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Washington Focus: The full Eleventh Circuit has agreed to rehear a recent 2-1 panel decision granting historian Anthony Pitch's request to unseal grand jury records from a 1946 Georgia lynching in which two black couples were murdered. POLITICO legal reporter Josh Gerstein noted that the Justice Department has consistently argued that judges can only unseal grand jury records based on the six exceptions laid out in Rule 6(e) on grand jury secrecy. Gerstein indicated that while the Eighth Circuit had rejected a 2009 attempt to unseal the Whitewater grand jury records, other circuits –like the Second and the Seventh – have allowed judges to unseal records in cases of historic interest. While DOJ considers Rule 6(e) sacrosanct, the idea that responsible disclosure of such records can flesh out the historic record certainly has an implicit public interest component.

Court Rejects FBI Exemption 1 Claims For Redactions in Comey Memos

Resolving what was left of CNN's suit against the FBI to force the agency to disclose contemporaneous memos written by former FBI director James Comey after conversations he had with President Donald Trump, Judge James Boasberg has ruled that some of the redactions the agency made under Exemption 1 (national security) must be disclosed because the agency failed to provide a plausible reason for withholding them while others withheld under Exemption 3 (other statutes) are completely protected. Boasberg also found that *in camera* affidavits submitted by the FBI in support of its original exemption claims constitute court records and that the remaining redactions in the affidavits must be disclosed to CNN under the common law right of access to court documents.

The case began in 2017 after portions of Comey's memos were made public. CNN requested the memos and related records under FOIA and the FBI initially withheld them entirely, claiming they were protected by Exemption 7(A) (interference with ongoing investigation or proceeding) because they were part of Special Counsel Robert Mueller's investigation into Russian interference in the 2016 election. To support its exemption claim, the FBI also submitted two *in camera* affidavits from FBI Special Agent David Archey. In

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his first ruling in the case, Boasberg agreed with the FBI that the records were protected by Exemption 7(A). The FBI subsequently provided copies of the memos to Congress after redacting classified information and later made the redacted versions available in its online reading room. Having dropped its Exemption 7(A) claim, the FBI continued to assert Exemption 1 and Exemption 3 to withhold 24 redactions. The FBI disclosed most portions of the Archey affidavits but claimed that some redactions were still necessary. For its part, CNN argued that the *in camera* affidavits were now the court's records and should be released under the common law right of access to judicial records.

Because his consideration of the applicability of the Section 102A(i)1) of the National Security Act as an Exemption 3 statute seemed straightforward, Boasberg started his analysis there. He explained that "combining the D.C. Circuit's broad interpretation of the statutory language and the deference owed to the FBI's determination, the Court has little trouble concluding that this redacted information 'relates' to intelligence sources and methods." CNN acknowledged that Section 102A(i)(1) qualified as an Exemption 3 statute but argued that the government had failed to show any harm in disclosing the redacted information. Boasberg responded that "here, Plaintiff hits a roadblock. Although a showing of harm to national security is necessary to invoke the protection of Exemption 1, Exemption 3 includes no comparable element." He added that "because the Government's invocation of Exemption 3 requires no showing of harm, this exemption 'presents an easier hurdle for the agency' than Exemption 1. The Court's conclusion that the Act is a qualifying statute whose plain language covers the Bureau's redactions thus settles the matter. The purported deficiency to which Plaintiff points has no bearing on the operative question here."

His analysis of Exemption 1, however, was complicated by the fact that under the executive order on classification an agency is required to show that disclosure will likely cause one of the specified harms to national security. The agency's burden under Exemption 1 is more to articulate the harm than to conclusively prove that harm will occur from disclosure, but the harm must "logically" or "plausibly" follow from the agency's claim. Here, the FBI claimed that disclosure could harm foreign relations or foreign activities. CNN did not dispute that the redactions related to foreign relations or foreign activities but argued instead that the FBI had failed to show that disclosure of positive information about foreign countries would harm national security.

The FBI responded by first attacking CNN's credentials to make such a claim. Boasberg noted that "this misses the point. Plaintiff's qualifications and preferred rationale are irrelevant; it is Defendant who has the burden of demonstrating a connection between the withheld information and any harm to national security. If it does not sustain its burden of demonstrating a 'logical or plausible' connection to a damaged national-security interest, the fault lies with the Bureau." Pointing out that in the context of the public version of the Memo six of the seven redacted comments were positive, Boasberg observed that "they alone reveal nothing about the *relative* importance assigned to foreign leaders." He added that "defendant must officer a *rationale* that is logical or plausible; it cannot simply state that it is logical or plausible that harm will ensue. And here, the Bureau has provided no line of reasoning linking the disclosure of these redactions to any harm to the United States' relations with a foreign country or leader and a consequent harm to national security." The agency's final argument was to suggest that Boasberg defer to the agency's expertise. He noted, however, that "what Defendant seems to be asking for here is more than deference; it wants acquiescence. Such an approach would relegate the Court to the role of the Bureau's loyal sidekick, offering only affirmation of its decisions. That, plainly, is not how judicial review works."

