Volume 45, Number 19
October 2, 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: The Senate confirmed Daniel Jorjani Sept. 24 to serve as Solicitor for the Department of the Interior 51-43. Sen. Ron Wyden (D-OR) had put a hold on Jorjani's nomination because of his involvement in the controversial awareness review policy at the agency allowing political appointees to review responses to FOIA requests before they were disclosed. Wyden noted that "the Interior Inspector General confirmed Jorjani is currently under investigation for his role in this FOIA policy. That fact alone ought to stop this nomination from moving forward." During the floor debate on Jorjani's nomination, Sen. Mazie Hirono (D-HI) pointed out that "internal documents released by [the agency] paint a very different picture [of Jorjani's involvement in the awareness review policy] – one in which Jorjani was regularly involved in reviewing FOIA documents. At best, Mr. Jorjani was not forthcoming or candid. In fact, it appears that he lied. Under oath."

Eleventh Circuit Upholds Privacy Exemption Claims for 9/11 Records

Ruling in a case that at one time appeared likely to force the FBI to disclose much more personally identifying information about Saudi nationals alleged to have been involved in the 9/11 terrorist attack as part of the FBI's original investigation and the subsequent investigation by the 2014 Meese Commission that reviewed implementation of recommendations made by the 9/11 Commission, a split panel of the Eleventh Circuit has reversed most of the trial court's conclusions that the FBI failed to show why certain personally identifying information was protected under Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records). While agreeing with aspects of the majority's decision, Circuit Court Judge Beverly Martin strongly criticized the majority's finding that the FBI had sufficiently justified its privacy exemption claims.

Occasionally, major historical events can be influenced by minor players. In this case, the *Broward Bulldog*, a small publication run by Dan Christensen covering South Florida, filed a FOIA request in 2011 with the FBI for records pertaining to a Saudi Arabian family with alleged ties to the 9/11 hijackers who abruptly left their South Florida luxury

ACCESS REPORTS

home two weeks before the attacks. The FBI disclosed some records but dissatisfied with the agency's response the *Broward Bulldog* filed suit. The Eleventh Circuit panel noted that the district court judge handling that case had issued a decision in August 2019 but had not yet entered a final judgement. After Congress created the Meese Commission in 2014, the *Bulldog* submitted two more requests in 2015, filing suit after the FBI and the Department of Justice failed to respond. In response to that request, the FBI disclosed 896 pages that had been located in an electronic storage site for Commission records. When that case was decided, the district court upheld the FBI's claims under Exemption 1 (national security), and Exemption 3 (other statutes), but rejected its Exemption 6 and Exemption 7(C) claims. It also upheld all but one of the agency's Exemption 7(D) (confidential sources) claims, upheld its Exemption 5 (privileges) claims, and found that about half of the contested withholdings under Exemption 7(E) (investigative methods or techniques) were appropriate.

The *Bulldog* argued that the agency's search was not adequate, in large part because documents has been disclosed piecemeal. Writing for the majority, Circuit Court Judge William Pryor pointed out that "although the Bureau did not 'exhaust all files which conceivably could contain relevant information' when it first responded to the request, it did not have to do so. The initial search, together with the continued efforts of the Bureau to provide responsive documents, satisfied the burden 'to conduct a search reasonably calculated to uncover all relevant documents.' And we agree with the government that if we were to hold that a later production of documents means that any initial search was inadequate, we would effectively tell agencies not to perform any additional searches in response to further inquiries." A coalition of newspaper groups who filed an amicus brief supporting the *Bulldog* also argued that transcripts of the Meese Commission should exist because they were required under the Federal Advisory Committee Act. Pryor disagreed, noting that "even assuming this law applies to the Commission, it would, at most, prove that the Commission *should* have kept transcripts of its meetings, but we fail to see how it proves that the transcripts Broward Bulldog seek *actually* exist."

Examining the district court's rulings on the agencies' exemption claims, Pryor first explained that, although Congress pointedly established in the 1974 amendments *de novo* review as the basis for assessing Exemption 1 claims, the fact that courts regularly ignored that standard and deferred to agency expertise instead was somehow codified in the 1996 EFOIA amendments by providing deference to agency assessments of the technical feasibility of reproducing records in the choice of format requested. Pryor noted that "whatever tension might otherwise exist between the Act's requirement of *de novo* review and deferring to an agency's explanation for withholding information, Congress has approved of deference within the specific context of Exemption 1. Accordingly, the district court did not err by deferring to the Bureau's affidavit supporting the Exemption 1 claim."

