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*Washington Focus: Rep. Raul Grijalva (D-AZ), chair of the House Natural Resources Committee, has requested that the Inspector General at the Department of the Interior conduct an investigation of the agency's recently adopted supplemental awareness review program, which allows senior officials to review responses to FOIA requests before they are sent. While Grijalva's request did not specifically mention acting solicitor Daniel Jorjani, whose nomination was recently put on hold by Sen. Ron Wyden (D-OR) because of allegations he had interfered with the FOIA process at the agency, his request did indicate that Hubbel Relat, a counselor to the Secretary of the Interior, "gave additional verbal instructions regarding FOIA productions.". . .The recent announcement that the Bureau of Land Management will move its headquarters from Washington to Colorado means that the FOIA officer will be moving as well. The agency's FOIA officer will now be located in Albuquerque, while three FOIA specialists will move to Reno, and another two FOIA specialists to Salt Lake City.*

## Ninth Circuit Finds (a)(2) Independently Enforceable

The Ninth Circuit has ruled 2-1 that the affirmative disclosure provisions contained in Section (a)(2) establish independent obligations for agencies to disclose records and are not dependent on a requester having made a FOIA request before asking for an agency to post information online. While the recent litigation in the D.C. Circuit on (a)(2)'s posting requirements – *CREW v. Dept of Justice*, 846 F.3d 1235 (D.C. Cir. 2017) and its progeny – was ultimately derailed by that court's conclusion that the affirmative disclosure provisions only applied to requesters who had already made a FOIA request under the better known reactive provisions contained in Section (a)(3), the Ninth Circuit chose to ignore that decision, focusing instead on a more logical interpretation of the plain language of (a)(2), suggesting that its disclosure provisions are completely separate from and independent of (a)(3).

Writing for the majority, Circuit Court Judge N. Randy Smith pointed out that "we interpret the words 'to enjoin the agency from withholding agency records' to mean what they

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say. FOIA authorizes district courts to stop the agency from holding back records it has a duty to make available, which includes requiring an agency to post § 552(a)(2) documents online. That the statute uses broad words to vest expansive equitable authority in district courts does not create ambiguity or vagueness."

While the CREW litigation has focused on forcing the Justice Department's Office of Legal Counsel to post all final opinions, the Ninth Circuit litigation was brought by a coalition of animal rights groups led by the Animal Legal Defense Fund concerned by the decision by the Agriculture Department's Animal and Plant Health Inspection Service to no longer provide online access to inspection reports prepared under such laws as the Animal Welfare Act that contain personally identifying information. Although the agency's decision to no longer provide online access to such information pertains primarily to the agency's expanded interpretation of Exemption 6 (invasion of privacy) to cover identifying information about family-owned businesses, the policy change also seemed to suggest a more aggressive push back on agency obligations to post information online.

But animal rights groups had come to rely on online access to do data analysis that required no further agency involvement and argued that stopping such posting had severe informational consequences, including the need for the animal right groups to now request the data under FOIA, which would further strain the agency's resources. The coalition of animal rights groups filed suit, alleging the agency's failure to post inspection reports violated the reading-room provision of (a)(2) and asking for a preliminary injunction to force the agency to post the information online. The district court dismissed the case, noting that while FOIA plaintiffs "may seek injunctive relief and production of documents to them personally," "they cannot compel an agency to make documents available to the general public."

APHIS did not challenge the standing of the coalition of animal rights groups. However, Smith indicated that courts had an independent obligation to determine whether they had jurisdiction. Smith found the animal rights groups had standing. He noted that "managing voluminous FOIA requests cost time and money to access records on previously public and free APHIS databases. Waiting for the agency to produce records after a request makes information stale. . ." Smith further pointed out that "informational injuries exist absent the denial of a request for particular information. However, some cases describe the injury sustained by a FOIA plaintiff as the denial of a request for particular records. This framing offers some intuitive appeal in the vast majority of FOIA cases, because the vast majority of FOIA cases arise under § 552(a)(3), the provision specifically requires agencies to 'make records promptly available' upon request. However, FOIA's reading-room provision requires agencies to post certain categories of documents *without a request*. The 'invasion of a legally protected interest,' occurs when the agency decides not to post records qualifying for § 552(a)(2) treatment, or when a plaintiff visits the online reading room and information required to be there is nowhere to be found."

Having found that the coalition of animal rights groups had suffered a redressable informational injury, Smith noted that "that informational injuries may be redressed through public disclosure of the information – rather than merely providing copies of the information to individual plaintiffs – is an unsurprising proposition given the traditional link between an informational injury and statutory provisions requiring publication of information." He pointed out that the inability of the coalition of animal rights groups "to inspect documents in virtual reading rooms harmed them in real-world ways; their injuries are different from the injuries sustained by other Americans who never regularly visited these online reading rooms. Additionally, their alleged injuries are 'fairly traceable' to the agency's action, and likely to be redressed by their requested relief."

Smith agreed with the coalition of animal rights groups that (a)(2)'s posting requirement could be enforced by the courts. He observed that "we detect nothing absurd about allowing district courts to halt violations of FOIA's clear command that agencies 'shall' make certain records available for public inspection.

To the contrary, reading the words 'jurisdiction to enjoin [an] agency from withholding agency records,' to mean Congress *withheld* jurisdiction to enjoin agencies from withholding agency records would directly contradict the plain text." He pointed out that "not only does the plain meaning of the phrase 'jurisdiction to enjoin [an] agency from withholding agency records' allow courts to order agencies to comply with their § 552(a)(2) obligations, but surrounding words confirm our reading. If, as APHIS argues, Congress only authorized federal courts to 'order the production' of records to a particular complainant, then the judicial-review provision would not need the words 'jurisdiction to enjoin the agency from withholding agency records;' the latter phrase would do all of the necessary work."