Boasberg rejected CNN's challenge to statements Trump made about Russian President Vladimir Putin, arguing that since Trump had made a vast number of public statements about Putin, disclosing this exchange would not harm national security. Boasberg disagreed, noting that "there is a large gulf – particularly in the eyes of a foreign country – between what a public figure may say to the press (or others) in

public and what she might reveal in private to the Director of the FBI." As to several other redactions concerning foreign leaders, Boasberg observed that "the Court fails to see, quite simply, how the redacted information contains anything about Trump's 'impressions of specific foreign leaders.' Perhaps this information warrants protection in its own right, but if it does, it is not on the basis offered by the FBI."

Turning to the Archey affidavits, the FBI argued that the existing redactions were justified by the National Security Act and Exemption 7(E) (investigative methods and techniques). CNN argued that the records were judicial records subject to the common law right of access. Boasberg agreed. He noted that the FBI "provided *in camera* information about the 'harms that could reasonably be expected to flow from disclosure.' After reviewing these declarations, the Court granted the Government summary judgment. There can be no doubt, therefore, that the declarations were 'intended to influence' the Court." He observed that "the Court, however, has already found that the Government has fallen short of meeting its burden for invoking any FOIA exemption here. And if the FBI is not, in fact, entitled to the 'right' it seeks to 'vindicate,' then nothing. . . counsels withholding the redacted information." (*Cable News Network, Inc. v. Federal Bureau of Investigation*, Civil Action No. 17-1167 (JEB), U.S. District Court for the District of Columbia, June 7)

Views from the States…

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

Connecticut

A trial court has ruled that the FOI Commission erred when it found that the Connecticut Trees of Honor Memorial, a non-profit organization that created a living tree memorial to honor Connecticut members of the armed forces who died in Iraq or Afghanistan on a parcel of land in Veterans Memorial Park in Middletown, was subject to the FOIA because it had acted as a functional equivalent of a public agency because creating a public park was typically a government function and funding for the project had primarily come from a $500,0000 grant from the Department of Energy and Environmental Protection. Douglas Fleming requested financial records from CTHM, which declined to provide them based on its assertion that it was not a public agency. Fleming then filed a complaint with the FOI Commission. While the FOI Commission found that CTHM was not a public agency under the definition in FOIA, it agreed with Fleming that its work in creating and maintaining the memorial using the DEEP grant meant that it was the functional equivalent of an agency. However, after reviewing the evidence, Judge Sheila Huddleston concluded that CTHM had nothing more than a contractual relationship with Middletown that did not constitute a government function. Huddleston pointed out that the commission's hearing officer had been impressed by the amount of government funding involved. But she noted that "the *amount* of governmental funding, however, is not dispositive of the functional equivalence test." She added that "the commission's concern about accountability for taxpayer funds in the absence of a finding of functional equivalence is misplaced. . . CTHM is nevertheless accountable to the public agencies with which it contracts. Its communications with the city and with DEEP, and any documents it provides to the city or to DEEP, are public records, subject to disclosure through requests to the public agency." As to the level of control by Middletown, Huddleston observed that "CTHM was created by private individuals and has been sustained by voluntary donations of money, materials, and labor. . .The city and CTHM clearly share a common purpose, which the lease reflects, of providing a memorial to fallen soldiers within the city's existing Veterans Memorial Park. But the fact that

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CTHM may be a close ally of the city does not make it the functional equivalent of a public agency." (*Connecticut Trees of Honor Memorial, Inc. v. Connecticut Freedom of Information Commission*, No. HHB-CV-17-6038816-S, Connecticut Superior Court, Judicial District of New Britain, June 10)

A trial court has ruled that the FOI Commission acted properly when it decided not to schedule a hearing on four complaints filed by Marissa Lowthert, who had made multiple claims that the Wilton Board of Education had violated FOIA several years ago. When the commission told Lowthert it would not hear her complaints because of time and budget constraints, Lowthert filed suit. Noting that in a 2015 decision in *Godbout v. FOI Commission* a trial court had found that to hear Godbout's 11 separate complaints would abuse the commission's administrative process, the court observed that "plaintiff here has filed 250 allegations in the space of ten days involving more than 80 meetings, many of which occurred several years ago. Scheduling and hearing the plaintiff's complaints would be an abuse of the Commission's administrative process." (*Marissa Lowthert v. Freedom of Information Commission*, No. HHB-CV-176041080, et al., Connecticut Superior Court, Judicial District of New Britain, June 11)