The district court found the FBI failed to justify its Exemption 7(C) claims for 15 documents that included personally identifying information, indicating that some of the information appeared to be available in the public domain and that the *Bulldog* had shown a public interest in disclosure. Relying on a district court ruling from the D.C. Circuit holding that "one can have no privacy interest in information that is already in the public domain," the district court concluded that information in the 15 disputed documents was publicly available. Pryor observed that the official acknowledgment doctrine applied only to information that had been officially disclosed by the government. Finding this was not the case here, he pointed out that "Broward Bulldog does not suggest that it proved that the same information *in each redaction* is also in the public record, or that the Bureau or the relevant individuals disclosed the information in each redaction." He added that "because the district court ruled that the public-domain doctrine applies to information that is in the public domain based only on media speculation and did not require the Broward Bulldog to prove the *same* information in each redaction was already in the public domain, the district court erred." Pryor also rejected the *Bulldog*'s assertion that the agency had acted inconsistently in its redactions. Instead, he pointed out that

"the relevant question is whether the redactions the government made were proper, not whether it could have made *additional* redactions. Neither the district court nor Broward Bulldog cites any authority to support the argument that the government must explain the inconsistent application of an exemption."

Pryor concluded that "Broward Bulldog has failed to establish a significant public interest that can outweigh the strong privacy interests in the clearly identifying information at issue. . ." But he added that "the Bureau seeks to redact other types of information that do not clearly identify any individual. . For all potentially identifying information that is not a name, address, or phone number, we remand to the district court to allow it to determine in the first instance whether the information is identifying."

Pryor faulted the district court's own inconsistent conclusions under Exemption 7(D). Pryor noted that the district court had improperly relied on a D.C. Circuit district court ruling holding that a source could not be confidential for purposes of Exemption 7(D) if the source's identity was publicly known. Pryor indicated that the district court had erred in that conclusion, observing that "the public-domain doctrine does not apply to Exemption 7(D)." He added that "after the government proves that a source received an assurance of confidentiality, Exemption 7(D) creates a 'per se limitation on disclosure.'" Finding that the same source identified in two separate documents had received an assurance of confidentiality, Pryor also observed that the agency had improperly withheld the name of a security guard "because his actions – including his speaking on the record to a journalist before he spoke to the Bureau – would not support an inference that he spoke to the Bureau under an implied assurance of confidentiality."

Turning to Exemption 7(E), Pryor pointed out that "the parties agree that the dispute turns on whether the redacted information, if released, would 'disclose techniques and procedures for law enforcement investigation or prosecutions.'" The FBI withheld several slides, including a grainy photograph. Finding the photograph was not protected by Exemption 7(E), Pryor noted that "although we agree that disclosing the location of a specific, hidden camera still in operation would disclose a 'technique or procedure of law enforcement,' the Bureau has not provided enough facts to determine that this photo is from a hidden camera as opposed to one that is visible or that the photo is clear enough to reveal the camera's location to any subject."

A final remaining dispute was over whether the district court had improperly declined to disclose the records the *Bulldog* requested in its still unresolved suit before another district court judge. Pryor noted that "the first-filed rule provides that when parties have instituted competing or parallel litigation in separate courts, the court initially seized of the controversy should hear the case.' He explained that "indeed, 'where two actions involving issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule.'" He observed that "Broward Bulldog was already engaged in ongoing litigation before another district judge, so the district court here did not err when it refused to entertain 'the exact same legal issues' raised by the 'exact same parties' about the 'exact same [documents].'"

Martin dissented on the issue of the majority's acceptance of the FBI's privacy claims. She indicated that "I believe it improper for the FBI to make a blanket challenge to all rulings on a given Exemption, without specifying which rulings it seeks to challenge." She also faulted the agency for its failure to define the categories of privacy interests. She observed that "I find it hard to understand why the privacy interests of an FBI agent and a person of interest to the investigation should be presumed to be so similar that we analyze them together. There may well be reasons to conduct the analysis in this way, but the FBI has not enlightened us as to what those reasons might be." Martin also put far more emphasis on the public interest in these records than did the FBI and the majority. She pointed out that the context of the Bulldog's request "involves

