, a journalist and documentary filmmaker who was routinely pulled aside and interviewed by CBP agents each time she returned to the United States from international travel. During an ambush in Baghdad that killed one soldier and injured several others, two soldiers spotted a woman with film equipment on a nearby roof. The woman was identified as Poitras and she was questioned by a Lieutenant Colonel two days later, at which time she implied that she was not present during the ambush. Based on subsequent interviews with the Lieutenant Colonel and Poitras, an historian provided a sworn statement that he believed Poitras has prior knowledge of the ambush. The FBI opened an investigation and starting in July 2006, Poitras was interviewed by CBP agents whenever she returned from international travel. In 2014, Poitras sent FOIA requests to the FBI, U.S. Citizenship and Immigration Services, and CBP for records about herself. The FBI identified 350 responsive pages, released one page in full and 262 pages in part, and withheld in full 87 pages, withholding records under **Exemption 5 (privileges), Exemption 7(A) (ongoing investigation or proceeding)**, **Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigative methods or techniques)**. CBP disclosed 220 pages with redactions. However, the agency later located additional records in its New York field office, disclosing 223 pages with redactions and withholding 3,182 pages. Poitras argued that the FBI had not established a connection between Poitras and a legitimate concern that she had violated a federal law or posed a security risk. Howell disagreed, noting that "the FBI has established that its investigation of the plaintiff was realistically based on a legitimate concern that she may have been either an unintentional or unwitting tool to film or otherwise document an ambush that resulted in the death of one American soldier and serious injury to several others." Poitras pointed out that Army investigators had found that there was not enough credible evidence to suggest Poitras had committed a crime at the time the FBI began its own investigation. But Howell observed that "the plaintiff's dissembling about her whereabouts at the time of the fatal ambush and about whether she documented the events, despite two eyewitnesses who saw her on a rooftop over-looking the ambush area with her camera and sound equipment may reasonably have contributed to the FBI's view that an investigation was warranted." Howell explained that "the FBI has established both 'a rational nexus between the investigation and one of the agency's law enforcement duties' and a 'connection between an individual or incident and a possible security risk or violation of federal law,' thereby satisfying the Exemption 7 threshold requirement." After finding the FBI had met the threshold requirement, Howell approved its claims under 7((A), 7(D), and 7(E). Poitras also challenged CBP's search, particularly that of the New York office because it only covered a three-month period and failed to search any other New York field office files. Howell found CBP had appropriately interpreted Poitras' request. She pointed out that "the four corners of the plaintiff's request to CBP did not offer any details about her encounters with airport officials, the locations of those encounters, or the dates for which she expected to find documents pertaining to those encounters. The plaintiff provided a wholly different agency – USCIS – with detailed information about several detentions or encounters between herself and CBP officials at airports in Newark and New York City, but these details were not provided to CBP. In fact, USCIS FOIA officials repeatedly informed the plaintiff that she should request any CBP-related information for these specific encounters from the CBP FOIA Division – not from USCIS, but the plaintiff does not appear to have done so." (*Laura Poitras v. Department of Homeland Security, et al.*, Civil Action No. 15-1091 (BAH), U.S. District Court for the District of Columbia, Mar. 29)

Judge Rudolph Contreras has ruled that the Department of Justice failed to justify redactions made under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** concerning the selection of corporate compliance monitors for 15 corporations that