Kentucky

A court of appeals has ruled that the Cabinet for Economic Development violated the Open Records Act when it failed to disclose information revealing individuals or entities that had a 20 percent shareholder stake in Braidy Industries, a company that had recently been formed and incorporated by entrepreneur Craig T. Bouchard for the purpose of building a $1.3 billion aluminum plant in Greenup County, making it eligible for $10 million in tax incentives. Courier-Journal Reporter Tom Loftus requested records from the Cabinet containing shareholder information. The Cabinet provided records listing individuals or entities that had at least a 20 percent shareholder stake in Braidy Industries but refused to provide any more information. Loftus filed a complaint with the Attorney General's Office, which ruled in favor of Loftus. The Cabinet then filed suit in the trial court challenging the AG's opinion. The trial court upheld the AG's opinion and concluded that four other documents the Cabinet had provided for *in camera* review should also be disclosed. The department then appealed to the court of appeals. The appellate court agreed with the AG's opinion but found that the trial court had gone too far in ordering disclosure of the other four documents because they contained information beyond the scope of Loftus's request. The appeals court noted that "our decision is founded upon the limited conclusion that *the names of Braidy's stockholders or investors* were subject to the purview of the ORA. Indeed, that was the extent of the Attorney General's opinion; and *the names of Braidy's stockholders or investors* was the extent of the Courier-Journal's request." The appeals court explained that "we are puzzled by the [trial] court's apparent decision to prohibit the Cabinet from redacting the documents submitted for *in camera* review to the extent that those documents included information *beyond* the names of Braidy's stockholders or investors." The trial court had also awarded the Courier-Journal $30,693 in attorney's fees and $2,225 in statutory penalties. The Cabinet did not argue about the size of the award but claimed that the trial court did not have jurisdiction to make such an award because it had lost jurisdiction at the time the Cabinet appealed its decision. The appeals court disagreed, finding instead that because the Cabinet had filed an appeal before the trial court could rule on attorney's fees that issue still fell within the trial court's jurisdiction. (*Cabinet for Economic Development v. Courier-Journal*, Kentucky Court of Appeals, May 17)

Nevada

The supreme court has ruled that the Las Vegas Review-Journal's challenge to the propriety of the City of Henderson's attempt to charge it $2,894 to pay for a privilege review of more than 70,000 pages of electronic documents became moot once Henderson provided the newspaper a privilege log and allowed the newspaper to view the non-privileged documents. The court noted that "the issue of Henderson's fee became moot once Henderson provided the records to LVRJ free of charge because 'a controversy must be present

through all states of the proceeding and even though a case may present a live controversy at the beginning, subsequent events may render the case moot.'" The supreme court also approved of Henderson informing LVRJ within five business days that it would need to conduct a privilege review before disclosing the records. The supreme court observed that "Henderson did not waive its right to assert privileges in the records LVRJ requested by not providing a completed privilege log within five business days of LVRJ's request." The newspaper also argued that Henderson's claims under the attorney-client privilege and the deliberative process privilege were too vague. Upholding the attorney-client privilege claims, the supreme court explained that the district court should have conducted a further balance of records withheld on the basis of the deliberative process privilege. The supreme court pointed out that the trial court did not "consider the difference between documents redacted or withheld pursuant to the statute-based attorney-client privilege and those withheld pursuant to the common-law-based deliberative process privilege." (*Las Vegas Review-Journal v. City of Henderson*, No. 73287, Nevada Supreme Court, May 24)

New Jersey

A court of appeals has ruled that the identity of a state trooper who was listed in the annual report by the State Police's Office of Professional Standards as having been disciplined as the result of a substantiated allegation of misconduct is protected under the personnel records exemption in the Open Public Records Act. After learning of the incident by reviewing the report, Libertarians for Transparent Government requested the trooper's identity. The state police withheld the record under the personnel exemption. Libertarians for Transparent Government filed suit and the trial court, rejecting the state police's claim that the records were protected by the law enforcement or official information exemptions, found the identity of the trooper was protected under the personnel records exemption. The appeals court agreed, noting that "under the unusual circumstances of this case, disclosure of the trooper's name pursuant to the narrow exception to the personnel records exemption would violate both the letter and the spirit of the exemption itself, and was thus properly denied." (*Libertarians for Transparent Government v. New Jersey State Police*, No. A-5675-16T2, New Jersey Superior Court, Appellate Division, May 20)

Wisconsin

A court of appeals has ruled that reporter Bill Lueders' subsequent request for copies of legislator Scott Krug's emails in electronic format asked for more data than was available from Krug's original response providing only printed copies of the emails. Lueders requested copies of Krug's emails on certain subjects from January to April 2016. Krug responded by providing the emails in printed copy. When Lueders then asked Krug to provide the emails in electronic format as well, Krug declined, arguing that he was only legally obligated to provide copies that were substantially as readable as the original. Lueders filed suit and the trial court ruled in his favor. Krug then appealed. The appeals court agreed that under a technical reading of the statute, Krug's first response providing only printed records satisfied his obligation. But the appeals court then pointed out that under another provision allowing for enhanced records' requests, the printed copies of the emails did not provide the metadata available from the electronic versions. The court of appeals pointed out that "copying the emails onto a flash drive would have provided Lueders with a copy of the emails that contained all of the information, including the metadata, that the original emails themselves contain; however, affording Lueders access to only the paper printouts did not. Thus, while affording Lueders access to the paper printouts may have been a satisfactory response to his initial open records request, it was not a satisfactory response to Lueders' subsequent, enhanced request for the emails in electronic form." (*Bill Lueders v. Scott Krug*, No. 2018AP431, Wisconsin Court of Appeals, June 5)

