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Washington Focus: The Interior Department's awareness review process, allowing political appointees at the agency to weigh in on responses to FOIA requests before being released, has been criticized by both open government advocates and members of Congress as both inappropriate and an open invitation to increased litigation by increasing already existing routine delays. In a memo from the National Park Service that was released as part of FOIA request, the agency indicated that "delays resulting from the Awareness Review process, which prevent the NPS from responding to requests within the legally required 20 workday time frame, are preventing NPS from meeting its legal obligations under the FOIA. Such delays leave the NPS open to potential litigation, which could result in the assessment of attorney fees."

D.C. Circuit Panel Dismisses CREW Suit to Post OLC Opinions

After years of virtually no legal challenges under Section (a)(2), the proactive disclosure provisions of FOIA because neither open government advocates nor the government believed there was any remedy under FOIA, related suits brought by CREW and the Campaign for Accountability have made some progress – including a D.C. Circuit admission that FOIA does indeed provide a limited remedy – but the hope that Section (a)(2) will ever become a panacea for proactive disclosure remains highly unlikely. In the most recent challenge to make it to the D.C. Circuit, a split panel, relying on *EFF v. Dept of Justice*, 739 F.3d 1 (D.C. Cir. 2014), has ruled that CREW failed to state a claim in its attempt to force the Justice Department's Office of Legal Counsel to post most of its legal opinions because at least some of them were clearly privileged and thus not subject to the proactive provisions at all.

By far the best-known provision of Section (a)(2) is the electronic reading room provision, which requires agencies to post responsive records when they have received three or more requests for the same information. But more broadly, (a)(2) requires agencies to publish other records, such as final opinions as well. CREW has consistently pushed for routine disclosure of OLC opinions on the ground that they constitute

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final opinions. However, its earliest attempt to push the issue ran aground because it had filed its complaint under the Administrative Procedure Act – which at the time was considered the only available legal remedy – rather than FOIA itself. After concluding that FOIA did provide equitable relief, the district court dismissed CREW's complaint for failure to state a claim. In *CREW v. Dept of Justice (CREW I)*, 846 F.3d 1235 (D.C. Cir. 2017), the D.C. Circuit agreed with the district court's conclusion that CREW's challenge should have been brought under FOIA rather than the APA. The D.C. Circuit also indicated that to have a remedy under (a)(2) the plaintiff was first required to have made a formal FOIA request to the agency under Section (a)(3) and been denied access. While *CREW I* was pending, the D.C. Circuit ruled n *EFF v. Dept of Justice*, finding that an OLC opinion to the FBI was protected by the deliberative process privilege and did not constitute a final opinion as to the FBI. Following the decisions in *EFF* and *CREW I*, CREW renewed its request to force OLC to post its opinions. After the agency failed to respond, CREW filed suit. In *CREW v. Dept of Justice*, 298 F. Supp. 3d 151 (D.D.C. 2018), the district court, relying on *EFF*, dismissed CREW's complaint again, noting this time that *EFF* "dooms CREW's complaint as currently articulated, because it establishes that at least one of OLC's formal written opinions – the opinion in *EFF* – is exempt from disclosure." The district court gave CREW an opportunity to amend its complaint to state a possibly viable claim, but CREW elected to appeal instead. Also relevant here is *Campaign for Accountability v. Dept of Justice*, 278 F, Supp. 3d 303 (D.D.C. 2017), in which another district court judge ruled that while *EFF* precluded a universal challenge to the posting of all OLC opinions, CfA would be allowed to amend its complaint to encompass a subset of OLC opinions that might be subject to (a)(2) disclosure.

Writing for the majority, Circuit Court Judge Karen LeCraft Henderson noted that "an OLC opinion in the [required disclosure] category qualifies as the 'working law' of an agency only if the agency has 'adopted' the opinion as its own. Thus, the question before us is whether CREW has plausibly alleged that the OLC's formal written opinions have all been adopted by the agencies to which they were addressed, subjecting the opinions to disclosure under FOIA reading-room provisions as the 'working law' of those agencies." She continued, observing that "CREW's complaint makes no such allegation. It instead, alleges only that the OLC's formal written opinions are 'controlling,' 'authoritative,' and 'binding.'" She added that "because CREW's complaint fails to allege the additional facts necessary to render an OLC opinion the 'working law' of an agency, CREW's claim that *all* of the OLC's formal written opinions are subject to disclosure under FOIA's reading-room provision fails as a matter of law."