APHIS's primary challenge to the Ninth Circuit majority's conclusion that the affirmative disclosure provisions in (a)(2) could be enforced by a court was that the D.C. Circuit's 2017 decision in *CREW v. Dept of Justice* concluded that the provision could only be enforced by a requester who had first been denied access to records under (a)(3) and then asked for them to be posted under (a)(2). But the D.C. Circuit's opinion in *CREW* first resolved the issue of whether FOIA provided a remedy under (a)(2) rather than requiring an action under the Administrative Procedure Act—agreeing with the district court's finding that FOIA, rather than the APA, did apply – but then took an unrelated detour by deciding that a 1996 D.C. Circuit opinion in *Kennecott Utah Copper v. Dept of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), rejecting the company's attempt to require the agency to publish a regulation in the Federal Register under Section (a)(1) since no agency records had been withheld. Distinguishing the circumstances, Smith noted that "*Kennecott* involved a violation of § 552(a)(1)'s requirement to *publish* certain records in the Federal Register, whereas this case involves making certain records *available for public inspection* under § 552(a)(2). Making a record *available* for public inspection is synonymous with *producing* a record for public inspection." Calling the agency's claim that (a)(2) relief was only available to an individual complainant a "red herring," Smith noted that "ordering an agency to upload records that FOIA mandates agencies will post in reading rooms would provide relief to plaintiffs, like those here, injured by the agency's failure to make those records so available." (*Animal Legal Defense Fund, et al. v. United States Department of Agriculture; Animal and Plant Health Inspection Service*, No 17-16858, U.S. Court of Appeals for the Ninth Circuit, Aug. 29)

## PA Subsection (e)(7) Prohibits Agencies From Maintaining Non-Pertinent Records

In the most substantive Privacy Act decision in recent years, the Ninth Circuit has ruled that the law enforcement exception to subsection (e)(7), restricting law enforcement agencies from maintaining records about an individual's exercise of their First Amendment rights unless pertinent to an ongoing law enforcement investigation requires an agency to expunge such a record after its maintenance is no longer relevant.

The case involved a Privacy Act suit brought by Eric Garris, the founder of Antiwar.com, challenging the FBI's continued maintenance of two memos that pertained to Antiwar.com, but mentioned Garris. The first was a threat assessment alert prompted by the March 2004 discovery that a post-9/11 watch list was available on Antiwar.com. The Newark FBI field office investigated the matter, noting that "it is unclear whether Antiwar.com may only be posting research material compiled from multiple sources" and concluding that "there are several unanswered questions regarding Antiwar.com." However, the Newark field office recommended that the FBI San Francisco field office monitor Antiwar.com further. The San Francisco field office declined to do so because "it appears the information contained [on Antiwar.com] is public source information and not a clear threat to National Security." The second memo, prepared in 2006, dealt with the possible protests at the Halliburton annual meeting in Oklahoma and listed Antiwar.com as one of the websites on which information about the Halliburton annual meeting was posted. Garris filed suit to force the agency

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to expunge the memos because they violated subsection (e)(7). The district court ruled in favor of the government.

At the Ninth Circuit, Garris argued that "regardless of whether the creation of the Memos was justified under § (e)(7), because the investigations underlying the Memos have concluded, the FBI's maintenance of the Memos is not pertinent to an authorized ongoing law enforcement activity and therefore violates the Act." Writing for the court, Circuit Court Judge Wallace Tashima noted that "the question of whether the Privacy Act requires records to be pertinent to an ongoing law enforcement activity to be maintained is one of first impression in this Circuit. . .We hold that Privacy Act § (e)(7) prohibits the FBI from maintaining records describing First Amendment activity unless the maintenance of the record is pertinent to and within the scope of a currently ongoing authorized law enforcement activity. We further hold that the FBI has not carried its burden of demonstrating that the maintenance of the 2004 Memo is pertinent to an authorized law enforcement activity; therefore, it must be expunged."

Tashima pointed out that the Privacy Act defined the term "maintain" as meaning "maintain, collect, use, or disseminate." He continued, noting that "we presume that, because Congress defined maintain to include "maintain" and "collect," Congress intended the provision to apply to distinct activities. Therefore, we believe the plain meaning of the text is clear. The word maintain, as used in the Act, can be read as it is, or replaced with 'collect' (or 'use' or 'disseminate'). Therefore, an agency may not 'maintain' a record describing how any individual's protected First Amendment activity 'unless pertinent to and within the scope of an authorized law enforcement activity. And an agency may not 'collect' a record describing any individual's protected First Amendment activity 'unless pertinent to and within the scope of an authority law enforcement activity.' *Each* act of an agency must be justified to fall under the § (e)(7) exception." He added that "if the agency does not have a dissenting *current* 'law enforcement activity' to which the record is pertinent, the agency is in violation of the Privacy Act if it keeps the record in its files."

The FBI contended that the "plain meaning of the statute is that the law enforcement exception allows agencies to 'collect' *and* 'maintain' records so long as they were pertinent to an authorized law enforcement activity at the time of collection, and to hold otherwise would be to read a temporal limitation into the statute." Tashima pointed out that "there are *two* exceptions contained in § (e)(7) – an exception for authorization by statute or by an affected individual, and a law enforcement activity exception. The two exceptions are parallel grammatically. And the exception necessarily modifies the verb 'maintain,' not just 'record,' as it is quite evidently the *maintenance* that must be authorized, not the record. The clause 'by the individual about whom the record is '*maintained'* makes that much plain." He indicated that "our reading is that the text requires that an agency 'maintain no record describing how any individual exercises right guaranteed by the First Amendment unless [*the maintenance of the record is*]. . .pertinent to and within the scope of an authorized law enforcement activity. Both are clarified by adding implicit text; ours has the added benefit of not also reading all but one of the statutory definitions of the word 'maintain' out of the statute."

