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Washington Focus: The Department of the Interior agreed to make minor changes to its recent revisions of its FOIA regulations, returning to the previous standard that requests "reasonably describe" the records sought, instead of requiring requesters to identify discrete records. While advocacy groups welcomed the minor changes, the new regulations remain controversial. Kevin Bell, staff counsel for Public Employees for Environmental Responsibility, told reporters that "while the impact of some sections may have been softened, the intent of this regulation is still to provide less information to fewer requesters on a slower basis.". . .The EPA, which recently issued its own controversial set of revised FOIA regulations without any public comment, has now admitted that its decision to centralize the receipt of FOIA requests stems from a 2018 recommendation by the FOIA Advisory Committee encouraging agencies to centralize the processing of requests. In a letter from Rep. Katie Porter (D-CA) criticizing the EPA's revisions, Porter noted that "centralized submissions with continued decentralized processing. . .increases delays as FOIA requests are routed to the appropriate office or branch. A comment period for the rule may have revealed similar concerns and recommendations."

Ninth Circuit Upholds Exemption 2 Claim But Modifies Exemption 6, Agency Records Issues

Jorge Rojas, who filed a pro se suit against the FAA after it denied his application to become an air traffic controller, has now been involved in two substantive decisions by the Ninth Circuit stemming from issues in his FOIA litigation against the agency. His first trip to the Ninth Circuit resulted in the court of appeals roundly rejecting the consultant corollary. Now his second time before the court of appeals has resulted in an increasingly rare Exemption 2 (internal practices and procedures) claim coupled with an even rarer discussion of subsection (k)(6) of the Privacy Act, which exempts testing and examination material from disclosure under that statute. Along the way, the Ninth Circuit also discussed the agency employees' privacy interest in their personal email addresses as well as how to analyze whether emails that appear to be personal qualify as agency records.

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Before 2014, the FAA gave preference to air traffic controller applicants who earned aviation degrees from FAA-accredited schools, known as Collegiate Training Initiative (CTI) schools, and who scored highly on the Air Traffic Selection and Training examination (AT-SAT test), an eight-hour proctored examination that tested cognitive skills related to working as an air traffic controller. In 2013, there were about 3,000 college graduates with FAA accredited degrees. These individuals were placed on the FAA's Qualified Applicant Register and were therefore eligible to apply for air traffic controller job openings.

Because of an anticipated surge in retirements, the FAA developed a plan to hire some 12,500 controllers during the next decade. As part of its review of the hiring process, the agency commissioned a report known as the Barrier Analysis of Air Traffic Control Specialists Centralized Hiring Process to evaluate the diversity of its workforce. The Barrier Analysis recommended that the FAA place less weight on the AT-SAT test because of problems with regard to ethnic and gender diversity.

Based on the results of the Barrier Analysis, the FAA instituted significant changes in its hiring practices. Instead of giving preference to individuals who had graduated from CTI schools and scored well on the AT-SAT test, the agency announced it would consider candidates qualified if they had a high school diploma, spoke English, and passed the FAA's new test, called the Biographical Assessment. The Biographical Assessment test consisted of 62 multiple choice questions. Applicants took the test online without supervision. Of the 28,000 applicants who took the test in 2015, fewer than 10 percent passed. The scoring information for the test was kept confidential. The FAA did not release the minimum passing score. Individual applicants were told only whether or not they had passed or failed. Failing to pass the Biographical Assessment made applicants ineligible to take the AT-SAT.

In response to the substantial failure rates, an investigation by Fox Business in 2015 reported that Sheldon Snow, an air traffic controller and then-president of the Washington Suburban Chapter of the National Black Coalition of Federal Aviation Employees (NBCFAE), had posted screen shots of correct answers that could be used by applicants. Media attention to the new hiring process also attracted congressional inqueries. Fourteen House Members sent a letter to the FAA urging it to investigate the issues of possible cheating.

