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Washington Focus: The EPA published revisions to its FOIA regulations June 26 without going through the notice and comment period required under the Administrative Procedure Act. The new provisions, which are scheduled to take effect July 25, allow political appointees to make decisions on FOIA releases, including whether records are covered by an exemption, are non-responsive to the request, or do not exist. The new rules also require that FOIA requests sent to regional field offices be sent to the agency's D.C. headquarters for processing. Commenting on the publication of the new rules, Sean Moulton of the Project on Government Accountability told The Hill that "in my 20 years of working on FOIA policy I've never seen an agency do a FOIA regulation change without public comment. In terms of the process, that's incredibly troubling. They are inviting and accepting no public input.". . .Earthjustice and the Campaign for Accountability have both requested the Inspector General at the Department of the Interior investigate the legality of a similar awareness program formalized recently at the department, allowing political appointees to review and delay responses to FOIA requests.

Supreme Court Abandons Substantial Competitive Harm Test

The Supreme Court has overturned 45 years of case law on Exemption 4 (confidential business information) after finding that since the *National Parks* substantial competitive harm test is not contained in the actual language of the exemption it does not reflect the plain language of the exemption itself and cannot be the basis for analyzing the exemption's coverage. Instead, a 6-3 majority that included the five conservatives Justices, joined by Justice Elena Kagan, concluded that information submitted by companies was confidential if the company treated the information treated the information as non-public and the government agreed to abide by the company's assertions. Writing for the majority, Justice Neil Gorsuch explained that "at least where commercial or financial information is both customarily and actually treated as private by the owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."

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Although the issue before the court – whether or not the likelihood of substantial harm test was a permissible interpretation of Exemption 4 – was fairly narrow, rejecting this test out-of-hand has potential consequences that were not addressed by the Court at all. While this is the first time the Court has addressed Exemption 4 directly, its 1979 ruling in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) recognized a business-initiated cause of action under the Administrative Procedure Act to block disclosure of allegedly proprietary information submitted to the government by the company. But the case that reached the Court – *Food Marketing Institute v. Argus-Leader Media* – traveled a circuitous route that served to limit the issues in play. The Argus-Leader newspaper in Sioux City, Iowa originally requested store-level redemption data from the Department of Agriculture's Supplemental Nutrition Assistance Program (SNAP). The agency originally denied the request under Exemption 3 (other statutes), but after the Eighth Circuit ruled that the statute cited by the agency did not cover the data requested, the agency relied solely on Exemption 4. This time, the district court ruled that the agency had failed to show that disclosure would cause substantial competitive harm and ordered disclosure. The agency declined to appeal, but the Food Marketing Institute was allowed to intervene to argue against the substantial competitive harm test. The Eighth Circuit upheld the district court's ruling and, even though the government was no longer a party to the case, the Supreme Court agreed to hear FMI's challenge to the substantial competitive harm test. The government filed an amicus brief in favor of FMI's position, pledging not to disclose the information without a court order.

Because of the peculiar way in which the case arrived at the Supreme Court, Gorsuch took a moment to address the issue of whether or not FMI had standing since the application of an exemption is an agency decision and, normally, it is the agency that bears the burden of persuading the court that its exemption claim is appropriate. Gorsuch found that FMI had standing on its own, noting that "disclosure would likely cause them *some* financial injury" and added that "the government has represented unequivocally that, consistent with its longstanding policy and past assurances of confidentiality to retailers, it 'will not disclose' the contested data unless compelled to do so by the district court's order."

Relying on the dictionary meaning of "confidential" in 1963 when the language of Exemption 4 was crafted, Gorsuch pointed out that two conditions might be required to claim something was confidential. "In one sense," he noted, "information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it. In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret." Gorsuch then wondered "must both of these conditions be met for information to be considered confidential under Exemption 4?" He answered that "at least the first condition has to be; it is hard to see how information could be deemed confidential if its owner shares it freely." He then asked: "Can privately held information *lose* its confidential character for purposes of Exemption 4 if it's communicated to the government without assurances that the government will keep it private?" Here, he pointed out, that this condition had been met as well because the government had agreed to keep the information confidential.

Adopting the government's critique of *National Parks* as a "relic of a 'bygone era of statutory construction,'" Gorsuch primarily railed against the decision for not mirroring the statutory language and, further, committing the cardinal sin of relying on congressional testimony as a guide to interpreting a quite new provision that had never previously been the subject of judicial interpretation. He revisited the D.C. Circuit's en banc decision in *Critical Mass v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) as evidence that the substantial harm test had been revised even by the D.C. Circuit. But while the Justice Department's original goal in asking the entire D.C. Circuit to rehear the *Critical Mass* case was to get the court to abandon the substantial competitive harm test, the D.C. Circuit actually refused to scrap the test and instead created a carve-out for records that were voluntarily submitted to the government, which would be treated as customarily confidential, and those that were required to be submitted, which would continue to be judged under the substantial competitive harm standard. Instead of referring to either the majority opinion in

the case, written by Circuit Court Judge James Buckley, or the dissent, written by then Circuit Court Judge Ruth Bader Ginsburg, Gorsuch cited a concurring opinion by Circuit Court Judge A. Raymond Randolph, an occasionally strident conservative voice on the D.C. Circuit who later served as a role model for then Circuit Court Judge Brett Kavanaugh.