Applying this conclusion to the two memos, Tashima found the 2004 threat assessment was no longer protected. He observed that "the threat assessment turned up nothing more than protected First Amendment activity. At that point, the record was no longer – if it ever was – pertinent to an authorized law enforcement activity." He found the 2006 memo did have continued relevance. He noted that "the Memo describes security preparations for an oft-protested meeting, only incidentally includes protected First Amendment activity and is relevant to preparations for future iterations of the annual shareholders' meeting." (*Eric Anthony Garris v. Federal Bureau of Investigation*, No. 18-015416, U.S. Court of Appeals for the Ninth Circuit, Sept. 11)

# Views from the States…

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

## Connecticut

A trial court has ruled that the Erasure Act, which requires non-disclosure of records pertaining to a criminal charge whenever the person charged is acquitted or pardoned or the charge is dismissed, does not apply categorically to criminal investigation records. However, the court also found that the FOI Commission used too narrow a standard in determining that many records pertaining to the investigation of the murder of Barbara Gibbons were not covered by the non-disclosure restrictions of the Erasure Act and ordered the commission to review the records based on the correct standard. The case involved a request from Thomas McDonnell for the closed Gibbons murder investigation. Gibbons' then-teenaged son, Peter Reilly, was originally tried and convicted of the murder. However, he was granted a new trial in 1977 and was acquitted. In response to McDonnell's request for the Gibbons murder investigation file, the Department of Emergency Services and Public Protection denied the request based on the Erasure Act, arguing that once Reilly was acquitted all records related to the investigation were protected. McDonnell filed a complaint with the FOI Commission, which found that only information identifying Reilly as a suspect was protected by the Erasure Act. After reviewing the records *in camera*, the commission hearing officer concluded that a number of records that did not identify Reilly should have been disclosed. The department appealed to the trial court, arguing that none of the records were disclosable. When the case was first before the trial court in 2009, the trial court remanded the case to the commission to consider whether the Erasure Act could be waived. During the remand, the department agreed that some records were not subject to the Erasure Act but were instead protected by other exemptions. The commission ultimately reviewed 15,697 pages *in camera*, concluding that only records identifying Reilly as a suspect or defendant were protected by the Erasure Act. As a result, the commission found that 7,155 pages were not subject to the restrictions of the Erasure Act. Judge Sheila Huddleston agreed that the FOI Commission had jurisdiction to determine whether the Erasure Act covered all records of a criminal investigation, but concluded that the commission should have used the standard developed in *State v. West*, 472 A.2d 775 (1984), linking the accused, directly or indirectly, to the underlying crime, instead of the standard used by the commission limiting the scope of records only to those identifying Reilly as a suspect. Huddleston found that police reports pertaining to suspects or witnesses were also protected by the Erasure Act. She noted that "a substantial number of these records should be deemed to be erased under the *West* standard because they disclose information about when or where the accused was arrested, the nature of or circumstances surrounding the crime charged, or the names of witnesses from who further information may be obtained." She sent the case back to the commission to review the records again under the *West* standard. (*Commissioner, Department of Emergency Services and Public Protection v. Freedom of Information Commission*, No. HHB-CV-14-6027085-S, Connecticut Superior Court, Judicial District of New Britain, Aug. 20)

A trial court has ruled that Robert Morrin's request for social media posts made by Bruce Adams, general counsel of the state banking department, pertaining to payday loans, some of which were subsequently taken down, fails to state a claim because no practical relief is available. Hilary Miller originally requested all social media postings by the department pertaining to payday loans. While the department was processing Miller's request, Adams deleted some of his posts. Robert Morrin then made the same request. After the department told Morrin that it no longer had Adams's deleted posts, he filed a complaint with the FOI Commission, arguing that the social media postings constituted public records and the agency was obligated to

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retrieve them. Although the court concluded that the FOI Commission had not justified its finding that the deleted records were not public records, the court dismissed Morrin's appeal, noting that "the commission's exercise of discretion in declining to address whether Mr. Adams' posts were public records which the department was obliged to produce in response to Mr. Miller's and Mr. Morrin's requests [is moot], in light of the fact that they were already in possession of the same posts. . ." (*Robert T. Morrin v. Freedom of Information Commission*, No. CV 17 6038625, Connecticut Superior Court, Judicial District of New Britain, Aug. 13)

## Florida

A court of appeals has ruled that the Miami *Herald*'s appeal for video footage of two separate incidents at correctional facilities is moot because the *Herald* indicated that it no longer needed the footage. The newspaper requested video footage from two correctional facilities as part of a story it was preparing. The Department of Corrections denied access to the footage, claiming the security exemption. The *Herald* filed suit and the trial court ruled that the security exemption applied but agreed with the *Herald* that the request fell within the "good cause" exception to the security exemption and should be addressed by an appellate court. The *Herald* also indicated that it no longer needed the footage to write its articles. The appeals court found the fact that the *Herald* no longer needed the footage was dispositive. Dismissing the case, the appeals court pointed out that "regardless of whether the Miami Herald's previously-offered reasons for disclosure met the statutory standard, their contention that it no longer wanted the videos because they were no longer newsworthy means that they failed to show good cause sufficient to invoke the exception to the exemption." (*Florida Department of Corrections v. Miami Herald Media Corporation*, No. 1D18-1324, Florida District Court of Appeal, First District, Aug. 9)

## Kentucky

A court of appeals has ruled that the proposal submitted by the Louisville/Jefferson County Metro Government to Amazon to attract its new second headquarters became final once Amazon did not accept Louisville's proposal and is no longer privileged. The Louisville *Courier-Journal* requested the proposal submitted to Amazon. Louisville disclosed a heavily redacted 118-page proposal, claiming much of it was preliminary in nature. The *Courier-Journal* filed suit. The trial court ruled in favor of the newspaper and Louisville appealed. Louisville characterized its proposal to Amazon as recommendations and options that could be broadly applicable to attracting businesses. Indicating that such a broad claim did not have relevance under the circumstances, the appeals court pointed out that "Louisville Metro's Proposal was merely an offer submitted in response to Amazon's RFP. It remained subject to additional negotiation, modification and approval by other agencies or government bodies. But once Amazon excluded Louisville Metro from its list of finalists, the Proposal was no longer subject to change. Any possible re-opening of the bid process would require a new Proposal. Consequently, we must conclude that the final action occurred at that point. Therefore, the preliminary recommendations in the Proposal lost their exempt status once the final action occurred." (*Louisville/Jefferson County Metro Government v. Courier-Journal*, No. 2018-CA-001560-ME, Kentucky Court of Appeals, Aug. 9)

