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Washington Focus: In response to the Supreme Court's recent ruling in Food Marketing Institute v. Argus Leader Media finding that Exemption 4 does not contain a harm test for withholding confidential business information, Sen. Charles Grassley (R-IA), chair of the Senate Judiciary Committee, Sen. Patrick Leahy (D-VT), Sen. John Cornyn (R-TX), and Sen. Dianne Feinstein introduced the "Open and Responsive Government Act of 2019"
(S. 2220) July 23 restoring the substantial harm test by including it in the language of Exemption 4. The additional language provides that "the term 'confidential' means information that, if disclosed, would likely cause competitive harm to the competitive position of the person from whom the information was obtained." The Senate bill also includes a provision prohibiting agencies from withholding records because they are non-responsive.

Agency Record Issue Does Not Rob Court of Jurisdiction

Aside from the exemptions themselves, a primary basis agencies use for rejecting FOIA requests is that the records requested do not qualify as agency records because they are in the custody or control of an body or entity not subject to FOIA. The FOIA's definition of an agency comes from the Administrative Procedure Act and limits the statute's coverage to executive agencies with exceptions for offices inside the Executive Office of the President that primarily advise the President. The statute also specifically excludes Congress and the judiciary.

To the extent that these issues are subject to litigation, a primary focus is the unsettled intersection between congressional and agency records. While the statute is clear that Congress' own records are not covered, it is considerably less clear where the line exists when agency records are provided to Congress as part of its legislative and oversight functions. Decisions like *United We Stand America v. IRS*, 359 F.3d 595 (D.C. Cir. 2004), in which the D.C. Circuit found that specific restrictions on disclosure placed on IRS records provided to the Joint Committee on Taxation showed the Committee's decision to control the records are obvious examples of when agency records become congressional records.

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Several years ago, when the Republicans still controlled the House, then Rep. Jeb Hensarling (R-TX), who chaired the House Financial Services Committee, encouraged agencies to adopt a policy of denominating all records sent to Congress as congressional records not subject to FOIA. To get some sense of how embedded this policy had become, Cause of Action Institute submitted FOIA requests to agencies like the IRS. In its two requests to the IRS, CoA Institute asked for records transmitted between the IRS and the Joint Committee on Taxation. The agency denied both requests, claiming the records were not agency records but congressional records not subject to FOIA. CoA Institute filed suit and the agency asked Judge Ketanji Brown-Jackson to dismiss the case for lack of jurisdiction based on its claim that the agency had not withheld any records subject to FOIA.

Although she did nothing more than allow CoA Institute to continue its suit, Brown-Jackson decisively rejected the entire basis for the agency's motion for dismissal, finding instead that whether or not records qualified as agency records subject to FOIA was an issue to be determined at the merits stage as part of an affirmative defense against responding to the request. Brown-Jackson began her assessment by noting that "the IRS insists that the factual prerequisites for the exercise of a court's remedial powers with respect to a plaintiff's FOIA claim are, themselves, requirements that implicate this Court's subject-matter jurisdiction. This assertion is misguided and the Court squarely rejects the common but confused contention that Congress intended for a federal district court's subject-matter jurisdiction over a FOIA claim to turn on whether or not the agency had improperly withheld 'agency records'. . ." Instead, she pointed out that "the Court is satisfied that CoA Institute has pled a plausible violation of the FOIA, insofar as its complaint plainly alleged that 'the IRS is an agency' to which CoA Institute submitted two detailed requests for records, and in response to those requests, the IRS 'denied CoA Institute access to agency records to which it has a right under the FOIA.'"

Brown-Jackson explained that two appellate court decisions undercut the agency's jurisdictional argument. She pointed out that in *CREW v. Office of Administration*, 566 F. 3d 219 (D.C. Cir. 2009), the D.C. Circuit rejected the exact same jurisdictional argument and instead found that "a court's determination that the defendant was 'not an agency covered by FOIA' meant that plaintiff's FOIA claim failed on the merits as a matter of law under Rule 12(b)(6), *not* that the court was without subject-matter jurisdiction to consider plaintiff's FOIA claim by virtue of that determination. The second decision was *Main Street Legal Services v. National Security Council*, 811 F.3d 542 (2d Cir. 2016), where the Second Circuit held that "while section 552(a)(4)B) references the court's 'jurisdiction,' that provision 'relates to the court's *remedial* power rather than to its subject-matter jurisdiction.'" Brown-Jackson observed that "the holdings and reasoning of the *CREW* and *Main Street* cases singularly undermine the IRS's argument that the question of whether or not the records at issue here qualify as 'agency records' implicates this Court's subject-matter jurisdiction."