Rojas was enrolled in a CTI school in Phoenix when the FAA changed it hiring process. He took the Biographical Assessment and failed, making him ineligible to apply for a job as an air traffic controller. His first request asked for records of emails and chats sent to and from Sheldon Snow. He then filed a FOIA/PA request for the minimum score for passing the Biographical Assessment test, his own Biographical Assessment test score, and a copy of applicant information for a particular air traffic controller opening. After Rojas filed suit, the agency responded first to his request for the minimum score for passing the Biographical Assessment test, as well as his own test scores. The agency withheld the information under Exemption 2 and subsection (k)(6) of the Privacy Act. In response to his request for emails related to the Sheldon Snow incident, the agency withheld personal email addresses under Exemption 6. It also withheld 202 assorted emails it claimed did not qualify as agency records. The district court upheld the agency's claims, finding that the 202 emails were "personal emails regarding Snow that do not respond to Rojas's FOIA requests or the mission of the FAA."

Noting that the Supreme Court had simplified the definition of Exemption 2 in its decision in *Milner v. Dept of Navy*, 562 U.S. 562 (2011), the Ninth Circuit pointed out that "Exemption 2 applies to internal rules and practices exclusively connected with 'the selection, placement, and training of employees,' including 'hiring and firing.'" Applying the *Milner* definition, the appeals court pointed out that "we conclude that the FAA's rules and practices for scoring tests relating to the selection of employees, including its rules and practices regarding the minimum passing score and the score for a particular test, qualify under Exemption 2. It is undisputed that the FAA's rules and practices for scoring the Biographical Assessment are internal and

that the test is used solely as one step in the process of selecting individual employees." Turning to the application of subsection (k)(6) of the Privacy Act, Rojas argued that the scores were not testing materials but rather the end product of the testing process. The court of appeals disagreed, noting that "the term 'testing material' refers to the items needed to conduct a test or examination to determine an individual's proficiency or knowledge. Test scores are part of the material necessary to evaluate an individual's proficiency or knowledge. We therefore conclude that test scores are part of the 'testing or examination material' used to determine individual qualifications for purpose of Exemption (k)(6)." Rojas questioned whether the agency had shown that disclosure of his test scores would lead to cheating. The appeals court, however, pointed out that "although Rojas argues that his request is limited to his own score, the FAA expresses the concern that other applicants could rely on the same arguments to obtain their own scores and asserts that the history of the cheating scandal here indicates that they would be likely to do so."

The existence of the scandal helped tip the balance in favor of disclosure for identifying information of individual agency employees who received emails generated by the Snow screen shot attachments. The court of appeals noted that "because the email in which Snow forwarded the Barrier Analysis to personal email accounts relates to the FAA's change in hiring practices, we conclude that the public interest in identifying the individuals receiving this information outweighs the privacy interests of those individuals." But the appeals court took steps to mitigate any invasion of privacy. The appeals court pointed out that 'the public's interest is limited to learning their identity. Therefore, the FAA could satisfy its obligation under FOIA by identifying the email recipients by name, instead of revealing the recipients' personal email addresses."

To resolve the agency records status of the 202 emails, the appeals court turned to *Tax Analysts v. Dept of Justice,* 492 U.S. 136 (1989), noting that to qualify as an agency record, a record needed to be in the custody and possession of an agency and was available for use by the agency. The appeals court indicated that the D.C. Circuit had adopted a four-factor test for agency records in *Judicial Watch v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013). But the Ninth Circuit panel explained that 'we hold that courts may consider a range of evidence to determine where specified records are in the agency's possession in connection with agency-related business, or instead involve personal matters not related to the agency's 'transaction of public business.'. . .Agency records are not limited to documents that are preserved according to agency directions, however. Given that the term 'record' includes electronic records, emails sent or received for agency-related business may be agency records, even if not stored in agency files in any formal sense. By contrast, emails or other documents that are unrelated to agency business are not agency records, even if stored on the agency's server and used by an agency employee." The appeals court then observed that 'we have no trouble concluding that the FAA possessed the withheld materials, because they were discovered in the FAA's computer system. But it is less clear whether the FAA possessed any of the documents in the conduct of its official duties or public business. Our independent review suggests that some of the withheld documents were not purely personal." Finding the district court's explanation insufficient, the appeals court remanded the issue back to the district court for further determination. (*Jorge Alejandro Rojas v. Federal Aviation Administration, et al.*, No. 17-17349, U.S. Court of Appeals for the Ninth Circuit, Oct. 22)