## Tennessee

A court of appeals has ruled that non-exempt non-investigative records do not become exempt merely because they are later used as part of a criminal investigation. The case involved allegations made by Kim Locke, that her husband, Jason Locke, the former director of the Tennessee Bureau of Investigation, was having an affair with Sejal West, an employee of the Tennessee Department of Mental Health and Substance Abuse Services, and that Locke had been threatened by her husband while he was carrying a gun. Then-

Governor Bill Haslam asked the Tennessee Department of Safety and Homeland Security to investigate the charges with the assistance of the Comptroller's Office. Kim Locke also contacted Nashville NewsChannel 5, owned by Scripps Media, and investigative reporter Phil Williams submitted several Public Records Act requests to the TBI for travel reimbursements submitted by Locke, as well as calls made with his cell phone. Williams requested the same records from TDMHSAS pertaining to West. The Attorney General's Office denied the request because the records were part of an ongoing criminal investigation. Williams and Scripps Media filed suit. Before their case was heard, the investigation was completed and the records were released. Although it acknowledged that the case was moot, the trial court ruled on whether or not the exemption applied. The trial court ruled in favor of the government. The court of appeals reversed, finding the records were not exempt at all. The court pointed out that "the State acknowledges that the records here would have been disclosed but for the criminal investigation and, in fact, actually were disclosed after the criminal investigation ended. Indeed, these records were accessible from their inception. That they later were relevant to a criminal investigation did not alter either their nature or where they were kept." (*Scripps Media, Inc. v. Tennessee Department of Mental Health and Substance Abuse Services*, No. M2018-02011-COA-R3-CV, Tennessee Court of Appeals, Aug. 16)

### Vermont

The supreme court has ruled that the University of Vermont Police Services improperly withheld a probable cause affidavit to support its criminal citation for disorderly conduct. Jacob Oblak requested the citation. The UVM Police denied the request, claiming it pertained to an open investigation. Oblak filed suit. The trial court found the citation was protected under the Vermont Rule for Public Access to Court Records 6(b)(24). Oblak then appealed to the supreme court. The supreme court found the trial court had erred in concluding that the citation was a court record. The supreme court pointed out that "not only was the record kept by UVM Police Services, but petitioner also requested the record directly from the agency." UVM Police Services argued that the supreme court should find that the court access rule constituted a prohibition to disclosure under the Public Records Act. The supreme court declined to do so, noting that "policy decisions made by the Court do not apply to other branches of government, including executive agencies. As such, the PACR Rules do not create, by law, a confidential exemption to the PRA such that agencies need not disclose information in their possession and control otherwise subject to the PRA." (*Jacob Oblak v. University of Vermont Police Services*, No. 2018-278, Vermont Supreme Court, Aug. 23)

## The Federal Courts…

Judge Tanya Chutkan has ruled that the CIA must conduct an electronic **search** of its FOIA database to extract data elements requested by TRAC after finding that doing so would not require the creation of a record. The CIA rejected six requests from TRAC for information from its FOIA database, including the date a request was closed, arguing that to provide the information would require writing new computer code that was not required under FOIA. Chutkan noted that "the court is unconvinced by the CIA's argument that writing new computer code to locate responsive records in its database or compiling the resulting records constitute the creation of a new record." She pointed out that "although Plaintiffs phrased their Processing Data Requests as seeking a 'case-by-case listing,' the information they seek is neither a listing nor an index of the database contents. Instead, they seek certain data fields that the CIA concedes exist within the database. Thus, compiling these records does not constitute the creation of a new record." The CIA also argued that fulfilling TRAC's requests would be **unduly burdensome**. Chutkan found the agency had not yet justified the claim and noted that "while the court affords agency affidavits substantial weight in FOIA litigation, it cannot

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rely solely on conclusory statements that a search process 'would be extremely burdensome.'" TRAC requested data reflecting the database's capabilities over the past 18 months. The agency argued that such a search would also be unduly burdensome. Chutkan ordered the agency to search for the records. She noted that "even taking as true the CIA's assertion that user-generated reports are not tracked, it is not clear from the [affidavit] whether such user-generated reports are stored anywhere in the CIA's systems. The declaration also does not explain whether user-generated reports are the only type of reports generated by the FOIA database management system. To the extent some responsive records do exist, the CIA is obligated to perform a reasonable search to locate and produce them." (*Susan B. Long, et al. v. Central Intelligence Agency*, Civil Action No. 15-1734 (TSC), U.S. District Court for the District of Columbia, Sept. 10)