In response to the Argus-Leader's claim that the Supreme Court has consistently recognized that FOIA exemptions should be narrowly construed, Gorsuch observed that "just as we cannot properly *expand* Exemption 4 beyond what its terms permit, we cannot arbitrarily *constrict* it either by adding limitations found nowhere in its terms."

Justice Stephen Breyer dissented, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor. While agreeing with the majority that the concept of substantial competitive harm did not appear in Exemption 4, he suggested that some kind of harm test was implicit in the term "confidentiality" and that courts should at least assess whether "release of such information must also cause genuine harm to the owner's economic or business interests." He indicated that he disagreed with the majority's decision to find that there was no harm requirement to assert that records were confidential. He pointed out that "after all, the word 'confidential' sometimes refers, at least in the national security context, to information the disclosure of which would cause harm." He observed that "'confidential,' in this sense, conveys something about the nature of the information itself, not just (as the majority suggests) how it is kept by those who possess it." Breyer criticized the majority's customarily confidential conclusion, noting that "given the temptation, common across the private and public sectors, to regard as secret all information that need not be disclosed, I fear the majority's reading will deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia." (*Food Marketing Institute v. Argus-Leader Media*, No. 18-481, U.S. Supreme Court, June 24)

Views from the States…

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

Arkansas

The supreme court has ruled that while email exchanges can constitute a public meeting under the Freedom of Information Act serial emails exchanged between a quorum of the Fort Smith city council did not result in a decision subject to the statute. After Fort Smith hired Nathaniel Clark as its new police chief, Clark set out to increase minority hiring by the police department. However, his plans ran afoul of the Fort Smith Civil Service Commission's rule requiring an applicant for sergeant or above to have served on the Fort Smith police force for at least five years. When Clark sought to change the CSC rules to allow for the appointment of outside candidates, the Fraternal Order of Police threatened a no-confidence vote on Clark. City administrator Carl Geffken and three city council members participated in an email discussion and agreed to pass a non-binding resolution supporting Clark's plan to hire outside candidates. At its public meeting a week later, the city council discussed and adopted the non-binding resolution supporting Clark's plan to hire outside candidates. Bruce Wade, who was on a list to receive notifications of public meetings, filed suit, alleging he email discussion constituted an illegal meeting. The trial court agreed with Wade and Fort Smith appealed to the supreme court. Fort Smith argued that email meetings were not illegal because they were not even mentioned in the statute. Noting that it had previously held that phone meetings were covered by the statute, the majority noted that "FOIA's open-meeting provisions apply to email and other forms of electronic

communications between government officials just as surely as they apply to in-person or telephonic conversation." The majority added that "exempting electronic communications would allow government officials who are so inclined to make decisions in secret, leave the public in the dark, and subvert the purpose of FOIA's open-meeting provisions." Having found that email exchanges could constitute a meeting, the majority concluded that "no decision was made, and the board discussed the proposed CSC rule change at its June 6, 2017 public meeting." The majority noted that "the emails here contain information, a recommendation; and unsolicited responses with no decision. . . [T]he communication does not violate the open-meetings provisions set forth in [the FOIA]." Several justices dissented, finding that the email exchange clearly constituted a decision. (*City of Fort Smith, et al. v. Bruce Wade*, No. CV-18-351, Arkansas Supreme Court, June 20)

Connecticut

A trial court has ruled that although the FOI Commission incorrectly found that Greenwich Emergency Medical Services performed a government function it agreed with the commission's finding that GEMS qualified under the other three factors for finding that a private entity is the functional equivalent of a public agency – the level of government funding, the extent of government involvement or regulation, and whether the entity was created by the government – and, as a result, was required to respond to Joseph Soto's request for personnel records. GEMS declined to respond to Soto's request, arguing that it was not a public agency. Soto complained to the FOI Commission, which concluded that GEMS qualified under all four factors as the functional equivalent of a public agency. GEMS filed suit challenging the finding. Superior Court Judge Sheila Huddleston found that there was not sufficient evidence that GEMS was performing a government function, but that all three other factors applied. Indicating that whether or not GEMS was performing a government function was a close question, Huddleston explained that "GEMS provides its services to the town pursuant to a contract that attempts to make GEMS independent from the town, at least in some respects, and to insulate the town from liability for GEMS' actions or employees. And, although GEMS might be said to administer the town's emergency medical services program, it does so in a manner that is closely regulated by state laws and regulations and by its contract with the town. It does not have the power to govern or to make decisions that bind the town." Huddleston rejected GEMS' claim that its funding came from the services it provided, noting instead that "the budgetary process between GEMS and the town closely resembles the process by which a town department obtains budgetary funding. The court concludes that the town annually appropriates funds based on the town's determination of the amount of funding GEMS needs to maintain its operations." Huddleston observed that even if the first two factors weighed against finding that GEMS was the functional equivalent of an agency, the other two factors strongly supported the commission's conclusion. She noted that "these findings establish that the government – at both state and local levels – is really involved with the core of GEMS' program." (*Greenwich Emergency Medical Services, Inc. v. Freedom of Information Commission*, No. HHB-CV-17-6039788-S, Connecticut Superior Court, Judicial District of New Britain, June 18)