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The Federal Courts…

Judge Trevor McFadden has ruled that the Animal and Plant Health Inspection Service improperly withheld records describing inspections of homestead animal facilities under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to requests from the Humane Society because the public interest outweighed the owners' personal privacy interest but indicated that as a general matter the agency should normally withhold identifying information about owner-operated facilities while disclosing substantive information about the agency's inspections. The Humane Society requested records about inspections of a facility identified by its USDA Certificate Number. The agency's search located 137 pages of inspection records, 663 photographs, and 11 videos. The agency disclosed nine pages of inspection records in full but redacted street addresses and zip codes, as well as other information that might allow the Humane Society to match them to inspection reports available on the agency's online database. When the Humane Society appealed, the agency disclosed information from the photographs that included the licensee's name, certificate number, and the name of the agency photographer but continued to withhold everything else as well as the 11 videos. The Humane Society then filed suit, challenging the agency's claims under the two privacy exemptions. The agency argued that "the licensees have privacy interests in the narrative sections because linking the licensees' names – which the Service has already disclosed – with descriptions of noncompliant conduct can invite harassment and stigma." The Humane Society argued that the agency's evidence was largely anecdotal hearsay. McFadden agreed in part, noting that "without the accounts of harassment from the licensees, the [agency's] declaration's justification for withholding the information is reduced to speculation and summary accounts of the hearsay. Nothing in [the agency's declaration] suggests that the agency has verified or confirmed any of these reports." But he explained that because the facilities were owner-operated their employees had more than a *de minimis* privacy interest. He noted that "because the licensees and third-parties have a significant privacy interest in their names, addresses, and personally identifying information, and because there is no public interest in that information, the balancing is easy. The Service properly withheld the licensees' addresses and names of third-party veterinarians under Exemption 6." The Humane Society argued that Exemption 7(C) was inapplicable here because the inspection reports were not compiled for law enforcement purposes. McFadden disagreed, noting that "these inspection reports relate to the Service's responsibility to enforce the [Animal Welfare Act] and ensure compliance by licensees, not oversight of employees. Routine inspection reports may not be 'investigatory' but there is a 'rational nexus' between the reports and the Service's law enforcement duties." However, he pointed out that "even under Exemption 7(C)'s broader standard, the Service's withholding of the narratives and descriptions of noncompliant conduct is improper." McFadden concluded that "the Service properly withheld the licensees' addresses and contact information from the inspection documents. It also properly withheld third-parties' names, images, and personally identifying information. But the Service's other withholdings – dates, inspection narratives, animal inventories, and so on – were improper and the Service must now disclose that information to the extent it is reasonably segregable from the information properly withheld." (*Humane Society of the United States v. Animal and Plant Health Inspection Service, et al.*, Civil Action No. 18-00646 (TNM), U.S. District Court for the District of Columbia, June 3)

Judge Colleen Kollar-Kotelly has ruled that the FBI has not shown that it is entitled to an *Open America* stay to delay processing of the Daily Caller News Foundation's FOIA request for records pertaining to FBI Special Government Employee Daniel Richman largely because she accepted the Daily Caller News Foundation's statistics on the agency's recent backlog over those presented by the agency itself. DCNF had also requested expedited processing. The agency denied DCNF's request for expedited processing and told DCNF that it had located 11,000 potentially responsive records and told DCNF that if it was willing to narrow the scope of the request it might qualify for a smaller processing queue. DCNF indicated that it did not need

any of Richman's final work product, which narrowed the universe of potentially responsive records to 7,000. After DCNF filed suit, the agency argued that it could not respond to the request within the statutory time limit because of its increasing number of FOIA requests and FOIA-related litigation and asked Kollar-Kotelly for a stay until December 2020. The FBI contended that a "statistical analysis show[ed] that in fiscal years 2011-2015, the FBI received an average of approximately 19,400 requests, but starting in F 2016, the number of requests grew18 percent, and in FY 2017, 'the growth trend increased at an even more accelerated pace' with an increase of 23 percent over FY 2016, and a subsequent 18 percent rise in FY 2018." DCNF argued that the FBI's statistics included both FOIA and Privacy Act requests and that the increase in requests was largely due to a change in administration. DCNF presented its own statistical analysis covering 2005-2017 showing that "the FBI has received fewer FOIA requests during the first two years of the Trump election and Administration than it did under the first two years of the Obama election and administration" and that the "backlog of FOIA requests has only gotten worse." DCNF produced a blizzard of statistics, noting that in 2008 the FBI received 17,241 requests – the highest number in the past decade – which was 4,732 more requests than had been received the previous year. However, in 2016, the FBI received 15,202 requests, which was 2,039 fewer than 2008 and only 2,271 more than the previous year. DCNF argued that the agency's level of requests had remained more or less constant. Agreeing with DCNF's statistical analysis, Kollar-Kotelly noted that "the statistical analysis cited by Defendant shows a steady increase in FOIPA requests (about 20 percent annually) from 2016-2018. Accordingly, the increase in the amount of FOIA requests cannot be said to be unforeseen or remarkable." While the FBI argued that the requests it received had become more complex over time and required more resources, Kollar-Kotelly again sided with DCNF, even though at one point she referred to its claims as "surmises." She pointed out that "the FBI provides no evidence to support these claims other than anecdotal evidence, and accordingly, there is not enough information from which the Court could conclude that the overall complexity of the FBI's workload has increased over time or that technological advances have slowed the process." Kollar-Kotelly also agreed with DCNF that the FBI's FOIA-related litigation had not increased substantially from its normal rate. She also indicated that while the FBI's backlog in 2008-2009 stood at 1,400 requests, its backlog in 2016 and 2017 had risen to 4,400 requests. She denied the agency's request for a stay but rejected DCNF's suggestion that the agency be required to process its FOIA request at a rate of 1,200 pages a month, opting instead for the traditional rate of 500 pages a month. (*Daily Caller News Foundation v. Federal Bureau of Investigation*, Civil Action No. 18-1833 (CKK), U.S. District Court for the District of Columbia, June 7)