A federal court in New York has ruled that many of the EPA's **Exemption 5 (privileges)** claims contained in a sampling of 116 documents that Judge Jesse Furman reviewed *in camera* are appropriate, but that the agency has not shown that the Natural Resources Defense Council agreed to accept Furman's findings on the exemption claims contained in the sampling as applicable to all the records as well. The NRDC requested records about the participation of Dr. Nancy Beck, who had previously worked for the American Chemistry Council before becoming head of the Office of Chemical Safety and Pollution Prevention, on a number of issues. The NRDC agreed to limit its request to seven categories. The agency identified 1,350 responsive records, released 277 records in full, 920 records in part, and withheld in full 153 records. The agency relied on Exemption 5, as well as **Exemption 6 (invasion of privacy)**. The NRDC identified a sampling of 116 records to assess the validity of the agency's exemption claims. The NRDC only challenged the agency's Exemption 5 claims. Furman noted that "the parties also disagree about whether documents beyond the 116 at issue here remain in dispute. The EPA contends that by selecting 116 records, the NRDC waived or abandoned its claims regarding the other approximately 950 records withheld in full or in part, an argument to which the NRDC strenuously objects." Furman indicated that he would review ten records *in camera*, as representative of the 116 records. After finding that agency's search was adequate, Furman turned to the issue of whether or not the agency had justified the **foreseeable harm** that would be caused by disclosure. Furman pointed out that "the agency has provided substantially more context for the decisionmaking processes in question and the harms that would reasonably ensue from disclosure of the material – which makes all the difference." Furman added that "while some of the EPA's discussion still verges on boilerplate, the Court finds overall that the agency has adequately articulated 'the link between this harm and the specific information contained in the material withheld.' In short, because the agency has demonstrated a logical relationship between the specific decisionmaking processes involved and the harms that the privilege guards against, it has shown that it 'reasonably foresaw that disclosure would harm' its Exemption 5-related interests." The agency claimed that the deliberative process privilege applied to most of the records. Furman observed that "here, the draft rules and guidance documents, the inter- and intra-agency comments and responses to such drafts, and the other documents created to assist EPA staff in developing formal agency policy were central to the development of those formal rules and guidance documents – that is, paradigmatically part of the 'deliberative process.'" He found that another series of records dealing with drafts of agency issue papers, reports, and internal guidance were protected as well since they were both predecisional and deliberative. But Furman indicated that records dealing with how the agency intended to explain its policies to the press or Congress did not qualify under the privilege. He pointed out that "according to the agency, these documents concern 'whether and how the agency should publicly present. . .*previously-decided* policies.' That acknowledgement is fatal to the EPA's position: Because they merely 'reflect deliberations about what "message' should be delivered to the public about an *already-decided* policy decision' and, thus, their disclosure would not 'reveal the deliberative process underlying a *not-yet-finalized* policy decision,' these records are not protected under Exemption 5." The agency had also withheld several records under the attorney-client privilege. Furman upheld all those claims. Having completed his *in camera* review of the ten records, Furman observed that "five were not exempt from disclosure at all; four contained

some segregable factual information that should have been disclosed; and one was properly withheld in its entirety. Based on that sample – admittedly, perhaps an unrepresentative one – the Court is not persuaded by the EPA's across-the-board claims that it has appropriately disclosed all of the reasonably segregable, non-exempt material from its records." Furman rejected the agency's claim that the NRDC had agreed that the 116 records constituted the universe of records in which it was interested. Instead, Furman indicated that "the Court agrees with the NRDC that it has not waived or abandoned its claims as to the other, as-yet-unaddressed records and that the non-disclosure of those records remain at issue." He ordered the parties to meet and decide how to proceed. (*Natural Resources Defense Council v. U.S. Environmental Protection Agency*, Civil Action No. 17-5928 (JMF), U.S. District Court for the Southern District of New York, Aug. 30)

Judge Colleen Kollar-Kotelly has ruled that the Department of State properly withheld records pertaining to seven of former Secretary of State Hillary Clinton's daily schedules dealing with meeting on national security issues, including National Security Council meetings, under **Exemption 5 (privileges)** in response to a request from Judicial Watch for records concerning Bill Clinton's speech schedule. In responding to Judicial Watch's request, the State Department disclosed 1,183 documents in full, 1,777 in part, and withheld 17 documents in full. Since Judicial Watch only challenged the agency's redactions of the seven documents, Kollar-Kotelly agreed to review them *in camera*. After having conducted her review, Kollar-Kotelly found that all the redactions were appropriate under the presidential communications privilege. She noted that the recent decision by Judge Rudolph Contreras in *Property of the People v. OMB*, 2019 WL 3891166 (D.D.C., Aug. 19, 2019), finding that the organization could not gain access to records of White House meetings on national security issues through OMB, was particularly on point here. She explained that "just as a White House log reflecting a particular individual at a particular time could all but confirm she deliberated with the President or his immediate White House advisor about a given topic, so too an entry on Secretary Clinton's schedule reflecting a meeting with the President or an immediate White House advisor at a particular time could give away sensitive information about its contents. More specifically, the Secretary's participation in a meeting of the NSC or one of its sub-units on a particular date and time – particularly if accompanied by a list of other attendees – threatens to divulge national security-sensitive information." She pointed out that "here too, the events on Secretary Clinton's calendars presumably would involve advice to the President or his immediate White House advisors to guide their development of policies." Her specific analysis of the individual redactions was contained in six pages that were redacted as well. Kollar-Kotelly also addressed the agency's **segregability** analysis. She noted that "the presidential communications privilege protects the entirety of a document to which it applies. It seems to follow, *a fortiori*, that a redaction protected under this privilege need not be parsed for segregable material." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 13-772 (CKK), U.S. District for the District of Columbia, Sept. 5)

Judge Emmet Sullivan has ruled that **Exemption 5 (privileges)** does not protect the principal investigator's name who conducted experiments on dogs at the Louis Stokes Cleveland Veterans Affairs Medical Center and that the Department of Veteran Affairs has not shown that **Exemption 6 (invasion of privacy)** applies to the investigator's name. In response to a request from White Coat Waste Project, a non-profit organization whose mission is to expose wasteful taxpayer-funded animal experiments, for records concerning the experiments, the agency eventually disclosed 217 pages of records but refused to disclose the identity of the principal investigator under both Exemption 5 and Exemption 6. Sullivan noted that "the factual material in this case is the principal investigator's name, and the VA has failed to show how the redacted name assisted the agency with the decision-making process." Sullivan added that "here, the principal investigator's name neither reflects an 'exercise of judgment as to what issues' should bear on the research, nor involves the selection of facts as part of the agency' deliberative process." Having found that Exemption 5

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did not protect the investigator's name, Sullivan examined the applicability of Exemption 6. Here, he pointed out that "WCW's suggestion – that the principal investigator's name is not personal in nature – is unavailing." Instead, Sullivan found that the investigator's name could be considered a "similar" file for purposes of Exemption 6. However, Sullivan indicated that the agency had failed to show that the investigator would be subject to harassment if his or her name was disclosed. He noted that "the VA has failed to carry its burden of demonstrating a substantial privacy interest in the principal investigator's name." Sullivan concluded that the VA had articulated a possible privacy interest in the name and sent the case back for further briefing on that issue. (*White Coat Waste Project v. United States Dep0artment of Veterans Affairs*, Civil Action No. 17-2264 (EGS), U.S. District Court for the District of Columbia, Aug. 29)