ACCESS REPORTS

a specific finding of fact by a Congressional Commission and has been publicly called into question by a former U.S. Senator who served on the 9/11 Commission. The FBI contributed to this public interest in the case when it publicly disputed the Bulldog's initial 2011 article on the [Saudi family in South Florida]. Therefore, even when evaluating the 'public interest. . . in light of all that is already known,' there remains sufficient public interest in the disclosures ordered by the District Court." (*Broward Bulldog, Inc. v. U.S. Department of Justice, Federal Bureau of Investigation*, No. 17-13787, U.S. Court of Appeals for the Eleventh Circuit, Sept. 23)

Views from the States…

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

Illinois

A court of appeals has ruled that the Juvenile Court Act, which prohibits disclosure of a minor's criminal record without authorization, does not apply to the investigation conducted by the Chicago Police Department as to whether or not the fatal shooting of W.R., a minor, was justified, is not covered by the provision and is subject to disclosure in response to a request from WMAQ-TV for all records pertaining to the shooting. CPD denied the request entirely, citing the confidentiality provision of the Juvenile Court Act. W.R., who had a loaded firearm, was shot and killed after a lengthy pursuit by Chicago police officers after he hid under a vehicle. WMAQ-TV filed suit. The trial court ruled that, while the Juvenile Court Act applied to W.R.'s criminal records, it did not transform records pertaining to the police shooting investigation into a request for the minor's exempt confidential records. The trial court further found that W.R.'s criminal records were not subject to disclosure and that the redactions made to the records pertaining to the investigation of the police shooting were proper, although the trial court ordered the CPD to disclose the minor's name and gang affiliation. The trial court stayed disclosure pending the CPD's appeal. The court of appeals upheld the trial court's ruling. Criticizing the CPD's overly broad interpretation of the Juvenile Court Act, the appeals court pointed out that under such a broad interpretation, "records involving instances of alleged police misconduct toward alleged or adjudicated juvenile offenders would be shielded from public view even though those confidentiality provisions are intended to serve the best interests of minors. Clearly, the confidentiality provisions of the Act are intended, not to shield possible police misconduct toward minors but rather, to protect the privacy of minors. . ." (*WMAQ-TV v. Chicago Police Department*, No. 1-18-1426, Illinois Appellate Court, First District, Fourth Division, Sept. 5)

A court of appeals has ruled that the trial court did not err in finding that the Algonquin Township Road District is a public agency for purposes of the Freedom of Information Act even though the trial court also found that the Road District was not required to hold a public meeting pertaining to its collective bargaining agreement with Local 150 of the International Union of Operating Engineers. James Sweeney, head of Local 150, filed suit alleging a number of claims against the Road District, including its failure to hold a meeting as required by the Open Meetings Act, and failing to respond to Sweeney's FOIA request. As to the access claims, the Road District argued that it did not qualify as a public agency subject to FOIA or OMA. The appeals court dismissed Sweeney's OMA claim, noting that "the Open Meetings Act specifically exempts collective negotiating matters between a public body and its employees or their representatives. Thus, the Road District did not have to hold an open meeting when negotiating the CBA, even if it had several officers negotiating." The Road District argued that since the trial court had found the OMA inapplicable then it was not subject to the FOIA either. Pointing out that the trial court's holding that the Road District was not

required to hold a public meeting was not based on its conclusion that the Road District was not a public body, the appeals court indicated that "under the Highway Code, each township is called and considered a road district for the purposes of construction, repair, maintenance, financing and supervision of township roads. Because the Road District is a municipal corporation under section 2(a) of FOIA, it is a public body." (*James M. Sweeney v. Algonquin Township Road District*, No. 2-19-0026, Illinois Appellate Court, Second District, Sept. 10)

North Carolina

A trial court has ruled that the Southern Environmental Law Center has provided sufficient evidence that the North Carolina Railroad Company is subject to the Public Records Act because the NCRR is a state-owned corporation, whose board members are appointed by the Governor or the General Assembly. SELC requested records concerning the development of a light rail project that would travel throughout downtown Durham. The NCRR argued that the state's shareholder stake in the company was not sufficient to show that it was a public body. However, the trial court observed that "in the absence of an express legislative enactment that the NCRR and its leadership are exempt from the Public Records Act, the Court must permit this action to proceed, subject to later motions practice or trial based on a more complete factual record." (*Southern Environmental Law Center v. Scott M. Saylor, et al.*, No. 19-500268, North Carolina Superior Court, Wake County, Sept 11)