A trial court has ruled that provisions of a statute protecting the confidentiality of information submitted to the Department of Insurance as part of a preacquisition notification protects virtually all the information submitted and that the FOI Commission erred when it distinguished between certain descriptive terms in finding that some types of information were not protected under the provisions. The trial court also found that the confidentiality provisions did not prohibit the commission from inspecting information *in camera* as part of its decisionmaking process, but that the commission improperly assessed a $500 penalty against the insurance commissioner for failing to provide the information for *in camera* review. The Campaign for Consumer Choice requested records pertaining to a proposed merger from the Insurance Department. The Department withheld records under the confidentiality provisions. The Campaign for Consumer Choice then filed a complaint with the FOI Commission. There, the commission concluded that the

confidentiality provisions did not apply as broadly as the Insurance Department claimed and that the commission needed to conduct *in camera* inspection of the records to determine what should be disclosed. In its final decision, the commission found that the confidentiality provisions protected only the Form E regulatory filings, which had already been disclosed to the Campaign. The FOI Commission also found that the Department's refusal to provide records for *in camera* inspection was improper and assessed a $500 penalty against the insurance commissioner. The department then filed suit challenging the commission's decision. The FOI Commission argued that the scope of the confidentiality provisions was more limited then claimed by the department. However, the trial court sided with the department's interpretation, noting that "the actual Form E filings submitted to the department regarding the two proposed mergers at issue are statutorily exempt from disclosure. . .In addition, any supporting information submitted by the insurers, either alongside their Form E filings or during the waiting period set for [in one provision] is also exempt from disclosure." The trial court found that the statutes did not prohibit *in camera* inspection by the commission. The trial court pointed out that "the extensive protections given to information submitted to the commission for in camera review make clear that the information will not be subject to public disclosure." However, the trial court rejected the assessment of a penalty, observing that "although the department's construction of the statutory provisions at issue here was ultimately mistaken, the department nonetheless relied in good faith on their interpretation of these statutes in refusing to submit the requested information for in camera inspection." (*Commissioner, Department of Insurance v. Freedom of Information Commission*, No. CV 17 6039096 S and No. CV 17 6039097 S, Connecticut Superior Court for the Judicial District of New Britain, June 12)

Massachusetts

The supreme court has remanded back to the trial court a case involving whether a database containing birth and marriage data that is publicly available on computers at the Department of Public Health is disclosable under the public records law or whether it is protected by the privacy exemption or the exemption for records protected by other statutes. The case stemmed from a request by the Boston *Globe* for the exact same data available on the department's public computer. When DPH failed to respond to the request, the *Globe* filed a complaint with the supervisor of records, which ordered DPH to comply with the request. DPH provided the *Globe* with death and divorce information but refused to disclose the birth and marriage indices. In response to DPH's request for reconsideration, the supervisor of records agreed that the birth and marriage data was protected. The *Globe* then filed suit. The trial court ruled in favor of DPH, finding that the records were protected by the privacy exemption but not the exemption for non-disclosure provisions contained in other statutes. The *Globe* appealed and the supreme judicial court transferred the case on its own motion. The supreme judicial court agreed with the trial court that none of the non-disclosure provisions in other statutes claimed by DPH applied since the *Globe* had only requested data that DPH already made public. The supreme judicial court was skeptical of the agency's privacy exemption claims as well but explained that the privacy interest would vary depending on whether future disclosures to the *Globe* or other requesters might allow comparisons that would reveal data protected by the privacy exemption. The supreme judicial court noted that "there may be a greater privacy interest in a compilation of personal information than in the discrete information that a compilation summarizes, that the availability of a requested compilation itself, not merely the availability of information that makes up the compilation, will significantly reduce the privacy interest in that compilation. The more difficult it is to create a requested compilation using public sources, the greater the privacy interest in the compilation." The supreme judicial court instructed the trial court to assess the existence of multiple sources for the data, the public availability of other sources, the risk of identity theft and fraud, and the likelihood of unwanted intrusions if the data was disclosed. The supreme judicial court also explained that individuals' privacy interest in non-disclosure must be weighed against the public interest, and the public interest did not have to be limited to shedding light on government activities. The supreme judicial court pointed out that "information is the bread and butter of democracy. And the government is in a unique

position to collect and aggregate information from which the public may benefit. As the request in this case demonstrates, reporters, scholars, and others seek to use this information to learn and teach." (*Boston Globe Media Partners v. Department of Public Health*, No. SJC-12622, Massachusetts Supreme Judicial Court, June 17)

