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Washington Focus: The Office of Information Policy has issued a short three-question guide for agencies to use in determining whether information is confidential under the Supreme Court's recent decision in Food Marketing Institute v. Argus Leader Media, rejecting the substantial harm test for purposes of Exemption 4. OIP explained that an agency should first determine if the submitter customarily kept the information confidential. If no, the information is not confidential. If yes, the second question deals with whether the government provided an express or implied assurance of confidentiality when the information was shared with the government. If yes, then the information is confidential. If no, the third question deals with whether there were express or implied indications at the time the information was submitted that the government would publicly disclose the information. If no, and the government has effectively been silent, the information is confidential. If yes, and no other countervailing factors exist, the submitter could not reasonably expect confidentiality and the information is not protected under Exemption 4.

Court Addresses Agency Records Issue On DOD Confirmation of Conference Calls

Attempting to resolve an agency records issue stemming from a FOIA request submitted by Cause of Action Institute concerning Defense Department emails pertaining to its scheduling of audio and video teleconferences for the Executive Office of the President, Judge Randolph Moss has found that the D.C. Circuit's ruling in *Judicial Watch v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), concluding that, even though the Secret Service compiled and used the records to keep track of visitors to the White House or the Vice President's residence, the fact that the information on visitors came from staff at the White House or Vice President' s residence meant they were presidential records subject to the Presidential Records Act and not agency records subject to FOIA, may be dispositive in resolving the access issue in COA Institute's case. But because the U.S. Army has not yet provided enough evidence to convince Moss of the status of the records, he sent the case to the parties to further develop the argument.

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Cause of Action Institute submitted a FOIA request to the White House Military Office, which is part of the Department of Defense and operated by the Army, for records of communications with the Executive Office of the President concerning telephone and/or video conferences hosted and/or arranged by the military. The Army first responded by telling COA Institute that it had no responsive records. In its administrative appeal, COA Institute attached an email from the address system.manager@conus.army.mil, arguing that the email account should have been searched. The Army ultimately disclosed 250 pages with redactions under Exemption 6 (invasion of privacy) for personnel at or below the rank of Colonel, as well as civilian employees at or below GS-15. The agency also concluded that although the CONUS emails were generated by software housed on an Army server, they were only created in response to requests from EOP employees and not responsive to the request because the calls were not hosted or arranged by the military. After COA Institute filed suit, the Army claimed for the first time that since the records could well reveal EOP initiatives and policies they were not agency records.

Moss first found that the Army's interpretation of COA Institute's FOIA request was too narrow. He noted that "if the request merely asked for records of communications concerning conferences that the military arranged, the Army's reading of the request might make sense. The very next sentence of the request, however, explains that Plaintiff was seeking 'any email requesting that a conference line be open, as well as *any subsequent confirmation email* or related correspondence.' That clarification is best understood to bring the emails at issue within the scope of the FOIA request. The CONUS emails were communications with EOP employees that confirmed telephone and/or video conferences." Moss added that "any doubt about what records Plaintiff sought, moreover, was resolved by its administrative appeal, which attached a sample email. The Army, accordingly, had a sample of exactly what Plaintiff sought *before* the Army conducted *any* search for responsive records."

Having found that COA Institute's request included the CONUS emails, Moss next addressed whether or not those emails were agency records. Moss pointed out that the Army had so far failed to justify its contention that the emails dealt solely with EOP. He noted that "the issues presented here are similar to those addressed in *Judicial Watch v. U.S. Secret Service* and, thus, the Court must follow the trail blazed in that case. That trail, however, is fact-intensive and the Court concludes that it cannot definitively resolve the question whether the CONUS emails are Army, EOP, or both Army and EOP records on the current record." The Army argued that it did not keep a copy of the confirmation emails. Moss indicated that "of course, if the Army never possessed the records that Plaintiff sought, that may well resolve matters; the Army could not release records that it did not have." Further, he observed, "if the Army could establish that the CONUS email account automatically generated responses to meeting requests, without maintaining a copy of the incoming or outgoing email for even a brief time – on a backup system or otherwise – that fact would weigh substantially in the Army's favor. But once again, the present record does not provide sufficient detail for the Court to resolve that important question."

