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Washington Focus: In response to what it says is a 30 percent increase in the number of FOIA requests, the Interior Department has published proposed amendments to its FOIA regulations that would allow it to reject requests altogether because they were considered too burdensome and limit the number of requests individual groups or organizations could file each month. Among the large number of public interest organizations decrying the new proposed FOIA regulations, Jeff Ruch, executive director of Public Employees for Environmental Responsibility, noted that "these changes are designed to facilitate more official stonewalling and delays in producing public records, especially on fast developing news stories."

Court Finds Innovation Office Does Not Qualify for Agency Status

Judge Colleen Kollar-Kotelly has ruled that the Office of American Innovation, which was set up by President Trump and is run by Jared Kushner, is not subject to FOIA because it has no independent authority and exists for no other reason than to provide advice to the President. While Kollar-Kotelly's decision is not particularly surprising, it is yet another example of congressional intentions gone astray by the development of case law that has consistently moved to defend executive privilege prerogatives at the expense of public access. Rejecting a challenge by the Democracy Forward Foundation and a coalition of other public interest groups, Kollar-Kotelly explained that "while the OAI is given many responsibilities, these responsibilities fall under the sole mission of the OAI which is to 'make recommendations to the President on policies and plans that improve government operations and services, improve the quality of life for Americans now and in the future, and spur job creation.' If all of OAI's responsibilities are cabined within its overarching mission to make recommendations to the President, it is unclear how the OAI could 'wield substantial authority independent of the President.'"

But to the extent that all executive authority is delegated through the President, it becomes somewhat unwieldy to determine where that delegation of authority ends. When Congress decided that FOIA applied to executive branch

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agencies it set in motion an underlying separation of powers dispute that in part has been resolved by the judicial conceit that at some point an executive entity became so integral to the President's day-to-day operations that to make it subject to FOIA would impinge on the President's ability to get candid advice from his immediate staff. The idea that separation of power issues were inherent in the disclosure mandate of FOIA was a reality that was not met head on and to the extent that it surfaced was left to the courts to sort out. The first instance in which this tension came to a head was in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), in which the D.C. Circuit found that the Office of Science and Technology's role in evaluating federal science programs indicated that it had an independent authority beyond solely advising the President and was therefore subject to FOIA. When Congress amended FOIA for the first time in 1974, the Conference Report embraced *Soucie'*s holding, indicating that the term "Executive Office of the President" should be interpreted consistent with "the results reached" in *Soucie*.

The sole function test from *Soucie* underwent significant judicial gloss in *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993) involving the Presidential Task Force on Regulatory Relief, which had been created during the Reagan administration and led by Vice President George Bush and continued into the Bush administration where it was led by Vice President Dan Quayle. In *Meyer*, the majority explained that whether an EOP entity was subject to FOIA depended on (1) its operational proximity to the President; (2) the degree of delegation of substantially independent authority from the President; and (3) whether it had a separate staff and self-contained structure. This kind of rethinking of the sole function standard from *Soucie* also resulted in the D.C. Circuit, in *Armstrong v. Executive Office of the President*, 90 F.3d 556 (D.C. Cir. 1996), to conclude that the National Security Council, which had previously considered itself to have a sufficient degree of independent authority to be subject to FOIA, in reality had no authority that was not delegated by the President. In *CREW v. Office of Administration*, 559 F. Supp. 2d 9 (D.D.C. 2008), Kollar-Kotelly herself relied on *Meyer* in rejecting CREW's claim that the Office of Administration, which provides administrative services to components of EOP, was an agency subject to FOIA. There, she pointed out that "when the nature of OA's delegated authority is considered along with that fact that OA is, at least as a matter of formal organization, proximate to the President, the Court is compelled to conclude that OA is not an agency subject to FOIA under the test set forth in *Meyer*." Kollar-Kotelly's decision was upheld by the D.C. Circuit in *CREW v. Office of Administration*, 566 F.3d 219 (D.C. Cir. 2009).

Kollar-Kotelly agreed with the government that the fact that OAI was an entity within the White House Office was fatal to DFF's claim of agency status. She pointed out that "the D.C. Circuit has repeatedly interpreted *Kissinger v. Reporters Committee* to mean that entities within the White House Office are categorically not agencies for purposes of FOIA. And, Plaintiffs have failed to cite any case in which an entity within the White House Office has been held to be an agency under FOIA. Based on FOIA's 'agency' definition and this Circuit's precedent, the Court concludes that, because the OAI is an entity within the White House Office, the OAI is not an agency subject to disclosure requirements under FOIA."

DFF argued that OAI's responsibilities indicated that it had independent authority, pointing to such responsibilities as evaluating and directing the modernization of federal technology systems, developing a federal infrastructure plan, managing "Centers for Excellence," and negotiating deals between public and private partners. DFF also pointed to the report by the American Technology Council, which OAI alleged helped prepare. But Kollar-Kotelly observed that "the Report's preface indicates that the Report is meant to provide recommendations. And, many of those recommendations specifically request that 'the President direct the implementation of the plan outlined' by the Report. Merely providing policy recommendations for the President to direct does not establish the substantial independence of the OAI."