The Federal Courts…

Judge Amit Mehta has ruled that the Department of Justice has failed to show that it **conducted an adequate search** and properly withheld records under **Exemption 5 (privileges)** and **Exemption 7(F) (harm to any person)** in response to federal prisoner Matthew Sluss' two FOIA requests for records pertaining to the agency's decision to turn down his request to be transferred to Canada to serve out his sentence for advertising child pornography. While finding the agency's Exemption 5 and Exemption 7(F) claims lacking sufficient support, Mehta approved redactions the agency made under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Sluss asked for records concerning implementation, policies, or guidelines of the International Prisoner Transfer Unit pertaining to prisoner transfers to Canada. After Sluss filed suit, the agency located 176 pages of records in the IPTU's case file on Sluss. The agency also found 23 pages of responsive records on the website of DOJ's Criminal Division. The agency disclosed those 23 pages and subsequently released six pages in full, 32 pages in part, and withheld 30 pages entirely. The agency asked IPTU to conduct a second search, which yielded another eight pages that were disclosed in full. Sluss argued that the agency waived the deliberative process privilege for two memos pertaining to the reasons for denying Sluss' request for a transfer to Canada when the Director of Enforcement Operations marked an "X" next to the word "Deny" and signed the document. Mehta acknowledged that the D.C. Circuit's holding in *Abtew v. Dept of Homeland Security*, 808 F.3d 895 (D.C. Cir. 2015), in which the D.C. Circuit found that a supervisor's initialing of an asylum officer's Assessment to Refer did not waive the privilege, weighed in favor of the government's claim here. But he indicated that here four specific acronyms for denying Sluss' transfer request appeared on the memos, making Mehta wonder whether "the term 'Denial Code' could signify the *Director's* reasons for denying Plaintiff's request. If that is what they mean, then query whether the Denial Codes correspond to the reasoning contained in the memoranda. If they do align, then perhaps the agency has 'expressly adopted' the author's reasoning as its own, in which case the document's predecisional character would cease." Pointing out that the agency had provided no evidence explaining the Denial Codes, Mehta indicated that he could not determine "if the Director's 'Deny' checkmark and signature on each document constitutes an express adoption of the document's reasoning or something else." Mehta added that the agency had not explained a letter from the chief of the IPTU describing the reasons for denying Sluss' transfer using terms reflected in the denial codes, suggesting that the letter had adopted the reasoning of the memos. Turning to Exemption 7(F), Sluss argued that the agency could not use the exemption to protect his safety and told Mehta that if the agency was unwilling to disclose those records to him in prison it could disclose the records to his attorney. Mehta rejected Sluss' claim that prisoner transfers did not qualify as a law enforcement purpose, noting instead that "IPTU makes determinations concerning an individual offender's rehabilitation into society, which includes weighing public safety. Such decisions fall within the heartland of law enforcement duties and responsibilities." Mehta also dismissed Sluss' assertions that Exemption 7(F) did not apply to protect a requester and that he could choose to waive the protection. But he observed that "this case presents facts that convince the court that DOJ has failed to carry its burden of showing a *reasonable* expectation that Plaintiff's safety would be at risk if the material in question was disclosed. The court will accord deference to the agency's assessment of danger, but only when it supplies facts to support it." He pointed out that the agency's affidavit on this point was conclusory, including the fact that the affidavit linked the potential danger to being in the general population of a prison, whereas Sluss was actually in a designated sex offender facility. He ordered the agency to

disclose the Exemption 7(F) material to Sluss' legal advisor. Mehta found the agency's electronic search was inadequate because it failed to identify why the search was limited to those records and what search terms were used. (*Matthew David Sluss v. U.S. Department of Justice*, Civil Action No. 17-00064, U.S. District Court for the District of Columbia, June 14)

Judge Rosemary Collyer has ruled that the Department of Justice properly withheld FBI interviews with former President Barack Obama, former chief of staff Rahm Emanuel, and former presidential advisor Valerie Jarrett conducted during its investigation of former Illinois governor Rod Blagojevich's attempts at extortion in connection with naming a new U.S. senator to replace Obama after he was elected President under **Exemption 5 (privileges)**. When Judicial Watch requested the three Form 302 reports prepared by the FBI as part of the Blagojevich investigation, the agency originally withheld them under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. The agency continued to claim Exemption 7(A) until Blagojevich decided not to appeal his conviction to the Supreme Court. After 7(A) no longer applied, the agency claimed the interview reports were protected by the attorney work-product privilege. Collyer pointed out that "the fact that Mr. Blagojevich had already been arrested on a criminal complaint on December 9, 2008 – the same month the relevant interviews were conducted – demonstrates that the DOJ was actively engaged in litigation against Mr. Blagojevich, not merely contemplating it. Without a doubt, the FBI interviewed the Obama administration officials and prepared the Forms 302 reflecting those interviews when litigation was in the offing." Judicial Watch argued that because FBI agents are required to prepare Form 302 reports to memorialize interviews these three interviews were created pursuant to the agency's administrative policy rather than because of pending litigation. However, Collyer observed that "the germane inquiry is whether the Form 302 would have been prepared by the FBI agents but for the impending prosecution of Mr. Blagojevich. Because the interviews occurred and the Forms 302 were drafted 'for the purpose of gathering evidence that could be presented to a grand jury and that could factor into the case,' the Forms 302 were prepared in anticipation of litigation." Judicial Watch also claimed that the reports were not protected by the attorney work-product privilege because they were not prepared by attorneys. Collyer rejected that claim as well, noting that "law enforcement agents operating in their independent investigatory capacities are not usually considered attorney agents whose notes are protected as attorney work product, but once they are acting in a supportive role to the attorney preparing the case for indictment or prosecution, the attorney work-product protection applies to their work product under FOIA Exemption 5." Assessing the issue of **segregability**, Collyer explained that "as the entire contents of the records at issue here constitute attorney work product, protected from disclosure by Exemption 5 in their entirety, there is no segregable information." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 16-1888 (RMC), U.S. District Court for the District of Columbia, June 25)