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settled charges brought for violating the Foreign Corrupt Practices Act through deferred prosecution agreements, but that its redaction under **Exemption 4 (confidential business information)** was appropriate. Dylan Tokar, a reporter for the publication *Just Anti-Corruption*, requested the records. The agency provided pre-disclosure notifications to the corporations and Tokar submitted a second FOIA request for any objection letters filed by the corporations. After Tokar filed suit, the agency provided him with a table containing the information responsive to his first request and copies of letters he sought through the second request with redactions made under Exemption 6, Exemption 7(C) and Exemption 4. Because Tokar had narrowed his first request in an attempt to avoid processing delays, which resulted in DOJ compiling a table, the agency argued that Tokar had impermissibly requested information rather than records. Contreras sided with Tokar, noting that "if DOJ could not reasonably interpret from Mr. Tokar's narrowed request what types of records or information he was seeking, it had a duty to confer with Mr. Tokar to clear up any confusion. In order to save the agency some time and provide Mr. Tokar the requested information in a more user-friendly format, the agency certainly could have reached an agreement with Mr. Tokar regarding his acceptance of the chart in lieu of the requested documents. But the record does not reflect that such an agreement was reached and the agency cannot unilaterally reinterpret the request in this fashion." DOJ continued to withhold identifying information about individuals who were nominated but not selected, as well as their firms if they were small, under Exemptions 6 and 7(C). Contreras agreed that there was a *de minimis* privacy interest in the information. He pointed out that although "this could be a situation in which it is an honor just be nominated for this role," he observed that "it is plausible that these individuals would prefer to have their consideration and ultimately non-selection withheld from the public's view." Tokar identified a public interest in "evaluating who was nominated to be a monitor and who the agency did not ultimately choose, he will be able to learn about the inner workings of the selection process which is now cloaked in secrecy, outside of the supervision of any courts." Contreras indicated that "because Mr. Tokar has demonstrated that the release of even this small amount of information will serve the public interest, to an extent that outweighs the candidates for those lucrative positions' interest in keeping their identities secret, the Court finds the unselected candidates' names cannot be properly withheld pursuant to Exemption 6." He rejected the application of Exemption 7(C) as well, pointing out that "here, because the type of stigma or harassment that traditionally triggers protection under Exemption 7(C) is not present, as evidenced by the fact that DOJ freely released the names of those candidates who were selected to be compliance monitors, . . .the privacy interests are much weaker than in a traditional Exemption 7(C) case." Contreras ordered the agency to disclose the identities of DOJ attorneys and corporate attorneys involved in the cases since the agency had failed to articulate any real privacy interest in non-disclosure. Although Tokar had not challenged the redactions under Exemption 4, Contreras agreed with DOJ's position that the information was "commercial" for purposes of Exemption 4, explaining that case law in the D.C. Circuit had concluded that "information about 'the way companies implement their compliance programs' is 'sufficiently "instrumental" to the companies' operations to qualify as 'commercial.'" (*Dylan Tokar v. U.S. Department of Justice*, Civil Action No. 16-2410 (RC), U.S. District Court for the District of Columbia, Mar. 29)

A federal court in Arizona has ruled that the public interest in knowing more about complaints filed against U.S. Customs and Border Protection agents accused of mistreating unaccompanied children in the agency's custody outweighs the employees' individual privacy interests under **Exemption 6 (invasion of privacy)** or **Exemption 7 (C) (invasion of privacy concerning law enforcement records)**. The agency requested the court reconsider its earlier decision ordering disclosure of identifying information, arguing that the complaints had already been investigated and identification of the accused employees would not shed further light on the agency's actions. The court disagreed, noting that 'the sole reason Plaintiffs were able to determine that one particular Border Patrol agent was repeatedly the subject of abuse allegations was that Plaintiff could see personal identifying information for that agent in the records because he went by the nickname 'Mala Clara,' and thus Plaintiffs were able to connect the records of various abuse allegations to that

agent. In other words, it is only because Plaintiffs *had* personal identifying information for Mala Clara – similar to that they now seek for other agents accused of mistreatment – that they could accomplish their goal of finding alleged repeat offenders, which in turn allows them to examine whether the agencies initiated disciplinary actions in the cases of alleged repeat offenders." The agency also relied on *Forest Service Employees for Environmental Ethics v. Forest Service*, 524 F.3d 1021 (9th Cir. 2008), and *Lahr v. National Transportation Safety Board*, 569 F. 3d 964 (9th Cir. 2009), to argue that because the agency had investigated the complaints the public interest in disclosure was minimal. The court instead pointed out that "here, Plaintiffs show an *absence* of disciplinary investigations on the part of the agencies, which is the subject of this case." The agency argued the records disclosed so far only showed the existence of allegations and did nothing to substantiate those allegations. The court observed that "while it is true that one cannot determine the truth of any of the allegations from the documents provided, one can reasonably believe that agency investigations were insufficient if the documents show that almost none of the over 200 allegations – many of a serious nature – resulted in a completed investigation. From this, Plaintiffs' evidence establishes more than a bare suspicion of government misconduct in the form of insufficient investigations into the allegations of abuse – the impropriety the parties agree is at issue here." (*American Civil Liberties Union of Arizona, et al. v. United States Department of Homeland Security Office for Civil Rights and Liberties, et al.*, Civil Action No. 15-00247-PHX-JJT, U.S. District Court for the District of Arizona, Mar. 22)