Brown-Jackson found further support in *Judicial Watch v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), where the D.C. Circuit "not only evaluated the issue in the context of cross-motions for summary judgment, instead of a Rule 12(b)(1) motion to dismiss, but did not address subject-matter jurisdiction *at all*. What is more, the panel grappled with the 'agency records' issue as part of its evaluation of the *merits* of the plaintiff's FOIA claim, and when it reversed the district court's judgment on the grounds that certain of the requested records were not 'agency records' subject to disclosure under the FOIA, it did not simultaneously conclude that the district court was thereby divested of subject-matter jurisdiction to adjudicate the dispute."

Based on this case law, Brown-Jackson explained that "notwithstanding section 552(a)(4)(B)'s reference to 'jurisdiction,' Courts have long considered FOIA disputes that pertain to the nature of the defendant entity (i.e. is it an 'agency'?) or the nature of the records at issue (i.e., are they 'agency records'?) to relate to the merits of a plaintiff's claim that the defendant has violated the FOIA, rather than a court's authority to adjudicate the case."

The IRS tried to distinguish the holding in *CREW v. Office of Administration* from the facts here, asserting that *CREW* involved an EOP office while this case involved Congress. While recognizing the difference in entities, Brown-Jackson pointed out that "the IRS has yet to explain how the 'agency' question in *CREW* is materially different than the question that the IRS raises in the instant motion to dismiss – i.e., whether the records that CoA Institute has requested from the IRS are 'agency records' under FOIA, despite the fact that other records retained by the IRS qualify as 'agency records' for FOIA purposes. Indeed, from the standpoint of evaluating section 552(a)(4)(B) as setting forth either jurisdictional or non-jurisdictional prerequisites to maintain a FOIA action, both circumstances are identical."

Brown-Jackson also faulted the agency's jurisdictional argument for shifting the burden of proof from the agency to CoA Institute. She noted that "if the IRS's contention that this Court's subject-matter jurisdiction depends on whether or not the requested records are 'agency records' is correct, the burden of demonstrating that the requested records are, in fact, 'agency records' within the meaning of the FOIA would necessarily shift from the IRS to CoA Institute. . ." She pointed out that "a government agency's burden of demonstrating that the requested documents are *not* 'agency records' cannot be logically reconciled with treating that question as a jurisdictional prerequisite, which would require the plaintiff to proves that the requested documents *are* 'agency records.' And there's more: to accept the IRS's framing would mean that the plaintiff would have to prove that 'agency records' were 'improperly' withheld as yet another threshold jurisdictional issue, when under the FOIA, it is unquestionably the *agency's* burden to establish that its withholdings are 'proper' because they comport with one of section 552(b)'s nine enumerated exemptions." (*Cause of Action Institute v. Internal Revenue Service*, Civil Action No. 16-2354 (KBJ), U.S. District Court for the District of Columbia, July 17)

Views from the States…

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

Alabama

The supreme court has ruled that the Health Care Authority for Baptist Health, an affiliate of the University of Alabama-Birmingham Health System, is a public body for purposes of the Open Records Act and is required to respond to an access request from Central Alabama Radiation Oncology, a Montgomery-area radiation practice, which accused the Authority of trying to drive it out of business by opening up a competing clinic in Montgomery in violation of their existing non-competition agreement. After CARO learned that the Authority planned to open a clinic in CARO's coverage area, CARO submitted a request for documents about the decision. The Authority declined to respond, arguing that it was not a public body for purposes of the Open Records Act. CARO filed suit and the trial court ruled in its favor. The Authority then appealed to the supreme court. The supreme court upheld the trial court's decision. The supreme court noted that "regardless of how Baptist Health began, it chose to partner with the University of Alabama to become a government-authorized health-care authority." The Authority argued that some portions of its meetings contained protected confidential information. But the supreme court observed that "during this litigation the Authority permitted counsel for CARO to view the unredacted Board minutes; in doing so, the Authority surrendered any plausible claim that the redactions actually contained confidential or proprietary information." (*Health Care Authority for Baptist Health v. Central Alabama Radiation Oncology, LLC.*, No. 1171030, Alabama Supreme Court, June 28)

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Georgia

A court of appeals has ruled that various state legislative offices are not subject to the Open Records Act. The Institute for Justice requested records from state legislative offices. The offices declined to respond, arguing that the legislature was not subject to the Open Records Act. The Institute for Justice filed suit and the trial court ruled in favor of the state legislature. The Institute for Justice then appealed. The Institute of Justice claimed that a 2012 revision of the Open Records Act expanded its coverage to "offices," which, the Institute argued, included legislative offices. The court of appeals disagreed, noting that "the Institute's reading of the Act would encompass not only the many offices at issue here but also a myriad of other offices and departments under the General Assembly, including the offices of the individual members. . .Such an expansive reading would allow the exception to swallow the rule that the General Assembly is not subject to the Act." (*Institute for Justice v. Reilly, et al.*, No. A19A0076, Georgia Court of Appeals, July 2)