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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 FOI Commission acted properly when it declined to schedule a hearing on David Godbout's complaint that former Governor Daniel Malloy should be criminally charged for failing to respond to Godbout's request for records concerning the mass shooting in Las Vegas if they related to the shooter's use of a bump stock, and metadata from any recent email from the governor to any person. When the governor's office failed to respond within the statutory time limits, Godbout filed a complaint with the FOI Commission requesting the commission refer the case to the state's attorney for criminal prosecution. The commission sent notice to the parties that the executive director believed that scheduling a hearing would be an abuse of the commission's administrative process. After filing a motion to disqualify the commission's executive director and chairman for bias, Godbout ultimately asked to withdraw his complaint. After a hearing officer recommended the commission not schedule a hearing on Godbout's complaint, Godbout filed suit challenging that decision. The trial court dismissed Godbout's challenge, noting that "the plaintiff has no right, under [FOIA], to seek such a prosecution as relief for an alleged violation of the act. [The FOIA] specifically authorizes the commission to order that records be provided as a complaint if such records exist and are not subject to any exemption. In this case, however, the plaintiff expressly disavowed any interest in having the commission order the governor to produce any responsive documents; he was only interested in having the governor arrested. The commission correctly concluded that the plaintiff was not pursuing a legitimate records request because he did not seek a commission order for the production of any public records." (*David Godbout v. Freedom of Information Commission*, No. HHB-CV-19-5025125-S, Connecticut Superior Court, Judicial District of New Britain, Sept. 23)

Ohio

A court of appeals has ruled that the Bellbrook-Sugarcreek school district properly withheld identifying information about Connor Betts, who killed nine people and injured 27 more during a mass shooting in Dayton in August 2019, who was a 2013 graduate of Bellbrook High School because the information is exempt under the Ohio Student Privacy Act. Betts was also killed during his shooting spree. In pursuing more information about Betts' background, a coalition of media groups requested his information from Bellbrook High School. Although the school district argued that both OSPA and the federal Family Educational Rights and Privacy Act prohibited disclosure of any student information concerning Betts beyond directory information, the media coalition asserted, based on Ohio common law pertaining to the tort of invasion of privacy, that Betts' privacy rights did not survive his death. The appeals court rejected the notion. It pointed out that "we find the News Agencies' focus on an individual's right of privacy somewhat misplaced. The question here is not Betts' rights, but rather the School's legal duties under the [Public Records Act] and OSPA, and the News Agencies' corresponding legal rights. The common law right to privacy in Ohio, enforceable by way of a tort claim when violated, and the statutory mandate to schools to hold their students' educational records confidential unless they have obtained consent, are simply different." The media coalition also argued that the Public Records Act should be construed in favor of disclosure. The appeals court, however, observed that "we do not see any ambiguity in the Public Records Act to construe. The PRA unambiguously provides that records that are cannot legally be released are not public records. Neither party takes a different view. OSPA, which, as an exception to the PRA, must be 'strictly construed' against the custodian, is also unambiguous. OSPA's plain language prohibits the release of an adult former student's records without written consent." The appeals

court also found that a writ of mandamus did not provide the remedy sought by the media coalition. The appeals court explained that "the rights/duties enforced in mandamus must be legislatively created, not judicially created, meaning that common law rights are not determinative or particularly relevant." (*State of Ohio ex rel. Cable News Network, Inc., et al. v. Bellbrook-Sugarcreek Local Schools, et al.*, No. 2019CA0047, Ohio Court of Appeals, Second District, Greene County, Oct. 2)