DFF pointed to OAI's participation in developing the Trump administration's infrastructure plan as further evidence of its independent authority. But Kollar-Kotelly noted that "even if the Court credits

Plaintiffs' allegations that the 'OAI aided in the development' of the federal infrastructure plan, participation in that task does not establish substantial independence from the President. After all, according to the plan itself, the White House, not the OAI released the plan. Again, participating in developing and drafting legislation and policy released by the White House does not establish independence from the President. If anything, assisting the White House in developing policies such as the federal infrastructure plan strengthens the argument that OAI's primary function is to assist and advise the President." (*Democracy Forward Foundation, et al. v. White House Office of American Innovation*, Civil Action No. 18-349 (CKK), U.S. District Court for the District of Columbia, Jan. 9)

Views from the States…

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

District of Columbia

A court of appeals has ruled that the trial court erred when it refused to award fees for various items requested by Kirby Vining after he prevailed in his litigation against the District of Columbia's Advisory Neighborhood Commission for emails sent to or from chair Diane Barnes pertaining to the development of McMillan Park. Vining, a neighborhood activist, requested emails from both Barnes' government and personal email accounts. Barnes initially denied the request, claiming that all responsive emails had already been made public. After Vining filed suit, the trial court ordered the District to search Barnes' personal email account. The District produced 368 responsive documents but after further negotiations disclosed a CD containing 3,409 emails from Barnes' personal account with redactions pursuant to various FOIA exemptions. Vining then filed a motion for attorney's fees. The trial court found that the District's original litigation posture was reasonable until its first ruling and then unreasonable after that. The trial court also found that travel and disability expenses incurred by Vining's attorney Don Padou were not reimbursable under the statute and awarded Vining $66,122 in attorney's fees. The court of appeals agreed that the trial court had properly exercised its discretion in finding that Vining deserved an award for certain parts of the litigation but not for others. However, it observed that while the District's initial resistance to searching Barnes' personal email account was a matter of first impression, the trial court had not considered the reasonableness of Barnes' denial of Vining's FOIA request – that all responsive records had already been made public – and ordered the trial court to reconsider whether Vining was eligible for attorney's fees for challenging Barnes' denial. Vining had worked with Padou in the past on issues pertaining to McMillan Park when Padou lived and practiced in the District. However, Padou had since moved to California but agreed to represent Vining in this action. Vining requested reimbursement for $8,125 for Padou's travel expenses. The appeals court noted that the trial court had ruled that travel expenses were not reimbursable under the D.C. Code. Finding that such expenses were reimbursable if reasonably incurred, the appellate court pointed out that "we are unable to discern, however, whether the trial court's denial of Mr. Vining's request for travel expenses was the result of a discretionary determination that they were unreasonably incurred or the belief that travel expenses are categorically excluded from costs under the D.C. Code. . .[W]e remand to allow for a more clear-cut determination whether it was reasonable, under the circumstances of this case, for Mr. Vining to hire Mr. Padou and thus to incur cross-country travel expenses as part of the cost of litigation." Padou was blind and he had hired an amanuensis and a legal secretary to help him. The trial court had rejected this expense as well, finding that it was unnecessary to Vining's representation. Sending the issue back to the trial court for redetermination, the appeals court observed that "the proper inquiry is not whether a sighted lawyer would

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have hired or charged for an amanuensis or legal secretary for the purposes described in his fee petition; it is whether it was reasonable for Mr. Padou to do so." The appeals court upheld the trial court's ruling that Vining was not entitled to an award for Padou's preparation of two motions that were not used. (*Kirby Vining v. District of Columbia*, No. 15-1182 and No. 15-1328, District of Columbia Court of Appeals, Dec. 20, 2018)

Hawaii

Rejecting eight opinion letters issued by the Office of Information Practices between 1989 and 2007, the supreme court has ruled that Hawaii's Uniform Information Practices Act does not include a broad deliberative process privilege protecting records that are predecisional and deliberative in nature. Although OIP concluded almost from the beginning of its existence that such a privilege was implicit in the statute, in response to a suit brought by Civil Beat reporter Nick Grube for records concerning discussions for the 2016 budget for the City and County of Honolulu, the supreme court ruled that the legislature intentionally left such a privilege out of the UIPA. In response to Grube's request, Honolulu's Office of Budget and Fiscal Services denied him access to internal documents pertaining to the 2016 budget discussions, claiming they were protected by the deliberative process privilege and citing the eight OIP opinions as support. The supreme court reversed, noting that "because the deliberative process privilege attempts to uniformly shield records from disclosure without an individualized determination that disclosure would frustrate a legitimate government function, it is clearly irreconcilable with the plain language and legislative history of Hawaii's public record laws. The Office of Information Practices therefore palpably erred in interpreting the statutory exception to create this sweeping privilege." Instead, the supreme court sent the case back to the trial court for a determination as to whether or not other exemptions applied. Honolulu argued that without such a privilege staff would be unwilling to offer candid advice. The supreme court, however, pointed out that "but the UIPA itself makes clear that these generalized concerns alone are not sufficient to constitute frustration of a legitimate government function within the meaning of the statute." The supreme court explained that "the list of the UIPA's underlying purposes and polices, which was provided to guide our interpretation, repeatedly emphasizes that ensuring government accountability through public access and disclosure was among the legislature's top priorities in enacting the statute." The supreme court observed that "as the City and BFS readily admit, the deliberative process privilege is specifically designed to protect from public scrutiny 'documents reflecting advisory opinions, recommendations, and *deliberations comprising part of a process by which government decisions and policies are formulated*' – the precise opposite of the policy [the statute's purposes section] explicitly declares the UIPA should be interpreted to promote." The supreme court concluded that "in light of the policy statement and rules of construction contained in [the statute's purposes section], the disclosure of pre-decisional, deliberative records cannot be said to inherently frustrate a legitimate government function within the meaning of the UIPA." (*Peer News LLC, dba Civil Beat v. City and County of Honolulu and Department of Budget and Fiscal Services*, No. SCAP-16-0000114, Hawaii Supreme Court, Dec. 21, 2018)