COA Institute challenged the agency's redactions under Exemption 6, arguing that the agency was required to assess the foreseeable harm in disclosure. Moss explained that "but both parties assume those amendments apply to Plaintiff's FOIA request, even though the FOIA Improvement Act of 2016 was signed into law over a year after Plaintiff submitted its FOIA request to the Army, and it explicitly applies only to 'requests for records. . .made after the date of enactment.' The Court, as a result, has no occasion to address the effect of those amendments on the standards for withholding under FOIA." Instead, Moss balanced the privacy interest in non-disclosure against the public interest in disclosure, concluding that the privacy interests outweighed any public interest. (*Cause of Action Institute v. U.S. Department of the Army*, Civil Action No. 16-1020 (RDM), U.S. District Court for the District of Columbia, Sept. 29)

Views from the States…

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

Florida

A court of appeals has ruled that the South Florida Water Management District properly closed a meeting to discuss litigation brought against it by a contractor pertaining to an environmental project. During litigation over the contract dispute, the trial court ordered the parties to attend mediation. The District went into closed session to discuss a potential settlement with its attorneys. After the closed session concluded, the District reconvened in public session and approved the settlement. The public version of the closed meeting's minutes redacted any references to mediation communications. The Everglades Law Center filed suit, arguing that there was no exemption under the Sunshine Law for closing the meeting. The District argued that the statute authorizing mediation in contract disputes provided for confidentiality of such discussions. The trial court held that the statute providing for confidentiality of mediation communications superseded the open meetings mandate in the Sunshine Law and that the District had appropriately redacted mediation communications from the public minutes. The appeals court agreed with most aspects of the trial court's ruling, noting that "the principle that constitutional and statutory provisions must be read in pari materia in a way to harmonize the provisions of each" applied here. The Everglades Law Center argued that an Attorney General's opinion dealing with privacy on an individual's medical record implied that the mediation communications should be disclosed as well. The appeals court rejected the argument, noting that the AG's opinion "addressed the protection of confidentiality and privacy of an *individual's* medical record in the context of a workman's compensation claim. It does not address the confidentiality regarding *multiple* persons." The court of appeals found that the trial court had erred by not reviewing the disputed records *in camera*. The appeals court pointed out that "given the importance of protecting the Sunshine Law, the Public Records Act, and mediation confidentiality, we hold that it is fundamental error for a trial court to rule on an exemption to public access to the full meeting transcript by redacting mediation communications without conducting an in camera review of the transcript to determine if the claimed exemption applies." (*Everglades Law Center, Inc. v. South Florida Water Management District, et al.*, No. 4D18-1220, No. 4D18-1519, and No. 4D18-2124, Florida District Court of Appeal, Fourth District, Sept. 18)

Maryland

After finding that Prince George's County improperly withheld the entire lease with Calvert Tract to develop a shopping center that would include Whole Foods because it contained confidential business information, the Court of Special Appeals has approved the County's subsequent disclosure of a heavily redacted version of the contract to Jayson Amster, an attorney and county resident who opposed the proposed project. After the Court of Special Appeals sent the case back to have the county process Amster's request, the trial court upheld the county's redactions and rejected Amster's claims that the trial court erred when it rejected his request for discovery, as well as sanctions and costs. The court of appeals rejected Amster's request for sanctions, noting that the trial court found that "Appellees did not purse this matter in bad faith. . . [The trial court] cited the novelty of the issue presented as a reason for finding that the case was not maintained in bad faith." On the issue of costs, the appeals court pointed out that since the Maryland Public Information Act only applied to state and local bodies, Calvert Tract could not be held liable for costs. Turning to the county's liability, the appeals court also cited the novelty of the issue, noting that "no prior Maryland case interpreted the confidential commercial information exemption in the context of private records voluntarily provided to the government. Accordingly, we conclude that, although Appellees did not succeed

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in withholding the Lease, their initial reluctance to release it was not unreasonable." (*Jayson Amster v. Prince George's County*, No. 1073, September Term, 2018, Maryland Court of Special Appeals, Sept. 13)