Washington

The supreme court has reversed a ruling by the court of appeals finding that emails sent to or from University of Washington Professor Robert Wood, president of the UW chapter of the American Association of University Professors, pertaining to his union activities, were not subject to the Public Records Act because they were not within the scope of his employment under *Nissen v. Pierce County*, 357 P.3d 45 (2015), which dealt with the issue of whether or not records created on personal devices while conducting public business qualified as public records, after finding that *Nissen* did not apply to records created on agency-owned devices. The case involved a request from the Freedom Foundation, an anti-union advocacy organization, for communications that several named faculty members had with various unions. The university told Wood that it was planning to disclose 3,913 pages of emails unless he filed suit to block disclosure. Local 925 of the Service Employees International Union filed a complaint on Wood's behalf. The trial court granted a temporary restraining order allowing Wood to review the records. Wood identified 102 responsive records. However, the trial court, applying the *Nissen* scope of employment standard, found all the records were protected. The court of appeals upheld the trial court's ruling. The supreme court, however, reversed, noting that "the 'scope of employment' test does not determine whether a record that is concededly 'retained' by an agency, also satisfies the second prong of the public records definition." The Freedom Foundation argued that Wood's emails were public records because they were sent or received on a government email account. The supreme court rejected that argument, noting that to adopt such a position, "regardless, of its content, any message stored on an agency server would necessarily meet the statute's definition. We do not believe our legislature intended that result." However, the supreme court concluded that "for an email to 'contain information relating to the conduct of government or the performance of any governmental or proprietary function,' it need not have been sent or received within the 'scope of employment' as that phrase is defined in *Nissen*." Because the lower courts had ruled that the scope of employment standard from *Nissen* protected all the emails, the supreme court sent the case back to the trial court to consider the union's other exemption claims. (*Service Employees International Union Local 925 v. University of Washington*, No. 96262-6, Washington Supreme Court, Sept. 5)

# #

ACCESS REPORTS

The Federal Courts…

Judge Colleen Kollar-Kotelly has ruled that the Department of Justice has not shown that disclosure of emails from former acting Attorney General Sally Yates would cause **foreseeable harm** under **Exemption 5 (privileges)**. In response to a request for Yates' emails from Judicial Watch, DOJ disclosed the records in three stages, withholding some records under the deliberative process privilege or the attorney work product privilege. Judicial Watch argued that DOJ had not provided sufficient detail as to why disclosure would cause foreseeable harm. Noting the sparsity of case law interpreting the foreseeable harm standard, Kollar-Kotelly pointed to *Rosenberg v. Dept of Justice*, 342 F. Supp. 3d 62 (D.D.C. 2018) and *Judicial Watch v. Dept of Commerce*, 375 F. Supp. 3d 93 (D.D.C. 2019), two D.C. Circuit district court cases, as well as *Natural Resources Defense Council v. EPA*, (S.D.N.Y., Aug. 30, 2019) 2019 WL 4142725, a case from the Southern District of New York, as the most recent cases to address what was required under the foreseeable harm standard. She pointed out that in *Rosenberg*, Judge Amit Mehta found that "while the agency could 'take a categorical approach – that is, group together like records' – it still had to 'explain the foreseeable harm of disclosure for each category.' The court ultimately found that the agency's statement that disclosure of the information withheld would 'impede open discussion on these issues' was insufficient." She indicated that "the FOIA Improvement Act imposes a meaningful and independent burden on agencies to detail the specific reasonably foreseeable harm that would result from disclosure of certain documents or categories of documents. DOJ has not carried its burden here." She noted that "DOJ provides nearly identical boilerplate statements regarding the harms that will result throughout its first affidavit and *Vaughn* index." She then explained that "like the generic descriptions of harm provided in *Rosenberg* and *Judicial Watch v. Dept of Commerce*, these generic and nebulous articulations of harm are insufficient. The agency has failed to identity specific harms to the relevant protected interests that it can reasonably foresee would actually ensue from disclosure of the withheld materials. Furthermore, it has not connected the harms in any meaningful way to the information withheld, such as by providing context or insight into the specific decision-making processes or deliberations at issue, and how they in particular would be harmed by disclosure. At bottom, the agency has not explained in sufficient detail how '*particular* Exemption 5 withholding would harm the agency's deliberative process.'" Having found that DOJ had not articulated the foreseeable harm in disclosing the withheld emails, Kollar-Kotelly agreed with Judicial Watch that a 30-page chart entitled "Sensitive or High-Profile Matters within the Next Two Weeks" was not protected by either the deliberative process privilege or the attorney-work product privilege. Kollar-Kotelly observed that "it has not provided sufficient specific information about the individual entries, their origins, and their connections to ongoing or anticipated litigation for the Court to determine whether the withheld portions are protected by the attorney work product privilege." She found the same problem with the agency's deliberative process privilege claims. She pointed out that "like with its invocation of the attorney work product privilege, DOJ has treated the chart as a whole and failed to treat each entry (or even category of entries) separately. As a result, DOJ has provided too little information to carry its burden here." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 17-0832 (CKK), U.S. District court for the District of Columbia, Sept. 24)