A federal court in Illinois has ruled that the Department of Justice has shown that internal communications pertaining to 11 contested immigration decisions issued by the Attorney General before 2010 were privileged under **Exemption 5 (privileges)**, but that the agency's *Vaughn* index does not provide a sufficient explanation to support its claim that certain records were protected by the deliberative process privilege. The National Immigrant Justice Center requested the records. Immigrants subject to removal first appear before an immigration judge and their decisions can be appealed to the Board of Immigration Appeals, which consists of DOJ attorneys. Both immigration judges and BIA members are part of the Executive Office of Immigration Review, a component of DOJ, but the Department of Homeland Security represents the government's interests in removal proceedings before immigration judges and the BIA. The Attorney General may review any BIA decision and any further decision made by the AG is binding and precedential. Immigrants may seek review of final BIA or Attorney General decisions in the appropriate court of appeals, where DOJ's Office of Immigration Litigation defends the BIA or Attorney General decision. If the decision is appealed to the Supreme Court, the Office of the Solicitor General represents the government. NIJC argued that communications between the Attorney General and/or the Office of Immigration Litigation and the Solicitor General's Office were not privileged because OIL and OSG had a separate interest in the litigation that could be considered adverse to that of the Attorney General. The court disagreed, noting that "in this capacity, communications between OIL and OSG with the Attorney General during her review of a BIA decision may constitute communications between attorney and a client in anticipation of litigation." Rejecting NIJC's contention that the case was similar to the Ninth Circuit's decision in *Klamath Water Users Protective Association v. Dept of Interior*, 189 F.3d 1034 (9th Cir. 1999), the court observed that "extending this ruling to communications made between various groups *within* an agency would not only be logistically difficult but also would stymie the very purpose of Exemption 5 – to allow for the free flow of information and ideas within an agency." Turning to the agency's deliberative process privilege claim, the court pointed out that "if existing policy was discussed in this email and other emails in the *Vaughn* indices, then those communications were not properly withheld." However, the court agreed that other records were protected by the attorney-client privilege or the attorney work-product privilege. (*National Immigrant Justice Center v. United States Department of Justice*, Civil Action No. 12-04691, U.S. District Court for the Northern District of Illinois, Mar. 27)