New Mexico

A court of appeals has ruled that the trial court did not err in finding that records concerning settlement agreements related to prisoner suits against Corizon Health, which provided medical services to prisoners under a contract with the state of New Mexico, are public records that should have been disclosed to the New Mexico Foundation for Open Government and the *Albuquerque Journal* and that the trial court acted appropriately in awarding attorney's fees to the plaintiffs. Corizon Health appealed the trial court's ruling, arguing that the records were not subject to the Inspection of Public Records Act. The appeals court found that Corizon "was acting on behalf of the New Mexico Corrections Department by providing medical services to inmates at New Mexico detention facilities. The settlement agreements were created as a result of [Corizon's] public function acting on behalf of NMCD as they involve alleged mistreatment of inmates while in custody of the State of New Mexico." The appeals court added that "allowing private entities who contract with a public entity 'to circumvent a citizen's right of access to records by contracting' with a public entity to provide a public function 'would thwart the very purpose of IPRA and mark a significant departure from New Mexico's presumption of openness at the heart of our access law.'" The court of appeals explained that "information about the mistreatment and abuse of New Mexico inmates as raised in the civil claims is exactly the type of public information that the IPRA contemplates must be disclosed to the public in order to hold its government accountable. Regardless of whether [Corizon] was a third-party private entity, the settlement agreements at issue arose from allegations resulting from [Corizon's] performance of a public function. . ." The appeals court also agreed that the trial court acted appropriately in awarding the plaintiffs' attorney at an hourly rate of $400. (*New Mexico Foundation for Open Government, et al. v. Corizon Health*, No. A-1-CA-35951, New Mexico Court of Appeals, Sept. 13)

Vermont

The supreme court has ruled that agencies may not charge fees to prepare records for inspection. Reed Doyle requested records from the Burlington Police Department including body cam video, of an incident he had witnessed in a public park. The police told him that they could only provide a heavily redacted version of the video and that preparing the redactions would cost several hundred dollars. The trial court ruled in favor of the police and Doyle appealed. The supreme court reversed, noting that "the statute's plain language indicates that the Legislature did not intend to authorize charges associated with staff time in complying with a request to inspect." The supreme court concluded that "state agencies may not charge for staff time spent responding to requests to inspect public records pursuant to the Public Records Act." One justice dissented, observing that "when a person seeks access to a record that contains confidential information unavailable to the public, the custodian is compelled to create a new record – a redacted copy of the requested record – for public access. The cost of staff time to create a new record is explicitly permitted [under the fee provisions] To the extent the redacted copy cannot be considered a new record because it does not contain any additional information beyond that contained in the original record, it then must be considered a copy – a redacted copy – of the original record, for which the cost of staff time beyond thirty minutes in collectible [under the fee provisions]." (*Reed Doyle v. City of Burlington Police Department*, No. 2018-342, Vermont Supreme Court, Sept. 13)

The Federal Courts…

Judge Tanya Chutkan has ruled that two tweets from President Donald Trump pertaining to communications between then National Security Advisor Michael Flynn and Russian Ambassador to the United States Sergey Kislyak do not confirm the existence of records requested by Judicial Watch from the CIA, the Department of Justice, and the Department of Treasury. In May 2017 testimony before the Senate Judiciary Committee, then FBI Director James Comey also alluded to an investigation of Flynn. In response to Judicial Watch's requests, both the CIA and Treasury invoked a *Glomar* response neither confirming nor denying the existence of records, while the FBI told Judicial Watch it was withholding records under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. After Flynn pled guilty, the FBI reassessed its 7(A) claims, concluding they were still valid. After Judge Emmet Sullivan ordered the FBI's FD-302 on Flynn's interview disclosed in redacted form, the FBI withdrew its categorical 7(A) claim but continued to withhold a number of records under 7(A). The FBI released two documents, claiming that as well as 7(A), the other records were protected by **Exemption 3 (other statutes), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods or techniques)**. Judicial Watch argued that the FBI was required to justify its 7(A) claims based on a document-by-document assessment rather than the agency's category-by-category justification, which grouped the records into investigative information, evidentiary records, and administrative records. Chutkan approved those three categories, noting that "equipped with information regarding the targets, scope, focus, and investigative techniques, certain individuals would be able to readily interfere with the FBI's investigation and prosecution." She rejected Judicial Watch's argument that because so much was publicly known about the Flynn investigation there must be records that could be disclosed. Chutkan pointed out that "plaintiff has failed to identify the 'extensive information' that has been released in the public domain and which undermines the FBI's invocation of exemption 7(A)." Although there was no apparent confirmation that either the CIA or Treasury were investigating Flynn. Judicial Watch argued that it was certainly likely that both agencies had an interest in the investigation. Finding that neither of Trump's tweets nor a subsequent White House statement confirmed any investigation by the two agencies, Chutkan indicated that "in this case, there is doubt as to whether the CIA or Treasury have an intelligence interest in Flynn. Plaintiff provides no information suggesting that CIA or Treasury are conducting an investigation; rather it simply asserts that because the FBI is investigating Flynn, 'it would simply be malfeasance if either agency did not have such files.' This assertion does not overcome the fact that no official acknowledgement matches the records Plaintiff seeks, and there is no evidence that the information is in the public domain." (*Judicial Watch, Inc. v. CIA, et al.*, Civil Action No. 17-397 (TSC), U.S. District Court for the District of Columbia, Sept. 29)