Nevada

The supreme court has ruled that the trial court erred in finding that the Las Vegas *Review-Journal* was entitled to attorney's fees because it had substantially prevailed in its litigation against the City of Henderson. The *Review-Journal*'s request to Henderson encompassed some 70,000 pages. Henderson told the newspaper that it needed several weeks to review the records and that the *Review-Journal* would be responsible for paying some of the costs of review and redaction. The *Review-Journal* filed suit and the trial court upheld Henderson's actions. However, the *Review-Journal* appealed to the supreme court. The supreme court reversed in part, ordering the trial court to conduct further analysis on remand. Before the remand was resolved, the *Review-Journal* filed a petition for attorney's fees. The trial court found that the *Review-Journal* had prevailed in obtaining access to records but awarded the newspaper less than it had requested. Henderson appealed the attorney's fees decision, arguing that the *Review-Journal* had not substantially prevailed. This time, the supreme court noted that in its first decision "we reversed and remanded for the district court to analyze whether requested documents were properly withheld as confidential under the deliberative process privilege. We did not order the production of those records or copies of those records, as LVRJ requested in its petition. We instructed the district court to conduct further analysis and determine whether, and to what extent, those records were properly withheld. The ultimate determination of the district court on that issue is not before us. Because the sole remaining issue that the LVRJ raised in its underlying action has not yet proceeded to a final judgment, we conclude that the LVRJ is not a prevailing party." (*City of Henderson v. Las Vegas Review-Journal*, No. 75407, Nevada Supreme Court, Oct. 17)

New York

A trial court has ruled that communications between the Port Authority of New York and New Jersey and the Federal Aviation Administration pertaining to a proposed monorail train line between LaGuardia Airport and the Willetts Point/Citi Field subway /LIRR station are not privileged. Riverkeepr made a request for records concerning the environmental impact of the proposed project, including communications between the Port Authority and the FAA pertaining to a forthcoming environmental review. The Port Authority withheld records pertaining to communications with the FAA, claiming they were protected by the deliberative process privilege or the common interest doctrine. The trial court agreed with Riverkeeper that since the Freedom of Information Law defined agencies as state or local agencies, the deliberative process privilege did not extend to federal agencies. The Port Authority contended that it shared a common interest with the FAA that served to extend the privilege. But the trial court noted that "if any litigation did result from the development of the [project], it is very possible that Respondent and the FAA could have opposing positions and interests. . . Respondent and the FAA thus cannot be said to be collaboratively working towards the same goal, as they have their own independent interests, which is reiterated by the fact that they retained separate counsel in drafting the Memorandum of Understanding." The Port Authority also asserted that the records were privileged because they were acting as an agent for the FAA. The trial court rejected that claim as well. The trial court noted that "Respondent was required to take certain actions, but that is not sufficient to establish the formation of an agency relationship. Respondent was seeking approval from the FAA but was not acting with any authority as its agent. Thus, Respondent cannot use agency law to argue that the common interest exception applies to its communications with the FAA." (*In the Matter of the Application of*

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Riverkeeper, Inc. v. Port Authority of New York and New Jersey, No. 157114/2019, New York Supreme Court, New York County, Oct. 22)

