Volume 45, Number 17
September 4, 2019

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: Based on agency emails obtained by Earthjustice as a result of a FOIA request, Sen. Ron Wyden (D-OR) announced that he was placing a hold on the nomination of Daniel Jorjani to become chief counsel at the Department of the Interior in large part because of concerns that Jorjani played a leading role in the agency's awareness program allowing political appointees at the agency to review responses to FOIA requests before they were disclosed. In a letter to the Department of Justice's acting head of the public integrity division, Wyden noted that "I believe Department documents made public through the Freedom of Information Act show Mr. Jorjani may have knowingly misled members of the [Senate Energy and Natural Resources] Committee about the Department's adherence to laws meant to ensure transparency and accountability in government." The emails also revealed that the Interior Department relied on the FBI's policy of providing 500 pages a month in response to FOIA requests as the basis for its own per-month standard under its recently revised FOIA regulations.

Court Rules Expedited Processing Provision Does Not Apply to Animals

In what started as a novel challenge to whether the harm to an individual standard in the expedited processing provision encompassed animals as well, the Ninth Circuit has ruled that the provision applies only to humans and does not include animals. However, even although the court rejected the Animal Legal Defense Fund's claim that the condition of Tony the Tiger, a tiger housed at a truck stop in Louisiana, qualified under the provision, the court agreed with the ALDF that it had stated a claim by alleging the Animal and Plant Health Inspection Service had a pattern and practice of consistently rejecting its claim without further consideration.

The case began when the ALDF learned from a veterinarian that Tony the Tiger was suffering from serious health issues. It asked APHIS to conduct an inspection under the Animal Welfare Act. APHIS told ALDF that it would need to make a FOIA request for the results of the inspection. ALDF did so and requested expedited processing, arguing that

ACCESS REPORTS

failure to expedite its request would pose an imminent threat to Tony's life and physical safety. The agency rejected ALDF's expedited processing request because it did not consider Tony an individual under its regulations. ALDF filed suit, asking the district court to require the agency to consider animals as individuals for purposes of FOIA's expedited processing provision.

While its suit was pending, ALDF filed three other FOIA requests for expedited processing regarding animals. APHIS denied two of the requests but had not yet responded to the third request when ALDF appealed to the Ninth Circuit. APHIS disclosed 43 pages in response to ALDF's request concerning Tony the Tiger. The district court then ruled that the term individual in the expedited processing provision did not apply to animals.

APHIS argued that ALDF's suit was moot once the agency responded to the request. The Ninth Circuit disagreed. Pointing to its decision in *Hajro v. U.S. Citizenship & Immigration Services*, 811 F.3d 1086 (9th Cir. 2016), which laid out the elements of a pattern or practice claim in the Ninth Circuit, Circuit Court Judge William Fletcher, writing for the court, explained that "a 'specific request' claim is mooted by the agency's production of all non-exempt requested records. But where, as here, 'a plaintiff alleges a pattern or practice of FOIA violations and seeks declaratory or injunctive relief,' those claims are not mooted by the production of requested documents if the plaintiff can show: '(1) the agency's FOIA violation was not merely an isolated incident, (2) the plaintiff was personally harmed by the alleged policy, and (3) the plaintiff himself has a sufficient likelihood of future harm by the policy or practice.'" Fletcher pointed out that "the FOIA violation alleged with respect to Tony was not an isolated incident. ALDF alleges other instances in which USDA denied expedited processing to ALDF based on USDA's definition of 'individual.'"

APHIS also argued that the expedited processing provision divested district courts of jurisdiction "to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request," which meant that the court no longer had jurisdiction. Again, Fletcher disagreed with the agency. He observed that "where a plaintiff asserts a 'pattern or practice' claim that satisfies *Hajro*'s three-pronged test, § 552(a)(6)(E)(iv) does not bar the plaintiff's action. In a 'pattern or practice' claim seeking declaratory or injunctive relief, the district court is not reviewing a particular denial of expedited processing. Instead, it is reviewing an agency's anticipated denial of expedited processing requests under similar circumstances in the future. The district court has jurisdiction to review such a claim."

Whether ALDF's Tony the Tiger request deserved expedited processing hinged on whether ALDF had shown that the request met the compelling need standard for granting expedited processing. Fletcher pointed out "the term 'compelling need' means. . .that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to *the life or physical safety of an individual*.'" Observing that "FOIA does not define 'individual,'" Fletcher noted that "we agree that, as a noun standing alone, 'individual' ordinarily refers to a single human being."

Arguing that "individual" could be used to distinguish between groups and a single member of the group, including animals, ALDF asserted that a more generous interpretation of "individual" would be consistent with FOIA's broad disclosure mandate. While Fletcher sympathized with ALDF's policy goals, he noted that "while FOIA as a whole favors broad disclosure, the expedited processing provision serves the narrower purpose of prioritizing requests over others." Citing the House Report on the expedited processing provision, he observed that "given finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requesters who do not qualify for its treatment."