CREW argued that the burden of proof was on the agency to show that the records were exempt. But Henderson pointed out that to state a claim in the first place, CREW was required to show that the agency had improperly withheld records. She noted that "regardless of the OLC's ultimate burden of proof, CREW must first allege factual matter supporting a plausible claim that the OLC 'improperly' withheld its formal written opinions. . ." CREW also argued that the majority was requiring it to anticipate potential exemption claims. But Henderson explained that "although *EFF* ultimately held that an OLC formal written opinion is exempt from disclosure, the decision adopted the broader rule that the OLC's formal written opinions are not the 'working law' of an agency simply because they are nominally 'controlling.' In the context of FOIA's reading-room provision, that an OLC formal written opinion is not the working law of an agency means that it does not fall within one of the reading-room's enumerated categories and therefore is not subject to disclosure even absent an exemption. Thus, our decision today does not require CREW to anticipate potential exemptions; consistent with *EFF*, it requires only that CREW plead more than that the OLC's formal written opinions are 'controlling' to make out a plausible claim that the opinions are the working law of an agency subject to disclosure under FOIA's reading-room provision." Henderson rejected CREW's claim that requiring it to identify a subset of OLC opinions that might constitute agency working law was an unfair burden. Henderson observed that "but the purported unfairness CREW faces is self-inflicted. CREW declined to avail itself of other measures at its disposal, not the least of which was acceptance of the district court's invitation to amend its complaint as *amicus* CfA has done."

Circuit Judge Cornelia Pillard dissented, finding that CREW had alleged facts that sufficiently stated a claim for relief. Observing that the majority put too much weight on the D.C. Circuit's holding in *EFF*, Pillard noted that "I agree that *EFF* shows that there is a subcategory of opinions (encompassing at least one, and likely many more) that need not be disclosed under the reading-room provision, whether because they have not been adopted by the receiving agency, or are subject to a FOIA exemption, or both. But the majority makes too much soup from one oyster. *EFF* could only defeat CREW's merits claim if we were certain that every one of the Office's opinions would be shielded from disclosure for the reasons that were dispositive in *EFF*. The government does not so claim, however, and my colleagues do not so hold. The identification of a single opinion that could be withheld even were plaintiff's legal theory correct is no basis upon which to dismiss the complaint for failure to state a claim." (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, No. 18-5116, U.S. Court of Appeals for the District of Columbia Circuit, Apr. 30)

Views from the States…

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

Connecticut

A court of appeals has ruled that while most of pro se litigant Michael Aronow's allegations against the FOI Commission should be dismissed, it has found that that FOI Commission improperly narrowed Aronow's request based on an email exchange in which Aronow urged the University of Connecticut Health Center to provide crucial documents for his appeal. Aronow alleged he was fired by the Health Center in retaliation for his whistleblowing activities. He submitted a number of voluminous FOIA requests to the Health Center and filed a complaint with the FOI Commission when the Health Center failed to respond. The FOI Commission agreed with Aronow that the Health Center's failure to provide a timely response violated the Freedom of Information Act, but also concluded that Aronow's email exchange had narrowed the categories of records he was seeking. The FOI Commission remanded the case back to the Health Center for completion. Aronow, however, appealed the Commission's ruling as well, arguing in particular that he had not intended to narrow his request as a result of the disputed email exchange. Dismissing Aronow's other claims, the appeals court agreed with him that his email had not narrowed his request. The appeals court noted that "the plaintiff, however, did not state in the email that he was in any way limiting his original request, or that he was excluding the remainder of the documents related to that request. The only reasonable reading of the plaintiff's emails is that he was attempting to expedite the receipt of certain documents for his upcoming committee appeal. Nowhere in the plaintiff's response to [the Health Center's FOIA coordinator] did he evince an intent to permanently alter the scope of his pending FOIA request." (*Michael Aronow v. Freedom of Information Commission*, No. AC 41297, Connecticut Appellate Court, May 14)

Illinois

A court of appeals has ruled that the Secretary of State may not charge Joseph Varan fees for providing copies of filings for 26 named corporations and limited liability companies because the agency did not respond within the statutory time limits. Using the contact form on the Department's website, Varan sent an email request to the business services department. The same day, an employee from the Trademark/Servicemark