Washington

The supreme court sitting en banc has ruled that names and birth dates of public employees are not protected by the privacy exemption in the Public Records Act or Section 7 of the Washington Constitution. The Freedom Foundation, an anti-union advocacy group, submitted requests to several state agencies for records indicating union-represented employees, including their full names, birth dates, and agency work email addresses. Several unions filed suit to block disclosure of the information. The trial court granted a temporary injunction but ultimately held that the unions had not shown that the identifying information was exempt. However, the court of appeals ruled that the Section 7 of the Washington Constitution created a privacy interest encompassing state employees' full names when associated with their birth dates. The Foundation appealed the court of appeals' ruling to the supreme court. In a majority opinion supported by five justices, the supreme court concluded that no exemption protected the birth dates. The majority noted that "if the PRA contained an exemption for birth dates of state employees, that exemption would likely be found in [the provision] which addresses the exact category of records requested here. Personnel and employment related records exempt from disclosure under [the provision] include birth dates of *dependents* of employees, but not birth dates of employees themselves. The plain language of the statute is unambiguous; the legislature exempted only the birth dates of dependents. We cannot assume that the legislature simply neglected to include employee birth dates within the scope of the exempted employee records." The unions argued that protection for employees' birth dates should be assumed. But the majority observed that "this exemption provides no basis to imply a broad rule of nondisclosure for all records containing a state employee's birth date, especially when the specific provision addressing employee records does not exemption employee birth dates. We must read [the provision] for what it is: a list of specifically exempt personal information, not an illustrative description of a broader, implied exemption for all personal information." The unions argued that birth dates coupled with names would lead to identity theft. But the majority pointed out that "this does not mean that names and associated birth dates have become private – only that this information is personally identifying. The fact that information is personally identifying, alone, is insufficient to warrant its exemption from disclosure under the PRA." The majority rejected the unions' constitutional claim. The majority pointed out that 'the interest in confidentiality, or nondisclosure of personal information, has never been recognized by this court as a fundamental right. Instead, we engage in a balancing analysis and allow the State to require disclosure of personal information when it serves a legitimate governmental interest." The majority concluded that "adhering to our rational basis test, we conclude that the disclosure of state employees' names with corresponding birth dates does not violate any right to privacy under article I, section 7. Disclosure of birth date information is not 'highly offensive' under our precedent, and it serves legitimate public interests, furthering the policy of the PRA to promote transparency and public oversight." (*Washington Public Employees Association, et al. v. Washington State Center for Childhood Deafness & Hearing Loss, et al.*, No. 95262-1, Washington Supreme Court, Oct. 24)

In a second en banc decision, the supreme court has found that its rule prohibiting standing requests encompassing future information not yet in existence also applies to instances in which voluminous requests require multiple interim responses. The case involved a request from Ross Gipson, an employee of the Snohomish County Denney Juvenile Justice Center, who was under investigation for allegations of sexual harassment and discrimination reported by several female corrections officers. Gipson was also the longest-serving member of the Everett City Council and was up for reelection in 2015. After reports of the investigation appeared in the local media, Gipson filed a Public Records Act request for records mentioning him related to the investigation. Because of its voluminous size, the county issued its response in five installments over several months. In its second and third installments, the county withheld or redacted a

number of records under the ongoing active investigation exemption. In its fourth installment, the county concluded it had disclosed all responsive records. Gipson contended that some records were missing, and the county found and disclosed additional records in its fifth installment. Gipson filed suit. The county argued it had the right to continue to claim the ongoing investigation exemption for all installments of the response because the exemption was valid at the time the county received Gipson's request. Both the trial court and the court of appeals upheld the county's claim. Gipson then appealed to the supreme court. With a single dissent, the supreme court upheld the two lower courts. The supreme court cited *Sargent v. Seattle Police Dept*, 260 P.3d 1006 (2011), in which the supreme court held that "the PRA does not provide for standing records requests. An agency is not required to monitor whether newly created or newly nonexempt documents fall within [such] a request to which it has already responded." Gipson argued that his request should have been treated as stand-alone requests once the ongoing investigation exemption was no longer applicable. The supreme court disagreed, noting that "installments are not new stand-alone requests. Rather, installments fulfill a single request and should be treated as such. With any request, the receiving agency determines any applicable exemptions *at the time* the request is received. . .The agency prepares each installment based on the initial records request it receives. An agency is required to provide only records in existence at the time the request is made. An exempt record, like a nonexistent record, is not available for inspection, and an agency is not obligated to produce it." (*Ron Gipson v. Snohomish County*, No. 96164-6, Washington Supreme Court, Oct. 10)