The Second Circuit has ruled that a 2004 opinion prepared by the Justice Department's Office of Legal Counsel pertaining to whether the STELLAR WIND surveillance program established by the Bush Administration fell within the parameters of E.O. 12,333, a Reagan era executive order on presidential authority over intelligence activities, is protected by **Exemption 5 (privileges)**. The ACLU sent a FOIA request to various agencies asking for records describing the government's understanding of its authority under E.O. 12,333. The agencies disclosed hundreds of documents but refused to disclose an OLC memo entitled "Re: Review of the Legality of the STELLAR WIND Program," claiming it was protected by the attorney-client privilege as well as the deliberative process privilege. The ACLU filed suit and the district court ruled in its favor. The ACLU appealed to the Second Circuit, contesting only the withholding of the OLC opinion and six other documents that had been withheld under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. On appeal, the ACLU acknowledged that the OLC opinion was privileged, but argued that the government waived the privilege through various public statements, including those by former Attorney General Alberto Gonzales. Writing for the court, Circuit Court Judge Jose Cabranes first explained that the attorney-client privilege could not be breached by subsequent public statements because "such *informational* disclosures have no effect on whether a *communication* is protected by the attorney-client privilege." However, he added that "the attorney-client privilege may not be invoked to protect a document

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adopted as, or incorporated by reference into, an agency's policy." Cabranes pointed out that the OLC opinion would only loss its privileged status if it constituted the working law of the agency or had been incorporated by reference as binding authority. The ACLU argued that statements by Gonzales that he agreed with the reasoning of the OLC opinion indicated that he had adopted the opinion as binding authority. Cabranes disagreed, noting that "mere agreement with a document's reasoning and conclusion is insufficient to transform advice into law. Instead, the document must be *treated* as binding by the agency or explicitly relied upon in a formal decision." Besides Gonzales' public statements, the ACLU also pointed to other agency documents, including an internal report describing the OLC opinion as providing a "new legal basis" for the program. Cabranes found these were insufficient. He pointed out that none of "these disclosures represent an official decision or final opinion that explicitly references and relies on [the] OLC opinion; press briefings, congressional testimony, while papers and inspectors general reports might be informative, but they rarely, if ever, amount to official decisions or 'final opinions.'" (*American Civil Liberties Union v. National Security Agency, et al.*, No. 17-3399, U.S. Court of Appeals for the Second Circuit, May 30)

In a case involving former Secretary of State Hillary Clinton's use of a private email server in which he had already granted Judicial Watch discovery, Judge Royce Lamberth has ruled that Judicial Watch has shown a need to know certain information that would otherwise be protected by the attorney work-product privilege, but has upheld State Department claims that other records are still protected by the attorney-client privilege. Lamberth's privilege ruling concerned 12 documents, six pertained to CREW's FOIA request for Clinton's emails and the other six pertained to Judicial Watch's FOIA request for the emails. Lamberth acknowledged that the attorney work-product privilege was quite broad, but explained that "the lone exception in this otherwise expansive privilege arises when the work-product contains discoverable facts (distinct from legal opinions) and the party seeking discovery demonstrates both a 'substantial need' for the factual information and an inability to collect the information or its 'substantial equivalent' without 'undue hardship.'" He indicated that he had authorized Judicial Watch to take discovery on three topics –(1) whether Clinton had intentionally attempted to evade FOIA by using a private email account while Secretary of State, (2) whether State's efforts to settle this case in late 2014 and early 2015 amounted to bad faith, and (3) whether State adequately searched for records responsive to Judicial Watch's FOIA request. Lamberth found the factual exception to attorney work-product applied here, noting that "the law permits deeming the documents fact work-product since doing so will not affect State's position in this litigation. Additionally, construing these documents as fact work-product comports with the purpose of the work-product privilege: since 'there will be no trial in this case and the parties are not conducting discovery to prepare their case for trial,' society's general interest in revealing relevant facts outweighs any need to protect an attorney's private thoughts." Lamberth upheld most of State's attorney-client privilege claims. He rejected Judicial Watch's argument that State waived its privilege by sending an email to the general counsel at the National Archives and Records Administration. Instead, he noted that "courts in this district have extended attorney-client privilege to situations like this one, where counsel for one government agency asks for confidential legal advice from counsel for another government agency within the executive branch. That strikes this Court as the right approach here too, given the historic significance and singular importance of the attorney-client privilege, and the salutary effects of interagency cooperation within a unitary executive." In another instance, he found that emails sent by former State FOIA Officer Sheryl Walter to agency attorney Gene Smilansky were privileged because "she asks Smilansky a legal question; he summarizes relevant facts and recommends a particular action; she asks a follow-up; and he responds. Accordingly, these emails fall within attorney-client privilege." But he found an email response from attorney Karen Finnegan was not privileged, pointing out that "Finnegan volunteers factual information beyond what Walter needs to understand the legal issue" and added that Finnegan's email did not fall under the attorney work-product either. He pointed out that "it amounts to a factual observation about State's processing of CREW's request, not a legal impression, conclusion, opinion, or theory. And moreover, because the observation relates to when the Department

learned about Clinton's missing emails, it sheds light on the central question of whether State attempted to settle this case in bad faith. Finnegan's email accordingly constitutes discoverable fact work-product since Judicial Watch can show a substantial need for the otherwise unobtainable information." But he rejected State's claim for an email that was carbon-copied to an agency attorney, indicating that "for the attorney-client privilege to apply, the attorney must play a role in the description of a legal problem or the dissemination of legal advice." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 14-1242, U.S. District Court for the District of Columbia, June 12)