Hawaii

The supreme court has ruled that the exception in the personnel matters exemption requiring public bodies to hold open meetings if an employee asks for an open meeting does not require a public body to close a meeting if an employee does not request that it be open and that, further, the exceptions justifying closing a public meeting are discretionary and a public body does not violate the Sunshine Act when it holds a public meeting. The case involved litigation brought by the Civil Beat Law Center for the Public Interest alleging that the Honolulu Police Commission improperly closed three meetings to consider the future of then-Honolulu Police Chief Louis Kealoha who was the target of a federal investigation. The police commission ultimately decided to allow Kealoha to retire. Since Kealoha had not requested that the meetings be open, the police commission closed the meetings because they concerned a personnel matter. The supreme court found that the commission was not required to close the meeting, noting that "a board will not violate the Sunshine Law by holding an open meeting, so long as the board complied with all other Sunshine Law requirements, such as a sufficient notice." The supreme court rejected the notion that discussion of Kealoha's employment status required closing the meeting absent Kealoha's request that the meeting be open. The supreme court observed that "rather, it establishes that an open meeting *must* be held if such a request is made. As such, this rule limits the applicability of an *exception*, and thus places no limitation on the open meetings requirement." The supreme court added that "because holding an open meeting does not violate the Sunshine Law, even when an exception is applicable, board members are not subject to criminal prosecution [under the statute] for holding an open meeting." Civil Beat argued that the personnel exception implicitly included a balancing test similar to the privacy exemption in the Uniform Information Practices Act. Instead, the supreme court indicated that while the personnel exception applied to matters involving an employee's privacy, "it does not necessarily follow that a legitimate privacy interest was impacted. The record lacks a sufficient factual basis to support the [trial] court's conclusion that the Commission properly invoked the personnel-privacy exception." The supreme court remanded the case to the trial court to determine if the personnel exception actually applied in this case. (*Civil Beat Law Center for the Public Interest v. City and County of Honolulu*, No. SCAP-17-0000899, Hawaii Supreme Court, June 27)

Kentucky

A court of appeals has ruled that the Ludlow Youth Football League is not an entity subject to the Open Records Act and is not required to respond to a request from the City of Ludlow for records documenting its expenditures of city money during the 2015 Ludlow Summer Fireworks Festival. The City paid $6,000 to Vito's Fireworks as its contribution to the $8,000 fireworks display ordered by Ludlow Youth Football League as part of its annual fundraiser. The City asked LYF for documentation of funds provided to

LYF for the festival. LYF told the City that it had no records other than the cancelled check. The City then sued LYF, alleging it had violated the Open Records Act. The trial court ruled that LYF was not subject to the Open Records Act. The City then appealed, arguing that LYF was required to account for the donations it received from the City. The appeals court agreed that LYF was not subject to the Open Records Act. The appeals court pointed out that "funds expended by the City in support of the annual festival are not sources of revenue to LYF. The private funds raised by LYF as a result of citizen's enjoying booths, food and drink, and other activities are not attributable to the City. Consequently, LYF is not a 'public agency' as the term is defined by [the Open Records Act]." (*City of Ludlow v. Ludlow Youth Football League*, No. 2017-CA-000539-MR, Kentucky Court of Appeals, June 28)

Louisiana

A court of appeals has ruled that Abdullah Muhammad is not eligible for attorney's fees for his Public Records Act litigation related to his murder conviction because he had not substantially prevailed. Muhammad originally requested records related to his 1992 trial and conviction from the Office of the District Attorney for St. James Parish. After Muhammad filed suit because the agency did not respond, the office told Muhamad that his records had been destroyed. Muhammad appealed that decision and the appeals court found that district attorney's office had not shown why Muhammad was not entitled to the records and sent the case back to the trial court. The trial court found the issue was moot and Muhammad appealed once again. The second time, the appeals court again ruled against the district attorney and sent the case back to the trial court to resolve, including considering whether Muhammad was entitled to attorney's fees. The trial court found that Muhammad was not entitled to attorney's fees and he appealed once again. This time, the appeals court rejected Muhammad's claim that he was entitled to attorney's fees, finding that the district attorney's office was not the actual custodian of the records and could not be liable for fees. The appeals court pointed out that "plaintiff may not avail himself to the remedies afforded to a person who has been denied a right to public records by the custodian of the record, as the District Attorney's Office at the time of plaintiff's request was not a custodian of the record." (*Abdullah Muhammad v. Office of the District Attorney for the Parish of St. James*, No. 19-CA-24, Louisiana Court of Appeal, Fifth Circuit, June 19)