The Federal Courts…

A federal court in California has certified a group of three immigration attorneys and two non-citizens to represent the class of frequent FOIA requesters bringing a **pattern or practice** claim against the Department of Homeland Security for the failure of U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement to provide Alien files within the statutory time limit under FOIA. One contributor to the agency's backlog in responding to requests for A-Files is its policy of referring portions of A-Files to ICE for review. Judge William Orrick agreed that the five representatives of the class had met the four factors – numerosity, commonality, typicality, and adequacy – under Rule 23(a) for certification as a class. Addressing the issue of numerosity, Orrick noted that "plaintiffs provide various declarations of immigration attorneys that show at least 173 A-File FOIA requests filed on behalf of noncitizens have been pending with USCIS for more than 30 business days without a determination, and at least 139 A-File FOIA requests that USCIS has referred to ICE and have been pending for more than 30 business days. Plaintiffs also point to the backlogs reported by DHS as evidence that defendants know the exact number of class members who have not received a timely determination." On the issue of commonality, Orrick explained that in *Hajro v. U.S. Citizenship and Immigration Services*, 811 F.3d 1086 (9th Cir. 2016), the Ninth Circuit had recognized a pattern or practice claim for failure to respond within the statutory time limits, but had sympathized with plaintiffs whose challenges often became moot once the agency had responded to their individual requests. DHS argued that the class representatives represented only an aggregation of individuals challenging the way in which their A-File requests were being processed. Orrick disagreed, noting instead that "this argument rests upon a misunderstanding of plaintiffs' claims, which do not relate to the delay in any particular A-File FOIA request but instead to defendants' 'widespread practice of failing to make a determination within FOIA's statutory time frame' that can be resolved in a 'single stroke.' Plaintiffs have established commonality because the shared injury between plaintiffs and proposed class members is the delayed receipt of determination on their A-File FOIA requests filed with USCIS, and, with respect to the ICE Referral class, subsequently referred by USCIS to ICE. This delayed receipt is the result of defendants' alleged pattern and practice of failing to make determinations in A-File FOIA cases within the statutorily mandated time frame,

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making it the common contention, or the 'glue' that holds each class member together." Addressing the issue of typicality, Orrick observed that "here, plaintiffs and proposed class members have filed or will file A-File FOIA requests to defendants who are required to make timely determinations pursuant to the timeframe set forth in [FOIA]. Thus, plaintiffs seek the same relief that members of the proposed class would seek: the timely determination of their A-File FOIA requests." On the issue of adequacy, Orrick pointed out that "both plaintiffs and proposed class members have a shared interest in ensuring that defendants make determinations in response to their A-File FOIA requests within the statutory time period." Orrick also found the proposed class would represent the interests of the larger class. He observed that "plaintiffs do not seek relief with respect to the determination made on individual A-File FOIA requests. They 'challenge Defendants' pattern or practice of refusing to timely make such determinations.' Plaintiffs' pattern or practice claim is 'central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct.' Certification, therefore, does not hinge on the complexities of each A-File requested but rather on the uniform untimeliness in responding to A-File FOIA requests." (*Zachary Nightingale, et al. v. U.S. Citizenship and Immigration Services, et al.*, Civil Action No. 19-03512-WHO, U.S. District Court for the Northern District of California, Oct. 15)