Louisiana

A court of appeals has ruled that the trial court erred when it found that the St. Charles Parish Sheriff's Office had substantially complied with a request from the Center for Constitutional Rights pertaining to two 2016 trips taken by the sheriff and his deputies to North Dakota because of protests against the Dakota Access Pipeline Project. Sheriff Greg Champagne argued that the trips were made pursuant to an emergency management assistance compact. The sheriff's office provided some records, but during a deposition one employee agreed that there should be receipts for travel expenses, which had not been produced. At the court of appeals, that court found that because Champagne had not turned over any receipts the trial court had erred in ruling in favor of the sheriff's office and told the sheriff's office to turn over all receipts. Other testimony revealed that at least one deputy had taken photos during the North Dakota trips and to the extent such photos

existed, they needed to be processed for possible disclosure. (*Center of Constitutional Rights v. St. Charles Parish Sheriff's Office*, No. 18-CA-274, Louisiana Court of Appeal, Fifth Circuit, Dec. 27, 2018)

New Jersey

A court of appeals has ruled that the trial court erred in finding that the Port Authority of New York and New Jersey properly ignored a number of the multiple requests submitted by the Port Authority Police Benevolent Association. The PAPBA submitted a total of 58 requests. The Port Authority answered six requests but rejected 38 requests as being overbroad. PAPBA filed suit and the trial court sided with the Port Authority and although it found the Port Authority had not yet responded to 14 of the requests, expressed skepticism about the overbreadth of those requests as well. PAPBA then filed a motion of $36,000 in attorney's fees. The trial court instead awarded $5,400 for the organization's success in pursuing a single request. Both parties appealed. The appeals court agreed with the Port Authority that a series of requests for records of meetings were "overbroad, ambiguous, and impose an impermissible burden on the custodian of records." For the most part, the appeals court agreed with the trial court's conclusion that requests were overbroad, although it found that eleven requests were clear enough and sufficiently limited in scope that the Port Authority should have been able to process them. The appellate court also found that the trial court had properly assessed the degree to which PAPBA was successful in the litigation in awarding only $5,400 in fees. The court of appeals observed that "the judge was entitled to weigh heavily the fact that plaintiffs were successful only in fourteen out of fifty-eight requests, and that these requests were almost identical to ones previously denied. The court's approach did not constitute an abuse of discretion or an erroneous application of law." (*Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, No. A-1810-16T3, New Jersey Superior Court, Appellate Division, Dec. 20, 2018)

Ohio

The supreme court has ruled that security-camera video footage of a use-of-force incident at the Marion Correctional Institution is neither an infrastructure record nor a security record and must be disclosed to Corredon Rogers, an MCI employee who requested a copy of the video. Although the Department of Rehabilitation and Corrections argued that the video was an infrastructure record, the supreme court found that it did not fit the statutory definition, which excluded a simple floor plan. DRC also claimed the video disclosed the configuration of the network of security cameras. The supreme court disagreed, noting that "the video does not reveal the location of any video cameras other than the one that records the incident at issue" adding that "the disclosure of windows, doors, and vents in the Dorm 6 East hallway falls far short of disclosing the underlying configuration of a critical system." As to the security record exception, the supreme court indicated that "the video footage Rogers has requested is from a single video camera on a specified day and time and does not contain any information as to the network of cameras operating in and around the prison. In short, DRC has not offered any analysis as to why the video requested in this case fits squarely within the exception." The supreme court also upheld the trial court's grant of $1,000 in statutory damages to Rogers. The supreme court confirmed that Rogers was entitled to attorney's fees but sent the case back to the trial court for a determination based on a four-factor test. (*State ex rel. Corredon Rogers v. Department of Rehabilitation and Correction*, No. 2017-0331, Ohio Supreme Court, Dec. 20, 2018)

The supreme court has ruled that while Lauren Kesterson's public records suit against Kent State University is moot because Kent State ultimately responded in full, she is entitled to $1,000 in statutory damages and is eligible for attorney's fees as well. To support her federal litigation against Kent State for Title IX violations, Kesterson submitted a public records request to Kent State for records concerning policies and training for various coaches of the women's softball team. The agency failed to respond in a timely

manner and Kesterson filed suit in state court. After court supervision, the university provided 750 pages of records. The university argued that it had provided the records as a courtesy and had no legal obligation to do so. The supreme court rejected that claim, noting that "these materials were public records, and despite [the university's] assertion that Kesterson's February 2, 2016 request was limited to Title IX and sexual-assault/harassment training offered exclusively to the softball team, this request was broader and encompassed *all training and information* provided to the softball team, which by definition includes training and information provided to all incoming students – precisely what the university ultimately produced." But the supreme court observed that "despite its failure to comply with Kesterson's request within a reasonable period of time, Kent State's eventual production of all the requested records has rendered her mandamus claim moot." The supreme court agreed that Kesterson was entitled to statutory damages and sent the issue of attorney's fees back to the trial court to allow Kesterson to provide an appropriately itemized list of her costs that Kent State could then challenge. (*State ex rel. Lauren Kesterson v. Kent State University*, No. 2016-0615, Ohio Supreme Court, Dec. 20, 2018)