Michigan

A court of appeals has ruled that the papers of Dr. John Tanton, widely recognized as the grandfather of the anti-immigration movement, which were donated to the Bentley Library at the University of Michigan with the proviso that they remain closed to the public until April 2035 constitute public records for purposes of the Michigan Freedom of Information Act and are subject to access under FOIA. Hassan Ahmad requested the 15-25 boxes containing Tanton's papers from the University of Michigan. The University denied his request, claiming Tanton's papers were not public records because they were not "utilized, possessed, or retained in the performance of any official University function." Ahmad filed suit and the trial court ruled in favor of the University. Ahmad then appealed. The appeals court pointed out that Tanton's papers qualified as public records if they came into the library's possession as part of an "official function, which included "those authorized acts or operations that are expected of the Library as it relates to its position as a public library." The University's bylaws provided that "the Bentley Library's historical collection is 'maintained for the purpose of *collecting, preserving*, and *making available to students* manuscripts and other materials pertaining to the state, its institutions, and its social, economic, and intellectual development.'" The University argued that all three elements – collecting, preserving, and making available to students – had to be met before the library's records could be considered public records. In this case, the University noted, the Tanton papers had not yet been made available to students. The appeals court found the University's claim too narrow. The appeals court pointed out that "the flaw with the University's argument is that while all three

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aspects of the Library's purpose are relevant to the Library's purpose and mission, they do not each have to have been completed in order for the Library's acts to have been in furtherance of its purpose. Instead, from the context of the bylaws, all that is required is that the Library's actions were done *with the intention* that all three aspects of its stated purpose were to be fulfilled." (*Hassan M. Ahmad v. University of Michigan*, No. 341299, Michigan Court of Appeals, June 20)

The Federal Courts…

Judge Amit Mehta has ruled that the names of attorneys and their law firms may not be withheld under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** because the exemption does not apply to businesses. The case resolved the remaining issues from a suit brought by the law firm of King & Spalding pertaining to its requests to the Department of Health and Human Services and the Department of Justice for records pertaining to a 2012 investigation of its client Abiomed for alleged off-label marketing of a medical device. The investigation ended three years later without any enforcement action. Abiomed suspected that Maquet, a competitor, had been responsible for disclosure of the information that had triggered the investigation through an anonymous source who disclosed records through a private attorney. In his first ruling in the case, Mehta found that the name of the law firm was not protected under Exemption 7(C) because of the D.C. Circuit's ruling in *SafeCard Services v. SEC*, 976 F.2d 1197 (D.C. Cir. 1991) finding that Exemption 7(C) protected identifying information of any third parties identified in law enforcement records unless there was evidence of wrongdoing. Because he found no wrongdoing in the case, he concluded that the attorney's name fell within the categorical exemption established by *SafeCard Services*. Aside from the remaining dispute over disclosure of the law firm's name, King & Spalding also asked Mehta to reconsider his ruling finding Exemption 7(C) protected the attorney's name. King & Spalding argued that the categorical rule from *SafeCard Services* did not take into account prior decisions like *Washington Post v. Dept of Justice*, 863 F.2d 96 (D.C. Cir. 1988), which found that business privacy was not protected by Exemption 7(C). Mehta agreed that case law since *SafeCard Services* did not clearly answer the business privacy issues brought up by the *Washington Post* decision, but found that the recent D.C. Circuit decision in *Doe 1 v. Federal Election Commission*, 920 F.3d 866 (D.C. Cir. 2019) supported the notion that business privacy was limited at best. *Doe 1* involved a challenge to the decision of the FEC to disclose information identifying the name of the trustee of a political action committee by the trust and the trustee to block disclosure in a reverse-FOIA suit. The D.C. Circuit ruled against the trustee, noting that "the trustee's privacy interest in his *representational capacity* is minimal." Reconsidering his prior decision, Mehta observed that he "mistakenly assumed that the lawyers had a personal privacy interest in their names simply because their names appeared in criminal investigative files. Upon reconsideration, the court now finds that disclosure of the lawyers' names would not result in 'an unwarranted invasion of personal privacy.'" He added that "the lawyers merely represented the confidential source in relaying information to the government, presumably at the direction of their client." Further, Mehta pointed out that "Exemption 6 likewise does not protect the lawyers' names from disclosure. The 'personal privacy' interest protected by Exemption 6 is the same as under Exemption 7(C). With no 'personal privacy' to protect, the lawyers' names are not protected from disclosure under Exemption 6 either." (*King & Spalding, LLP v. U.S. Department of Health and Human Services, et al.*, Civil Action No. 16-01616 (APM), U.S. District Court for the District of Columbia, July 24)