Judge Randolph Moss has ruled that the Bureau of Alcohol, Tobacco and Firearms has not yet shown that it properly responded to two requests from the Brady Center to Prevent Gun Violence. The Brady Center's first FOIA request asked for records pertaining to a 2017 White Paper titled "Federal Firearm Regulations – Options to Reduce or Modify Firearms Regulations." The Brady Center's second FOIA request asked for records pertaining warning letters or notices of revocation of license issued to federal firearm licensees from July 2015 to July 2017. After the agency failed to respond, the Brady Center filed suit. The agency released 1,134 pages responsive to the White Paper request and told the Brady Center that many of the records responsive to the warning letters request would be withheld or redacted under **Exemption 3 (other statutes)** citing the Tiahrt Rider, which precludes BATF from expending any funds on responding to FOIA requests for records on gun sales or gun traces. The Brady Center focused its challenges on the **adequacy of the agency's search**, particularly the agency's determination that attachments to responsive email did not fall

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within the scope of the request, that records related to the White Paper were protected by **Exemption 5 (deliberative process privilege)**, and the applicability of the Tiahrt Rider to the redacted or withheld records pertaining to the Brady Center's warning letters request. The Brady Center argued that the agency's email search using only the term "White Paper" was inadequate. Moss agreed, noting that "it is not difficult to formulate a variety of possible search terms, and to define a relevant timeframe for the search. It is not the Court's role, however, to dictate precisely how the agency should conduct the search. Accordingly, for present purposes, the Court merely holds that the ATF's exclusive use of the search term 'White Paper' was not reasonably calculated to locate all records 'related to' the white paper." He added that "the Court will leave it to the ATF, in the first (or now, second) instance to craft a search protocol that 'can be reasonably expected to produce the information requested.'" Since Judge Emmet Sullivan had held in *Coffey v. Bureau of Land Management*, 277 F. Supp. 3d 1 (D.D.C. 2017), that attachments to emails were presumed to be responsive unless the agency provided evidence showing otherwise, the Brady Center argued that the agency had not carried its burden of showing the attachments were not responsive. Under these circumstances, however, Moss found the agency had sufficiently justified its claim that the attachments were not responsive. He observed that "the ATF has reviewed each of the attachments and has certified 'that none of the separate documents which were considered out of scope, including certain attachments to emails, contain *any information even slightly related* to the White Paper and, instead, are wholly on independent subjects outside the purview of the underlying request.' Moreover, treating such wholly unrelated attachments as part of the main document would cause increased delay in the agency's responses to FOIA requests, would increase costs to the agency and requesters, and would do little, if anything, to further FOIA's goal of enhancing transparency and confidence in the workings of government." Moss found the agency's current *Vaughn* index did not provide a sufficient explanation for many of the agency's redactions pertaining to the Brady Center's written notice request. He pointed out that "when combined with the declarations the ATF has filed in support of its motion, the Court can reasonably discern the nature of some – but not all –of the redactions." The Brady Center argued that the agency's redactions under the Tiahrt Rider were frequently inconsistent and thus arbitrary for purposes of the Administrative Procedure Act. However, Moss pointed out that "the problem is that the Brady Center has brought a FOIA case, not an APA case, and the Brady Center does not cite a single case applying the APA's arbitrary and capricious standard to FOIA. . .[N]othing *in the FOIA* precludes agencies from releasing exempt records, and nothing *in the FOIA* requires agencies to adopt a consistent policy." Ultimately, Moss remanded the written notice request back to the agency to further develop its claims and to allow the Brady Center to respond to them. He observed that "the existing record, accordingly, leaves the Court with an information deficit on two different fronts. First, the Court has little guidance from either party about how broadly it should understand the Rider's prohibition on 'disclosure' to sweep – or even how it should answer that question. Second, without a *Vaughn* index or a detailed declaration, the Court cannot determine how much of an inferential or investigative step would be needed to take a particular piece of redacted information and trace it back to particular 'information required to be kept by licensees. . .' or to information gleaned from the eTrace database." (*Brady Center to Prevent Gun Violence v. U.S. Department of Justice, et al.*, Civil Action No. 17-2130 (RDM), U.S. District Court for the District Court of Columbia, Sept. 28)