Texas

A court of appeals has ruled that the Leander Independent School District improperly redacted personally-identifying information from a spreadsheet listing complaints made against teachers in response to a request from a local reporter. Leander requested an opinion from the Attorney General as to whether its redactions were appropriate. The AG ruled against the school district. The school district then filed suit against the AG. The trial court sided with the AG and the school district appealed once more to the court of appeals. At the court of appeals, the school district argued that the redactions were appropriate under a variety of exceptions, including the deliberative process privilege, attorney work product, and privacy, including an argument that the redactions were protected by a constitutional right of privacy previously recognized by the Texas Supreme Court. The school district claimed the identifying information was the product of deliberations, but the appeals court observed that "the fact that [the superintendent] used a deliberative process to determine what information to include in the Document makes the Document the product of deliberation, not a predecisional, privileged document that is part of the deliberation process." Turning to the constitutional privacy claim, the court of appeals pointed out that "workplace harassment and discrimination, whether founded or unfounded, generally do not involve constitutional rights of the alleged perpetrator that are within any recognized zone of privacy." (*Leander Independent School District v. Office of the Attorney General for the State of Texas*, No. 03-18-00242-CV, Texas Court of Appeals, Dec. 14, 2018)

The Federal Courts…

While the D.C. Circuit had little trouble finding that EPIC had no legal right to Donald Trump's tax returns without his consent, it ruled that the IRS FOIA regulations improperly shifts the burden of proof on to requesters to show that such tax information is disclosable rather than requiring the agency to show that such records are protected by an exemption. EPIC submitted a FOIA request to the IRS for Trump's tax returns from 2010 to the present. As in almost all cases where a requester does not have the permission of the taxpayer to disclose such records, the IRS rejected EPIC's request without Trump's consent. EPIC then sent a letter to the IRS appealing its decision to not process its request, arguing that under Section 6103(k)(3), which allows the agency to disclose return information when needed to correct a misstatement of fact after gaining approval from the Joint Committee on Taxation, the agency should use that exception to correct misstatements made by Trump. The IRS declined to process the second request as well and told EPIC that any future requests would not be processed. Judge James Boasberg agreed with the IRS, finding that EPIC had **failed to exhaust its administrative remedies** by not providing a perfected request. EPIC then appealed to the D.C.

Circuit. Although earlier reports of the oral arguments before the D.C. Circuit panel indicated that at least Circuit Court Judge Patricia Millett questioned the agency's policy of rejecting such requests without third-party consent, Circuit Court Judge Karen LeCraft Henderson ruled that ultimately Section 6103 provided a statutory basis through **Exemption 3 (other statutes)** for withholding such records, but that the agency's procedures for rejecting such requests were inappropriate. Henderson first explained the IRS's policy, noting that "the IRS reads its regulations as requiring that a FOIA requester establish his entitlement to records – in other words, establish that the records are not exempt – before the IRS has any processing duty. Because EPIC failed to supply either President Trump's consent or the Joint Committee's approval, the IRS contends that EPIC did not establish its 'entitlement' to the requested records, a violation, by its lights. This violation, according to the IRS, left EPIC's administrative remedies unexhausted." But Henderson pointed out that "the IRS misunderstands its FOIA disclosure obligations. FOIA unambiguously places on an agency the burden of establishing that records are exempt. To withhold records, then, the IRS must establish that a requester seeks 'returns' or 'return information' subject to the section 6103(a) bar on disclosure. The IRS maintains that its 'published rules,' however, shift the burden to the FOIA requester. Granted, FOIA allows an agency to establish 'published rules' governing 'the time, place, fees (if any), and procedures to be followed' in making a FOIA request. But the IRS's [cited] rules do not speak to these purposes; instead they address a requester's substantive right to records. And FOIA specifically places on the agency the burden of establishing that its records are exempt. Neither an agency's 'published rules' nor its regulations can modify the Congress's clear command. Thus, the IRS cannot disregard the plain statutory text and apply its regulations in a way that forces a requester – like EPIC – to establish that records are not subject to section 6103(a)'s disclosure bar." Finding that exhaustion did not apply under these circumstances, Henderson noted that "the IRS denied EPIC's initial FOIA request, notifying EPIC that its request was closed 'as incomplete.'" But Henderson pointed out that EPIC then submitted a letter with detailed arguments supporting its claim. She observed that "EPIC followed the administrative appeal process to the limited extent the IRS allowed and was repeatedly met with a closed door. Accordingly, we conclude that exhaustion does not bar review of EPIC's FOIA claims." Even though the IRS argued that Section 6103 exempted the records entirely, EPIC argued that there were likely some non-exempt records that could be **segregated** and disclosed. Henderson agreed with the agency that "EPIC has framed its FOIA request in such a way that acknowledging the existence of any responsive documents would itself violate section 6103 by disclosing whether the President has filed income tax returns for the years in question." Henderson pointed out that "because any response to EPIC's requests would reveal 'returns or return information,' we agree with the IRS that section 6103(a) prevented the IRS from complying with the requests unless an exception to the disclosure bar applied." Henderson acknowledged that 6103(k)(3) gave the IRS discretion to pursue the correction of a misstatement but found no evidence that a FOIA requester could force the agency to take such action. She observed that "however the section 6103 exceptions work with FOIA, the (k)(3) exception may be *sui generis* in that it affords a FOIA requester no disclosure right." (*Electronic Privacy Information Center v. Internal Revenue Service*, No. 17-5225, U.S. Court of Appeals for the District of Columbia Circuit, Dec. 18, 2018)