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Judge Christopher Cooper has ruled the Department of Justice still has not shown that it conducted an **adequate search** for records concerning the investigation of child sexual abuse charges against former Penn State assistant football coach Jerry Sandusky, or its claim that records are still subject to **Exemption 7(A) (ongoing investigation or proceeding)**, but approved all but one of its withholdings under **Exemption 5 (privileges)**. Ryan Bagwell, a Penn State alumnus who has doggedly pursued open records litigation at the state and federal level for records about the Sandusky investigation, requested records from both the Justice Department and the Department of Education. Because the U.S. Attorney's Office for the Middle District of Pennsylvania was involved in pursuing federal charges against Sandusky, Bagwell requested records from the Executive Office for U.S. Attorneys. EOUSA disclosed 517 pages and withheld 104 pages. In his earlier decision, Cooper questioned the agency's search of its email system, as well as the lack of any records of communications with former FBI Director Louis Freeh, whose law firm had conducted an investigation of Sandusky on behalf of Penn State, and ordered the agency to conduct a second search. The agency identified six staff positions most likely to have received responsive emails and searched those accounts. Bagwell claimed that the use of only the term "Pennsylvania State University" was underinclusive. Cooper agreed, noting that "because it is likely that emails concerning the investigation would use 'PSU' or "Penn State' rather than the full name of the University, the Department's search was not reasonably calculated to find all responsive emails." Bagwell argued that he had not received any of the records referred by DOJ to the Department of Education. DOJ argued that the records were similar to ones that Bagwell had requested directly from Education. Cooper pointed out that "that may be so, but any similarity in the two requests does not relieve at least one of the Departments of the obligation to inform Bagwell of its intent to withhold the documents pursuant to valid FOIA exemptions or release them." DOJ withheld records from a state grand jury used in Sandusky's state prosecution, which was currently subject to an appeal by Sandusky, on the basis of Exemption 7(A). Cooper agreed with DOJ that it had shown the existence of an ongoing proceeding, but noted that "the mere fact that these records were part of the grand jury proceeding and are confidential does not explain how the release of the records would interfere with the ongoing proceeding. . . Without a discussion of the way in which release of this information would jeopardize the still-pending proceedings, the Department has failed to meet its burden under Exemption 7(A)." Cooper told DOJ it could supplement its affidavits to provide more support for its claim, including issues dealing with federalism and comity. Cooper found that several documents qualified as attorney work-product. Although Bagwell had argued broadly that documents prepared too early in the investigation did not qualify as work product, here Cooper pointed out that "because the attorneys prepared these documents during a law enforcement investigation into specific allegations of illegal conduct by specific individuals, with the intention of bringing criminal charges if those allegations were substantiated, they were prepared in reasonable anticipation of litigation." (*Ryan Bagwell v. U.S. Department of Justice*, Civil Action No. 15-0531 (CRC), U.S. District Court for the District of Columbia, Mar. 22)

A federal court in Connecticut has ruled that the FBI properly withheld audio and videotapes used in the criminal investigation and trial of Bridgeport Mayor Joseph Ganim under **Exemption 3 (other statutes)** and personally-identifying information under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Ganim was tried and convicted in 2003 after a joint FBI/IRS investigation into municipal corruption. The FBI argued that the audio and videotapes were created as the result of wiretaps under Title III, which had been recognized as an Exemption 3 statute. Thomas Reilly argued that since some tapes had been played in open court, the other tapes should be considered public as well. The court disagreed, nothing that "the mere fact that the public record reveals the existence of a recording does not transform the entire recording into public record. To find otherwise courts the absurd result that any time the existence of a wiretap recording is revealed in a court proceeding – including a Vaughn Index during a FOIA civil suit – the entire recording must be released." The court found the FBI had also

properly withheld some information under Rule 6(e) on grand jury secrecy. Turning to the privacy exemption claims covering personally-identifying information of law enforcement officers as well as individuals investigated, the court pointed out that "because all third parties featured or mentioned in the recordings will in some way be associated with a criminal investigation, these third parties have a privacy right in any identifying information in the recordings." Reilly argued that Ganim had lost any privacy interest because of his conviction, but the court pointed out that "the Defendant cannot both comply with Plaintiff's FOIA request and protect Ganim's identity. Plaintiff's FOIA request is directed specifically to evidence of Ganim's criminal conduct. Consequently, Ganim has a privacy interest in all of the information that the government maintained in connection with his criminal investigation." (*Thomas K. Reilly v. Department of Justice*, Civil Action No. 16-2024 (VLB), U.S. District Court for the District of Connecticut, Mar. 30)

Judge Reggie Walton has ruled that affidavits submitted by the Director of the Office of National Intelligence are insufficient to show that two emails are protected by **Exemption 5 (deliberative process privilege)**. The James Madison Project and journalist Ken Dilanian filed suit against the Justice Department, the Defense Department, the CIA, and ODNI after those agencies withheld records concerning Thomas Drake, a former National Security Agency employee accused of improperly disclosing classified information during the Obama administration. By the time Walton ruled on the case, the only issue remaining was whether two emails qualified for the deliberative process privilege. Walton found they did not. He noted that "the open and frank discussions and opinions [protected by the deliberative process privilege] must relate to the agency decisionmaking process, a process that neither the Director nor [the other agency affidavit] has identified." As to the first email, he pointed out that "the language in the e-mail responding to the e-mail containing the redacted language raises an inference that the withheld information was merely an update on the status of the Drake prosecution, and the Director's involvement in that matter is not clear from what has been submitted to the Court." Faulting the "vague description" of the second email, Walton observed that "the Court cannot discern the particular deliberative process involved, the role that the withheld information played in that deliberative process, or the nature of the decisionmaking authority vested in the e-mail participants. Without sufficient contextual detail, 'the Court is unable to assess, one way or the other, the [Director's] deliberative process privilege claim.'" (*James Madison Project and Ken Dilanian v. Department of Justice, et al.*, Civil Action No. 16-116 (RBW), U.S. District Court for the District of Columbia, Mar. 26)