Judge Randolph Contreras has ruled that U.S. Immigration and Customs Enforcement has shown that it **conducted an adequate search** for records responsive to the first prong of 2014 and 2017 requests from the National Immigrant Justice Center but has not justified the adequacy of its search as to the second prong. The first prong of NIJC's requests were for records pertaining to detention beds in the Seattle and San Antonio Area of Responsibility, while the second prong pertained to the agency's nationwide detention policies. In response to the 2014 request, ICE disclosed 732 pages and 127 Excel spreadsheets. The 2017 NIJC request updated its 2014 request to the present. Acknowledging that the complexity of multiple searches made the agency's explanation confusing at times, Contreras indicated that since the agency's 2017 search encompassed all potentially responsive records, he would focus on the adequacy of that search. Answering that question, Contreras observed that "on this showing, for both the Seattle and San Antonio AOR searches, the Court finds that, although ICE 's first stabs at searches involving limited personnel and search terms were plainly inadequate, the agency's 'relatively detailed' description of the later search that it conducted 'sets forth the search terms and the type of search performed' with specificity and thereby satisfies ICE's initial burden. The burden thus shifts to the FOIA requester to 'produce countervailing evidence' suggesting that there is a genuine dispute of material fact.'" Contreras indicated that "NIJC raises no specific argument concerning the locations searched, the personnel who had conducted the search, or the search terms used. The adequacy of a search is judged by the process utilized, not the results." However, Contreras concluded that the agency had not sufficiently explained the adequacy of its search pertaining to the second prong of the 2014 request. Contreras pointed out that "because the substantively identical 2017 FOIA request ultimately tasked a number of other program offices with searching for records responsive to the same set of issues, a lack of parallel scope of search in 2014 is suspect." He added that "because the 2014 FOIA request sought records from January 1, 2009 to the present, and the 2017 FOIA request sought records from July 2, 2014, to the present, any flaw in ICE's search methodology for the 2014 request would not be remedied by a search that begins in June 1 2013." Turning to the exemptions claimed by ICE, Contreras found that the agency had not yet provided sufficient justification for its **Exemption 5 (privileges)** claims. He sent them back to the agency for supplementation. (*Heartland Alliance for Human Needs & Human Rights, d/b/a/ National Immigrant Justice Center v. United States Immigration & Customs Enforcement, et al.,* Civil Action No. 16-204 (RC), U.S. District Court for the District of Columbia, Sept. 12)

Judge Amit Mehta has ruled that the Department of Justice has not shown that criminal proceedings of BNP Paribas, S.A., which was prosecuted for evading economic sanctions against Sudan, Iran, and Cuba, is still ongoing to qualify for **Exemption 7(A) (ongoing investigation or proceedings)** coverage. Johnmark Majuc and Joseph Jok, two Sudanese refugees who were involved in a class action suit against BNPP, requested 33 categories of documents. The Justice Department's Criminal Division denied the request entirely under Exemption 7(A). Mehta pointed out that "it is unclear whether there is any ongoing enforcement proceeding. . .For the exemption to apply, a 'proceeding must remain pending at the time of [the court's] decision, not only at the time of the initial FOIA request.' Thus, records created at the time of an ongoing

investigation are not automatically shielded from disclosure under 7(A). Rather, the documents must remain pertinent to a 'concrete prospective law enforcement proceeding' at the time of the court's decision. Vague mentions of ongoing proceedings are not enough to support Exemption 7(A)." He observed that "here, the court is left uncertain whether there is, at present, a pending investigation involving the responsive records." He added that "the court cannot grant summary judgment when faced with such glaring ambiguity about 'whether a related investigation is in fact ongoing.' That is particularly true when as here, the DOJ is claiming that all responsive records are categorically exempt from disclosure under 7(A)." The agency argued that potential witnesses might be intimidated if the records were disclosed. Mehta found this claim was diminished by the fact that the bank's prosecution occurred years ago and was already well known. He pointed out that "the investigation and prosecution of the bank has been public for a number of years, so the notion that a person or entity related to BNPP's sanctions violations might not know that he or she is, or will be subject to, an investigation seems dubious at best." (*Johnmark Majuc and Joseph Jok v. United States Department of Justice*, Civil Action No. 18-00566 (APM), U.S. District Court for the District of Columbia, Sept. 13)

Although acknowledging that the burden of proof had been reduced as a result of the Supreme Court's recent decision in *Food Marketing Institute v. Argus Media Leader*, 139 S. Ct. 2356 (2019), a federal court in California allowed the American Business League to take **discovery** on the issue of whether Lockheed Martin customarily kept information about their subcontractors confidential. In a case involving Lockheed Martin's subcontracting plan to hire small businesses, ASBL argued that the identities of many subcontractors were routinely publicized by the company, suggesting that such relationships were not customarily confidential. Agreeing with ASBL, Judge William Alsup noted that "according to [the company's affidavit], Lockheed Martin simultaneously keeps private its supplier names to protect against poaching and freely discloses its 'exemplary' suppliers to attract more suppliers. These explanations do not square. Vague statements and discrepancies such as these sufficiently demonstrate that certain limited discovery is warranted under Rule 56(d)." (*American Small Business League v. United States Department of Defense, et al.*, Civil Action No. 18-01979 WHA, U.S. District Court for the Northern District of California, Sept. 15)