Judge Amit Mehta has ruled that the FBI has not shown why disclosure of National Agency Check results in response to retired NIH analytical chemist Noel Whittaker's FOIA request for his 2007 background investigation report would reveal information protected by **Exemption 7(E) (investigative methods or techniques)**. Whittaker requested the records from OPM, which released his report but redacted the National Agency Check results at the request of the FBI. The FBI told Mehta that disclosing the National Agency Check results would reveal the type of information the agency finds relevant to a name check, provide an indication of whether or not derogatory information existed in FBI files, and that routinely withholding such information is itself a law enforcement technique or procedure meriting protection. Mehta indicated he was confident that neither the second nor the third claim qualified under Exemption 7(E) and that on the current record he lacked enough information to assess the merits of the first claim. Mehta started by noting that "it is not evident how revealing whether the FBI has 'derogatory' information about a requester would disclose a

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law enforcement technique or procedure." He added that "disclosing the results of Plaintiff's National Agency Check would not necessarily reveal how the FBI 'goes about' collecting information returned from such inquiries" and observed that the agency's claim of harm was more akin to Exemption 7(A) (interference with ongoing investigation or proceeding) than to Exemption 7(E). He expressed puzzlement over the agency's claim that the name check technique was itself protected, pointing out that "the position is odd, to say the least, as the FBI now has disclosed the very technique or procedure it seeks to protect. The court is aware of no case, and Defendants cite none, for the proposition that the practice of categorically invoking a FOIA Exemption is itself protected from disclosure under Exemption 7(E)." Mehta explained that the FBI's policy on name checks was to routinely issue a *Glomar* response neither confirming nor denying the existence of records. He indicated that *CREW v. Dept of Justice*, 746 F.3d 1082 (D.C. Cir. 2014) provided an example of the improper use of a *Glomar* response to withhold records about an already-known investigation of then House majority leader Rep. Tom DeLay (R-TX) in light of a clear public interest in the investigation, while *Kalu v. IRS*, 159 F. Supp. 3d 16 (D.D.C. 2016), concerning the FBI's refusal to acknowledge whether Kalu was on the FBI no-fly list, represented a more appropriate use of *Glomar*. Noting that the use of *Glomar* as a categorical exemption for name check results fell somewhere between the two cases, he pointed out that "'the agency must at least provide *some* explanation of what procedures are involved and how they would be disclosed.' Defendants have not adequately done so here." (*Noel F. Whittaker v. United States Department of Justice, et al.*, Civil Action No. 18-01434 (APM), U.S. District Court for the District of Columbia, June 21)

The D.C. Circuit has ruled that the Department of the Army conducted an **adequate search** for records discovered during a remand of Carl Oglesby's request for records pertaining to Reinhard Gehlen, a former Nazi general recruited by the United States to operate a European spy ring known as the Gehlen Organization which was eventually absorbed by West Germany's intelligence service and that the CIA properly redacted the ten documents remaining in dispute under **Exemption 3 (other statutes)**. Oglesby originally requested the Gehlen records in 1985 and ultimately forced the government to acknowledge its connection with Gehlen. Oglesby received thousands of records, but his FOIA litigation remained unresolved when he died in 2011. He was replaced as a plaintiff by his daughter Aron DiBacco and his domestic partner Barbara Webster, who continued to pursue the litigation. Both the district court and the D.C. Circuit previously ruled in favor of the government. However, during the litigation the Army discovered another 2,863 pages of microfilm records that were then processed and disclosed with only a handful of redactions under **Exemption 1 (national security)** and Exemption 3. DiBacco argued that the fact that the microfilm records contained references to records that were removed from the file at the time they were microfilmed constituted a clear lead as to the existence of potentially responsive records requiring the agency to search for those records. The agency told the district court that its FOIA staff "could not locate the documents referred to in the Replacement sheets, or even determine where to start looking for any such documents." The district court concluded that if the records still existed the agency would have found them during its FOIA searches. The D.C. Circuit agreed, noting that "the information revealed in the Remand Records was neither a 'clear' nor 'certain' lead, and thus was not the sort of indication of further material that was 'so apparent' as to require additional inquiry." Because the D.C. Circuit found all ten redactions were justified either under the National Security Act or the CIA Act it did not bother to analyze whether they were properly withheld under Exemption 1 as well. DiBacco argued that the exception for CIA personnel records did not apply because there was no indication that any of named individuals were still employed by the CIA. Noting that the D.C. Circuit had never addressed this exact issue, the panel indicated that the Ninth Circuit's ruling in *Minier v. CIA*, 88 F.3d 796 (9th Cir. 1996) has ruled that the CIA Act applied to former employees as well and that in *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980), the D.C. Circuit had held that contract employees of the CIA were covered, concluding as a result that "we reject DiBacco's argument that the CIA Act only applies to information referencing current intelligence personnel." (*Aron DiBacco and Barbara Webster v. United States Department of the Army, et al.*, No. 17-5048, U.S. Court of Appeals for the District of Columbia Circuit,

June 14)