Judge Emmet Sullivan has ruled that the FBI must process a request from Property of the People for records concerning the FBI's allegation that the Russians were attempting to recruit then Rep. Dana Rohrabacher (R-CA) as an agent of influence because Rohrabacher had publicly acknowledged the FBI's allegation. In May 2017, the *New York Times* published an article indicating that in 2012 the FBI told Rohrabacher that the Russians were trying to recruit him. The article also included an interview with Rohrabacher in which he confirmed the FBI meeting. As a result, Property of the People requested FBI records on Rohrabacher. The agency issued a *Glomar* response neither confirming nor denying the existence of records. Subsequently, the FBI modified its *Glomar* response by acknowledging that Rohrabacher had

waived his privacy interests by making a public statement about the 2012 meeting and conducted a search for those records. The FBI disclosed 260 records, redacting or withholding records under **Exemption 3 (other statues), Exemption 6 (invasion of privacy)**, and **Exemption 7 (law enforcement records)**. After litigation had begun, Property of the People found out that Rohrabacher had also attended a 2013 meeting about Ukraine held in the District of Columbia with lobbyist Paul Manafort. As a result of the Manafort connection, the FBI also contacted the Special Counsel's Office, which told the FBI it had no responsive records. The FBI agreed to search for records about that incident and finally completed its response to Property of the People's request by disclosing records associated with Rohrabacher's official duties as a U.S. congressman. Property of the People challenged the **adequacy of the agency's search**, including its decision to use a certain cut-off date, the continued use of a *Glomar* response to limit its search, the use of **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, including Property of the People's claim that the names of some individuals had been officially acknowledged. Sullivan found that Rohrabacher had more than a de minimis privacy interest in protecting the records. But Sullivan pointed out that "Plaintiffs seek the FBI's records concerning Congressman Rohrabacher to discover 'how the FBI handled the issue of threats posed by Russian intelligence in the U.S. political system.'" Sullivan indicated that "the Court cannot balance the competing interests at this level of generality." To shed further light on the balance, he ordered the FBI to provide a more detailed *Vaughn* index in order to ascertain more specifically what kinds of records the FBI had pertaining to Rohrabacher. Property of the People argued that the FBI had not adequately explained why it used a shorter cut-off date for its searches. Sullivan agreed, noting that "the FBI failed to notify Plaintiffs of the July 15, 2017 cutoff date until it filed its memorandum in opposition to Plaintiffs' cross-motion for summary judgment." He added that "the Court expresses no view on the propriety of the FBI's practice of employing cutoff dates, but the FBI's failure to give Plaintiffs advance notice of the cutoff date was inconsistent with D.C. Circuit precedent." Property of the People also challenged DOJ's failure to search the Office of General Counsel as well as the Office of Congressional Affairs. DOJ argued there was no evidence that OGC would have responsive records. Sullivan sided with Property of the People, noting that 'Plaintiffs correctly point out – and DOJ does not contest – that the older version of the FBI's policy clearly states that the Office of General Counsel responded to Congressional requests for FBI documents. Because Congressman Rohrabacher began his service in the House in 1989, it is reasonable to expect that the Office of General Counsel would have responded to requests from Congressman Rohrabacher under the older version of the FBI's policy. DOJ argues – and the FBI's declarations do not aver – that the Office of General Counsel would have no responsive records." Resolving the remaining issues, Sullivan agreed that the FBI had not provided enough detail to show that some aspects of its searches were adequate. He also rejected Property of the People's argument that the agency had not shown that its affiants had sufficient personal knowledge of the searches under Rule 56(c)(4). (*Property of the People, et al. v. Department of Justice*, Civil Action No. 17-1728 (EGS), U.S. District Court for the District of Columbia, Sept. 24)