A federal magistrate judge in New York has ruled that Osen, LLC, which represents service members who were victims of terrorism in Iraq and their families in their suit against Iran, is **collaterally estopped** from relitigating a previous ruling by District Court Judge Katherine Failla, finding that the Defense Department properly withheld records that could identify Iranian-backed terrorists who had been accused of terrorist attacks in Iraq under **Exemption 6 (invasion of privacy)** because the current litigation involves the same parties and the same issue. Only 28 documents remained in dispute in Osen's suit against CENTCOM, involving claims under **Exemption 1 (national security)** and Exemption 6. Osen only challenged the Exemption 6 claims protecting identifying information about terrorists, arguing that Failla's earlier ruling was

not binding, or, alternatively was wrongly decided. Noting that the doctrine of collateral estoppel applied to FOIA litigation, Magistrate Judge Barbara Moses pointed out that "to be sure, the specific reports requested by Osen in this case are not identical to those in *Osen I*. However, the underlying legal issues – whether the Redacted Individuals have a privacy interest, whether disclosure of their names would further the 'core purposes of the FOIA,' and whether, on balance , CENTCOM was entitled to apply Exemption 6 as it did – are the same." Moses indicated that, even assuming collateral estoppel did not apply under the circumstances, she would still reach the same conclusion. She noted that Osen had relied heavily on *Broward Bulldog v. Dept of Justice*, 2017 WL 2119675 (S.D. Fla, May 16, 2017), which had rejected some government Exemption 6 claims after finding that the public interest in knowing more about the 9/11 terrorist attacks outweighed the privacy interests of individuals identified in the 9/11 report. However, Moses pointed out that the Eleventh Circuit had just reversed the district court's decision on the privacy balance in *Broward Bulldog v. Dept of Justice*, 2019 WL 4593316 (11th Cir., Sept. 23, 2019). She observed that "the Eleventh Circuit acknowledged that the public might have 'some' interest in disclosure of the identifying information at issue – which could 'reveal how the government took action with respect to certain leads,' or permit media outlets 'to contact individuals involved in the investigation' – but held that those were not 'significant public interests that can outweigh the strong privacy interests in the clearly identifying information at issue.'" Osen also argued that CENTCOM had previously disclosed names or photographs of some of the terrorist suspects. Under those circumstances, Moses explained that "that contention, if true, could bar CENTCOM from invoking Exemption 6 here." However, Moses observed that Osen had not provided evidence that CENTCOM had previously disclosed identifying information but indicated that if Osen wanted to provide such evidence she would consider it. (*Osen, LLC v. United States Central Command*, Civil Action No. 18-06069-BCM, U.S. District Court for the Southern District of New York, Sept. 30)

Judge Amy Berman Jackson has ruled that the Department of Veterans Affairs and the Department of Justice failed to **conduct adequate searches** in response to FOIA requests submitted by Watkins Law & Advocacy for records concerning inter-agency agreements related to f*inancially* incompetent veterans that would disqualify them for gun ownership, but that the FBI's searches were sufficient. The VA searched three offices and disclosed records, withholding some under **Exemption 5 (privileges)**. The agency also argued that after reviewing the request more closely it had decided that records created before 2013 were not responsive to the request. Watkins Law & Advocacy challenged that decision and Jackson agreed with the law firm. She noted that "the plain language of the request does not purport to limit the dates of the documents; it limits the procedures to which the documents pertain. To the extent that records that pre-date 2013 'set out or reflect' procedures that were in effect in 2013, they fall within the request." Although she rejected the agency's attempt to narrow the scope of the request, Jackson agreed with the agency that its claims under the attorney-client privilege and the deliberative process privilege were appropriate. The FBI's original search yielded a total of 12 responsive pages. Watkins Law & Advocacy faulted the agency's search, arguing that it had not included many of the search terms identified in the request. The agency conducted a second search incorporating almost all the requested search terms. The agency disclosed 37 pages in full, 22 pages in part, and withheld 40 pages in full. Jackson upheld the adequacy of the agency's searches based on the results of the second search. She noted that "while there have been some unexplained anomalies in the process, such as the lack of any documents from the past decade and the failure to unearth the two file numbers where many records were found, 'the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.'" But she rejected a search by the Office of Information Policy because of the limited number of search terms. She observed that "here, the agency's four search terms are deficient because they exclude obvious topics such as mental health, which goes to the very heart of plaintiff's FOIA request, and commonly used abbreviations." Jackson found that the other agency involved – the Bureau of Alcohol, Tobacco and