ALDF also argued that limiting expedited processing to requests involving humans would penalize organizations like theirs that focused on animal welfare. Acknowledging that animal welfare was an important goal, Fletcher explained that 'it has not, however, been recognized in FOIA's expedited processing provision. Congress chose to limit its definition of 'compelling need' to prioritize certain records for expedited processing – specifically, records whose delayed release would pose an imminent threat to the life or physical safety of a human being. ALDF may disagree with Congress's policy choice. But we are not at liberty to override congressional intent and read a statutory term contrary to its plain meaning." (*Animal Legal Defense Fund v. United States Department of Agriculture, Animal and Plant Health Inspection Service*, No. 18-1637, U.S. Court of Appeals for the Ninth Circuit, Aug. 12)

Views from the States…

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

Connecticut

A court of appeals has reversed a trial court ruling upholding a decision by the FOI Commission finding that weekly meetings held by a leadership group containing less than a quorum of the Meriden city council to discuss upcoming items to place on the council's agenda constitutes a proceeding subject to the open meetings provisions of the Freedom of Information Act. The appeals court noted that the term "hearing or proceeding" referred "to a process of adjudication, which falls outside the scope of activities conducted during the leadership group gathering in the present case." The appeals court observed that "because the gathering of the leadership group did not serve an adjudicatory function within the plain meaning of 'hearing' and 'proceeding,' the gathering was not a 'hearing or other proceeding' but, instead, constituted a 'convening or assembly' for the purposes of the [statute]." (*City of Meriden, et al. v. Freedom of Information Commission, et al.*, No. AC 41441, Connecticut Appellate Court, Aug. 6)

Indiana

A court of appeals has ruled that records shared by the Indiana Finance Authority with the IRS as part of the federal agency's examination of the 2004 swap of bonds first issued in 1993 on behalf of Union Hospital are protected by the exemption for confidential business information. The 2004 transaction consisted of the hospital buying back the 1993 bonds from bondholders and then selling them to a financial institution. In 2013, the IFA received an information request from the IRS, which was examining the 2004 swap of bonds to determine if the transaction was in compliance with federal tax law. The IFA forwarded the request to Union Hospital, which provided information to the IRS. In 2015, when the IRS examination was still ongoing, William Scott sent an Access to Public Records Act request to IFA for all records related to the IRS examination. The IFA denied Scott's request, claiming the records were protected by the exemption for confidential business information. Scott filed a complaint with the Public Access Counselor, who upheld the agency's denial decision. Scott then filed suit. The trial court also ruled in favor of the IFA. Scott then appealed. The court of appeals sided with the agency as well. The court of appeals noted that "based on the undisputed, designated evidence, we conclude that the documents relating to the swap transaction contain confidential financial information belonging to the Hospital. The Hospital provided these documents to IFA to respond to the IRS's request for information. As such, the documents are not properly the subject of a records request under the APRA." (*William Mark Scott v. Indiana Finance Authority*, No. 18A-MI-2446, Indiana Court of Appeals, July 30)

# #

Pennsylvania

A court of appeals has ruled that the Office of Open Records used an incorrect standard in assessing whether records pertaining to Adrian Rodriguez and other students at West Chester University of Pennsylvania qualified as student records protected under the federal Family Educational Rights and Privacy Act. Rodriguez requested emails about his case before the Office of Student Conduct involving the university's computer science club. The university disclosed 50 pages of emails but withheld 500 pages more, claiming those emails were protected student records under FERPA. Rodriguez complained to OOR. OOR concluded that the withheld records did not qualify as student records under FERPA because they were not academic records and were not kept in the central, permanent file of any student, a definition of protected student records stemming from the Supreme Court's ruling on FERPA in *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002). The appeals court agreed with West Chester that OOR had used the wrong standard to assess whether the emails were protected student records. The appeals court noted that "the appropriate inquiry is whether the record – regardless of its subject matter – directly relates to a student other than Respondent." The appeals court added that "education records must be maintained in some way that preserves them and tracks requests for access to them, but placement within a single student's permanent file is not the only action that could constitute such maintenance." Sending the case back to OOR to apply the proper standard, the appeals court also ordered OOR to consider possible constitutional privacy interests contained in the Pennsylvania Constitution that might apply to student records. (*West Chester University of Pennsylvania v. Adrian Rodriguez*, No. 1078 C.D. 2018, Pennsylvania Commonwealth Court, July 24)

Washington

A court of appeals has ruled that the Department of Social and Health Services did not violate the Public Records Act when its estimated that it could complete requests submitted by Freedom Foundation, a right-to-work advocacy organization, pertaining to training of department employees who were union members within the 30 day statutory time allowed in the PRA, but failed to do so because it contacted the affected union to allow it to file a challenge blocking disclosure of personal information on behalf of its members. Finding that the agency's original completion estimate was proper, the appeals court noted that "whether an estimate is reasonable necessarily must be based on a forward-looking evaluation at the time of the estimate, not on a backward-looking evaluation after the fact." The court found that the department acted appropriately by contacting the union to allow it to seek an injunction against disclosure of personal information. The court also noted that since the union had obtained a court injunction, it was appropriate to continue to withhold the records. (*Freedom Foundation v. Washington State Department of Social and Health Services*, No. 5149802-H, Washington Court of Appeals, Division 2. Aug. 6)