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Department replied to the email, telling Varan that he should contact the LLC Department and the Corporation Department respectively for the requested records. However, Varan did not hear anything further from the agency for six months, when he was contacted by the FOIA coordinator, who had just received the request, and told that the records he requested cost $25 each for a total of $19,711. The Department also told Varan that the $25 cost was required under two separate statutes. Varan filed suit, arguing that under Section 3(d) the Department was not allowed to charge fees if it missed the statutory deadline for making a determination. The trial court agreed with Varan that the Department had technically violated FOIA but ultimately ruled in favor of the Department. The appeals court reversed, finding that since the Department had clearly failed to either respond, deny, or extend the time for complying, within five business days it had violated Section 3(d). The Department argued that it could still charge fees because it had not denied Varan's request. Calling this a "circular argument," the appeals court noted that "defendant's only basis for withholding the records is plaintiff's non-payment of the fee in the first place. In this instance, it would defy logic to allow plaintiff's non-payment of the fee to preempt the statutory language that prohibits the imposition of that same fee." The Department argued that it could not have complied in a timely manner because the department would have first needed to print off the records, redact them and then rescan them into electronic form. But the appeals court observed that "FOIA does not distinguish between records maintained in an electronic format and records maintained in an electronic format that may require manual redaction of exempt information. In any event, defendant's argument is aimed at demonstrating an undue burden, but defendant has forfeited this argument by failing to timely respond to the FOIA request." (*Joseph Varan v. Jesse White, Illinois Secretary of State*, No. 16-MR-543, Illinois Appellate Court, Second District, May 6)

Kentucky

A court of appeals has ruled that the trial court erred in finding that the investigative file pertaining to the University of Kentucky's investigation of allegations of sexual abuse brought by two female students in the University of Kentucky's College of Agriculture's Department of Entomology against Professor James Harwood. that resulted in Harwood's resignation but allowed Harwood to seek academic employment else, was totally protected by the Family Educational Rights and Privacy Act and could not be reviewed by the Attorney General *in camera* to assess the validity of the University's claims that the records were exempt in response to an Open Recordd Act request. The *Kentucky Kernel*, the University's student newspaper, requested the investigation file on Harwood after he resigned as a result of two unnamed students' allegations. The University provided Harwood's resignation letter and other public documents but refused to disclose the investigative file, citing FERPA, which threatens federal funding to educational institutions that routinely disclose identifying student information. The *Kernel* complained to the Office of the Attorney General, which concluded that the University had not provided sufficient support for its FERPA claim and asked to see the investigative file *in camera*. The University refused to allow an *in camera* review, arguing that even that kind of disclose would violate FERPA. Because the University had refused the AG's request for *in camera* review, the AG issued an order siding with the *Kernel* and finding that the University had not justified its FERPA claims. The University filed suit challenging the AG's order and the trial court ruled in favor of the University. The day after the trial court ruled in its favor, the University provided records to the AG in response to its discovery requests. Based on those records, the *Kernel* filed a motion asking the trial court to amend its ruling. The trial court finally ruled against both the *Kernel* and the AG, finding that the records were protected by FERPA. Both the *Kernel* and the AG appealed. The appeals court sided with the *Kernel* and the AG, noting that "the University has not yet made any attempt to comply with the Open Records Act in any meaningful way. It has not separated the exempt from the nonexempt records, redacted any personally identifying information or provided sufficient proof in circuit court that the records are exempt through a proper index. It has taken the indefensible position that records are exempt because it says they are and it must be believed." The appeals court found that the AG's request to conduct an *in camera* review was not appropriate, but pointed out that the University should have provided the AG with appropriately redacted

records and that its failure to do so was improper. (*Kernel Press, Inc. v. University of Kentucky*, No. 2017-CA-000394-MR and No. 2017-CA-001347-MR, Kentucky Court of Appeals May 17)

Texas

A court of appeals has ruled that seven public records requests received by the City of Dallas pertaining to potential liability for damages stemming from claims against the City are protected by the attorney work-product privilege and do not constitute core public information that would be routinely disclosed. In each instance, the City asked for an Attorney General' opinion as to whether the information could be protected. The AG found that all of the claims fell within the core public information category and were required to be disclosed. The appeals court disagreed. Instead, it noted that the records "suggest that the City has shown that its investigations were conducted for the purpose of preparing for potential litigation. Based on our review of the sealed records and the summary judgment evidence, we conclude that the information at issue was made or prepared by agents and employees of the City in anticipation of litigation against the City. It is, therefore, properly classified as noncore work product." (*Ken Paxton v. City of Dallas*, No. 06-18-00095-CV, Texas Court of Appeals, Texarkana, May 15)