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Firearms—had conducted an adequate search and properly withheld records under the deliberative process privilege. (*Watkins Law & Advocacy, PLLC v. United States Department of Veterans Affairs, et al.*, Civil Action No. 17-1974 (ABJ), U.S. District Court for the District of Columbia, Sept. 30)

Judge Tanya Chutkan has ruled that the Department of Energy properly redacted information pertaining to Israel's nuclear capabilities under **Exemption 7(E) (investigative methods and techniques)** in response to a FOIA request from researcher Grant Smith while also upholding the State Department's claim under **Exemption 1 (national security)** for the same records. Smith, founder of the Institute for Research: Middle East Policy, requested WNP-136, a two-page document entitled "Guidance on Release of Information Relating to the Potential for Israeli Nuclear Capacity." The agency disclosed a redacted version, claiming Exemption 7(E) and indicating State advised DOE that some information was protected under Exemption 1 as well. Smith filed an administrative appeal with DOE, which was denied. Smith filed suit against both DOE and State. He then submitted a separate FOIA request to State, asking it to disclose the redactions made under Exemption 1. State told Smith that the redacted material was properly classified and indicated that he could file an administrative appeal. In court, State claimed that Smith's suit against it was barred because he **failed to exhaust his administrative remedies**. Chutkan agreed, noting that "here there is no question that Smith failed to exhaust his administrative remedies. Putting aside the fact that, at the time he sued the DOS, Smith had not filed a FOIA with the DOS, after DOS responded to his belated request, Smith did not file an appeal." Smith argued that DOE could not claim Exemption 1 because information about Israel's nuclear capabilities was already a matter of public knowledge. But Chutkan observed that "each of Smith's proffered official acknowledgements fails for the same reason: none of them are directly attributable to the DOE. The D.C. Circuit has made clear that courts in this district 'do not deem "official" a disclosure made by someone other than the agency from which the information is being sought.'" Chutkan also approved the agency's Exemption 7(E) claim. Noting that Smith's challenges were "grounded in speculation," she pointed out that "Smith has provided no factual basis for this court to find that WNP-136's purpose is anything but to provide guidance on classification. . ." (*Grant F. Smith v. United States of America, et al.*, Civil Action No. 18-00777 (TSC), U.S. District Court for the District of Columbia, Sept. 30)

A federal court in Texas has ruled that the IRS **conducted an adequate search** for records concerning its hiring of the Brattle Group to provide expert advice for the examination of Highland Capital Management's 2008-2009 tax returns, but it has not yet justified all of its claims made under **Exemption 3 (other statutes)**, **Exemption 5 (privileges)**, and **Exemption 7(A) (interference with ongoing investigation or proceeding)**. Highland requested the records in 2016. The agency's first search located 13,409 responsive pages and the agency withheld 1,632 pages in full and 132 pages in part, a decision which was upheld on appeal. In 2018, Highland filed suit. Because some of the employees who had participated in the original search had left the agency, Christopher Valvardi, the attorney from the agency's Office of Chief Counsel who was working on Highland's request and subsequent litigation, conducted an independent review of the records, located an additional 250 pages, and concluded that 14,937 pages could be disclosed in full, and 52 pages in part, while 360 pages should be withheld entirely. As part of a third search, Valvardi located electronic files containing an additional 9,000 pages, which yielded another 508 pages. Highland challenged the adequacy of the agency's multiple searches. However, after reviewing all the searches, the court noted that "ultimately, because the court concludes that the IRS declarations show that it used reasonable search methodology, and because the court is unconvinced by Highland's arguments to the contrary, the court concludes that the IRS has satisfied its burden of showing that it conducted an adequate search." The IRS claimed that Section 6103(e)(7), which allows the agency to withhold tax-return information when the Commissioner finds disclosure will impair tax administration, in conjunction with Exemption 7(A), provided a basis for withholding Highland's tax information. The court rejected the agency's 6103(e)(7) claim, pointing out that

"the IRS has done very little to explain to the court just exactly *how* disclosing any of these documents would seriously impair federal tax administration." However, the court agreed with the agency's 7(A) claims for almost all is proposed withholdings. The court pointed out that "if this information, including specific factual analyses contained within these reports and requests for additional information about Highland, were disclosed to Highland, the nature, scope, and strategy of the IRS's investigation into Highland would be revealed, thereby interfering with the IRS's examination." The court found that the agency's attorney-client privilege claims were not sufficiently justified, but that most, but not all, of its claims under the deliberative process privilege, including discussions with the contractor, were properly supported. (*Highland Capital Management, LP v. Internal Revenue Service*, Civil Action No. 18-0181-G, U.S. District Court for the Northern District of Texas, Sept. 30)