Judge Christopher Cooper has ruled that the General Services Administration has failed to show that it **conducted an adequate search** for records concerning the agency's 2018 decision to rebuild or renovate the FBI's Washington, D.C. headquarters building instead of relocating it to Northern Virginia as previously planned. Because the fact that the Trump International Hotel is directly across the street from the current FBI headquarters building might have influenced the agency's about-face, CREW submitted a six-part request for records concerning the change in plans, including communications between GSA Regional Commissioner Mary Gibert, GSA Administrator Tim Horne, and the White House. GSA initially found a single record responsive to the sixth item. It then realized that it had searched under "Mary Gilbert" rather that "Gibert," and ran the search again, locating an additional 28 responsive records, GSA withheld records under

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Exemption 5 (privileges) and **Exemption 6 (invasion of privacy)**. CREW argued that it was implausible that since GSA's Inspector General had located more than 50,000 pages about the FBI headquarters consolidation project that only 29 records concerning the change of plans existed. But Cooper pointed out that "CREW's FOIA request was not for *all* records, 'concerning the FBI headquarters consolidation project' – what the IG Report surveyed – but instead for records from January 20, 2017 onward concerning the decision to '*cancel* the procurement for the new FBI headquarters consolidations project.' That means many records that the IG Report reviewed would reasonably be excluded from CREW's request – because they either predated January 20, 2017, or concern the consolidation project, but not the decision to call it off." Indicating that CREW's claims that more records must exist was nothing more than speculation, Cooper noted that "and speculation alone does not provide an adequate basis to order a subsequent search." CREW also faulted GSA for limiting the time frame and conducting a search only for electronic records. Cooper found the agency's time frame sufficiently tracked CREW's request, but that it had failed to explain why it only searched for electronic records. GSA argued that an electronic records search would capture all records since its record retention policy required paper records to be stored electronically. Cooper, however, pointed out that "the trouble for GSA is that CREW happened to read the 'record retention policy' GSA alluded to, and it appears to stand for directly the opposite proposition: that records are kept in a variety of media." Having established that, Cooper ordered the agency to search its non-electronic records. CREW also challenged the agency's failure to use "JEH" and "Hoover Building" as search terms, as well as limiting its email search to emails sent or received by Horne or Gibert. Cooper agreed with CREW on both counts. He pointed out that "part of liberally construing a request is searching for 'synonyms' and 'logical variations' of the words used in the request; an agency may not fish myopically for a 'direct hit on the records' using only 'the precise phrasing' of the requester. Here, it strikes the Court as rather likely that 'JEH' and 'the Hoover Building' – referring to the current headquarters – would be used in communications and records regarding the headquarters consolidations project; a search reasonably calculated to uncover all documents responsive to CREW's request therefore, ought to include these rather obvious synonyms." GSA argued that inclusion of those terms would not have yielded more records, but Cooper observed that "the words 'JEH' and "Hoover' were not used in records that also used the words 'FBI headquarters,' but they *may* have been used in other records – particularly informal records like emails – as a replacement or shorthand for 'FBI headquarters.'" As to limiting the search for emails to communications involving Horne or Gibert, Cooper explained that "a search more faithful to CREW's broad request would have searched instead for communications between .gsa and .fbi/.omb addresses." Cooper found GSA's *Vaughn* index completely inadequate, noting that "the description of the withheld documents is so vague as to make impossible any meaningful evaluation of the appropriateness of the deliberative-process privilege." Rejecting the agency's current claim that talking points were protected by the deliberative process privilege, Cooper pointed out that "the agency has not explained *why* the withheld documents constitute deliberative talking points." He added that "the agency must either provide a more robust explanation or produce the documents in full." (*Citizens for Responsibility and Ethics in Washington v. United States General Services Administration*, Civil Action No. 18-377 (CRC), U.S. District Court for the District of Columbia, Dec. 17, 2018)

In a 2-1 decision, the Ninth Circuit has ruled that several opinions issued by U.S. Fish and Wildlife Service or the National Marine Fisheries Service concluding that an EPA rule-making process concerning cooling water intake structures could jeopardize endangered species are not protected by **Exemption 5 (privileges)** because they constituted the final opinions of FWS or NMFS even though they were not used as part of the EPA's rulemaking. The EPA began its rulemaking in 2012 and both FWS and NMFS provided jeopardy opinions in 2013. In 2014, the EPA issued a new version of the rule and both FWS and NMFS provided jeopardy opinions pertaining to the new rule. The Sierra Club requested records from both agencies concerning their involvement in the EPA rulemaking. After the Sierra Club filed suit, the agencies narrowed their privilege claims to 16 documents. The district court ruled that four documents were protected by