A federal court in Washington has ruled that the Department of State properly withheld portions of Silvana Nikaj's visa application records under **Exemption 3 (other statutes)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7(E) (investigative methods and techniques)**. Nikaj requested her 2004, 2008, and 2014 non-immigrant visa refusals. The agency located 16 responsive records. The agency released two records in full but withheld 12 records in full and two records in part. The agency withheld the majority of the records under Exemption 3, citing the Immigration and Nationality Act, 8 U.S.C. § 1202(f), which prohibits disclosure of records related to visa denials. Nikaj argued that since she had only requested records about her visa applications there should have been responsive information not related to the denial of her applications. The court disagreed, noting that "Plaintiff's FOIA request specifically asks for documents related to Plaintiff Nikaj's '2004, 2008, and 2014 non-immigrant visa refusals.' The FOIA request's own language requests documents that would fall squarely within 8 U.S.C. § 1202(f)." Nikaj challenged the use of Exemption 7 by the agency, arguing that denying a visa was not a law enforcement function. The court observed, however, that "the Government's determination about whether visa applications should be approved or denied, pursuant to U.S. immigration laws, is an administrative determination that has the 'salient characteristics of "law enforcement contemplated."' The Government compiled Documents 1 and 4-14 in order to determine whether Plaintiff Nikaj met the INA's qualifications for visa issuance. The Government has shown that, in responding to Plaintiff's FOIA request, its purpose fell within its sphere of INA enforcement authority and that the records were 'compiled for law enforcement purposes.'" Finding the records met Exemption 7's threshold, the court then found they were protected by Exemption 7(E). The court pointed out that "disclosure of the Government's visa application processes could lead to the circumvention of the law because it could allow potential applicants to cover up damaging information." (*Silvana Nikaj, et al. v. United States Department of State*, Civil Action No. 18-0496-JCC, U.S. District Court for the Western District of Washington, June 25)

A federal court in California has ruled that journalist Kevin Poulsen is not eligible for **attorney's fees** for his FOIA litigation against the Department of Justice because the disclosure of records pertaining to the FISA applications to surveil Carter Page came as a result of President Donald Trump's decision to declassify two memos prepared by the House Intelligence Committee, not because of Poulsen's FOIA suit. In response to Poulsen's suit, all the agencies initially indicated that they would invoke a *Glomar* response neither confirming nor denying the existence of records. While the National Security Agency and the Office of the Director for National Intelligence told the court that they would continue to assert *Glomar*, the FBI and DOJ's National Security Division and Office of Legal Counsel told the court that disclosure during congressional testimony by then-FBI director James Comey acknowledging that the FBI did not have any records pertaining to wiretapping of Trump Tower, and, further, the subsequent declassification of memos prepared by then-House Intelligence Committee chair Devin Nunes (R-CA) and then-ranking member Adam Schiff (D-CA) had acknowledged the existence of applications and orders to conduct surveillance of Page, constituted public acknowledgement of the information and waived the agency's ability to claim a *Glomar* response for those records. As a result, DOJ disclosed 83 pages and withheld 186 pages. The court granted the government's summary judgment motion and denied Poulsen's summary judgment motion. Poulsen then filed for attorney's fees, arguing that by adopting the government's suggested scheduling order for disclosing the records, Poulsen had substantially prevailed. District Court Judge William Orrick disagreed, noting that "the government's change in position – from full *Glomar* to its partial *Glomar* (for the FBI, NSD and OLC) and release of the Page FISA materials – was not caused by this lawsuit (or parallel lawsuits) but by the unprecedented declassification decision of the President. In these circumstances, Poulsen's lawsuit was not the catalyst for the government's changed position." Orrick observed that "neither the lawsuit nor my Order caused the

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government to agree to process or produce the FISA related materials; the internal declassification decisions following the limited acknowledgements did. There is no evidence that Poulsen's suit was the catalyst for or otherwise caused that processing and release, and he is not entitled to attorney fees." (*Kevin Poulsen v. Department of Defense, et al.*, Civil Action No. 17-03531-WHO, U.S. District Court for the Northern District of California, June 21)