Judge Christopher Cooper has ruled that AquaAlliance, a public interest organization advocating for protection of the waters in the northern Sacramento River watershed, is not entitled to **attorney's fees** for its FOIA suit against the National Oceanic and Atmospheric Administration because the suit did not cause the agency to respond to AquaAlliance's FOIA request for records related to pollution caused by the failure of California's Oroville Dam in 2017. When the agency failed to respond after six weeks, AquaAlliance filed suit. Shortly after the suit was filed, NOAA produced 3000 pages and withheld 114 documents in full. It also referred 344 documents to other agencies. Over the course of the next year, the parties narrowed the number of exemptions in dispute and after AquaAlliance dropped its objections to all but three documents, NOAA disclosed those documents in full. AquaAlliance then filed a motion for $41,000 in fees and costs. AquaAlliance argued that because of its negotiations with the agency, NOAA disclosed the three documents. NOAA, by contrast, argued that it disclosed the documents because one of them was actually non-responsive and not worth fighting over, and because its deliberative process privilege claim for the other two documents had dissipated with the passage of time. Cooper found none of these arguments persuasive. As to the diminution of the deliberative process claims, he noted that "there is a faulty premise baked into NOAA's argument: that to qualify as a catalyst the lawsuit must change an agency's broader position on the application of certain exemptions to certain types of documents. This demands far more than any of the relevant cases have required." He added that "the lawsuit here caused the agency to change its position on this particular document and produce it to AquaAlliance. That is enough to show the lawsuit was a catalyst for its production." However, having found that AquaAlliance was eligible for fees, Cooper concluded that it was not entitled to fees because the agency's conduct was reasonable once it learned of AquaAlliance's suit. He pointed out that "it cannot be true that pre-suit delay itself – irrespective of the delay's length, the reasons for it, and the agency's conduct post-suit – compels a reasonableness finding in a plaintiff's favor." He observed that "courts assessing the reasonableness factor are to consider, first, 'whether the agency's opposition to disclosure has a reasonable basis in law,' and second, 'whether the agency has not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.' A pre-suit failure to respond to a request helps answer the first question – because there will rarely be a 'reasonable basis' for failing to respond altogether – but helps must less with the second question – because the delay may not reflect recalcitrance or obduracy at all." Cooper noted that "to be sure, the agency does not earn perfect marks here: the failure to respond to the request within FOIA's 20-day deadline and before the lawsuit was filed renders its behavior less than exemplary. But only a myopic focus on that initial delay suggests the agency's behavior in this case was unreasonable." Cooper concluded that "because NOAA responded reasonably to the FOIA request, AquaAlliance is not entitled to an award." (*AquaAlliance v. National Oceanic and Atmospheric Administration*, Civil Action No. 17-02108 (CRC), U.S. District Court for the District of Columbia, June 12)

A federal court in California has ruled that Quentin Kopp is entitled to **attorney's fees** for his litigation to force the Secret Service to disclose records concerning its costs for providing protection to President Donald Trump's two adult sons while on international trips promoting their business interests, but has reduced Kopp's fee request by a third because he only prevailed on two of his three requests. In response to Kopp's three

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requests, the agency told Kopp that his requests did not sufficiently describe the records sought. Kopp responded to the agency's determination, arguing that his requests were sufficiently specific to allow the agency to search. However, the agency had no record of receiving Kopp's response until it was attached is his court complaint. After discovering Kopp's original response, the agency processed his request and disclosed 93 pages. The agency later disclosed the same records to two journalists. Kopp argued that he was entitled to attorney's fees because his litigation caused the agency to respond to his requests. By contrast, the agency asserted that it was Kopp's clarification that it did not receive that prompted the disclosure of records. The court found that "as a factual matter that Kopp's clarifying letter was sent but not received and holds that the Secret Service had no obligation to respond to that letter until it received a copy of it as an attachment to Kopp's complaint." The court then explained that it would analyze whether the agency should have disclosed records in response to Kopp's original requests without any further clarification. The court found that two of Kopp's requests were sufficiently clear to allow the agency to search for records. The court noted that "the Secret Service should have been able to interpret the request as calling for documents showing the compensation and expenses incurred by agents on the trip, or if it perceived some ambiguity that the Court does not, at the very least should have identified its concern in its request for clarification." The agency argued that Kopp's use of the term emoluments made it unclear whether he was referring only to foreign gifts. Calling this claim "baseless," the court pointed out that Kopp's clarification letter shed some light on whether the agency should have been able to search in the first place. The court observed that "at least with respect to the first two requests – regarding the number of agents and their compensation – it is unclear why the Secret Service would not have been able to identify on its own the categories that Kopp listed in his clarification letter or how those categories narrow in any way the scope of the original requests." As to the third request, the court indicated that its subject matter – rules and policies for agents on such trips – was unclear and that the agency acted appropriately in requesting clarification. Concluding that Kopp had prevailed on two of his requests but not the third, the court reduced Kopp's fee request by a third. The court rejected several of the agency's attempts to narrow the hours Kopp's law firm had claimed but agreed with the agency that Kopp could not be compensated for time spent on administrative matters. The court also rejected Kopp's request that a senior partner be compensated at $850 an hour rather than $700 an hour, an amount recognized in 2012 as being a fair market rate in the San Francisco area. The court noted that "there is no evidence that $850 per hour is in fact a fair market rate for the particular work performed. The Secret Service does not appear to object to a rate of $700 per hour and the Court awards fees at that rate for the allowable time entries." The court found that with the adjustments in his hourly calculations, Kopp was entitled to $30,612 but reduced that by one-third for a total award of $20,408. (*Quentin L. Kopp v. United States Secret Service*, Civil Action No. 18-04913-JCS, U.S. District Court for the Northern District of California, May 31)