Exemption 5 but ordered the agencies to disclose 11 documents in full and one document in part. The agencies appealed to the Ninth Circuit. The Ninth Circuit founds that the 2014 jeopardy opinions were protected because they were pre-decisional to the EPA's subsequent rulemaking. But it found that the 2013 opinions were not privileged. The court noted that "our focus is on whether each document at issue is pre-decisional as to a biological opinion not whether it is pre-decisional as to the EPA's rulemaking. Although the December 2013 jeopardy biological opinions in this case were not *publicly* issued, they nonetheless represent the Services' final views and recommendations regarding the EPA's then-proposed regulation. The purpose of the December 2013 jeopardy biological opinions and their accompanying documents was not to advise another decision-maker higher up the chain about what the Service's position should be on the proposed rule. Instead, these opinions, created pursuant to an [Endangered Species Act] Section 7 formal consultation, contain the final conclusions by the final decision-makers – the consulting Services – regarding whether a proposed regulation will harm protected species and habitat." The court pointed out that "where, as here, a document is created by a final decision-maker and represents the final view of an entire agency as to a matter which, once concluded, is a final agency action independent of another agency's use of that document, it is not pre-decisional." The dissent agreed with the agencies' argument that the deliberations from 2013 influenced the deliberations that resulted in the EPA's 2014 final rule. But the majority observed that "the fact that the decision to revise the rule after the jeopardy finding was the result of additional back-and-forth between the Services and the EPA does not render the December 2013 opinions or accompanying documents pre-decisional or deliberative as to the Services' opinion about the November 2013 version of the EPA regulation or as to the Services' later conclusion about a different version of the rule." (*Sierra Club, Inc. v. United States Fish and Wildlife Service and National Marine Fisheries Service*, No. 17-1650, U.S. Court of Appeals for the Ninth Circuit, Dec. 21, 2018)

The Fifth Circuit has overturned its ruling in *Cazalas v. Dept of Justice*, 709 F. 2d 1051 (5th Cir. 1983) in which a split panel decided that an attorney representing herself was eligible for attorney's fees, after finding that after the Supreme Court's ruling in *Kay v. Ehrler*, 499 U.S. 432 (1991), in which the Court held that an attorney representing himself in litigation brought under the Civil Rights Act was not eligible for attorney's fees, *Cazalas* was no longer good law. The Fifth Circuit consolidated three rulings by judges in the Eastern District of Louisiana finding that immigration attorney Michael Gahagan was not eligible for attorney's fees for representing himself. Although Gahagan had had some previous success recovering attorney's fees against the Department of Homeland Security, after one judge in the Eastern District of Louisiana decided that Gahagan was not eligible because of *Kay* two more judges ruled the same way. At the appellate level, the Fifth Circuit agreed that its holding in *Cazalas* conflicted with the Supreme Court's later ruling in *Kay* and abandoned its previous position that an attorney representing himself was eligible for attorney's fees. The Fifth Circuit had also ruled in *Texas v. ICC*, 935 F.2d 728 (5th Cir. 1991), that attorneys for the state of Texas were eligible for attorney's fees, alluding only in passing to the recent decision in *Kay*. But to overturn *Cazalas* now, the Fifth Circuit panel needed to assure itself that *Texas v. ICC* had not recognized *Cazalas* as precedential. Finding that *Texas v. ICC* was more about whether a state government could be awarded fees than whether its attorneys were eligible for fees, the Fifth Circuit panel decided *Texas v. ICC* had not embraced *Cazalas.* The Fifth Circuit panel noted that "the background principle – federal fee-shifting statutes should be interpreted consistently – applies with full force to the eligibility of *pro se* attorneys for fee awards. For that reason, *Kay* provided more than 'mere illumination;' it 'unequivocally overruled *Cazalas*. After *Kay*, *Cazalas* is no longer binding precedent on the eligibility of *pro se* attorneys to recover fee awards under FOIA." (*Michael W. Gahagan v. United States Citizenship & Immigration Services, et al.*, No. 17-30898, No. 17-30901, and No. 17-30999, U.S. Court of Appeals for the Fifth Circuit, Dec. 20, 2018)

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On remand from the Eleventh Circuit, a federal court in Georgia has ruled that the Department of the Navy has provided author Thomas Sikes all the relief to which he was entitled by re-disclosing the same 11 pages with redactions of materials found in the vehicle used by Admiral J.M. Boorda, then Chief of Naval Operations, who committed suicide in 1996. Sikes had requested records about the investigation of Boorda's suicide by the Naval Criminal Investigative Service. He received some documents, including the 11 redacted pages found in Boorda's vehicle. But in response to a subsequent request for all materials, the Navy refused to provide the 11 pages because he had already received them as part of an earlier request. Sikes filed suit and the district court upheld the agency's decision. Sikes then appealed to the Eleventh Circuit, which ruled that the Navy could not refuse to process the subsequent request based solely on its claim that it had already provided those records to Sikes and ordered the Navy to process the request. The Navy conducted an electronic-records search and came up with the same 11 pages, which it disclosed with the original redactions. This time, the Navy argued that Sikes could not challenge the agency's response to Sikes' earlier request that located the 11 pages because of *res judicata*. The trial court disagreed, noting that "the Navy's response to [Sikes' subsequent request that included the 11 pages] must be assessed independently. Indeed, the Eleventh Circuit went on to point out that the Navy did *not* just give Plaintiff the same eleven pages, rather, the Navy provided *no* records to Plaintiff in response to [the subsequent request]. Thus, Plaintiff's claim in the instant case did not challenge the adequacy of the Navy's production in the [original request] from *Sikes I*. Instead, Plaintiff's claim in this case challenged the Navy's non-response to [the subsequent request]. Nothing that occurred in *Sikes I* addressed this issue, and therefore, Plaintiff's claim here is not precluded." While the court found the Navy had conducted an adequate search and responded appropriately to Sikes' specific request that had been remanded by the Eleventh Circuit, Sikes argued that the agency's responses to other of his requests supported a finding of bad faith on the part of the agency. The court rejected Sikes' claim of bad faith, noting that "only the conduct of the Navy in withholding documents *in this case* informs the analysis of whether the Navy has acted in bad faith. Here, the Navy withheld responsive documents because it believed it had no obligation to *reproduce* documents to the *same* requester. In fact, this Court agreed with this position, until the Eleventh Circuit Court of Appeals reversed this ruling in a published opinion. Once the Navy's position was rejected, it immediately responded to [the disputed request]. There is no evidence of bad faith here, and this Court's findings in *Sikes I* are irrelevant." Sikes claimed that the agency had failed to certify the authenticity of the records, pointing to the agency's regulations providing for such a service. Noting that the provision addressing certification of records had been removed from the Navy's FOIA regulations prior to processing of the request, the court observed that "there is no requirement for providing a certificate of authenticity or any other type of certification within these governing regulations." (*Thomas W. Sikes v. United States Department of the Navy*, Civil Action No. 16-00074-DHB-BKE, U.S. District Court for the Southern District of Georgia, Dublin Division, Jan. 2)