The Federal Courts…

Judge Tanya Chutkan has ruled that the CIA has finally shown that President Barack Obama's reference to intelligence funding for Israel during an August 2015 speech at American University did not constitute a public acknowledgement that the CIA provided that funding. In response to a request from Grant Smith, a researcher and founder of the Institute for Research: Middle Eastern Policy, for records concerning intelligence funding for Israel, the agency issued a *Glomar* response neither confirming nor denying the existence of records pursuant to **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Smith argued that Obama's admission in the American University speech that the U.S. provided intelligence funding to Israel constituted a public acknowledgment of the existence of the funding and that the assistance would

have been reflected in the intelligence budget. Chutkan agreed with Smith and ordered the agency to process his request, inform Smith of the number of responsive records, and either release the records or identify an applicable exemption. Instead, the CIA asked Chutkan to reconsider her decision, arguing that Obama's statement did not confirm that the CIA itself provided the funding to Israel and that any of the 17 intelligence agencies could have been responsible for the funding instead of the CIA. Chutkan once again rejected the CIA's request for summary judgment, finding instead that it was still unclear whether or not the CIA retains the line-item budgets for other intelligence agencies. This time around, the CIA contacted the agency's Chief Financial Officer who said that the agency did not "retain, obtain, or access the budgetary information of other intelligence agencies." Smith asked Chutkan to infer that Obama's statement meant that the CIA must have the budget information. But Chutkan pointed out that "however, because the CIA does not retain the intelligence budgets of other agencies, President Obama's statement is not specific enough to support such an inference. And President Obama's remark does not undermine or contradict the CIA's proffered reasons for issuing the *Glomar* response, such as a concern that confirmation would reveal not only that the CIA is the specific agency administering aid to Israel, but also the specific type of aid being given and intelligence source information." Chutkan explained that "the court also finds that President Obama did not officially acknowledge that the CIA possessed a budget line item for the intelligence assistance to Israel because the CIA does not possess the intelligence budget line items of other agencies. Thus, the CIA's *Glomar* response was proper." Having found the CIA's *Glomar* response was appropriate, Chutkan went on to conclude that the agency had shown that the information was protected by both Exemption 1 and Exemption 3. She pointed out that "the detail of the supplemental declaration and the accompanying justification provided are within the ambit of what the D.C. Circuit considers sufficient to support the claimed exemption in the *Glomar* context." (*Grant F. Smith v. Central Intelligence Agency*, Civil Action No. 15-01431 (TSC), U.S. District Court for the District of Columbia, Aug. 20)

Acknowledging that the case law was against her, District Court Judge Alison Nathan has ruled that the Tiahrt Rider, which prohibits the Bureau of Alcohol, Tobacco and Firearms from expending funds to process FOIA requests for gun trace data, does not qualify under **Exemption 3 (other statutes)** because it does not cite to FOIA as required under the 2009 OPEN FOIA Act. The case was brought by the Everytown for Gun Safety Support Fund after the agency refused to process its FOIA request for data pertaining to firearms used in suicides or attempted suicides that were recovered by law enforcement and traced by ATF because of the funding prohibition included in the Tiahrt Rider. Nathan started by explaining that the Tiahrt Rider was first passed in 2003 and continued to be reenacted with occasional changes through 2012. But Nathan observed that "here, the potential statutory bar to disclosure is the current provision of the Tiahrt Rider, which was passed in 2012 – three years after the 2009 OPEN FOIA Act. Yet, the 2012 Tiahrt Rider contains no specific citation to 552(b)(3). Without that, the 2012 Tiahrt Rider cannot qualify as an Exemption 3 statute." ATF argued that the pre-2009 version of the Tiahrt Rider continued to apply, meaning that because it pre-existed the OPEN FOIA Act, it was not required to cite to that revision. Nathan disagreed. She noted that "this argument by the government fails because Congress's subsequent acts, including the currently operative 2012 Rider, cover the whole subject of the earlier acts and are a substitute for the earlier acts. As a result, the pre-2009 versions of the Tiahrt Rider that the government seeks to rely upon are no longer operative." Nathan emphasized that "the Riders' text and structure makes clear that Congress intended to revise and replace the earlier statutes with the new ones." She added that allowing the Tiahrt Rider to be considered a pre-2009 statute for Exemption 3 purposes would run afoul of congressional intent in passing the OPEN FOIA Act. She observed that "if Congress intended to ensure that no citation to section 552(b)(3) was required for reenactment of new versions of earlier statutes, it could have clarified that Congress was not required to include a clear statement rule in such circumstances. It did not do so." Nathan explained that "ATF's argument. . .is that failing to identify the Tiahrt Rider as a qualifying Exemption 3 statute frustrates a

ACCESS REPORTS

competing statutory purpose: protecting Firearms Trace System database information from FOIA disclosure. But insofar as Congress wished to enact statutes that would exempt Firearms Trace System Database data from disclosure following the enactment of the OPEN FOIA Act, it gave itself explicit directions for how to do so." Acknowledging that other courts had found that Congress had renewed the pre-2009 Tiahrt Rider rather than enacting a new (b)(3) statute after passage of the OPEN FOIA Act, Nathan indicated that "the argument, which certainly has strong intuitive sway, fails to examine at all the persuasive evidence that Congress intended to comprehensively replace each prior version of the Tiahrt Rider. In particular, it does not examine how the pre-2009 enactments may remain in effect after Congress passed new, comprehensive versions altering the applicable evidence." Nathan also rejected ATF's argument that responding to Everytown's request would constitute creating a record by requiring the agency to clean up existing data to respond to the specific parameters of Everytown's request. Nathan pointed out that "ATF concedes that the search required to generate the raw data Everytown requests is required by FOIA and that producing equivalent data counts from a paper records system would not constitute record creation." She added that "that the agency might be required to compile the resulting information into a response is a standard feature of FOIA requests, not a basis for concluding that the request asks the agency to go beyond its FOIA obligations." (*Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, Civil Action No. 18-2296 (AJN), U.S. District Court for the Southern District of New York, Aug. 19)