The Federal Courts…

Judge Colleen Kollar-Kotelly has ruled that the Department of Education properly redacted a series of emails pertaining to an October 2, 2017 meeting called "Cutting the Red Tape," particularly OMB's role in deciding the list of invitees, under **Exemption 5 (privileges)**. In response to a request from Public Citizen, the agency disclosed 447 pages. After negotiations between Public Citizen and the agency, additional documents were disclosed, or redactions were removed. By the time Kollar-Kotelly ruled in the case, only 13 pages with redactions under the attorney-client privilege or the deliberative process privilege remained in dispute. After reviewing the disputed redactions *in camera*, Kollar-Kotelly agreed with the agency that all its privilege claims were appropriate. Public Citizen challenged the agency's decision to redact the subject matter of the emails. But Kollar-Kotelly pointed out that "while the general fact of legal consultation is generally not privileged, information that would reveal the substance of the client's request for legal advice remains privileged." Based on her *in camera* review, she noted that "the email's subject line is sufficiently detailed that its disclosure would reveal Defendant's motive for seeking legal advice. Because disclosure of the email's subject line would reveal the nature of Defendant's legal inquiry, the Court finds that this information was properly withheld under the attorney-client privilege grounds of FOIA Exemption 5." Public Citizen questioned the agency's decision to redact the name of the DOE attorney as well, arguing that "no government attorney is so well-known and serves such a niche practice that the mere revelation of his name would indicate the *substance* of the matter on which the client consulted the attorney, let alone the specific communications made by the client seeking advice." Kollar-Kotelly disagreed, noting that "disclosure of such information in this context creates the risk that agency clients may feel constrained from reaching out to legal counsel for required legal advice due to fear of public disclosure." She also found the attorney's name was protected by the deliberative process privilege. She observed that "the content of the email chain involves ongoing disagreements and discussions over the appropriate scope of the guest list for the Defendant's October 2, 2017 event." She added that "releasing the name of the attorney who was consulted as part of Defendant's decision-making process would necessarily reveal information about Defendant's decision-making process." Accepting the agency's attorney-client privilege claim for the subject matter in another email chain, Kollar-Kotelly pointed out that "the subject line of the emails does more than reveal the general subject matter of the attorney-client consultations. Instead, the subject line of the emails is sufficiently detailed to reveal the

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specific motivations behind Defendant's request for legal counsel." As to withholding the attorney's name in this email chain, she observed that "disclosure of the name would shed light on the 'nature of the legal services rendered' as relates to the scope of the Defendant's invitee list." Again, she found withholding the identities was appropriate under the deliberative process privilege as well. She noted that "the withheld emails concern deliberations pertaining to the scope of the invitee list for Defendant's event. At the time the emails were sent, the invitee list was in flux and not finalized; as such, the emails were pre-decisional. Additionally, the content of the emails concerns a debate about who should and should not be invited to the event, thus making the emails deliberative." Another email chain involved a discussion of then Office of Regulatory Affairs Administrator Neomi Rao's guidance to the agency. Finding this email chain was deliberative, Kollar-Kotelly pointed out that "Administrator Rao, an employee with the Executive Office of the President, provided Defendant with guidance for its October 2, 2017 event. In reaction, [agency employee Robert Eitel] emailed another employee with the Executive Office of the President regarding complications arising from the guidance and a potential solution. The Court finds that the redacted portion of the email reflects the type of agency decision-making process that is protected under the deliberative process privilege." (*Public Citizen, Inc. v. United States Department of Education*, Civil Action No. 18-1047 (CKK), U.S. District Court for the District of Columbia, May 22)

A federal court in Virginia has ruled that the Humane Society has **failed to state a claim** in arguing that the U.S. Fish and Wildlife Service should be forced to post African elephant and lion trophy permits since 2016 on its website. The Humane Society had submitted a FOIA request for the permits but had also asked that the agency be required to post such records going forward on its website under the reading room provision of Section (a)(2) requiring proactive disclosure. After finding that the Humane Society's FOIA requests for the existing records became moot once the agency disclosed the records, the court next found that the Humane Society had failed to state a claim concerning the posting of future records under the reading room provision. The court pointed out that "the language of the statute itself – particularly the use of the term 'record,' indicates it is referring to information that already exists, not information that will be created in the future." The court added that "further, § 552(a)(2)(D) makes clear that it applies only to copies of records 'that have been released to any person under paragraph (3).'" The court noted that a D.C. Circuit district court had interpreted the meaning of the reading room requirements in *Lipton v. EPA*, 316 F. Supp. 3d 245 (D.D.C. 2018). The court pointed out that "as the *Lipton* court emphasized, this statutory language 'suggests that the particular information that must be published under the reading-room provision has to be the same information that has already been released in the past.'" Applying the holding of *Lipton*, the court observed that "it is impossible for a record that is not yet in existence to have been properly requested and released under paragraph (3). Thus, the reading room provision cannot be used to require agencies to release documents proactively. If Plaintiffs wish to use FOIA to compel agencies to automatically post certain records, Plaintiffs must convince Congress to revise the language of the statute, not seek injunctive relief from the courts." (*Humane Society of the United States, et al. v. U.S. Fish & Wildlife Service, et al.*, Civil Action No. 18-1301, U.S. District Court for the Eastern District of Virginia, May 16)