Judge Tanya Chutkan has ruled that Judicial Watch may not use a subsequent request concerning records on former Secretary of State Hillary Clinton's use of a personal email account to force the agency to process its request more quickly because it failed to respond within the statutory 20-day time limits. In 2016, Judicial Watch filed suit against the Department of Justice over its failure to disclose records concerning the FBI's investigation of Clinton's email server, as well as the June 2016 meeting between Bill Clinton and then Attorney General Loretta Lynch. During a status hearing in January 2017, Judicial Watch and DOJ attorneys discussed how requests for records related to the Clinton email investigation were being processed. The DOJ attorney indicated that the FBI was processing the entire investigative file, containing approximately 10,000 pages, at a rate of 500 pages a month, which were then placed on the agency's website. Judicial Watch filed a second suit in December 2016 for records discovered on Clinton's email server. At a status conference in January 2017, Judicial Watch was once again told that the records were being processed at a rate of 500 pages

ACCESS REPORTS

a month and that it would take between 20 and 24 months for all materials to be produced. Judicial Watch asked Judge Randolph Moss to require the agency to extract records responsive to its narrower request and review and process them first. Moss found Judicial Watch's resource swap was not feasible and allowed the FBI to continue to process the entire file. In July 2018, Judicial Watch submitted a third FOIA request for records concerning Clinton's use of a personal email account. DOJ acknowledged the third request, told Judicial Watch that already processed records were available on its website and that new postings would constitute interim releases. Judicial Watch filed suit, arguing that DOJ had failed to provide a **determination letter** concerning how it planned to proceed. The parties agreed that *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), in which the D.C. Circuit found that a determination letter required an agency to gather and review documents, determine and communicate the scope of the documents it intended to produce, including any reasons for withholding records, and tell the requester of their right to appeal, applied here. Chutkan explained that "Plaintiff had far more information when it filed this lawsuit than did the plaintiff in *CREW*." She pointed out that "the FBI provided information beyond mere notice of its receipt of Plaintiff's request, and the information provided constituted an adequate response. , .[T]he letter reiterated what Plaintiff knew since at least 2017: records responsive to its FOIA request were being processed and publicly posted on the FBI's online FOIA library on the first Friday of every month. . .[T]he letter informed Plaintiff that the available records constituted an interim release of information, and that the FOIA request would remain open while additional records were being produced." Chutkan concluded that "the letter, coupled with prior representations in virtually identical litigation with the same counsel, constituted a determination to comply with Plaintiff's FOIA request. The DOJ deserves an opportunity to apply its expertise, correct mistakes, and develop a factual record that could prevent the need for unnecessary judicial review." (*Judicial Watch, Inc. v. U.S. Department of Justice*, Civil Action No. 18-1979 (TSC), U.S. District Court for the District of Columbia, Sept. 19)

A federal court in Virginia has ruled OMB has not yet shown that it **conducted an adequate search** for records concerning agency reorganizational plans nor has it sufficiently justified its claims under **Exemption 5 (privileges)**. As a result, the court granted the Southern Environmental Law Center limited **discovery** to take depositions of OMB staff involved in the agency's searches. SELC submitted a FOIA request to OMB for records pertaining to any agency responsible for managing federal public lands. While OMB told SELC that it had found responsive records during its search, the agency's final response referenced only two records. By the time the court ruled, five documents remained in dispute, all of which were withheld under the deliberative process privilege. Finding the agency had not provided sufficient justification for its searches, the court observed that the agency's affidavit "fails to explain why the defendant's initial search for documents responsive to the plaintiff's FOIA request did not include potential custodians who were involved at other stages of the government-wide reorganization efforts. Nor does it address why the search for responsive documents was not immediately broadened after the [Office of Performance and Personnel Management] custodian only identified two documents. Such information is particularly relevant, given that OMB's own evidence indicates that *each* of the agencies at issue was required to produce *at least two* documents relevant to the plaintiff's FOIA request." The court pointed out that "although portions of the requested documents may ultimately be held to fall within the privilege, OMB has failed to meet its burden of demonstrating that the documents are exempt from disclosure in their entirety." The court noted that "although [the agency's affidavit] includes several paragraphs that purport to establish the legal basis for invoking the deliberative process privilege, it also leaves unanswered questions which may be critically relevant to the propriety of withholding all of the identified documents in full." Sending the case back to give the agency a chance to supplement its original explanations, the court observed that "if OMB wishes to maintain its exemption claims, 'it must supplement its *Vaughn* index and declarations, adequately describing the records withheld and specifically detailing how the claimed exemptions apply to the withheld information.' Alternatively, OMB must produce the documents for *in camera* review." (*Southern*

Environmental Law Center v. Mick Mulvaney, Civil Action No. 18-00037, U.S. District Court for the Western District of Virginia, Sept. 25)