Judge Christopher Cooper has ruled that Judicial Watch has shown a sufficient public interest in knowing more about the FBI's communications with Christopher Steele, a former British intelligence operative who compiled a dossier on Donald Trump's vulnerability to Russian influence, after Steele's status as a confidential source was ended in November 2016, to require a further search. Judicial Watch submitted a three-part request on Steele and the agency issued a *Glomar* response neither confirming nor denying the existence of records. However, after Steele's relationship with the FBI was declassified, the agency conducted two searches for responsive records. It disclosed five pages in full and 85 pages in part, primarily claiming various subparts of **Exemption 7 (law enforcement records)**. Judicial Watch argued that the agency failed to search for communications with Steele after his confidential source status ended. The FBI claimed any information was protected by **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Cooper noted that Judicial Watch could overcome the FBI's privacy exemption claims if it could show a public interest in disclosure of such communications with Steele. He pointed out that "although it is difficult for the Court to opine on that question in the abstract—given that the FBI has not conducted the search and the contents of any potentially responsive records are unknown – the Court can envision how such records might reveal insights into the FBI." He added that "of course, the records Judicial Watch speculates about might not even exist – and even if they do, they may not reveal anything significant about the FBI's operations. But that they might do so makes them a matter of potential public interest." Turning to Steele's privacy interests, Cooper noted that "that Steele is already a public figure with a well-known association with the FBI does not, to be sure, destroy his privacy interests in other communications he may have with the FBI. . .Just the same, Steele's FBI-related notoriety certainly weakens his privacy interests." Ordering the agency to conduct a further search, Cooper observed that the agency might well find that any records were appropriately exempt. However, he pointed out that "but until the FBI actually conducts a search, it cannot explain, and the Court cannot evaluate, the propriety of [any] exemptions." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 17-0916 (CRC), U.S. District Court for the District of Columbia, Aug. 16)

Judge Rudolph Contreras has ruled that OMB properly withheld eight Outlook calendar entries for National Security Council meetings pertaining to foreign relations, transportation, or infrastructure policy under **Exemption 5 (privileges)** under the presidential communications privilege. The OMB records had been

requested by researcher Ryan Shapiro and his organization Property of the People. In an earlier opinion in the case, Contreras had found that OMB's generalized description of the records was too vague to carry its burden of proof and told the agency to provide a supplemental explanation. The agency did so and this time around Contreras found the agency's explanations sufficient. Although OMB acknowledged that the President had not attended any of the meetings, it argued that the presidential communications privilege applied because the NSC's primary role was to advise the President. Shapiro and Property of the People argued that since the NSC was primarily made up of Cabinet officials or other agency heads, whose primary responsibilities were to run their respective agencies, OMB had not shown that the meeting qualified under the presidential communications privilege. Contreras rejected that claim, noting that "the meetings at issue in this case, are generally chaired by the National Security Advisor, who may delegate the role to the Homeland Security Advisor. Each of these positions easily qualifies as an immediate White House advisor for purposes of the privilege – a premise that even Plaintiffs do not appear to dispute." Shapiro and Property of the People also argued that the presidential communications privilege did not cover agency heads in their capacity of leading their agencies rather than advising the President. But Contreras observed that "Plaintiffs' misplaced focus on the mere *presence* of dual hat advisers at the meetings changes nothing. What matters for purposes of the privilege is who *solicits* the communication, and whether that person also ultimately *receives* it. In the context of NSC meetings, it is the President, or the National Security Advisor, or the Homeland Security Advisor who does the soliciting, as it is those individuals who set the agenda and, confer the invitations." Contreras noted that since the D.C. Circuit had previously ruled that the NSC was not an **agency** for FOIA purposes, Shapiro and Property of the People could not obtain the records directly from the NSC. He pointed out that "Plaintiffs could not obtain NSC meeting calendars from the NSC itself because those calendars are not 'agency records' for purposes of FOIA. Yet Plaintiffs essentially want to indirectly 'reconstruct' those calendars through requests to an entity, OMB, whose records are subject to the Act. From a practical standpoint, such a regime makes little sense [since] it would raise separation-of-powers concerns because it would threaten the ability of the President and his closest advisors to hold meetings and seek advice in confidence." (*Property of the People, Inc. and Ryan Noah Shapiro v. Office of Management of Budget*, Civil Action No. 17-1677 (RC), U.S. District for the District of Columbia, Aug. 19)