Judge Amy Berman Jackson has ruled that Anne Barton, Carol Grunewald, and Mary Rowse, D.C. citizens who sued the U.S. Geological Survey for records concerning the killing of white-tail deer in Rock Creek Park, are entitled to **attorney's fees** for their litigation which resulted in the agency changing its mind and disclosing 2,447 pages it had originally withheld under **Exemption 5 (privileges)**, but has reduced their fee request from $105,619.81 to $61,895.75 after finding that many of the hours claimed were not compensable. The agency originally disclosed 238 pages and withheld 2,447 pages. Although the requesters filed an administrative appeal, the agency claimed it did not receive it. However, after reviewing the withheld records, the agency decided to disclose the 2,447 pages because they contained only raw data collected by scientists. Baron, Grunewald, and Rowse then filed a motion for attorney's fees. The agency argued the requested fee amount was excessive and Jackson agreed. She reduced the hours requested by lead attorney Kathy Meyer for writing the background section, noting that "given Meyer's expertise and unique familiarity with the underlying facts, the Court finds that the seventeen hours she billed for the 'background' section of the summary judgment brief is excessive, and it will reduce the amount to twelve hours." Jackson also reduced several hours billed by two other attorneys but agreed that an hour spent researching Exemption 3 was appropriate. She pointed out that "counsel researched this exemption in response to the government's assertion that it was relying on internal agency 'policy' to withhold records. Plaintiffs reasonably believed it was necessary to argue that the only other exemption that could apply, FOIA Exemption 3, allowed the withholding of records only if commanded by Congress in another statute." As is often the case in attorney's fees litigation in the D.C. Circuit, the plaintiffs argued that the LSI *Laffey* matrix, which calculated hourly rates based on the rates paid for complex federal litigation, applied, while the government argued that the lower hourly rates in the USAO Matrix applied. Finding that the plaintiffs had the burden of proof on showing that the LSI Matrix applied, Jackson indicated that "plaintiffs' evidence is insufficient to establish that FOIA practitioners in Washington, D.C. receive rates in line with the LSI Matrix for complex federal litigation." She observed that "nor do plaintiffs' declarations provide the precise hourly rates obtained by other FOIA litigators in similar cases in the area, and the cases plaintiffs cite are largely inapplicable." Jackson found that 10 hours claimed had been for administrative tasks, which were compensable at $164 an hour. Adding up the total of compensable hours, Jackson awarded $47,298.44 for the underlying litigation. Turning to the plaintiffs' fee request for litigating the attorney's fees issue, Jackson reduced that as well, awarding a total of $12,500. Explaining her decision, she indicated that "a further reduction is warranted because this amount is nearly half of the total fee award for litigating the merits which is excessive." (*Anne Barton, et al. v. U.S. Geological Survey, et al.*, Civil Action No. 17-1188 (ABJ), U.S. District Court for the District of Columbia, Sept. 29)

Judge Dabney Friedrich has ruled that the FBI **conducted an adequate search** for records in response to requests from Brandon Schneider for records pertaining to a 2016 background check and that the agency properly invoked **Exemption 7(E) (investigative records or techniques)** to withhold records. Schneider

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applied for a summer chaplain internship at Fort Belvoir Community Hospital, which triggered OPM to initiate a background check. OPM found that in 2005, an individual whom OPM believed to be Schneider admitted to certain actions during a law enforcement interview. Although Schneider denied the allegations, he was removed from parish ministry. Schneider made a request to OPM for records concerning his background check. The agency provided him a redacted copy of his file and referred documents to the FBI. Schneider appealed, asking for more details about the 2005 interview. OPM denied his appeal. Schneider than requested records on the 2005 interview directly from the FBI. The agency located 24 pages of responsive records and disclosed 10 pages, citing Exemption 7(E) as well as Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), and Section (j)(2) of the Privacy Act, exempting law enforcement records. Schneider then filed suit, challenging only the adequacy of the search by the FBI and the agency's Exemption 7(E) claim. Although the FBI limited its search to its Central Records System, Schneider claimed that it should have conducted a more thorough search to locate records referred to in the 2005 investigation. Friedrich rejected the claim, noting that "Schneider speculates that additional documents about the investigation 'should exist,' but conjecture alone does not meet the 'exacting standard' of a lead 'so apparent' that the FBI must conduct additional searches." Schneider claimed that information about the way in which the FBI conducted background investigations was well known. But Friedrich pointed out that "although the public is generally aware that agencies refer investigative matters to the FBI, and Schneider himself is aware that the name check report mentioned him in connection with a 2005 investigation, neither is aware of the specifics of the name check system or the FBI's 2005 investigation. Further, public awareness alone does not automatically make 7(E) inapplicable." (*Brandon C. Schneider v. U.S. Department of Justice, et al.*, Civil Action No. 18-0474 (DLF), U.S. District Court for the District of Columbia, Sept. 28)