Judge Emmet Sullivan has ruled that the Army Corps of Engineers and U.S. Customs and Border Protection **conducted adequate searches** in response to requests from the Center for Biological Diversity for records mentioning the building of physical barriers on the U.S. border that were provided to the Presidential Transition Team. The agencies withheld records under a variety of exemptions, but CBD only challenged the agencies' **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods or techniques)**, as well as CBP's **Exemption 6 (invasion of privacy)** claims for non-law enforcement and agency employees. Noting that CBD had not challenged the adequacy of the agencies' searches, Sullivan indicated that he had an independent obligation to determine whether the agencies had met their FOIA obligations. After reviewing the agencies' affidavits, he concluded that both agencies had conducted adequate searches. Turning to Exemption 5, Sullivan observed that both agencies had shown that documents withheld under the deliberative process privilege were predecisional and deliberative. He pointed out that "defendants have identified the deliberative process at issue in this case: Army Corps has identified its process of determining the appropriate 'infrastructure along our nations' borders,' and CBP has identified its process for 'potential plans for construction of new tactical border infrastructure as directed by President Trump.'" Although CBD had not challenged CBP's attorney-client privilege claim, Sullivan reviewed them as well and found them appropriate. Assessing the CBP's Exemption 6 claims, Sullivan agreed that the agency had shown more than a de minimis privacy interest in names of employees. But Sullivan also found that CBD had articulated a public interest in disclosure of the names. He pointed out that "the level of expertise of the individuals providing information to the government related to environmental effects of the construction of the wall clearly falls under the ambit of information that 'lets citizens know what their government is up to.'" But he noted that "in light of the fact that the Center has the names of higher-ranking officials who provided information to the Transition team, the Center's claimed public interest in disclosure of the names of lower-level employees is diminished. The Court finds that, on balance, the lower-level employees' interest in avoiding harassment outweighs the interest of public disclosure which is moderated by the release of the names of higher-ranking agency personnel." CBD claimed that the Army Corps of Engineers had not shown that it had a law enforcement function that would allow it to invoke Exemption 7. Sullivan disagreed, noting that "the task for this Court is to determine whether the records were compiled for law enforcement purposes not simply to determine the nature of the agency which compiled the records." Finding that the records withheld by the Army Corps fell within Exemption 7(E), he pointed out that "the information relating to infrastructure and used to prevent or detect illegal entry of people and items is clearly information compiled for law enforcement purposes such that Exemption 7((E) applies." (*Center for Biological Diversity v. U.S. Army Corps of Engineers, and U.S. Customs and Border Protection*, Civil Action No. 17-1037 (EGS), U.S. District Court for the District of Columbia, Sept. 27)

Judge Amy Berman Jackson has ruled that the Criminal Division of the Department of Justice properly withheld records from prisoner Dominque Jackson concerning authorization to wiretap three specific phone numbers Jackson believed were involved in his prosecution and conviction under **Exemption 3 (other statutes)** and **Exemption 5 (privileges)**. Jackson provided excerpts of transcripts containing phone conversations used during his trial. He argued that since the information had been publicly disclosed, the agency had waived any exemption claim. Berman Jackson, however, pointed out that "while plaintiff has submitted exhibits showing that portions of certain intercepted communications were played for the jury at his trial, those communications are not the same information that is being withheld: the records of the requests apply to Title III warrants and the agency's internal memoranda concerning the approval of those requests.

# #

ACCESS REPORTS

Accordingly, the records he requests from the Criminal Division are not in the public domain and are protected from disclosure. . .” She agreed with the agency that the memoranda were protected by the attorney work product privilege. She noted that “each of these documents was prepared by attorneys working for the government, or someone working at the direction of such an attorney, for the purpose of obtaining a wiretap in anticipation of litigation – namely, the criminal prosecution of the plaintiff in this case. Accordingly, they are covered by the work product privilege and fall under Exemption 5.” (*Dominique L. Jackson v. United States Department of Justice, et al.*, Civil Action No. 14-0192 (ABJ), U.S. District Court for the District of Columbia, Sept. 27)