Judge Emmet Sullivan has ruled that the Department of Commerce and the Office of Government Ethics failed to show that they conducted a **segregability analysis** for records on ethical issues pertaining to the nomination of Wilbur Ross as Secretary and Todd Ricketts as Deputy Secretary in response to FOIA requests from the Center for Public Integrity to both agencies. Commerce ultimately reviewed thousands of pages of responsive records but only disclosed a fraction of them, while OGE located hundreds of records but also disclosed only a small portion of them. CPI did not contest the adequacy of the search but instead challenged the agencies' claims that they had segregated and disclosed all non-exempt information. Turning to OGE, Sullivan noted that "as it stands, OGE's *Vaughn* index does not indicate that the non-exempt information is 'inextricably intertwined with exempt portions' to justify withholding each document in full. The Court need not identify every entry in the *Vaughn* index to determine whether it is deficient. OGE's declaration and its *Vaughn* index do not provide a sufficient justification and enough details for withholding the documents in their entirety." As to Commerce, Sullivan found the same problems. He pointed out that "the descriptions in the *Vaughn* index do not provide sufficient information about documents withheld in full that fall outside of the narrow set of 'draft documents.' The *Vaughn* index fails to identify the authors of some documents and leaves out the number of pages for each document. As such, those entries are deficient." He observed that "because DOC's *Vaughn* indices do not give CPI an opportunity to challenge the information withheld in the documents, the Court finds that DOC has failed to demonstrate that the information is not reasonably segregable." CPI argued that DOC should have disclosed segregable header information. Sullivan agreed, noting that "given the narrow set of disputed documents in this case, the Court agrees with CPI that the

ACCESS REPORTS

header information is easily segregable from the exempt portion of the disputed documents." Sullivan sent the case back to the agencies to supplement their affidavits. He directed the agencies "to submit amended *Vaughn* indices that reevaluate the segregability issue for all non-draft documents that were withheld in full." (*Center for Public Integrity v. United States Department of Commerce, et al.*, Civil Action No. 17-2426 (EGS), U.S. District Court for the District of Columbia, Aug. 8)

A federal court in New York has ruled that the EPA properly withheld its most recent version of the Optimization Model for Reducing Emissions of Greenhouse Gases from Automobiles (OMEGA) under **Exemption 5 (privileges)**. The Natural Resources Defense Council and the Environmental Defense Fund submitted a FOIA request to the EPA asking for any versions of OMEGA that had not previously been made public. Although four other versions of OMEGA had been made public, the most recent version was not publicly available. The agency withheld the current version, citing the deliberative process privilege. NRDC and EDF argued that the current model did not qualify as either a letter or a memo under Exemption 5's threshold standard. After noting that a number of circuits, including the D.C. Circuit, had found that documents that were neither letters nor memos qualified for Exemption 5 protection, District Court Judge P. Kevin Castel rejected the claim. Castel then noted that the model was pre-decisional. He explained that "though the EPA ultimately relied on the Department of Transportation's CAFE model instead of OMEGA v.1.4.59 in developing the proposed Safe Vehicles Rule, OMEGA v.1.4.59 nonetheless qualifies as 'predecisional' because it was 'intended to contribute' to EPA's policy decisions regarding GHG emission standards for new vehicles. The fact that, historically, the EPA has used prior iterations of OMEGA to generate data to inform its decisions on GHG emission standards for vehicles corroborates the EPA's claim that this iteration was developed to inform future standards." NRDC and EDF also argued that the model was not deliberative because it was essentially an accounting program that reads inputs and performs a pre-set series of mathematical computations. Castel cited *Quarles v. Dept of Navy*, 893 F.2d 390 (D.C. Cir. 1990), in which the D.C. Circuit found that cost estimate calculations were deliberative even though they were primarily factual, as supporting the agency's claim that the model here was deliberative. He pointed out that "OMEGA has evolved over time and its 'calibration' reflects the mental processes of OMEGA's authors. Specifically, in developing the core model, OMEGA's authors had to make choices regarding which algorithms to use and which 'analytical tools' to include – these choices constitute judgments about how to manipulate the data in OMEGA's input files in a meaningful way." The EPA also addressed the issue of **foreseeable harm**. Castel agreed that its description of a chilling effect on agency discussions as well as the possibility of public confusion by disclosing the model was sufficient to meet the agency's burden on that issue. (*Natural Resources Defense Council and Environmental Defense Fund v. United States Environmental Protection Agency*, Civil Action No. 18-11227-PKC-DCF, U.S. District Court for the Southern District of New York, Aug. 22)

The Seventh Circuit has ruled that the district court erred in finding that the U.S. Park Police failed to provide sufficient justification for withholding personally identifying information under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to a FOIA request filed by the Federal Community Defender Office in the Eastern District of Pennsylvania on behalf of Dustin Higgs, who was convicted of killing three women in the Patuxent National Wildlife Refuge, a federal property in Maryland. Higgs was sentenced to death for directing the murder, although the co-defendant who actually shot the three women was sentenced to life in prison. More than 20 years after his conviction, the Federal Community Defender Office took his case to challenge his death sentence. In response to the request, the Park Police located 738 pages but released only 48 pages in full or in part. Higgs, who is incarcerated in the federal correctional facility at Terre Haute, filed suit in the Southern District of Indiana. The district court found the agency had not substantiated its privacy exemption claims but

agreed with the agency that other records were properly withheld under **Exemption 7(D) (confidential sources)**. The Seventh Circuit agreed with the district court that the agency had not adequately substantiated its privacy claims but concluded that because Higgs had failed to show any public interest in disclosure the privacy balance still favored the agency. The Seventh Circuit pointed out that "given the district court's acknowledgment that at least some of the affected people probably were still alive, it was legal error to find that the government had failed to make the required threshold showing of *any* protected privacy interests. If, after the burden shifted to Higgs, he had met it, then a remand to learn *more* about the government's asserted privacy interest may have been proper." Higgs claimed there was a public interest in learning whether the state prosecutor in Maryland had acted improperly. The Seventh Circuit observed that because a federal court in Maryland had previously rejected Higgs' claim of prosecutorial misconduct in his criminal trial "there are only so many bites at the apple that one person can have, and Higgs has had more than his share." Turning to the Exemption 7(D) issue, the court explained that the government's case would have been stronger if it had been able to show an explicit assurance of confidentiality for witnesses. But it then pointed out that since all redactions under Exemption 7(D) were also withheld under Exemption 7(C), there was no further need to rule on the Exemption 7(D) claims. (*Dustin John Higgs v. United States Park Police*, No. 18-2826 and No. 18-2937, U.S. Court of Appeals for the Seventh Circuit, Aug. 13)