A federal court in California has ruled that the FBI improperly claimed **Exemption 7(E) (investigative methods and techniques)** to withhold the names of companies that received letters lifting the requirement that companies refrain from disclosing prior receipt of a national security letter based on the agency's determination that disclosure of such information would no longer harm national security. The agency claimed the exemption was appropriate because disclosure might reveal trends in surveillance techniques. The court explained that the FBI had issued more than 37,000 national security letters in the period 2015-2017 but had only terminated 750 of them. The court noted that "this alone casts doubt on whether disclosure of the terminations will reveal any sort of technique or procedure – at least beyond the already well-

known technique of using national security letters." Referring to the agency's invocation of Exemption 7(E) as "dubious," the court pointed out that "these are particular investigations, of particular people, for which the FBI has determined it is not a problem to lift the nondisclosure requirement. There is no reason to expect that company usage patterns for that unique subset of people would reflect the company usage patterns for everyone being investigated either now or in the future." The court also explained that the termination letters pertained to investigations that were at least three years old. The court observed that "in a world where technology and communication methods are changing rapidly, there's no basis for assuming that a tiny sampling of decisions the FBI made several years prior will shed light on the decisions it's making today." Further, the court noted that companies were free to disclose the prior national security letters on their own once the nondisclosure requirement was lifted. The court indicated that "to the extent criminals wish to identify which companies have had nondisclosure requirements lifted much of this information is already publicly available." (*Electronic Frontier Foundation v. United States Department of Justice*, Civil Action No. 17-03263-VC, U.S. District Court for the Northern District of California, May 14)

Judge Royce Lamberth has expressed his frustration with the CIA's failure to respond to his requests for clarification in his 2017 opinion involving FOIA litigation brought in 2004 by Roger Hall. In his 2017 opinion, Lamberth told the agency to clarify its record destruction protocols, to confirm or deny the existence of non-operational records allegedly shown to Congress, to disclose previously redacted names of non-CIA employees, and provide information about why three documents do not fall within the 50-year automatic declassification requirement. Responding to the agency's most recent motion, Lamberth complained that "what's worse, the government's motion ignores almost everything the Court said in its August 2017 opinion, and almost everything the government itself said at two status conferences." As a result, he noted that 'the Court feels doomed to relive Groundhog Day." He indicated that "but ignoring prior judicial opinions and orders is never an advisable litigation strategy – especially for the federal government. Ordinarily, when litigants fail to acknowledge or respond to a dispositive motion, courts treat the motion as conceded. And when litigants rehash already-rejected arguments, courts reject them again under principles of waiver and res judicata. So too here, where the government has failed to meaningfully acknowledge or respond either to the Court's August 2017 opinion and order, or to the plaintiffs' renewed cross-motion." Lamberth told the CIA to respond within 20 days, with Hall having 10 days to respond to the agency's motion. (*Roger Hall, et al. v Central Intelligence Agency*, Civil Action No. 04-814, U.S. District Court for the District of Columbia, May 23)

A federal court in California has ruled that the National Archives and Records Administration properly withheld under **Exemption 3 (other statutes)** almost all of Melanie Lea Proctor's deposition transcript when she was interviewed by the Office of the Independent Counsel during the Whitewater investigation because she had worked at the Pentagon with Monica Lewinsky. The OIC requested interviews with fifteen Pentagon employees, including Proctor, as part of its investigation. After Proctor obtained pro bono counsel, OIC dropped its proposed interview and told Proctor that she could either appear before a grand jury in the Eastern District of Virginia or submit to a 'grand jury style" deposition at the OIC office, which would exclude her counsel. To avoid media outside the courthouse, Proctor agreed to the deposition. She was deposed by two OIC attorneys without the presence of her counsel. She later received a grand jury subpoena. In July 2018, Proctor submitted a FOIA request to NARA for records related to her. After finding out that it would take a year and a half to process 150 pages, Proctor narrowed her request to her eight-page deposition transcript. The agency denied her request under Exemption 3, citing Rule 6(e) on grand jury secrecy. Proctor argued that her deposition transcript would not reveal matters occurring before the grand jury. The court disagreed, noting that Proctor's deposition "was not collected for a purpose independent of the grand jury investigation." The

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court pointed out that "indeed, to focus solely on where testimony took place – *i.e.*, in front of a grand jury vs. before grand jury investigators or prosecutors for the sole purpose of being presented to the grand jury – would result in the disclosure of records that would compromise the grand jury processes. Witnesses who, like Plaintiff, choose to submit to a deposition rather than testifying before a grand jury would have their testimony subject to disclosure, revealing their identities and the direction of the grand jury investigation. This would discourage both witness cooperation and accommodations by investigators, knowing that testimony obtained specifically for a grand jury would be subject to disclosure simply because the witness was not questioned in the grand jury room." But the court agreed with Proctor that the identities of the prosecutors, the court reporter, and herself would not reveal matters before the grand jury. Alternatively, Proctor argued that the court had inherent authority to disclose the record outside of FOIA. Recognizing that the empaneling court could order disclosure of grand jury material, the court noted that "the transcript was produced under the supervision of the Eastern District of Virginia district court and is the record of that court. The inherent authority to release those materials therefore rests with the Eastern District of Virginia – the empaneling court from whose power the grand jury was able to issue and enforce its subpoenas – not the Northern District of California." (*Melanie Lea Proctor v. National Archives and Records Administration*, Civil Action No. 18-05672-KAW, U.S. District Court for the Northern District of California, May 17)