A federal magistrate judge in Idaho has ruled that although the Bureau of Land Management has now responded to the first of two requests submitted by the Western Watersheds Project and is processing the second request, the agency has so far failed to show that its delay in responding was appropriate under the unusual circumstances exception in FOIA. The magistrate judge observed that “but the fact that *some* delay was warranted due to the overwhelming nature of the coalescing factors within the [first request] does not *ipso facto* legitimize the BLM’s actual delay concerning its handling (to include the BLM’s delay in relaying back to WWP the required determination in the first instance).” The magistrate judge explained that “there is no getting around the fact that over one-and-a-half years has transpired since WWP first submitted [its first request] to the BLM and that it took the BLM over a year to start producing records to WWP that were responsive to that request – and *only after* WWP initiated this action and moved for summary judgment. These realities trouble the Court immensely when considering FOIA’s purpose and they cannot be excused by the BLM simply pointing to a need for more time. Had the BLM timely notified WWP of its need for more time and indicated upfront a date-certain for its anticipated determination and/or production; the BLM’s position would be more well-taken and, likewise, WWP could have chosen to proceed differently with its FOIA request(s). But BLM didn’t, and instead either went silent in the time between May 2018 and October 2018, or arguably moved the goalposts in providing WWP with a determination and/or production.” As a result, the magistrate judge asked the parties to provide a joint status report discussing ways to move forward. (*Western Watersheds Project v. Bureau of Land Management*, Civil Action No. 18-00505-REB, U.S. District Court for the District of Idaho, Sept. 27)

Judge Dabney Friedrich has ruled that the Department of Homeland Security has now shown that it **conducted an adequate search** for records concerning Wynship Hillier, who had requested from the CIA and the Department of State, as well as DHS, records related to involuntary outpatient treatment that seemed to have Federal cooperation. Friedrich previously granted summary judgment to the other agencies but found that DHS had not shown that the search of its system of records containing suspicious activity reporting was adequate. After DHS supplemented its affidavits concerning the search, Friedrich found the agency had now shown that the search was sufficient. She pointed out that “the search was reasonable because the [two agency affidavits] clarify that the Office of Intelligence and Analysis’s search of [the database] covered the suspicious activity reports of that office and all other DHS components.” Hillier argued that the search was inadequate “because the Office of Intelligence and Analysis could *query* but not *release* other components’ suspicious activity reports found under the Shared Spaces program.” Rejecting that argument as mere conjecture, Friedrich noted that “there is no evidence that the Office of Intelligence and Analysis found but was unable to release documents responsive to Hillier’s request. Indeed, the declarations state that the Office of Intelligence and Analysis found no responsive records.” (*Wynship W. Hillier v. Department of Homeland Security*, Civil Action No. 16-1836 (DLF), U.S. District Court for the District of Columbia, Sept 27)

Judge Timothy Kelly has ruled that Public Citizen Health Research Group's challenge to the 2018 decision of the Occupational Health and Safety Administration to forego collecting three data elements pertaining to workplace injuries as required in the 2016 Electronic Reporting Rule is **moot** because the 2018 decision has since been superseded by the agency's 2019 rule rescinding the data collection requirement for the three elements. Public Citizen Health Research Group, the American Public Health Association, and the Council of State and Territorial Epidemiologists filed suit against the Department of Labor after the 2018 announcement that the agency would delay implementation of the data collection requirement for the three data elements, arguing that they had suffered an informational injury because of the agency's failure to fully collect the required data. In his prior opinion, Kelly agreed with the plaintiffs that they had standing to challenge the suspension of the Electronic Collection Rule. While the litigation was pending, however, the Labor Department published a new regulation rescinding the collection requirement for the three data elements. The agency argued that action made the prior suit moot. Kelly agreed, noting that "if the 2019 Rule superseded the alleged suspension effected by the May 2018 announcement, the Court would be unable to grant Plaintiffs any effective relief in this lawsuit. In those circumstances, if the Court were to declare the May 2018 announcement an unlawful suspension of the Electronic Reporting Rule's July 2018 deadline for forms covering calendar year 2017, that pronouncement would do Plaintiffs no good. The 2019 Rule, including its permanent rescission of the electronic reporting requirements for the [three forms], would remain in effect. And Plaintiffs would be no closer to accessing the data they seek." Kelly added that "if the 2019 Rule did indeed entirely supersede the May 2018 announcement, to be entitled to the specific relief they seek, Plaintiffs must challenge that new rulemaking." Dismissing the action, Kelly observed that "to be sure, Plaintiffs still insist that they are being deprived of access to data that OSHA is required by law to collect, but it is not because of the May 2018 announcement. That action is a dead letter. Rather, it is due to the 2019 Rule, which Plaintiffs has already challenged in a separate lawsuit. This case, on the other hand, is moot." (*Public Citizen Health Research Group, et al. v. Patrick Pizzella, et al.*, Civil Action No. 18-1729 (TJK), U.S. District Court for the District of Columbia, Sept. 26)