A federal court in New York has ruled that the U.S. Secret Service properly withheld identifying information pertaining to law enforcement personnel but that it has not yet explained why there is no public interest in disclosing identifying information pertaining to visitors to Donald Trump during the periods when he was a presidential candidate receiving Secret Service protection, as well as while he was president-elect. In response to a request from Richard Behar, an investigative reporter and contributing editor at *Forbes* magazine, for records on who visited Trump during that period, the agency located nine emails and disclosed portions of two of them, citing **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods or techniques)**. Finding that the records had been created for law enforcement purposes, Judge Lewis Kaplan indicated that he would analyze the privacy claims under Exemption 7(C) rather than Exemption 6. He concluded that Exemption 7(C) applied to any law enforcement personnel. Although he found that both Trump and his visitors had more than a de minimis privacy interest, Kaplan acknowledged that disclosure of the names of visitors could potentially shed light on how those meetings shaped the administration's priorities. Kaplan observed that "it may be that these particular documents do not reveal information shedding light on these activities, but defendant paints too broad a brush in asserting that any meeting with any individual during the time in question categorically would not shed light on Mr. Trump's post-inauguration priorities and conduct." To resolve the question, he ordered the agency to provide more detailed supplemental affidavits. (*Richard Behar v. U.S. Department of Homeland Security*, Civil Action No. 17-8153 (LAK) and 18-7516 (LAK), U.S. District Court for the Southern District of New York, Aug. 15)

Judge James Boasberg has ruled that the FBI failed to claim **Exemption 3 (other statutes)** as the basis for withholding redactions in an *in camera* affidavit that Boasberg found were no longer protected under the common law right of access to court documents in the aftermath of the declassification of memos written by former FBI Director James Comey describing his interactions with President Donald Trump. After Boasberg ordered the redactions in the agency's affidavit disclosed, the FBI asked him to reconsider that decision, claiming it had previously indicated the affidavit was also protected by the National Security Act. Boasberg pointed out that he had previously rejected the FBI's claim that either Exemption 3 or Exemption 7(E) (investigative methods or techniques) overcame his conclusion that the records were releasable under the common law right of access to court records. He explained that the FBI was now trying to assert that Rule

ACCESS REPORTS

59(e) applied, allowing for amendment in the face of intervening change of controlling law, or the availability of new evidence. Boasberg indicated that "this is a bridge too far. For one, if the Bureau wanted to offer legal argument on the applicability of a FOIA exemption, the Court would expect it would do so in a legal brief, rather than relying on an FBI agent's declaration. Here, there is no basis whatsoever. . .that Defendant came anywhere close to gesturing at the argument it now presents in any *brief* it filed with the Court." Noting that the FBI could have filed a supplemental brief arguing a new position in light of the declassification of the Comey memos, Boasberg observed that "it did not. Not only would this avenue have created space for legal argument, it would also have granted opposing counsel the opportunity to respond, thus engaging in the adversarial process on which the Court depends. One statement in an FBI agent's declaration is no way to raise a new legal argument." (*Cable News Network, Inc. v. Federal Bureau of Investigation*, Civil Action No. 17-1167 (JEB), U.S. District Court for the District of Columbia, Aug. 12)

A federal court in New York has ruled that the Executive Office for Immigration Review is not required to post its Board of Immigration Appeals opinions since 1996 under **Section (a)(2)**, the affirmative disclosure provisions of FOIA because the New York Legal Assistance Group failed to make a FOIA request for the opinions that was then denied. Although the opinions are often cited, used, or relied upon by government lawyers, immigration judges, and the BIA itself, except for a small subset, they are not publicly available. NYLAG made a FOIA request asking the agency to post the opinions since November 1996 online. EOIR denied the request and its decision was upheld on appeal. NYLAG then filed suit. The district court noted that while the Second Circuit had not yet addressed this issue, the D.C. Circuit had ruled, in *CREW v. Dept of Justice*, 846 F.3d 1235 (D.C. Cir. 2017), that relief under (a)(2) was only available if the plaintiff had first made a FOIA request under (a)(3) that had then been denied. NYLAG argued that since *CREW* was not binding on the Second Circuit, the court should not follow it. Declining the invitation, the court observed that "plaintiff seeks exceedingly broad relief – an injunction requiring BIA to publish many thousands of unpublished, nonprecedential cases totaling millions of pages for over 20 years. There is no authority for the remedy Plaintiff seeks. The court is not 'empowered to enter general orders compelling compliance with broad statutory mandates.' It is the BIA's obligation to comply with FOIA and the Court's role to provide relief to individual complainants, not the public, for violations." (*New York Legal Assistance Group v. Board of Immigration Appeals, Executive Office for Immigration Review*, Civil Action No. 18-9495 (PAC), U.S. District Court for the Southern District of New York, Aug. 13)