Judge Christopher Cooper has ruled that neither the U.S. Postal Service nor its Office of Inspector General has shown that they properly denied two requests for records from DBW Partners, which operates Capitol Forum, a subscription news service. USPS Chief Customer and Marketing Officer James Cochrane did an interview with Stamps.com, praising the agency's Postage Reseller Program. Stamps.com then posted the interview on its blog a day before its earnings call with investors, during which it referred to Cochrane's interview. Capitol Forum requested records about an ethics investigation or review of Cochrane. The agency issued a *Glomar* response neither confirming nor denying the existence of records, citing **Exemption 6 (invasion of privacy)**. Capitol Forum filed an administrative appeal, which was denied by the agency. Capitol Forum sent a second request to OIG for its report detailing USPS's work with resellers and negotiated service agreements. The agency denied the request under **Exemption 3 (other statutes)**, citing § 410(c)(2), the good business practices exception contained in the Postal Reorganization Act. Capitol Forum also filed an administrative appeal of that decision, which was again denied by the agency. Cooper noted that "there can be little question that Cochrane has a significant – meaning more than *de minimis* – privacy interest in the records of any ethics investigation and also in the fact of their existence." However, Cooper observed that Cochrane's personal privacy was diminished somewhat by his government position and by the fact that he had spoken on the record. But Cooper pointed out that "although Cochrane's privacy interest is thus weakened neither of these concerns cuts against him strongly enough to eliminate it entirely, and so it remains more than *de minimis*. . ." However, Cooper found the agency had undervalued the public interest in Cochrane's ethics investigation. He observed that "the Court does not find it 'logical' or 'plausible' for the USPS to suggest that it would be a 'clearly unwarranted' invasion of privacy to even *acknowledge* the existence of records relating to an ethics review of Cochrane. Cochrane was a high-ranking official relative to his agency, making his privacy interest minimal, though not *de minimis*." He added that "if the public interest side of Exemption 6 balancing depends too much on the profile of the subject of the request, or on the amount of interest that the public has shown before any disclosures are made, FOIA would become a significantly weakened means for public oversight of government operations. FOIA would become largely ineffective with respect to lower-profile agencies like the USPS or instances of government misbehavior that has not garnered media attention. The public's interest does not have to be broad to be significant." Diminishing Cochrane's privacy interest, Cooper noted, was the fact that the ethics investigation did not focus on him. Cooper explained that "fewer privacy interests are raised when, as here, the allegedly unethical conduct relates to agency operations and not merely to personal conduct." As a result, Cooper found the agency's *Glomar* response was improper and ordered the agency to search for responsive records. As to Capitol Forum's request for the OIG's report on its ethics investigation, Cooper agreed that it was plausible that the records were covered by the good business

practices exception. But Cooper was skeptical as to whether the agency had conducted an appropriate **segregability** analysis of the heavily redacted document. He pointed out that "considering that the existence of USPS Reseller Programs and NSAs are already public knowledge, it is implausible that the OIG Whitepaper does not contain at least somewhat more segregable non-exempt information than what the USPS OIG has already revealed." He indicated that the agency's declarations did not "explain whether the Defendants have unredacted and produced *all information* that would not risk disclosing exempt information, as required by FOIA." Cooper ordered the agency to provide the document for *in camera* review. (*DBW Partners, LLC, d/b/a The Capitol Forum v. United States Postal Service, et al.*, Civil Action No. 18-3127 (RC), U.S. District Court for the District of Columbia, Oct. 28)

A federal court in California has agreed to **transfer** a suit brought by the Ecological Rights Foundation and Our Children's Earth Foundation challenging revisions to the EPA's FOIA regulations in the Northern District of California to the District of Columbia because they are essentially identical to suits filed there by CREW and the Center for Biological Diversity. The court noted that "by far the strongest argument in favor of transfer is the similarity to and possibility of consolidation with *CREW* and *CBD*." The court indicated that "it is true that the three cases do not make exactly the same claims, or allege the same facts. . .It is equally true, however, that the factual and legal overlap between the cases is significant. . .All three cases are challenging the process by which the Rule was promulgated, as well as some of the substantive changes it makes, under various provisions of the [Administrative Procedures Act] and the FOIA." The court also pointed out that based on a variety of statistical metrics, the Northern District of California was more congested then was the District of Columbia. The only reason disfavoring transfer that the California groups highlighted was that they would prefer to litigate near home. The court found that the balance favored transfer. The court observed that "the strongest argument disfavoring transfer – the plaintiffs' choice of forum – is minimized in that the facts underlying the case did not arise in this district; put differently, this district has no special interest in the litigation. The strongest argument favoring transfer – the possibility of consolidation with *CREW* and *CBD* – is thus significant enough to overcome that weakened presumption, given the risk of not only inefficient litigation, but also inconsistent judgments." (*Ecological Rights Foundation, et al. v. United States Environmental Protection Agency*, Civil Action No. 19-04242-RS, U.S. District Court for the Northern District of California, Oct. 18)