Once again, Judge Rudolph Contreras has rejected Jack Jordan's attempts to force the government to disclose two emails related to a Defense Base Act case involving his wife and DynCorp International. In his original litigation, Jordon sued the Department of Labor to force it to release two emails obtained from DI employees Darin Powers and Robert Huber. The agency argued the emails were protected by **Exemption 4 (confidential business information)** because they fell within the attorney-client privilege. Contreras agreed that one email was privileged but found that the other was not and ordered Labor to disclose that email. Jordon then appealed to the D.C. Circuit, which upheld Contreras' ruling. While Jordan's appeal was pending before the D.C. Circuit, he requested the emails from the Department of Justice, arguing that some portions of the privileged email must contain non-privileged material that could be separated and disclosed. Jordan asked that Contreras recuse himself because of bias. Rejecting that notion, Contreras noted that "Jordan's dispute with DOJ, DOL, and this Court's conclusions in the 2016 Action is a dispute of law – what disclosures FOIA requires when a party represents that an email contains an express request for legal advice – rather than a dispute over evidentiary facts." Contreras rejected Jordan's contention that his request to have DOJ segregate and disclose nonexempt information was a new claim. He observed that "in the motion, Jordan argued that DOJ had waived any privilege with respect to noncommercial words constituting a request for legal advice in the email, which he contended could be segregated from the rest of the email. This is the same argument he had already made, and the Court had already rejected, in the 2016 Action." (*Jack Jordan v. U.S. Department of Justice*, Civil Action No. 17-2702 (RC), U.S. District Court for the District of Columbia, May 8)

A federal court in California has ruled that Sierra Club may not add an additional claim extending the time frame of its request for external communications to and from former Interior Secretary Ryan Zinke, present Interior Secretary David Bernhardt, and other officials at the Interior Department. Because the agency had taken so long to process the Sierra Club's original requests submitted in September 2017 and February 2018, the Sierra Club claimed those records were now "stale" and that it should be able to access current communications as well. Interior argued that allowing the Sierra Club to extend the time frame of its original requests would essentially constitute a new request and that the Sierra Club was trying to "leapfrog over" other requesters waiting in the agency's current backlog of 1,591 requests. The court agreed with the agency. The court noted that "Defendant is still in the process of complying with the September 2019 and February 2018 requests, both of which include the same sources of documents sought in the new February 2019 request. Given the time periods covered by Plaintiff's September 2017 and February 2018 requests (i.e., January 23,

2017 through the date of the search), there must be some clear stopping point date-wise for the requests at issue in this action, otherwise Defendant would be required to continually produce documents as they were generated. In other words, Plaintiff could conceivably raise the same arguments in support of an amendment a year from now to assert a new claim based on *another* new FOIA request." As to the effect of the amendment on other requesters, the court observed that "granting leave to amend would prejudice other FOIA litigants given the Department's backlog of FOIA requests, and processing of such requests on a first-come, first-served basis. Of course, Plaintiff filed the motion in the first instance because Defendant had failed to comply with its FOIA obligations and thus has a significant backlog of requests creating the situation in which Defendant has not yet fully complied with a request made more than a year ago. Defendant's deficiencies in complying with the previous FOIA requests do not, however, warrant adding an additional claim to the instant action." (*Sierra Club v. U.S. Department of Interior*, Civil Action No. 18-00797-JSC, U.S. District Court for the Northern District of California, May 6)

Judge James Boasberg has ruled that the IRS has shown that it did not receive most of William Powell's requests and that it properly responded to his Privacy Act request, which was the only request it received. Powell had filed a number of suits against the IRS and several other agencies pertaining to tax records for his father's estate and his grandfather's printing company in Detroit. Here, Powell claimed the IRS had not responded to a number of his requests. The IRS argued that it had no record of receiving any of Powell's requests except for his Privacy Act request. Boasberg noted that the agency had conducted a search of its FOIA requests and while it located some of Powell's previous requests, it found no record of any other request aside from his Privacy Act request. Powell argued that the IRS regulations did not require the requester to provide proof of receipt by the agency. Boasberg agreed in principle, but noted that "these instructions, however, are not designed to address situations where a plaintiff has claimed to have mailed a request that the agency has not received. In those circumstances, courts have required plaintiffs seeking to rebut the agency's affidavits to offer something more than a declaration of having sent the request." Although Powell also argued that he had sent several requests to IRS offices in Cincinnati or Atlanta, Boasberg observed that Powell was aware that those addresses were not appropriate locations for FOIA requests. Boasberg found that the agency had conducted an adequate search for records in response to Powell's Privacy Act request. (*William E. Powell v. Internal Revenue Service*, Civil Action No. 18-453 (JEB), U.S. District Court for the District of Columbia, May 3)