Judge Timothy Kelly has ruled that the U.S. Fish and Wildlife Service properly withheld names of importers and exporters of wildlife from the Humane Society International under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, but that because the agency had not yet had the opportunity to assess the impact of the Supreme Court's ruling in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct 2356 (2019), finding that the substantial harm test was not supported by the language of **Exemption 4 (confidential business information)**, on its decision to withhold the monetary value of the wildlife imported or exported, he instructed the parties to submit new briefs on the Exemption 4 claims in light of *Food Marketing Institute*. HSI requested records from the agency's Law Enforcement Management Information System. After providing notice to potentially affected entities or individuals, the agency determined that 93 companies had shown their information was protected by Exemption 4. Of the 1,429 individuals who objected to disclosure of identifying information, the agency redacted only their names under Exemption 7(C) and **Exemption 6 (invasion of privacy)**. Since the Supreme Court's decision in *Food Marketing Institute* came out after the original briefing on Exemption 4, Kelly sent that issue back to be re-briefed. Turning to the privacy exemptions, Kelly found that since the records had been compiled for law enforcement purposes, Exemption 7(C) applied. HSI argued that the importers and exporters had a diminished privacy interest because they had voluntarily chosen to participate in a highly regulated activity. Kelly

rejected the claim, noting that "simply because these individuals have decided to engage in a regulated activity does not mean they have no privacy interest in the information they must provide the government in connection with that activity." HSI also argued that there was a public interest in disclosing the information based on its disagreement with recent FWS decisions. However, Kelly pointed out that "this evidence does not credibly suggest that during the relevant period, FWS officials engaged in misfeasance or failed to meet their statutory enforcement duties – nor does it have much to do with its purported need for the names of these individuals." (*Humane Society International v. U.S. Fish and Wildlife Service, et al.*, Civil Action No. 16-720 (TJK), U.S. District Court for the District of Columbia, Aug. 15)

A federal court in Montana has ruled that the U.S. Army Corps of Engineers did not **conduct an adequate search** and that it failed to show that its **Exemption 5 (privileges)** and **Exemption 7(A) (interference with ongoing investigation or proceeding)** appropriate in response to a FOIA request from the ACLU for records concerning cooperation between federal, state, and local law enforcement entities pertaining to anticipated protests against the Keystone XL pipeline. The ACLU submitted requests to the FBI, the Bureau of Land Management, the Department of Justice and the Department of Homeland Security as well, but only challenged the responses from the Corps of Engineers, BLM, and the FBI. Both the Corps of Engineers and BLM located responsive emails but redacted portions of them under Exemption 5. The FBI issued a *Glomar* response neither confirming nor denying the existence of records. The ACLU challenged the Corps of Engineers search. District Court Judge Donald Malloy found that the agency's affidavits lacked adequate explanations of their searches and his examination of the record also revealed inconsistencies in the existence of responsive records. Malloy pointed out that "without providing even a cursory explanation of [one employee's] search measures, the scope of [a second employee's] search, or its filing and email procedures, the Army Corps cannot meet its burden to prove its search was adequate." Malloy found that two emails the Corps of Engineers had redacted under the deliberative process privilege did not qualify for the privilege because they were not pre-decisional. He also rejected the Corps' Exemption 7(A) claim on one of the emails, noting that "that the Army Corps generally anticipates law enforcement involvement in securing the pipeline does not bring the email and attachment within Exemption 7(A)'s protections for law enforcement proceedings." Malloy rejected the BLM's claim that a communications plan was protected by the deliberative process privilege after concluding that it also was not pre-decisional. He added that, in this case, it was not deliberative either. He pointed out that the communication plan "does not express suggestions or concerns about possible courses of action, nor does it include any editorial comments or proofreading marks, either of which would reflect the views of an individual rather than the agency. Rather, the communication plan appears to be the final statement of BLM's official communication strategy." The ACLU argued that another BLM email sent by a manager to an attorney was not covered by the attorney-client privilege because it related to policy rather than legal advice. Malloy disagreed, noting that "BLM submitted declarations that the email involved legal advice and the forwarded message suggests the advice was whether further NEPA analysis was legally required." The ACLU challenged the FBI's *Glomar* response, arguing that records disclosed by BLM confirmed that the FBI had responsive records. Malloy observed that "the FBI has not waived its *Glomar* response merely because BLM disclosed relevant information." But he pointed out that "BLM's disclosures revealing responsive FBI documents are relevant to whether the FBI has sufficiently explained that the records' existence or nonexistence is exempt from disclosure." Malloy rejected the FBI's claim that the records were protected under **Exemption 7(E) (investigative methods or techniques)** but agreed that the *Glomar* response was appropriate under Exemption 7(A). (*American Civil Liberties Union, et al. v. Dept of Defense, et al.*, Civil Action No. 18-154-M-DWM, U.S. District Court for the District of Montana, Aug. 21)