Judge James Boasberg has ruled that the Department of Homeland Security properly withheld some records under **Exemption 5 (privileges)** in response to Joshua Reinhard's request for records concerning the Coast Guard's investigation of a hostile workplace at the Eighth Coast Guard District in New Orleans that resulted in Reinhard's separation but that the agency failed to justify some of its claims of the deliberative

process privilege and the attorney-client privilege. The agency disclosed 1,069 pages in response to Reinhard's request, withholding information under Exemption 5 as well as Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records). Reinhard filed suit and by the time Boasberg ruled, the only challenges remaining pertained to Exemption 5. Boasberg found first that the documents withheld under the deliberative process privilege – two investigative reports and two email chains – were predecisional. He explained that "both investigative reports at issue – one concerning Plaintiff's alleged retaliation and the other probing the command climate – concern and predate the Coast Guard's ultimate action. For both reports, Defendant attests that the Coast Guard issued its final decisions regarding the underlying allegations in later and separate memos, which are 'not reflective' of the preliminary reports. Although DHS has not said directly whether either of these final agency actions was, in fact, Plaintiff's termination – certainly the response to the command-climate investigation does not appear to be – it need not be so explicit to satisfy its burden. Defendant has identified the relevant decisionmaking process at issue: the manner in which the Coast Guard determined to respond to the issues and allegations that spurred the investigations. No more is required at this step." Having found the four disputed documents were deliberative as well, Boasberg rejected Reinhard's claim that the assembled factual material was not deliberative and needed to be disclosed. He noted that "the administrative investigation officer compiled these facts as a recommendation to the Coast Guard's ultimate decisionmakers on personnel matters. For such issues, the factual groundwork is intimately connected with the Coast Guard's ultimate action." He observed that "when final decisionmakers rely on others to condense a mass of available information into a summary or set of factual findings that the staff thinks important to the final decisionmaker, the deliberative privilege applies." Boasberg went on to point out the agency's culling of facts assertion "does not extend – at least not with the same force – to the witness statements, interview notes, and related material." He indicated that "certainly the witness statements, which appear to have been written by the witnesses themselves, do not reflect 'personal opinions. . .of the investigating officer,' contrary to what the Coast Guard's sole statement on this count attests" He noted that the agency had not shown that three documents were properly protected by the deliberative process privilege and ordered the agency to disclose them. Turning to the two email chains, Boasberg noted that "in this thread, the Coast Guard thus feeds the issue up the chain of command. This is precisely the type of information that permits a court to conclude that a document qualifies as deliberative." Boasberg also rejected Reinhard's claim that the reports reflected the agency's final decision. Instead, he observed that "a recommendation memo laying out the bases for a possible decision and emails discussing how to respond to a situation do not lose their status as deliberative simply because the decisionmaker follows the recommendation." Reinhard challenged the agency's attorney-client privilege claims by questioning whether or not the purpose of the communication was to ask for legal advice. Boasberg found the Coast Guard had met this threshold, noting that "the relevant communications from an attorney to a member of the Coast Guard all involve, often explicitly, material provided by the Coast Guard to the attorney for the purpose of the legal issue mentioned in the *Vaughn* Index. That is sufficient to satisfy this element of the privilege." Questioning the purpose of a communications between two employees, neither of whom were attorneys, Boasberg observed that "to sustain the privilege, the Agency need not show that the provision of legal advice was the communication's sole purpose; it does, however, need to demonstrate that securing legal advice was a 'primary purpose;' of the agency's communication. The fact that the attorneys are not direct recipients thus gives the Court some doubt about its legal purpose. More is thus needed to sustain the privilege." Boasberg indicated that the agency had not met its burden for withholding this email. Boasberg agreed with the agency that it had for the most part shown that the emails claimed under the attorney-client privilege had been kept appropriately confidential. However, finding that several emails did not explain the identity of an individual receiving privileged emails, Boasberg indicated those emails were not privileged. (*Joshua L. Reinhard v. Department of Homeland Security*, Civil Action No. 18-1449 (JEB), U.S. District Court for the District of Columbia, July 11)