A federal court in Arizona has ruled that Jorge Rojas failed to show that the FAA had a pattern or practice of missing its **estimated time of completion** estimates that violated the FOIA and that although it frequently missed those estimated complete dates, it still was able to respond to most of Rojas' requests within a reasonable amount of time. The court pointed out that "Rojas complains that the FAA did not meet some of the original ECDs – and the FAA admits as much. But for those requests, it did make productions shortly after the ECD. In fact, for each of those requests, the FAA completed its response within three business days of the ECD. Since, again, the ECDs are estimates, a production made within three business days of an ECD is not unreasonable and does not warrant judicial intervention." Rojas argued that the agency should be required to respond to his requests on a rolling basis set by the court. But the court noted that "the Petitioner has not demonstrated that the FAA has the capacity to supply any particular monthly-rolling quota. The FAA has represented that it will make monthly productions, and it has provided ECDs for each of the request. How to meet these ECDs is best left to the discretion of the agency at this point. The FAA is most familiar with its capacity as well as its limitations." Rojas also contended that the agency had not shown that unusual circumstances applied to some of his requests because the FAA had not shown that 5,000 pages were involved in responding. The court observed that Rojas "misreads the statute," explaining that "Paragraph (A)(viii) does not require the FAA to tell Rojas that it has concluded that the response would require more than 5,000 pages." (*Jorge Alejandro Rojas v. Federal Aviation Administration*, Civil Action No. 16-03067-PHX-GMS, U.S. District Court for the District of Arizona, Aug. 26)

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A federal court in New York has ruled that U.S. Immigration and Customs Enforcement has not shown that it **conducted an adequate search**, but that the Office of Legal Counsel at the Justice Department did **conduct an adequate search** in response to a multi-agency request from the Knight First Amendment Institute concerning the government's authority to exclude or remove individuals from the United States based on their speech, beliefs, or associations. The court also found that the Department of State had properly invoked **Exemption 5 (privileges)** but has not yet supported its **Exemption 7(E) (investigative methods or techniques)** claims. ICE located 2,677 pages, withholding most those pages in full or in part. OLC located 128 pages, withholding them all under Exemption 5. State located 243 records, totaling 1,719 pages. It disclosed 90 records in full and 126 records in part and withheld 16 records in full. The court found ICE's search insufficient. The court pointed out that 'because the Office of the Director failed to search for additional terms the agency itself would have used in referring to the relevant statutory provisions – and offers no reasonable justification to support its decision – ICE has not established the adequacy of the Office of the Director searches." KFAI argued that OLC should have searched White House records. But the court observed that "as a practical matter, one agency does not have access to another agency's records systems. Therefore, as a matter of law, OLC was not obliged to search White House records." The court found that the State Department's deliberative process privilege claims were justified since the records were both pre-decisional and deliberative. KFAI argued the records constituted working law as an expression of the Trump administration's immigration policy. However, the court pointed out that "reflection is not adoption. Reports or recommendations that have 'no operative effect' do not need to be disclosed even where the agency action agrees with the conclusion of the report or recommendation." The court rejected State's claim that portion of the Foreign Affairs Manual could be withheld under Exemption 7(E). The court observed that 'the mere descriptions of codified law and policy, even those including 'interpretation and application of immigration laws and regulations' are not protected under Exemption 7(E). To be 'compiled for law enforcement purposes,' the information must go a step further and describe the 'proactive steps' for preventing criminal activity and maintaining security." (*Knight First Amendment Institute v. U.S. Department of Homeland Security, et al.*, Civil Action No. 17-7572 (ALC), U.S. District Court for the Southern District of New York, Sept. 13)

Judge Timothy Kelly has ruled that the Consumer Financial Protection Bureau has so far failed to show that phone numbers of employees are protected by **Exemption 6 (invasion of privacy)**. Journalist Todd Shepherd requested phone records of Leandra English during the three-month period in which she unsuccessfully sought to be recognized as the CFPB's acting Director. The agency redacted phone numbers contained in the six pages that could not be confirmed as agency landline numbers or, after a Google search, business numbers. Kelly pointed out that "*the CFPB* bears the burden of proving that the phone numbers it redacted from the six pages of records at issue may be withheld under Exemption 6. . .To undertake [such an] analysis, the Court needs more information about the redacted phone numbers – as opposed to what they are not." Kelly faulted the agency's search, noting that "the CFPB identified – and therefore did not redact – its own Washington, D.C. landlines that appeared in the records. But it apparently took no steps to identify landlines associated with CFPB offices or CFPB-issued cell phones, two types of phone numbers that, at a minimum, do not clearly warrant withholding under Exemption 6. Similarly, the CFPB does not represent that it tried to identify, and therefore not redact, phone numbers associated with government offices or officials *outside the CFPB*. Whether Exemption 6 would cover such phone numbers – as in countless other situations – would depend on the particular facts, circumstances, and interests at stake." Kelly questioned the Google search well. He pointed out that "the Court has no information about the likelihood that a Google search of a phone number accurately reflects whether that phone number belongs to a business." (*Todd Shepherd v. Consumer Financial Protection Bureau*, Civil Action No. 18-2004 (TJK), U.S. District Court for the District of Columbia, Sept. 17)

A federal court in New York has ruled that while some records pertaining to three Maiden Lane LLCs, which were provided loans by the Federal Reserve Bank in New York pursuant to authorization by the Federal Reserve Board are **agency records** under prong one of the agency's records regulations because they pertain to the performance or functions of the Board, others do not qualify as agency records because they were not maintained for administrative reasons. Daniel Junk requested records about the three Maiden Lane LLCs. The agency denied his request, claiming they were records of the New York Federal Reserve Bank and not of the Federal Reserve Board. Judge Denise Cote found the records qualified under prong one. Cote observed that "the Board authorized the loans in question during the 2008 financial crisis, under conditions of severe economic distress. Their issuance resulted in information coming into the possession of the Board and/or an FRB 'in the performance of functions for or on behalf of the Board.' As such, under prong one of the regulations, records in 'the possession and under the control of' the FRBNY concerning these loans are Board records." But Cote pointed out that the records did not qualify under prong two. Cote indicated that "the Board has carried its burden of showing that the transactional records concerning the Maiden Lane LLC loans that Junk requests are not managerial or supervisory documents 'maintained for administrative reasons in the regular course of business.' Thus, they are not Board records under prong two of the regulation and the Board need not conduct a search for the requested documents among its administrative records." (*Daniel L. Junk v. Board of Governors of the Federal Reserve System*, Civil Action No. 19-385 (DLC), U.S. District Court for the Southern District of New York, Aug. 29)