In a ruling that seems at odds with a similar suit in Seattle concerning affirmative disclosure of Title X grant applications, Judge Trevor McFadden has allowed the Department of Health and Human Services to disclose a redacted version of a grant application submitted by Arizona Family Health Partnership after finding the redacted version did not risk disclosing confidential business information. Although a federal judge in Seattle recently blocked disclosure of a grant application submitted by Planned Parenthood to provide health services in Hawaii, McFadden made clear that Arizona Family Health Partnership had not made its case in the litigation before him. He pointed out that "it is not enough to say that the case 'raises serious legal questions' about issues such as FOIA Exemption 4, the Trade Secrets Act, an agency's *post hoc* rationalizations, and reliance on information outside the administrative records. Far from establishing that they have a 'substantial case on the merits,' the Plaintiffs fail to articulate how the Court erred. And the Court cannot evaluate whether the case on appeal is 'substantial' when the Plaintiffs do not say what the case is." McFadden pointed out that "Plaintiffs now ask the Court to prohibit the Department from releasing *any part* of their applications, even though Plaintiffs' counsel conceded at oral argument that most parts of its applications

were disclosable under FOIA." He observed that "the remaining disputed information is largely (1) skeletal outlines of generic budget information, with heavy redactions; and (2) background demographic information from their Needs Assessments. The background demographic information is publicly available, so there is little irreparable harm there, even if the Court were wrong on the applicable caselaw. And the unredacted Needs Assessments and budget language are far cries from the types of confidential, proprietary information that could make or break a grant application." Instead, McFadden pointed out that the department would suffer irreparable harm if it could not disclose the redacted applications. He explained that "the Department plans to post the applications on its website before the current grant application period closes on January 14, 2019. The Department believes that posting these applications as exemplars will attract a new pool of quality grant applicants. Even if the Department eventually prevails on appeal, it would be irreparably harmed by the delay because potential applicants would not be able to review these documents during this specific grant application round." He added that requesters would be harmed as well, noting that "FOIA grants them the right to speedy and robust disclosure of government-held information. They undoubtedly hope to use the information for their upcoming applications. For them, justice delayed is justice denied." Rejecting the request for a stay, McFadden observed that "the Plaintiffs argue that there is a public interest in protecting the competitive process, and the Court agrees. But the Nation is best served by rigorous competition for Title X grants, and the Department's desire to help other potential applicants to develop more robust applications is laudable. To do so, the redacted grant applications must be released well before January 14, 2019. In granting its permanent injunction, the Court found that this prong supports the Department, and the Court again finds that the public interest weighs against the Plaintiffs." (*Arizona Family Health Partnership, et al. v. U.S. Department of Health and Human Services*, Civil Action No. 18-02581 (TNM), U.S. District Court for the District of Columbia, Jan. 8)

Judge Colleen Kollar-Kotelly has ruled that Feliciana Reyes is entitled to $20,000 in **attorney's fees** for her suit against the National Archives and Records Administration for records concerning the role of female guerilla fighters in the Philippines during World War II, but reduced Reyes' requested award after agreeing with the agency that work done by Reyes' second attorney was duplicative and thus unnecessary. Reyes requested records concerning an Army report that had recognized the role of the Filipino female guerilla fighters. After the agency failed to respond in a timely manner, Reyes filed suit. Kollar-Kotelly issued a consent order requiring the agency to process Reyes' request by August 18, 2017. The agency did so, locating 153 responsive pages, disclosing 30 pages in full, 31 pages in part, and withholding 88 pages entirely. Reyes initially indicated that she would challenge the agency's exemption claims, but after discussions with the agency decided not to do so. However, she did file a motion for attorney's fees. NARA argued that the consent order did not show that Reyes had substantially prevailed because it only memorialized the parties' existing agreement. Kollar-Kotelly observed that "defendant misconstrues the standard. That the Court ordered Defendant to do something that it had voluntarily agreed to do in the course of litigation is irrelevant. What matters is that the Court ordered Defendant to take an action, make an initial release of responsive records by August 18, 2017, that Defendant had been unwilling to do prior to the initiation of this lawsuit. And, here, there is no evidence that Defendant was willing to make its initial disclosure by a date certain prior to Plaintiff filing her lawsuit." She added that "regardless of Defendant's voluntary agreement to release the records by August 18, 2017, the Court's Consent Order changed the legal relationship between the parties by creating a legal obligation for Defendant to release the documents." NARA argued that Reyes' request was not in the public interest and pointed to the fact that the U.S. Court of Appeals for Veterans Claims had rejected Reyes argument based on the documents she received from her FOIA request. Kollar-Kotelly disagreed, noting that "the D.C. Circuit has explained that a court should assess the potential public value of the information sought, not the public value of the information that was actually disclosed through the FOIA litigation." NARA questioned Reyes' personal and commercial motivation in making the request since she