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The Ninth Circuit has ruled that while two provisions of the Public Health Security and Bioterrorism Preparedness and Response Act (BPRA) qualified under **Exemption 3 (other statutes)**, the ability of the Centers for Disease Control & Prevention to claim the provisions was limited because much of the identifying information about the bioterrorism center at the University of Hawaii at Manoa the agency attempted to withhold had already been made public. However, the appeals court accepted the agency's redactions under **Exemption 6 (invasion of privacy)**. Bioterrorism centers were created in response to the anthrax attack in September 2001 and were designed to research methods for preventing and preparing for bioterrorism events in the future. One provision of the BPRA allowed CDC to withhold site-specific information while a second provision allowed the agency to withhold information if disclosure would endanger the public. After news reports in 2014 revealed that CDC had found widespread regulatory non-compliance at the UH biolab, Civil Beat Law Center filed a FOIA request for two records documenting the agency's findings. The agency initially denied the request entirely, claiming Exemption 3 and citing the two provisions of the BPRA. Several weeks later, however, CDC changed its position and disclosed redacted versions of the two documents, citing Exemption 3 and Exemption 6. Civil Beat filed suit and the district court ruled in favor of the agency. Civil Beat then appealed to the Ninth Circuit. While the appeal was pending, the CDC discovered it had previously disclosed the entire letter describing the site-specific violations in response to another FOIA request. As a result, the agency disclosed the entire letter and those portions of the second document that had been redacted under the site-specific exemption. The Ninth Circuit agreed that claim was now **moot**. The appeals court rejected Civil Beat's pattern-or-practice claim, noting that "nothing in the record suggests that Civil Beat will be affected [in the future] by the CDC's invocation of the site-specific BPRA exemption to FOIA." The Ninth Circuit indicated that at this point most of the information the agency was withholding under Exemption 3 had already been made public. Turning to the BPRA's public endangerment withholding provision, the Ninth Circuit found that the district court had erred in analyzing the issue under the official acknowledgment doctrine. The district court concluded that the BPRA public endangerment provision required the agency to withhold any information falling within its parameters and that because the agency had not officially acknowledged the existence of the information it was properly withheld. The Ninth Circuit indicated that here the matter of whether the agency had waived the exemption through official acknowledgement was not at issue but that, instead, the agency had so far failed to show that all the information was protected under the circumstances. The Ninth Circuit remanded the issue back to the district court to allow the agency to provide a more sufficient justification. The court of appeals agreed with the agency's redactions of personally identifying information under Exemption 6, finding that disclosure could lead to potential harassment. (*Civil Beat Law Center for the Public Interest v. Centers for Disease Control & Prevention*, No. 16-16960, U.S. Court of Appeals for the Ninth Circuit, July 10)

A federal court in New York has ruled that the Department of Justice properly withheld records from *New York Times* reporter Kenneth Vogel pertaining to its investigations of Paul Manafort, Rick Gates, and Michael Flynn for violating the Foreign Agents Registration Act by failing to register as representatives of foreign countries under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. Vogel submitted four FOIA requests to the agency, three to its FARA unit pertaining to each individual, and a fourth request to the Office of the Inspector General asking for records on Manafort, Gates, and Flynn. Vogel also requested expedited processing for each request, which was denied. After the agency failed to respond, Vogel and the Times filed suit. The National Security Division disclosed 43 pages and withheld 277 pages. In its final response, NSD withheld 1,810 emails and a DVD of documents under Exemption 7(A). While the litigation was pending, the Mueller report on Russian interference in the 2016 election became public. The court ordered DOJ to re-review its exemption claim in light of the release of the Mueller report. The agency did so, indicating that its position had not changed. The *Times* first argued that there was no rational nexus between the records and a law enforcement function. The court disagreed, noting that "plaintiffs, by their

own admission, are seeking records related to whether the FARA Unit 'has been effective in ensuring that certain individuals and entities have complied with [FARA]' and, thus, the specific requests directly implicate the FARA Unit's law enforcement function. Moreover, DOJ confirmed in [its public declaration] that 'the withheld records referenced in the *Vaughn* index relate to one or more pending or prospective enforcement proceedings.'" The court added that "DOJ is not obligated to supply additional facts to establish that the records were compiled for law enforcement purposes." Finding that the agency had adequately described how the records related to pending enforcement actions, the court rejected the *Times*' assertion that release of the Mueller report undercut the existing pending law enforcement claim. The court pointed out that "plaintiffs have not shown that information in the public domain is duplicative of the information they seek such that no harm would result from disclosure. Indeed, despite acknowledging that some information regarding the Enumerated Persons has been made public, DOJ maintains that releasing the records reasonably is likely to cause interference with pending or prospective law enforcement proceedings." Agreeing with the agency's claim that no non-exempt information was **segregable**, the court observed that "just because some investigations are publicly known does not mean that the release of documents related to those investigations are not likely to interfere with ongoing or pending law enforcement proceedings." (*New York Times Company and Kenneth P. Vogel v. United States Department of Justice*, Civil Action No. 18-02095 (SDA), U.S. District Court for the Southern District of New York, July 22)