# #

ACCESS REPORTS

A federal court in Connecticut has ruled that the Department of Veterans Affairs failed to justify withholding personally identifying information about subject matter experts used to determine whether veterans stationed at Camp Lejeune were eligible for disability benefits due to the toxicity of water used at the base. Between 1953 and 1987 troops and employees at Camp Lejeune were exposed to the toxic water. Although the overwhelming majority of disability claims from Camp Lejeune veterans had been denied by Veterans Affairs, after the addition of a subject matter expert program in 2012, the percentage of granted claims dropped by 25 percent. The Few, The Proud, The Forgotten, along with the Vietnam Veterans of America submitted FOIA requests to Veterans Affairs for records about the development and implementation of the SME program. The agency located more than 50,000 potentially responsive pages but had only processed and disclosed several thousand pages before Judge Victor Bolden ruled. The agency withheld identifying information on the subject matter experts under Exemption 6. Noting that the agency's Exemption 6 claims were vague at best, Bolden found that the public interest in knowing the identities of the subject matter experts outweighed any privacy interest. The agency claimed that "the SMEs' work was contentious, in general, and that the public or Camp Lejeune veterans might blame them for the failures of the program of the larger Veterans Affairs bureaucracy." But Bolden observed that "years into this litigation, however, there is still no specific, credible evidence that SMEs' fact risks of any kind. . ." Bolden concluded that "after reviewing the parties' submissions, both before and after document production, the Court finds that there is a 'countervailing public interest in knowing that VA employs qualified individuals.' This public interest outweighs the SMEs' privacy interest and permits the disclosure of the SMEs' names on the produced documents." (*The Few, The Proud, The Forgotten, et al. v. United States Department of Veterans Affairs*, Civil Action No. 16-647 (VAB), U.S. District Court for the District of Connecticut, Aug. 14)

A federal court in Kansas has ruled that the Justice Management Division properly withheld some records from its library catalog under **Exemption 5 (privileges)** in response to several requests from DocuFreedom, but that because the agency's claims were too broad the court would review many of the privilege claims *in camera*. The court also found that the agency properly redacted identifying information under **Exemption 6 (invasion of privacy)**. DocuFreedom requested 119 items from the catalog. DocuFreedom argued that the records were not exempt because many of them were publicly available through the Federal Depository Library Program. The court disagreed, noting that 'while the requested documents are government documents, they are not government publications. . .[W]hile [certain published] items may be in the Catalog of JMD-controlled libraries, it does not follow that each library item has been published. Instead, the disputed documents are internally created materials. The proper avenue for disclosure here is FOIA, not the Federal Depository Library Program." DOJ claimed that most of the records were either protected by the attorney work product privilege. The court pointed out that two cases from D.C. Circuit district courts – *Stein v. Dept of Justice*, 134 F. Supp. 3d 457 (D.D.C. 2015), and *Shapiro v. Dept of Justice*, 969 F. Supp. 2d 18 (D.D.C. 2013) distinguished between "how-to" manuals detailing litigation strategy that were privileged, and more general legal explanations that were not. The court found that a number of specific monographs fit into the "how-to" category and qualified as attorney work-product. However, the court concluded that DOJ's generalized description of other documents was insufficient to justify withholding entire documents. Ordering the agency to provide the documents for *in camera* review, the court pointed out that "DOJ broadly asserts that Civil Division attorneys use monographs- as well as the briefing papers, commentaries, and sample filings – to litigate constitutional and specialized tort cases. The court concludes this generalized assertion of privilege for all the documents in Item 4 – the number of documents is unknown to the court – won't suffice." (*DocuFreedom, Inc. v. United States Department of Justice, et al.*, Civil Action No. 17-2706-DDC-TJJ, U.S. District Court for the District of Kansas, Aug. 16)

A federal court in Montana has ruled that the Department of the Interior has not shown a sufficient justification under the **Federal Advisory Committee Act** for its 2017 reestablishment of the Royalty Policy Committee, an advisory committee originally established in 1995 to review and comment on revenue management and other mineral-related policies. In 2017, its focus was revised to provide advice on fair market value for Federal and Indian lands and to consider the need for regulatory reform. The committee held four meetings before lapsing in 2019. The Western Organization of Resource Councils filed suit, alleging the committee violated several FACA provisions. Rejecting three of Western's four counts, the court nevertheless agreed with Western that the agency had failed to justify the changes made in the committee's composition issuing a use injunction prohibiting the agency to rely on the committee's deliberations going forward. Western challenged whether the committee's membership was fairly balanced for purposes of FACA. Finding the agency had not explained its decision on viewpoint balance, the court pointed out that "the question is whether Defendants' tautological argument (that the very nature of the members provides that they are balanced) is sufficient to show the agency engaged in reasoned decision-making. It is not. While the agency can point to a group of members with diverse interests, it does not explain why certain groups were omitted or included." Addressing Western's request for a use injunction, the court indicated that "while public participation and accountability were present in the Committee's meetings, the Committee's very existence was tainted, undercutting both the Committee's devotion to the government fisc and accountability to the public." The court concluded that "a use injunction is the only way to achieve FACA's purposes of enhancing government accountability and avoiding wasteful expenditures going forward. The agency had the obligation and opportunity to comply with FACA from the start. It did not do so. Under the circumstances of this case, it cannot now rely on recommendations from an advisory committee whose very existence flies in the fact of FACA." (*Western Organization of Resource Councils v. David Bernhardt, et al.*, Civil Action No. 18-139-M-DWM, U.S. District Court for the District of Montana, Aug. 13)