Judge Christopher Cooper has ruled that federal prisoner James Price does not have a cause of action under the **Federal Records Act** to force the Department of Justice to preserve records pertaining to child pornography cases and that one possible explanation for why Price was unable to access such records may be because they are properly exempt under FOIA. In 2013, Price was sentenced to 13 years in prison for distribution and possession of child pornography. Starting in May 2017, he began filing FOIA requests relating to the Internet Crimes Against Children Task Force. In total, he filed or directed the filing of more than 250 FOIA requests. In 2017, he filed a FOIA suit in the Southern District of Florida, which was transferred to the District of Columbia in 2018. Before any action was taken on his FOIA claims, Price amended his complaint to allege violations of the FRA, claiming that the government created off-book records that were not accessible. Cooper found that Price had successfully stated a claim under 44 U.S.C. § 3106 requiring the Attorney General and the Archivist to take legal action for failure of DOJ to preserve the records. Cooper complained that "the government's primary litigation strategy in this matter appears to be feigned ignorance: if we act like we don't know what this *pro se* plaintiff is arguing, then perhaps neither will the court. The government repeatedly asserts that it cannot divine what Price is arguing, thereby avoiding substantive engagement with the various statutory provisions in play." Cooper then explained Price's claims: "he is arguing that, assuming federal law enforcement can use third parties to create and maintain records used in federal prosecutions at all, it can do so only to the extent such records are kept in compliance with federal records laws. And here, Price submits, the third parties have not done so, because they have (according to him) failed to keep track of essential metadata and various other records related to prosecutions." However, Cooper pointed out that "a recognizable theory does not equal a substantial likelihood of success on the merits. When the Court considers Price's *evidence* for his claim that the DOJ does not maintain records essential to its prosecutions, it concludes that he comes up short." Price submitted responses to some of his FOIA requests for metadata. But Cooper observed that "these exhibits establish at most that Price had ample reason to file his initial FOIA lawsuit, but they do not establish that DOJ is likely committing FRA violations. Price has put the cart before the horse. Without knowing *how* DOJ searched for the records Price requested, the Court cannot say with any certainty that the agency – again, assuming it must maintain them – has lost access to them altogether." He added that "the same is true for potential exemptions. Without knowing what responsive records, or parts of records, the agency determined were exempt, it is nigh impossible to determine what records the agency actually has in its possession." Cooper noted that the agency claimed Exemption 7 (law enforcement records) in withholding records. He pointed out that "given that this case stems from Price's desire to excavate the techniques used by law enforcement in the investigation and prosecution of child sex crimes, and that it seeks law enforcement records that are not personal to him, it seems inevitable that the privacy and investigative techniques exemptions will swallow up massive swaths of the records he seeks." He added that "Price may come to find that the DOJ in fact possesses the very records Price suspects they have failed to keep, but the he also has no right to access them. . .[U]ntil that happens, it would be a fool's errand to assess whether DOJ has complied with the FRA by reference to the scattershot FOIA exhibits attached to Price's pleadings." Cooper pointed out that a private right of action under § 3106 came into play only once the Attorney General and the Archivist had knowledge of a violation of the recordkeeping requirements of the FRA and failed to take action. However, Cooper found Price had not shown that either official had knowledge of a violation or potential violation. He observed that "neither the Attorney General nor the Archivist is under *any* duty to act until the 'once' or 'when' condition – knowledge of unlawful removal of records – is satisfied. Put another way, § 3106 imposes no duty upon either the Attorney General or Archivist to *find* that an agency

has removed records in violation of the FRA; it *does* impose mandatory duties upon each of them *if* they know that such unlawful removal of records has occurred, is occurring, or will occur." Cooper found that Price was asking for a remedy not available under the FRA. He pointed out that "by asking the Court to compel the Attorney General and Archivist to take action under § 3106, he is asking them *first* to determine that a violation occurred – which § 3106 does not mandate – and only *second* to take the enforcement action that § 3106 does mandate. The [Administrative Procedure Act] does not permit a plaintiff to compel agency action unless that action is mandated by statute. Accordingly, the Court concludes that a predicate to a viable § 3106 failure-to-act claim is a plausible allegation that the applicable agency head or Archivist knew that records are indeed being removed or destroyed in contravention of agency policy or the FRA." Cooper found that Price had not shown that the records he sought in his FOIA requests "are unavailable because of some unlawful recordkeeping practices relating to the DOJ's use of third-party software systems." Instead, he explained that " just as likely, if not more likely, is that the records Price sought merely appeared unavailable under FOIA because of improper search methods (which Price can probe via his FOIA claims) or that such records exist but are exempt from disclosure under FOIA, perhaps because of the carve-outs for records relating to law enforcement investigative techniques and records whose release would amount to an unwarranted invasion of privacy. As a result, the Court cannot conclude that the injunction Price seeks – forcing the agency to stop using [third-party software programs] to 'preserve the status quo of all records' – will have any effect on the universe of records that Price may be able to recover via FOIA." (*James Price v. United States Department of Justice, et al.*, Civil Action No. 18-1339 (CRC), U.S. District Court for the District of Columbia, June 19)

Judge Trevor McFadden has dismissed the remaining claims of Fielding McGehee and Rebecca Moore concerning their request to the FBI for records pertaining to the Jonestown Massacre. McFadden had previously ruled that the FBI **conducted an adequate search** even though it did not search certain records in the FBI's San Francisco office. McGehee and Moore filed a motion asking McFadden to reconsider his previous ruling. The FBI argued that McGehee and Moore were not entitled to reconsideration because they had filed their motion too late. While McFadden found McGehee and Moore's motion for reconsideration was filed on time, he indicated that the motion did not provide any new evidence meriting reconsideration. He rejected the plaintiffs' claim that the FBI should have searched at headquarters for records generated by the San Francisco field office, observing that "even if there was evidence that these records were there at some point, 'the Plaintiffs offer no evidence that the San Francisco documents were at the FBI Headquarters when they submitted their FOIA requests.' In any case, 'the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.' In short, Plaintiffs fail to identify any error, much less *clear* error, in the Court's earlier Order." McGehee and Moore argued that because their attorney was tied up with other litigation in Singapore at the time their opposition to the agency's summary judgment motion was due, they were unable to file anything more than a notice. McFadden suggested McGehee and Moore should have filed for an extension of time instead. He pointed out that "the Court, not the parties, set the briefing schedule. It would have been just as easy for the Plaintiffs to seek an extension as it was to file the Notice. But the former would have been more efficacious." (*Fielding McGehee, et al. v. U.S. Department of Justice*, Civil Action No. 01-0182 (TNM), U.S. District Court for the District of Columbia, June 18)