A federal court in New York has ruled that the Federal Reserve failed to **conduct an adequate search** in response to a request from the Center for Public Democracy for records concerning the appointment, review, or reappointment of Federal Reserve bank presidents because the agency improperly limited the number of offices searched, the keywords used in the searches, as well as failing to follow up leads that were discovered during the searches. The Federal Reserve searched only the records of current chair Jerome Powell, former chair Janet Yellin, and former vice-chair Donald Kohn because those three officials had each chaired the agency's Bank Affairs Committee during the timeframe of the request and were thus considered the most likely offices to have responsive records. The court found this limitation too narrow, noting that "although the BAC may be the primary entity handling communications between the Board of Governors and the Reserve Banks about presidential appointments and reappointments, the Federal Reserve Act explicitly tasks the entire Board of Governors – not the BAC – with approving Reserve Bank presidents." The court rejected the agency's claim that because the BAC records were the most likely location for responsive records there was no point in expanding the search. Instead, the court pointed out that "defendant must expand the search terms used to search emails and other records to include obvious alternative search terms, including keywords and the names or email addresses of all relevant individuals. . ." The Center for Popular Democracy also challenged the agency's unwillingness to search for potentially responsive records at the various Federal Reserve Banks. The agency claimed that any records pertaining to the appointment of presidents at the various Federal Reserve Banks would be records of the banks exercising their independent authority not subject to FOIA. The court disagreed, noting instead that "such records would constitute information maintained by Reserve Banks in the performance of functions for the Board of Governors and are thus subject to the FOIA request." The court noted that case law had established that records pertaining to the appointment of directors of Reserve Banks were subject to FOIA. The court observed that the "defendant fails to articulate a legal theory for why similar records concerning Reserve Bank presidents (as opposed to directors) should be treated differently." (*Center for Popular Democracy v. Board of Governors of the Federal Reserve System*, Civil Action No. 16-5829 (NGG) (SMG), U.S. District Court for the Eastern District of New York, July 16)

A federal court in New York has ruled that a suit challenging the Food Safety Inspection Service's failure to post unredacted versions of inspection reports of meat and poultry-processing facilities to monitor

their compliance with the Humane Methods of Slaughter Act and the Poultry Products Inspection Act under the **proactive provisions** in Section (a)(2) may continue. The Animal Welfare Institute and Farm Sanctuary submitted FOIA requests to the agency asking for unredacted versions of existing inspection reports as well as a commitment to post future reports. The agency responded by disclosing redacted versions of existing reports but did not address the request for proactive posting. AWI and FS filed an administrative appeal but after hearing nothing further from the agency they filed suit, claiming the records were required to be posted under the reading room provision of Section (a)(2). The agency argued that under *CREW v. Dept of Justice*, 846 F.3d 1235 (D.C. Cir. 2017), and other litigation in the D.C. Circuit pertaining to available remedies under Section (a)(2), AWI and FS had no remedy. The court disagreed, noting that "despite out-of-circuit case law holding to the contrary, a plain reading of this section seems to suggest that a district court has both the authority to enjoin the agency from withholding records (*i.e.*, injunctive relief), and to order production of any agency records withheld from a particular plaintiff, which would appear to cover the reading room provision. Defendants' argument, however, suggests that there is virtually no meaningful remedy for parties aggrieved under the reading room provision. This runs contrary to Section 522's purpose. . ." Alternatively, the agency asked the court to transfer **venue** to the D.C. Circuit district court. The court rejected the request, observing that "defendants have failed to satisfy their burden to demonstrate by clear and convincing evidence that the factors favor transfer to the District of Columbia." (*Animal Welfare Institute, et al. v. United States Department of Agriculture*, Civil Action No. 18-06626-MAT, U.S. District Court for the Western District of New York, July 15)

Judge Paul Friedman has ruled that the FBI's remaining **Exemption 7(E) (investigative methods or techniques)** claims in researcher Ryan Shapiro's FOIA litigation for records from Serial 91 pertaining to agency FOIA matters are appropriate. All the remaining 13 redaction claims related to techniques used by the agency in counterterrorism investigations. The FBI sought to withhold the name of certain units in the title page. Shapiro argued that the agency had not shown how disclosure of only the name would risk disclosing unknown investigative techniques. However, after having reviewed the records *in camera*, Friedman accepted the agency's claim. He noted that the agency's affidavits "logically explain how knowledge of a unit name that features an investigative technique – particularly one that is unknown and revealed in conjunction with the specific location in which it is employed – could equip potential criminals with information needed to evade detection." The agency also withheld names of commercial databases it used, contending disclosure would risk reducing the effectiveness of the use of such databases. Friedman agreed that the agency had met it burden of proof under Exemption 7(E). He pointed out that the agency's affidavits "logically explain how knowledge of the database name could increase the risk of circumvention of the law. The Court therefore finds that the government has met its low burden under Exemption 7(E)." (*Ryan Noah Shapiro v. Department of Justice*, Civil Action No. 13-0729 (PLF), U.S. District Court for the District of Columbia, July 24)