The Ninth Circuit has once again remanded Stephen Yagman's request to the CIA for records concerning the identities of individuals who were involved in torture as referred to in the Senate report on torture back to the agency for a response. When Yagman filed suit after his original request was rejected by the CIA as too vague, the trial court sided with the agency. But on appeal to the Ninth Circuit, the appeals court found Yagman had described the records sought sufficiently enough so that the agency should have processed his request and sent it back to the trial court to allow Yagman to provide details fleshing out his request. Yagman revised his request, referencing portions of the Senate report on torture. This time, the district court judge found Yagman had actually broadened his request rather than making it more specific and rejected it once again. Noting that Yagman's request referenced the Senate report that the CIA had suggested he use as a basis for his request, the Ninth Circuit pointed out that "a CIA professional familiar with this topic should be able to locate records responsive to Yagman's revised FOIA request." Sending the case back once again, the Ninth Circuit observed that "that Yagman may have broadened the scope of his request to encompass more documents is irrelevant as to the reasonable description inquiry at issue here, however. By ignoring Yagman's specifications and focusing instead on the scope of his request, the district court abused its discretion in denying Yagman's motion to re-open the case." Although the appeals court rejected Yagman's

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motion to disqualify the district court judge, it also found that Yagman should have been granted the costs of his appeal because he had prevailed. (*Stephen Yagman v. Gina Haspel*, No. 18-55784, U.S. Court of Appeals for the Ninth Circuit, May 1)

In a heavily redacted opinion, Judge Beryl Howell has ruled that two emails from a personal Gmail account subpoenaed by Special Counsel Robert Mueller as part of his investigation into Russian interference in the 2016 election do not contain attorney-client privileged discussions and can be shared with the investigative team. A government Filter Team, assigned to review the disclosed communications for privileged materials, concluded that the emails fell within the misconduct exception and, thus, were not privileged. Explaining the elements of the attorney-client privilege, Howell noted that "the privilege does not attach to communications intended to be shared with third parties rather than to be kept confidential. Moreover, even when the privilege initially attaches, third-party disclosures of a privileged communication's substance waives the privilege as to that communication." Howell observed that "here, [the email account holder] communicated to his attorney information regarding his [situation] with the understanding that the attorney would serve as a conduit of that information to [a third party]. As such, the emails at issue were never confidential, and, thus, never privileged. In the alternative, even assuming the privilege initially applied, the attorney waived the privilege by discussing the email's contents with [third parties]." Howell noted that "while the emails' contents suggest that the attorney did ultimately relay to the [third party] the fact of [his client's situation], the attorney need not actually have done so at all for the privilege to be inapplicable – what matters is merely that [the client] *intended* the attorney to have relayed this information to a third party." As to disclosures outside the privilege, Howell pointed out that "the records shows that on at least three occasions, the attorney 'disclosed the substance' of what might have otherwise been privileged emails regarding [legal advice] which information was then recounted [to third parties], thus waiving the privilege as to that information in those emails." (*In the Matter of the Search of Information Associated with [Redacted] @Gmail.com and [Redacted]*, No. 18-sc-4, U.S. District Court for the District of Columbia, May 22)

In another ruling pertaining to disclosure of sealed records, Howell has found that search warrants issued in the District of Columbia and referenced in disclosures made by the Southern District of New York pertaining to Michael Cohen's prosecution should be unsealed pursuant to a request from a media coalition including the Associated Press, CNN, the New York Times, POLITICO, and the Washington Post. Special Counsel Robert Mueller obtained five search warrants for email accounts used by Cohen. Some matters uncovered as a result of those search warrants were referred to the Southern District of New York, where Cohen was indicted and pled guilty to a number of charges. A media coalition asked the Southern District of New York to unseal the warrant materials relating to the FBI's search of Cohen's office. The Southern District of New York unsealed the warrants, which referenced four of the warrants originally issued by the District of Columbia District Court. The media coalition then filed a motion asking Howell to unseal those materials. Howell noted that the government did not oppose the unsealing motion to the extent that it was consistent with the redactions made by the Southern District of New York. Cohen also had not objected. Howell approved the disclosures as proposed. She pointed out that "the government's proposed redactions are consistent with those authorized by the S.D.N.Y., protective of the competing interests in the government's ongoing investigation and third-party privacy interests. These competing interests are strong enough to counterbalance the public's common law right of access to the Warrant Materials." (*In Re: Application for Access to Certain Sealed Warrant Materials*, No. 19-mc-44 (BAH), U.S. District Court for the District of Columbia, May 21)