A federal court in California has ruled that the Department of Health and Human Services **conducted an adequate search** for records in response to John Sigler's request for records concerning his HIPAA complaint against his health provider HealthPointe Medical Group and that it properly withheld records under **Exemption 4 (confidential business information), Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods or techniques)**. Although Sigler only contested the Exemption 7(E) claim, particularly concerning the **segregability analysis**, the court examined all the agency's claims. HHS withheld 66 pages under Exemption 7(E). The court noted that "HHS describes the documents withheld, identifies the exemption claimed, and explains that the documents fall within Exemption 7(E) because they reflect procedures and techniques used during the investigation of HIPAA complaints." On the issue of segregability, the court referenced *Hamdan v. U.S. Department of Justice*, 797 F.3d 759 (9th Cir. 2015) as particularly instructive. The court pointed out that in *Hamdan* the Ninth Circuit had concluded that the State Department's explanation of its segregability analysis was thorough, while the FBI's, although wanting in some respects, was sufficient, and the Defense Intelligence Agency's was non-existent. Saying HHS's segregability analysis was most like the FBI's in *Hamdan*, the court observed that "although declarations more closely resembling the State Department's declarations in *Hamdan* may be preferred, HHS has carried its burden to provide sufficiently detailed information to allow the Court to take HHS's declarations at face value." (*John W. Sigler v. U.S. Department of Health & Human Services*, Civil Action No. 18-00683-ODW (JCx), U.S. District Court for the Central District of California, Sept. 30)

Judge Timothy Kelly has ruled that while VoteVets Action Fund has **standing** to sue the Department of Veterans Affairs for allowing three associates of President Donald Trump to act as unappointed counselors to the agency, the organization has **failed to state a claim for relief** cognizable under the **Federal Advisory Committee Act**. After news reports of the existence of the "Mar-a-Lago Council," made up of three members of Trump's Florida country club – Ike Perlmutter, CEO of Marvel Entertainment, Bruce Moskowitz, a doctor from West Palm Beach and the founder of Biomedical Research and Education Foundation, and Marc Sherman, a managing director of the consulting firm Alvarez & Marsal – who apparently had delegated

themselves to advise Trump on how to run Veterans Affairs, VoteVets Action Fund filed suit, claiming the group had violated the access provisions of FACA. The government argued that VoteVets did not have standing to sue since it had shown no injury, and, alternatively, that it failed to state a claim for relief under FACA. Kelly found the organization had standing but agreed with the government that it had failed to state a claim for relief. Assuming that the three individuals constituted an advisory committee, Kelly observed that "VoteVets is entitled to the information required to be disclosed under the statute and 'a refusal to provide information to which [a plaintiff] is entitled under FACA constitutes a cognizable injury sufficient to establish Article III standing.'" He added that "VoteVets need not, as Defendants argue, have affirmatively sought and been denied information for which FACA requires disclosure to have suffered an injury." However, Kelly agreed with the agency that "VoteVets does not plausibly allege that President-elect Trump established the three men – the purported Council – as an advisory committee." He pointed out that "President-elect Trump's off-the-cuff comments at a press conference hardly reflect the kind of formal, affirmative steps required to establish an advisory committee." Kelly rejected VoteVets' claim that Trump had utilized the council. He observed that "the allegations in the amended complaint suggest that the alleged *advisory committee* exercised influence – perhaps in VoteVets' view undue influence – over the *agency*. But for FACA purposes, it is the amount of influence that the *agency* exercises over the *advisory committee* that matters. Accordingly, the allegations throughout the amended complaint that the three men exercised influence over the *Department* undermines any reasonable inference that Defendants exercised 'actual management or control' over them." (*VoteVets Action Fund v. United States Department of Veterans Affairs*, Civil Action No. 18-1925 (TJK), U.S. District Court for the District of Columbia, Sept. 30)

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