A federal court in Connecticut has ruled that the Department of Defense and the Department of Homeland Security have not **conducted adequate searches** for records concerning the Military Whistleblower Act, the military justice system, and Boards of Correction for Military Records in response to requests from Protect Our Defenders and Connecticut Veterans Legal Center and has questioned the agencies' use of **Exemption 5 (privileges)** to withhold four documents and **Exemption 6 (invasion of privacy)** to withhold identifying information of any individuals at the rank of colonel or below, including Staff Judge Advocate biographies . The requests were directed to the five military branches as well as the Coast Guard. Challenging the adequacy of the agencies' search, the plaintiffs focused on the Air Force working group on race and discipline. The group was made up of the Headquarters Office, the Secretary's Office, and the JAG Office. As a result, the Air Force searched the network drives of those offices as well as email accounts of staff involved in the working group. The court found the Air Force had adequately described its decentralized

filing system but had failed to show why certain systems and email accounts were not searched and why a variety of search terms were used. The court noted that "while [the agency's affidavit] declares that the Headquarters Office and Secretary's Office searched their shared network drives, Defendants provide no indication that the JAG Office searched its shared network drive. Defendants do not provide a satisfactory explanation for this." The court also questioned why the agency failed to search the email accounts of all the members of the working group." The court added that "it is unclear what search terms were used and it is also unclear what folders on the Headquarters Office shared network drive were searched using the terms." The court found that three of the four disputed documents withheld under Exemption 5 were protected by either the deliberative process privilege or the attorney-client privilege. However, the court found the recommendations section of a talking paper were not privileged. The court noted that "defendants have not provided the Court with sufficient information to determine whether the withheld information in the Talking Paper is part of any real governmental decision-making process rather than simply an exercise that went nowhere." Under Exemption 6, the agency withheld any identifying information of individuals at the rank of colonel or below. The court noted case law suggesting that information identifying individuals only in their professional capacity were not subject to Exemption 6. However, it agreed that personal information contained in the SLA biographies – akin to a resume – could be withheld, but that information pertaining to professional qualifications should be disclosed. The court rejected the agency's categorical use of Exemptions 6, noting that "as far as the Court can discern, the [redacted documents] include no information identifiable to any individual other than names and contact information. These documents cannot be swept up into Exemption 6 protection simply because they identify those government employees who authored or were involved in the manuals, emails, or Working Group Talking Paper. To conclude otherwise would render useless the FOIA statute's specification that Exemption 6 apply to 'medical and personnel files and similar files.'" (*Protect Our Defenders and Connecticut Veterans Legal Center v. Department of Defense and Department of Homeland Security*, Civil Action No. 17-02073 (VLB), U.S. District Court for the Connecticut, July 12)

Judge Timothy Kelly has ruled that both the Department of Energy and the Center for Public Integrity have so far failed to show records concerning performance evaluation plans for a number of national laboratories overseen by the National Nuclear Security Administration are protected by either **Exemption 4 (confidential business information)** or **Exemption 5 (privileges)** and has told both parties to provide further briefing on the issues involved. The agency withheld information under Exemption 4, claiming disclosure would likely cause substantial competitive harm. Kelly noted the competitive harm test had largely been negated by the recent Supreme Court ruling in *Food Marketing Institute v. Argus Leader Media*, 129 S. Ct 2356 (2019), pointing out that "the Supreme Court held that the term 'confidential' under Exemption 4 means 'private' or 'secret,' and that it does not encompass a requirement that the release of confidential information cause 'substantial competitive harm.'" Because the arguments in this case had been submitted before *Food Marketing Institute v. Argus News Leader* had been decided, Kelly explained that "the Court will deny both [summary judgment motions] without prejudice as to the claims addressing Exemption 4 and allow the parties to file renewed motions." The agency claimed the consultant corollary – allowing an agency to withhold deliberations between agency personnel and non-agency third parties as long as they were acting on behalf of the agency and had no self-interest adverse to the agency – applied under Exemption 5 to the self-assessment reports. The Center for Public Integrity argued that discussions pertaining to fees suggested a self-interest on the part of the contractors and should not qualify under the consultant corollary. Kelly indicated that some of the deliberations probably fell within the consultant corollary but observed that "without more, the Court has no basis to determine whether, or to what extent, the withheld material reflects the contractors representing their own interests, and therefore whether the material qualifies as intra-agency communications." Kelly sent this issue back to the agency for further justification. (*Center for Public Integrity v. U.S. Department of Energy*, Civil Action No. 17-0286 (TJK), U.S. District Court for the District of Columbia, July 15)

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