Judge Randolph Moss has ruled that the SEC properly withheld the names of 36 investors who complained to the agency about transfer of ownership of the Empire State Building to the Empire State Realty Trust under **Exemption 6 (invasion of privacy)**. Richard Edelman, an investor who operates a website about the transfer, requested information about the SEC's review of the transaction. In an earlier decision, Moss found the agency had not provided sufficient justification for categorically withholding complaints by 70 investors. He ordered the SEC to reconsider the balance in light of evidence that at least some complainants had been willing to be publicly identified. As a result, the SEC disclosed 34 of the complaints, but continued to withhold the 36 remaining complaints. Edelman argued that the names of investors in the trust were already public. But Moss agreed with the agency's broader concern that the public should be able to complain to the government in private. He pointed out that "although the identity of the Empire State Building investors may already be known, the complainants' interest lies in not being known as *complainants*, and that information is not public." Moss indicated that litigation over the sale was ongoing and observed that "it is not difficult to imagine that, armed with complaints that could be tied to particular investors, those investors might be contacted again or that others – such as investors' family members – might be contacted." Edelman argued that disclosure would reveal information about the agency's review of the complaints. But Moss noted that "that conclusion is at odds with the SEC's description of both its limited role in the transaction and the even

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more limited role of the complainants. Edelman has not offered any reason to think that the name corresponding to a given complaint will reveal 'how the SEC evaluated [or] weighed' that complaint." (*Richard Edelman v. Securities and Exchange Commission*, Civil Action No. 14-114- (RDM), U.S. District Court for the District of Columbia, Mar. 23)

Judge Royce Lamberth has ruled that the Department of the Air Force properly withheld records concerning Staff Sergeant John Broome's hearing before an Administrative Discharge Board at which the anonymous requester testified that Broome had sexually assaulted her under **Exemption 6 (invasion of privacy)**. The Board decided to retain Broome in the Air Force and E.G. requested records pertaining to the Board's proceedings. The Air Force disclosed her testimony, but withheld the rest of the records under Exemption 5 (privileges) and Exemption 6. However, after E.G. appealed, the agency conceded that only Exemption 6 applied. Lamberth noted that the records qualified as personnel records under Exemption 6. He observed that "they are detailed government records about SSgt. Broome that, if released, would be identified as applying to him. The plaintiff is correct that the administrative discharge proceedings mirror the judicial process; however, it is still an *administrative* process – regardless, the records produced focus on SSgt. Broome. While the records likely also relate to individuals other than SSgt. Broome, the standard does not demand the records relate *solely* to SSgt. Broome." E.G. argued that Broome had posted information about the proceeding on social media. But Lamberth indicated that "it was not Broome, but Broome's friends and family, who posted about the *outcome* of the proceedings on social media. While more detailed posts may have militated against a finding of Broome retaining a strong privacy interest in the files, the actual posts are not provided and it is unclear what exactly they disclosed." Lamberh concluded that E.G. had provided no evidence that disclosure would further the public interest. (*E.G. v. Department of the Air Force*, Civil Action No. 1-00424-RCL, U.S. District Court for the District of Columbia, Mar. 22)