In response to requests from Anthony Viola for records about state or local government officials who were prosecuted for public corruption in Cuyahoga County, Ohio, Judge Tanya Chutkan has ruled that EOUSA and the FBI **conducted an adequate search**, and that they properly withheld records under **Exemption 7(A) (interference with ongoing investigation or proceeding)**, but that the FBI has not shown that appeals of third parties convicted were still pending to qualify them for continued coverage under Exemption 7 (A). Because Viola had not provided third-party authorization, the agencies only searched for records pertaining to his 2011 prosecution for mortgage fraud. Viola challenged EOUSA's refusal to search for records of a state/federal mortgage fraud task force because they were not **agency records**. While Viola produced an affidavit from the Ohio Bureau of Investigation agent who headed the task force, Chutkan noted that the affidavit supported the agency's claim that the task force's records were not agency records under FOIA. She pointed out that "while federal agencies subject to FOIA may have been able to access and review the records, [the affidavit] provides no evidence that the federal government or the Ohio Bureau of Investigation intended or permitted federal entities to control MFTF records." Viola argued that the agencies' Exemption 7 claims were waived because some recordings had been played in court. Chutkan found Viola's

allegations fell short. She observed that "Viola cannot point to a judicial proceeding where the tapes and/or transcripts were disclosed without a protective order; he merely speculated there was no protective order – despite evidence from the *United States v. Calabrese* docket to the contrary." The FBI continued to withhold records because it claimed that appeals of some convictions were still pending. Viola indicated that a search of the prison library's computer revealed no pending appeals. Finding that the FBI had not carried its burden of showing the appeals were still pending, Chutkan pointed out that "this is not a situation where the agency is being asked to prove a negative. Rather, [the FBI's affidavit] declared that a 'few' appeals were pending at the time of the summary judgment motion. It is not burdensome to require the FBI to list those cases that are or were still on appeal in order to substantiate the FBI's reliance on exemption 7." (*Anthony L. Viola v. United States Department of Justice, et al.*, Civil Action No. 16-1411 (TSC), U.S. District Court for the District of Columbia, June 11)

Presiding over a case in the Western District of Texas, Judge Royce Lamberth has clarified several disagreements arising from John Eakin's massive FOIA requests estimated at 4.2 terabytes (300 million pages) of records concerning deceased World War II soldiers and the way the National Archives and Records Administration has been handling their personnel files. In August 2017, Lamberth allowed the government until February 2021 to produce all non-exempt responsive records. Eakin had asked for records as PDF files. He argued that the government should not be allowed to slow the processing of his request by re-reviewing records. Lamberth clarified that "the government can vet any never-before-released responsive records for exempt material before giving them to Eakin. The government can also reprocess any previously-released records if the government has not record of the results of the previous review – i.e., if the government doesn't know whether there was any material, or if the government didn't maintain the document in redacted form. But if the government has any responsive records that it knows have been already reviewed and appropriately redacted, the government cannot drag its feet by rehashing their review and redaction in this litigation." Lamberth also indicated that the government would be required to provide any newly released documents to Eakin as PDF files. He also agreed to assess Eakin's challenges to the government's *Vaughn* index to the extent such objections "to prevent the government from traveling too far down a wrong road." He added that "but the proper vehicle to do so remains a motion for summary judgment teeing-up the specific legal question with a *Vaughn* index that samples withholdings or redactions representative of Eakin's broader challenges." (*John Eakin v. United States Department of Defense*, Civil Action No. 16-972, U.S. District Court for the Western District of Texas, June 5)

The D.C. Circuit has ruled that CREW and the National Security Archive **failed to state a claim** for relief in their suit alleging violations of the **Presidential Records Act** as a result of the Trump White House's failure to prohibit the use of messaging apps that delete messages after they have been read as well as the use of personal email accounts to conduct public business. After both records' preservation issues became matters of public interest, the House Oversight Committee sent a letter to then White House Counsel Don McGahan expressing concerns about records preservation and asking McGahan to ensure that the PRA's recordkeeping provisions were observed. Assistant to the President Marc Short responded in a letter indicating that all White House employees received training on their PRA obligations and that the White House counsel provided legal guidance to employees on their obligations. A February 2017 internal memo from McGahan, which became public later on, instructed White House employees not to use message-deleting apps nor personal email accounts. CREW and the National Security Archive also filed suit, claiming that the White House was required to categorize records as presidential or personal, to follow certain procedures including notifying the Archivist before disposing records, and to implement records management guidelines. The district court dismissed the suit for failure to state a claim and, in a second decision, rejected the challenge to