Tying up most of the remaining issues stemming from multiple FOIA suits against the Department of Justice filed by prisoner Jeremy Pinson, Judge Rudolph Contreras has ruled EOUSA has finally explained its searches for various docket numbers requested by Pinson, and that the Bureau of Prisons properly withheld records under **Exemption 7(F) (harm to any person)** because disclosure could harm Pinson. Previously, Contreras had found that EOUSA had not sufficiently explained whether it had searched for the correct docket numbers requested by Pinson and why there was a discrepancy between the number of pages received and the number identified in the agency's affidavit. This time around, EOUSA's affidavit explained that "the discrepancy between the number of pages the EOUSA previously indicated it had located and the different number it claimed to have released was due to an error in the tabulation of the pages. After recounting the pages, [the agency affidavit] indicates that the number of public records located totaled 97 pages, and not 94." Contreras noted that "the Court finds the explanation reasonable, and that Pinson received all the pages associated with Request No. 12-1757." Turning to BOP's Exemption 7(F) claim, Contreras noted that "there is no balancing test in an Exemption 7(F) analysis, as it is 'an absolute ban against [disclosure of] certain information." After reviewing a supplemental affidavit from BOP, Contreras noted that "the Court finds that there is a reasonable expectation of endangerment and defers to BOP's expertise in assessing the plausible danger." (*Jeremy Pinson v. U.S. Department of Justice, et al.*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, Aug. 30)

A federal court in Minnesota has ruled that 39 U.S.C. § 410(c)(2), which allows the Postal Service to withhold information when under good business practice the information would not be disclosed, does not categorically apply to Negotiated Service Agreements with private parties providing the agency with lower rates or more favorable terms. The law firm of Dorsey & Whitney requested records about the NSAs and the agency issued a *Glomar* response neither confirming nor denying the existence or records, citing **Exemption 3 (other statutes)**. The law firm provided evidence that NSAs were publicly disclosed. The agency argued that while the existence of NSAs might be public, the specific pricing was not. But the court pointed out "this

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argument is unavailing. The issue before the Court is whether the *existence* of NSAs is disclosed under good business practices, *not* whether the underlying *contents* of NSAs are disclosed under good business practices. The record supports Dorsey's contention that the existence of NSAs and other beneficial partnerships is publicly disclosed under good business practice." (*Dorsey & Whitney, LLP v. United States Postal Service*, Civil Action No. 18-2493 (WMW/BRT), U.S. District Court for the District of Minnesota, Sept. 3)

Judge James Boasberg has resolved the remaining FOIA/PA requests to the IRS filed by William Powell looking for records concerning his taxes, those of his family printing business, and those of his father and grandfather as they related to the printing business, ruling that the IRS has shown that it properly responded to all the requests. Boasberg had previously found Powell had properly requested the Powell Printing Company's 1989 tax records and had alleged that the agency failed to search for his father's Form 706, which Powell claimed might contain information reflecting on his own Form 706. Boasberg agreed that the agency had shown that Powell's claim for access to the 1989 Powell Printing Company tax records was barred by **claim preclusion** since Powell had already litigated the issue with the IRS in previous litigation in the Eastern District of Michigan. Noting that the records request and the parties were identical, Boasberg pointed out that "the only question as to that judgment's validity would arise if the Michigan court had somehow lacked subject-matter jurisdiction over that claim. But, of course, any FOIA claim would give that court federal-question jurisdiction." Boasberg had previously ruled that the agency's description of its search for the Form 706 records was inadequate. This time, however, he indicated that "rather than its former bare assertion that it had searched for the Form 706 in a prior proceeding, the Service has now demonstrated in great detail the steps it took to attempt to locate this record. Powell's argument that it should have used alternative systems, including one belonging to the National Archives, does not defeat the adequacy of the Government's search." (*William E. Powell v. Internal Revenue Service*, Civil Action No. 17-278 (JEB), U.S. District Court for the District of Columbia, Sept. 6)

While finding that he had **jurisdiction** to hear the case, Judge Rudolph Contreras has ruled that Judicial Watch has **failed to state a claim** under the **Federal Records Act** to require the FBI to establish and maintain a recordkeeping program for non-email electronic messages. The agency attacked Judicial Watch's suit on jurisdictional claims. Siding with Judicial Watch on the jurisdictional issue, Contreras pointed out that "Judicial Watch in no way asks the Court to insert itself into the FBI's day-to-day recordkeeping practices or otherwise police the agency's 'unofficial policy of refusing to create records.' Rather, Plaintiff challenges the adequacy of Defendant's official Policy Guidelines with respect to electronic records other than email. This is just the sort of reviewable challenge to an agency's recordkeeping guidelines that [the D.C. Circuit's ruling in *Armstrong v. Bush*] permits." The agency also argued that Judicial Watch had failed to show injury in fact. Again, Contreras disagreed. He noted that "Judicial Watch points with particularity to individual, concrete FOIA requests and pending litigation regarding the electronic messages that are implicated in this suit. Moreover, the instant facts do not merely allege abstract, hypothetical future FOIA requests. Rather, Judicial Watch has pending requests at issue, which establish 'a real and immediate, not merely speculative, threat of future injury.'" But Contreras agreed with the agency that Judicial Watch had not spelled out in its complaint the basis for relief under the Administrative Procedure Act. He observed that "without more precise factual allegations that highlight *which* particular deficiencies make the challenge to the FBI's policy inadequate, Plaintiff's claims amount to conclusory allegations that the FBI failed to 'establish and maintain a recordkeeping program that provides effective controls.' These sorts of legal conclusions, standing alone, will not suffice to withstand a motion to dismiss." However, Contreras pointed out that since both Judicial Watch

and the agency had fleshed out the issues more thoroughly in their oppositions, he indicated that he would allow Judicial Watch to amend its complaint rather than dismiss the suit altogether. (*Judicial Watch, Inc. v. FBI*, Civil Action No. 18-2316 (RC), U.S. District Court for the District of Columbia, Sept. 4)



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