Judge Amy Berman Jackson has ruled that U.S. Immigration and Customs Enforcement conducted an **adequate search** for records concerning Dany Rojas-Vega's request for 1995 state proceedings pertaining to his immigration status and properly redacted records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)**. Rojas-Vega had requested the state proceeding transcripts in 2003 and 2008 but apparently never pursued either request to litigation. ICE concluded that its Office of Enforcement and Removal Operations was the most likely office to have responsive records. ERO's search located 13 pages related to Rojas-Vega using its ENFORCE Alien Removal Module application. Although the agency considered those records non-responsive because they did not relate to state proceedings, ERO redacted them under Exemptions 7(C) and 7(E) and disclosed them to Rojas-Vega. Rojas-Vega argued that the agency's search was insufficient because searches for his earlier requests for the state proceedings had included the agency's San Diego office. Jackson rejected the claim, noting that "because [his] May 30, 2016 request is the operative FOIA request in this case, the 2003 FOIA request is not relevant. The fact that plaintiff informed ICE that he had previously requested the same or similar information from the former Immigration and Naturalization Service did not give rise to an obligation on the part of ICE to search that location in response to the new request, and the fact that it did not do so does not make the search inadequate." ICE had redacted information about its internal database under Exemption 7(E). Jackson explained that "this type of information properly is withheld under Exemption 7(E)." (*Dany Rojas-Vega v. United States Immigration and Customs Enforcement, et al.*, Civil Action No. 16-2291 (ABJ), U.S. District Court for the District of Columbia, Mar. 26)

Judge Royce Lamberth has ruled that he does not have **jurisdiction** over Rodney Reep's claims against the FBI, the DEA, and the EOUSA because they were filed after the six-year **statute of limitations**

had expired and that BATF properly withheld records under several exemptions. Reep requested records concerning himself. Reep claimed that because he was still receiving correspondence from the FBI, DEA, and EOUSA he should be entitled to use that time frame as the basis for filing suit. Lamberth pointed out, however, that "Plaintiff's argument fails because the relevant factor is when the plaintiff has constructively exhausted his remedies, not when the administrative appeal has been adjudicated or when the agency last corresponds with the plaintiff." BATF cited the Consolidated Appropriations Act of 2012, which prohibited the agency from expending funds responding to FOIA requests on gun traces, under **Exemption 3 (other statutes)**. Lamberth agreed, noting that "the appropriations bill leaves the ATF with no discretion. And courts have previously held that Exemption 3 protects ATF firearms trace data." Under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, Reep claimed there was a public interest in disclosure. Rejecting Reep's claim, Lamberth pointed out that "the plaintiff appears to be justifying disclosure based on a private, not a public, interest. Namely that the government failed to release to him exculpatory information which would be helpful in challenging his own conviction." (*Rodney Reep v. United States Department of Justice, et al.*, Civil Action No. 16-1275-RCL, U.S. District Court for the District of Columbia, Mar. 22)

Judge Trevor McFadden has ruled that Judicial Watch **failed to state a claim** when it filed suit under the Administrative Procedure Act to force the Director of National Intelligence to conduct a damage assessment of former Secretary of State Hillary Clinton' email practices as allegedly required by Intelligence Community Directive 732. Judicial Watch argued that the failure of the ODNI to prepare such an assessment had prevented Judicial Watch from requesting the assessment under FOIA, which Judicial Watch claimed caused an informational injury. McFadden rejected the claim, noting that "the directive and FOIA have entirely different regimes, govern different conduct, and there is no expressed or implied interrelation between the two. Whether information is required to be disclosed under ICD 732 has no effect on FOIA, for FOIA does not require the government to create documents, but merely to produce documents that it already maintains." Judicial Watch argued that ICD 732 "cannot be analyzed in a vacuum" and that "the statute and Executive Orders under which ICD 732 was created also address the dissemination of information, which Judicial Watch has an interest in given their mission statement and 'extensive use of FOIA.'" However, McFadden noted that "Judicial Watch has not sued under the National Security Act or the Executive Orders, nor has it alleged that ICD 732 interrelates or is subject to any provision of the National Security Act or Executive Orders that require disclosure. This scenario is not one of the 'special statutory contexts' where the alleged informational injury is a kind that Congress meant to protect." (*Judicial Watch, Inc. v. Office of the Director of National Intelligence*, Civil Action No. 17-00508 (TNM), U.S. District Court for the District of Columbia, Mar. 22)