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the use of message-deleting apps by noting that "nowhere does the PRA specifically prohibit the use of any particular means of communication." At the D.C. Circuit, Circuit Court Judge David Tatel first noted that "at this stage of the litigation, i.e., motion to dismiss, CREW must plausibly allege that the White House is, in effect, defying the law." He continued, pointing out that "by issuing the February 2017 Memo, the White House has instructed its staff to comply with the PRA, and it has done so by prohibiting the use of message-deleting apps and restricting electronic communications to official email accounts that automatically preserve records. To be sure, the Memo may not *guarantee* full compliance with the PRA, but. . .under the law of this circuit we would have no jurisdiction as to the correction of any defects in the White House's day-to-day compliance with the Memo's records-preservation policy." Tatel added that "the Memo does just what the PRA requires" from the White House. Further, he pointed out that "the February 2017 Memo unquestionably speaks to the White House's efforts to satisfy the President's PRA obligations. . ." Tatel explained that a second obstacle to CREW's PRA claims were that they constituted the kind of micromanaging of White House PRA decisions that was proscribed in *Armstrong v. Bush (Armstrong I)*, 924 F.2d 282 (D.C. Cir. 1991). He observed that "determining whether White House personnel are in fact complying with the directive to conduct all work-related communications on official email would require just the kind of micromanaging proscribed by *Armstrong I*." (*Citizens for Responsibility and Ethics in Washington and the National Security Archive v. Donald J. Trump*, No. 18-5150, U.S. Court of Appeals for District of Columbia Circuit, May 28)

Judge Rudolph Contreras has ruled that CREW and the Refugee and Immigrant Center for Education and Legal Services (RAICES) **failed to state a claim** under the **Federal Records Act** or the Administrative Procedure Act challenging the failure of the Department of Homeland Security to create records concerning its zero-tolerance policy. After the Trump administration implemented its zero-tolerance policy in April 2018, it quickly became apparent that DHS had not created records adequate to identify children who were separated from their parents at the southern border to facilitate transferring them to the custody of the Department of Health and Human Services. CREW and RAICES filed suit alleging three claims for failure to create such records. Contreras found that he had jurisdiction over only one of the three claims and that, further, none of the claims could be remedied under the APA. Finding that RAICES had standing under one of the claims, he noted that "plaintiffs represent that DHS's inability to link unaccompanied children to family members from whom they were separated results in increased detention times for unaccompanied children, which impairs RAICES's ability to provide advice to and consult with its clients, as well as renders removal proceedings more difficult for the organization to handle," which required RAICES to expend time and resources. The agency argued that RAICES had not shown that it was injured by the failure to create records rather than the policy more broadly. Contreras pointed out that "but simply because RAICES's alleged harm may in part be caused by the zero-tolerance policy does not mean that it cannot also be caused in part by DHS's recordkeeping failures." However, having found that RAICES had standing to challenge one claim, Contreras concluded that none of the claims were actionable under the APA. Rejecting RAICES's one claim that had survived standing analysis, Contreras observed that "plaintiffs do not challenge a DHS policy, official or unofficial, setting agency-wide compliance with the FRA; instead, they challenge DHS's deficient compliance with § 3101 with regard to some of the records the agency creates." (*Citizens for Responsibility and Ethics in Washington, et al. v. U.S. Department of Homeland Security, et al.*, Civil Action No. 18-2473 (RC), U.S. District Court for the District of Columbia, May 24)

Judge James Boasberg has ruled that the Center for Biological Diversity still **failed to state a claim** for relief in its challenge to the Department of State's failure to publish two reports required under a multilateral agreement to stabilize greenhouse gas emissions. CBD filed suit after the agency failed to publish its 2018 edition of a national communication report and a biennial report. In an earlier decision, Boasberg found CBD had not shown that it had standing to challenge the agency failure but allowed CBD to amend its

claim to provide a sufficient basis for standing. This time, Boasberg started by indicating that the government was incorrect in insisting that CBD show both an organizational injury – such as expenditure or resources – as well as an informational injury. Rejecting the agency's claim that CBD needed to show both to have standing, Boasberg explained that "deprivation of information to which an organization has a statutory right and the loss of which causes harm is – as it would be for an individual—sufficient to confer standing. In other words, there is no need for a plaintiff to allege resources expenditure. Were Article III to require more, it is difficult to understand how organizational plaintiffs would have standing for FOIA suits without pleading such an expenditure." CBD argued that its injury could be redressed by requiring the agency to disclose some information even if it was not the reports themselves. But Boasberg pointed out that "the issue is not redressability, but injury." He pointed out that "their Complaint seeks only the two specific reports, so the Court must look to whether Defendant has an obligation to publish *those* – which it does not. That the treaty might require public disclosure of some *other* information unrelated to its claim in this deadline suit does not establish the requisite injury." (*Center for Biological Diversity v. United States Department of State, et al.*, Civil Action No. 18-563 (JEB), U.S. District Court for the District of Columbia, June 12)