A federal court in Florida has rejected Joshua Statton's request to reconsider its earlier decision finding that Florida Federal Judicial Nominating Commission was not an **agency** for purposes of FOIA. Statton argued that ruling against him on jurisdictional grounds had deprived him of his ability to argue the merits of the case. But the court pointed out that "the determination of whether an entity meets the definition of an agency under FOIA is a jurisdictional question, and the sua sponte consideration of subject matter jurisdiction was an obligation demanded of this Court." Statton challenged the court's previous ruling in finding that Carlos Lopez-Cantera, the head of the commission, was not a proper defendant even though he was sued in his official capacity. The court rejected the claim, noting that "Lopez-Cantera is an individual, not an agency as defined by FOIA, and naming Lopez-Cantera in his official capacity does not alter this conclusion." The court explained that Statton's arguments were based on his presumption that the commission was an agency. The court observed that "Statton ignores the fact that an entity must first be classified as an agency before it is subject to FOIA's disclosure obligations. His arguments rely on FOIA's disclosure provisions, but it fails to consider the statute's definition of an agency." (*Joshua Statton v. Florida Federal Judicial Nominating Commission*, Civil Action No. 19-485-T-33CFT, U.S. District Court for the Middle District of Florida, May 16)

Judge Ketanji Brown Jackson has ruled that the FBI conducted an **adequate search** for records on Callen Willis, finding 116 pages of her previously submitted FOIA requests. Willis submitted four FOIA requests to the FBI for records on herself. The agency found no records for three requests but located 116 pages containing previous FOIA requests she had submitted in response to her fourth request. The agency disclosed all the records but withheld the name of an FBI employee under **Exemption 6 (invasion of privacy)**. Willis filed suit, asking for a *Vaughn* index explaining the withholdings. Jackson found the agency's search was adequate. She noted that "Willis makes no argument that the FBI's search was unreasonable, and she presents no evidence that the agency acted in bad faith; rather, she merely asserts an entitlement to the release of the information she requested. This is patently insufficient to overcome the presumption of good faith that this Court must afford to the FBI's declaration." Jackson agreed that the agency's redaction of an employee's name was appropriate. She pointed out that "this Court agrees that the privacy interest here is substantial, and that the public interest in release of this single name is minimal, because it 'reveals little or nothing about an agency's own conduct' and 'does not further the [FOIA's] statutory purpose.'" Jackson rejected Willis' request for a *Vaughn* index. She noted that "here, the agency has not *withheld* any responsive records, and has *only* redacted a single piece of information (an employee's name). [The agency's] declaration not only identifies the withheld material, but also provides a cogent explanation as to why disclosure of that piece of information would constitute a clearly unwarranted invasion of that employee's personal privacy." (*Callen Willis v. Federal Bureau of Investigation*, Civil Action No. 17-1959 (KBJ), U.S. District Court for the District of Columbia, May 16)

A federal court in Maryland has ruled that prisoner Michael Scott **failed to exhaust his administrative remedies** by not administratively challenging a *Glomar* response he received from EOUSA pertaining to a witness that testified for the government at his trial in the District of Columbia on drug distribution charges. Believing that the government had failed to provide *Brady* material pertaining to the witness, Scott submitted a FOIA request to EOUSA. The agency told Scott that it had no public records and informed him that he could file an administrative appeal with the Office of Information Policy. Instead, Scott complained to OGIS, which sent him a letter explaining the meaning of a no records response and telling him that he should either submit an appeal of the no records response or resubmit a FOIA request to EOUSA with the OGIS letter attached. Scott submitted a new request to EOUSA for records on the witness and was once again told that he could not receive records on the witness without authorization but that he could request any

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public records available. Scott then requested the public records and received 11 pages. Scott did not appeal any of the decisions and later filed suit. He argued that the letter from OGIS constituted an appeal. The court disagreed. Dismissing his suit for failure to exhaust his administrative remedies, the court noted that "contrary to Scott's assertion, the letter provides no evidence that he followed the required procedures for exhausting his administrative remedies before filing his lawsuit. In the absence of evidence that Scott exhausted his administrative remedies as to any Agency final decision at issue here, the claims arising from those determinations will be dismissed without prejudice for lack of jurisdiction." (*Michael Scott v. United States Attorney Offices*, Civil Action No. RDB-18-725, U.S. District Court for the District of Maryland, May 10)