A federal court in New York has declined to reconsider its earlier decision requiring the Department of Justice to conduct a further **search** for personal emails used by participants in the since-abandoned voter integrity commission. District Court Judge Alvin Hellerstein had previously ruled that the fact that two participants at DOJ had been late in searching for personal emails suggested that the agency's search was insufficient. In its motion for reconsideration, DOJ argued that the disputed emails reflected personal

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communications rather than the conduct of agency business. Hellerstein rejected that notion, pointing out that "the emails, which concern voting integrity, and which were received and created by [agency] employees who enforce voting laws, 'reflect substance related to, and therefore shed light on' the conduct of their official duties." (*Brennan Center for Justice, et al. v. U.S. Department of Justice, et al.*, Civil Action No. 17-6335, U.S. District Court for the Southern District of New York, June 28)

A federal court in California has ruled that Lockheed-Martin may intervene in litigation brought by the American Small Business League against the Department of Defense and the Department of Justice for records related to its earlier FOIA litigation pertaining to its request for Sikorsky Aircraft Corporation's 2013 Comprehensive Small Business Contracting Plan. DOD withheld the records under **Exemption 4 (confidential business information)**, but after a trip to the Ninth Circuit, the government disclosed the plan with redactions made under Exemption 6 (invasion of privacy). ASBL then requested all documents transmitted between the agencies and Lockheed-Martin, Sikorsky's parent company regarding the 2013 FOIA request. In 2018, the court denied the parties' motions for summary judgment pertaining to Exemption 4. The court then approved a stipulated schedule regarding pretrial and trial dates, including a list of anticipated expert witnesses on the applicability of Exemption 4. Lockheed-Martin then asked to intervene. The court granted Lockheed-Martin's motion to intervene. The court emphasized that "Lockheed-Martin will be held to the promise made in its motion to intervene and affirmed at oral argument that it will not re-litigate previously decided issues. Furthermore, any attempts by Lockheed-Martin to impede the flow of discovery between ASBL and defendants Department of Defense and Department of Justice will not be tolerated." (*American Small Business League v. United States Department of Defense, et al.*, Civil Action No. 18-01979-WHA, U.S. District Court for the Northern District of California, June 24)

Judge Colleen Kollar-Kotelly has ruled that the Department of Justice conducted an **adequate search** for records pertaining to prisoner Van Jenkins in the Eastern District of Michigan. Jenkins requested records about himself from the U.S. Attorney's Office for the Eastern District of Michigan, providing references to an Assistant U.S. Attorney and several FBI numbers. The Eastern District of Michigan searched its Case View database but found no records. Jenkins then filed suit, arguing that since other prisoners had received information about state criminal cases in the Eastern District of Michigan that referenced federal law enforcement agencies as well there should be records pertaining to his state criminal charges. Rejecting the analogy, Kollar-Kotelly pointed out that "plaintiff misunderstands both an agency's obligations under FOIA and the limits of this Court's jurisdiction," adding that "plaintiff does not explain how a search of records maintained by some other DOJ component has any bearing on whether USAO/MIE maintains the information he requests, or how USAO/MIE staff might retrieve FBI records through Case View using an FBI number as a search term. Nor does plaintiff explain whether or how court documents could be considered 'agency records,' meaning those records created or obtained by an agency, and in its control at the time a FOIA request is made." (*Van Jenkins v. U.S. Department of Justice*, Civil Action No. 16-1676 (CKK), U.S. District Court for the District of Columbia, June 17)

A federal court in Missouri has once again rejected Jack Jordan's multiple attempts to re-challenge the court's previous ruling dismissing his suit, which was itself based on Jordan's challenge of an adverse ruling he received the previous year in virtually identical FOIA litigation in the D.C. Circuit district court. Jordan, who was representing his wife in a Defense Base Act action, had requested emails sent by two employees of a defense contractor that became part of the record considered by an administrative law judge at the Department of Labor. In the first ruling in Jordan's case, Judge Rudolph Contreras found that while one of the emails was not privileged the other one was protected by the attorney-client privilege. Contreras' decision was summarily

affirmed by the D.C. Circuit. Jordan then filed suit in the Western District of Missouri asking the court to disclose the emails. The court rejected Jordan's request, finding that the issues had already been litigated in the D.C. Circuit district court. This time, Jordan came back with multiple claims that the government had violated various rules and that the records should be disclosed. Rejecting all of Jordan's claims, the court noted that "other than Judge Contreras's recent decision, Plaintiff's latest Rule 60 motion is similar, if not identical, to his previous Rule 60 motion. The Court has already addressed those arguments. Plaintiff's additional arguments related to the recent decision by Judge Contreras does not change the Court's analysis and does not provide a basis for granting Plaintiff's relief pursuant to Rule 60." (*Jack Jordan v. U.S. Department of Labor*, Civil Action No. 18-06129-SJ-ODS, U.S. District Court for the Western District of Missouri. June 27)

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