Judge Tanya Chutkan has ruled that the FBI appropriately issued a ***Glomar* response** neither confirming nor denying the existence of records in response to prisoner Brian Casey's request for records concerning six named individuals and their relationship to a murder investigation. The agency told Casey it would not process his request without proof of death or a third-party authorization. Casey replied that he had been wrongfully convicted of the murders and that the public interest would be served by disclosure. The FBI told Chutkan that its *Glomar* policy was necessary "because members of the public are likely to draw adverse inferences from the mere fact that an individual is mentioned in the files of a law enforcement agency such as the FBI" and that "confirmation of such records could expose the subjects to the types of harm Exemption 7(C) is intended to shield, including 'unsolicited and unnecessary attention.'" Since Casey had not addressed the issue at all, Chutkan found the FBI was entitled to summary judgment as a matter of law. (*Brian M. Casey*

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v. Federal Bureau of Investigation, Civil Action N. 17-00009 (TSC), U.S. District Court for the District of Columbia, Mar. 23)

Judge Richard Leon has ruled that the Department of State conducted an **adequate search** for records on Samuel Knowles, who had been extradited from the Bahamas on drug-trafficking charges, and that it properly withheld records under **Exemption 1 (national security), Exemption 5 (privileges), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and that it properly referred documents to DEA and the Justice Department's Criminal Division for processing and response. The State Department disclosed 28 documents with redactions and withheld six documents completely. It referred an extradition memo to DEA, which disclosed it after redaction identifying information. State referred 41 pages to the Criminal Division, which withheld them entirely under Exemption 5, Exemption 6, and Exemption 7(C). Knowles challenged the Criminal Division's failure to consider the **segregability** of its withholding under Exemption 5. Leon noted that "the Criminal Division has no obligation to 'identify segregable material or disclose any factual contents' because all of the records referred to it were appropriately determined to be attorney work product and thus fully exempt under FOIA Exemption 5." (*Samuel Knowles v. U.S. Department of State*, Civil Action No. 16-1450 (RJL), U.S. District Court for the District of Columbia, Mar. 29)

Judge Amy Berman Jackson has ruled that two anonymous plaintiffs failed to show that they have an enforceable privacy interest in preventing the Federal Election Commission from disclosing their identities as part of its investigation into an illegal campaign contribution that resulted in a $350,000 fine. CREW filed a complaint with the FEC in 2015, alleging a violation of the Federal Election Campaign Act when the American Conservative Union funneled $1.8 million to the Now or Never PAC. The agency investigated the matter and settled on the penalty. The FEC then announced that it would disclose the file, including the names of two anonymous participants. Those two then filed suit under the Administrative Procedure Act, arguing that disclosure would violate the FECA, FOIA, and the First Amendment. In dismissing the complaint, Jackson rejected the plaintiffs' argument that their identities would be protected by Exemption 7(C) (invasion of privacy concerning law enforcement records). She noted that "John Doe 2 is a trust and under well-established FOIA principles, an entity has no right to 'personal privacy' under FOIA Exemption 7(C). And the actions of John Doe 1, as the trustee for John Doe 2, were solely on behalf of the trust, not himself, so his asserted privacy interests are minimal." (*John Doe 1 & John Doe 2 v. Federal Election Commission*, Civil Action No. 17-2694 (ABJ), U.S. District Court for the District of Columbia, Mar. 23)

A federal court in Oregon has ruled that the government failed to show that a 70-page draft document entitled "The Kuchel Act and Management of Lower Klamath and Tule Lake National Wildlife Refuges," that the government contended had been inadvertently disclosed in response to a FOIA request from the Audubon Society of Portland should be returned to the Department of the Interior because it is privileged. Rejecting the claim, the court noted that "it is Federal Defendants' burden to demonstrate an expectation of confidentiality, and simply 'identifying the document as attorney-client communications' as they have done here, is insufficient." The court added that "here, Federal Defendants have not supported their contention that they took reasonable steps to prevent disclosure with sufficient factual detail" and indicated that "aside from stating that a Solicitor's Office attorney reviewed the material at issue, there is no explanation as to the procedures used to identify or determine whether a document was privileged. . ." (*Audubon Society of Portland, et al. v. Ryan Zinke, et al.*, Civil Action No. 17-00069, et al., U.S. District Court for the District of Oregon, Mar. 27)

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