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had made it as a substitute for discovery in her Veterans Claims appeal. Kollar-Kotelly agreed that her veterans claim suggested a personal or commercial interest in the litigation but pointed out that special circumstances existed here mitigating those factors. She explained that Reyes' request not only benefitted her personally but thousands of other female Filipino guerilla fighters who were also seeking compensation and that she had been represented pro bono. Kollar-Kotelly indicated that "granting attorneys' fees in these circumstances, where Plaintiff is represented pro bono and where her request benefits others, would further the purposes of FOIA." On the issue of whether the agency's position was reasonable, she pointed out that "this purpose would not be served if it were reasonable for agencies to withhold documents for indeterminant periods of time because they have too many FOIA requests and too few FOIA staff members." Reyes had used the two attorneys working on her veterans claims appeal to assist her in her FOIA litigation. Finding the use of two attorneys unnecessary here, Kollar-Kotelly noted that "even if two attorneys were required for her appeal, that does not lead to the conclusion that two attorneys were required for this straightforward FOIA case. And, because the issues are distinct, the factual and legal knowledge the [second attorney] may have gained by working on Plaintiff's appeal would not be necessary or materially useful to Plaintiff in her FOIA litigation." Kollar-Kotelly agreed that review of documents during the litigation was a cost deserving compensation. She pointed out that "Plaintiff's counsel did not simply review the documents at leisure after the litigation ended. Instead, Plaintiff's counsel reviewed the documents as they were released and acted pursuant to the information contained in those documents." NARA challenged Reyes' request for fees for arguing the attorney's fees motion. But aside from reducing the fees requested by her second attorney, Kollar-Kotelly concluded that the fees requested were appropriate. (*Feliciana G. Reyes v. United States National Archives and Records Administration*, Civil Action No. 17-1497, U.S. District Court for the District of Columbia, Dec. 18, 2018)

A federal court in California has ruled that U.S. Immigration and Customs Enforcement has now adequately explained its **search** for records concerning policies for interacting with local police and that it has justified one of its **Exemption 7(E) (investigative methods and techniques)**, but not the other. In her previous decision, Magistrate Judge Jacqueline Scott Corley had questioned the agency's use of differing search terms. This time, she noted that the agency's affidavit explained that "San Francisco Field Officers were directed to use the search terms that they reasonably believed would appear in the records they maintained. Each of the officers searched by Plaintiff's A-number, and five of the six officers searched for variants on Plaintiff's name, and four of the six searched for variants on the operation name. The Court is persuaded that discrepancies in the search terms are not material given that they were based on the officers' 'unique knowledge of the manner in which they keep their own files and the vocabulary they use.'" Turning to Exemption 7(E), Corley accepted the agency's claim as to a section that served as a refresher on Fourth Amendment issues. After reviewing the pages *in camera*, she agreed that they were exempt, noting that "while the public may generally know that ICE uses particular techniques, there is no dispute on this record that the step-by-step means for applying these techniques is not publicly known." But she rejected the agency's claims as to a section of the Justice Department handbook on arrest, search and seizure for immigration officers. Here, she observed that "the chapter at issue consists of three paragraphs and only provides general information regarding this law enforcement tactic and ICE has failed to show how revealing this very generalized information would assist fugitives in identifying undercover initiatives and evading apprehension." (*Ariel Cervantes Anguiano v. United States Immigration and Customs Enforcement*, Civil Action No. 18-01782-JSC, U.S. District Court for the Northern District of California, Dec. 21, 2018)

Judge James Boasberg has ruled that Freedom Watch **failed to exhaust its administrative remedies** when it filed suit against the FBI after the agency told the organization that its request for records concerning any communications between the FBI and the Southern Poverty Law Center since 2008 did not sufficiently

describe the records sought to allow the agency to conduct a search. The agency suggested that Freedom Watch provide more specific information. Freedom Watch filed suit instead. Boasberg noted that "the FBI's determination gave Freedom Watch two routes forward. It could have resubmitted its FOIA request with the additional detail required – thus perfecting its request – or it could have administratively appealed the FBI's assessment that its request was incomplete. Apparently unhappy with those options, Plaintiff instead brought its grievance to this Court, challenging the FBI's denial of an unperfected request that Freedom Watch did not administratively appeal. By doing so, it created two related grounds to dismiss the suit. No matter how it is sliced, Plaintiff's case cannot go forward." Freedom Watch argued it was not required to file an administrative appeal because to do so would be futile. Boasberg pointed out that "although a 'futility exception' to exhaustion does exist, it is reserved for narrow circumstances, such as when 'an agency has articulated a very clear position on the issue which it has demonstrated it would be unwilling to reconsider,' Freedom Watch points to no such circumstance here, nor can the Court glean any possible support for Plaintiff's position from its review of the Complaint and the FBI's communications with that entity. This Hail Mary lands incomplete." (*Freedom Watch, Inc. v. Federal Bureau of Investigation*, Civil Action No. 18-1912 (JEB), U.S. District Court for the District of Columbia, Jan. 4)

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