Ruling in a case concerning the involvement of medical professionals in designing and implementing interrogation tactics that began in 2007 and involves multiple agencies, Judge Rudolph Contreras has found that some agency claims made under **Exemption 5 (privileges)** or **Exemption 7(E) (investigative methods or techniques)** are appropriate while for others the agencies have so far failed to justify the application of the exemptions. Gregg Bloche and Jonathan Marks submitted the requests. They challenged whether one document created in 2008 two years after their requests were submitted could qualify as either predecisional or deliberative, particularly since it was shared with Physicians for Human Rights. Contreras pointed out that "plaintiffs misconstrue the relevant policymaking timeline. Here, as Defendants note, the policy deliberations concerned *whether* to amend the policy in 2008. An agency may deliberate about potential changes to a policy before concluding that there should be no amendment, and the privilege may still apply so long as the agency establishes the role that the documents at issue played in the *deliberative process*." But Contreras questioned whether PHR qualified as a consultant. He noted that the agency "has not provided enough explanation about its relationship with PHR, a non-agency actor, for the Court to assess whether [the agency] may properly rely on the 'consultant corollary exception to Exemption 5. It is true. . . that the involvement of an entity outside of the agency in generating a document does not necessarily bar the application of the privilege. But there are limitations on when an agency can rely on this exception. Critically, an agency can invoke the consultant

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corollary only if the 'outside consultant did not have its own interests in mind.'" Bloche and Marks challenged the Navy's decision to withhold several records originating from NCIS under Exemption 7(E). Finding that the records qualified under 7(E), Contreras observed that "based on the titles of the materials and the agency's discussion of them, the documents were drafted to reevaluate the agency's approach to interrogation." He then pointed out that the Navy's justification for claiming the exemption was insufficient but noted that regardless "the Court's *in camera* review of the document indicates that the partial redaction is appropriate in order for Navy to shield particular details of its interrogations strategy." Contreras approved of the Army's deliberative process claims except for redactions in documents for which the agency no longer could locate the originally unredacted version. For those, Contreras indicated, the Army would have to provide more detail. He also upheld the Army's claims under the attorney-client privilege. While he accepted other claims made by the Army under the attorney work-product privilege, he rejected others because they failed to show a realistic prospect of litigation. As to one of those claims, Contreras pointed out that "this speculative future prospect of possible litigation, without more, does not suffice to establish that material is privileged pursuant to the work product doctrine." For the remaining 40 documents, the Army claimed a combination of the deliberative process privilege and the attorney-client privilege, arguing that both privileges could apply. Contreras agreed with Bloche and Marks that there was a distinction between the privileges that the Army had not adequately explained. He noted that "the problem stems from the language that Army invokes and the manner in which it claims both privileges without any particularity as to which privilege applies to which portions of the document." He then concluded that the Army had not yet shown that it conducted an adequate segregability analysis. (*M. Gregg Bloche and Jonathan H. Marks v. Department of Defense, et al.*, Civil Action No. 07-2050 (RC), U.S. District Court for the District of Columbia, Oct. 29)

Judge Reggie Walton has wrapped up the remaining issues involved in litigation brought by Henry Heffernan, who served as the Roman Catholic priest in NIH's Department of Spiritual Ministry and participated in a 2007 review of its operations before retiring in 2013. In response to Heffernan's request for records about the review, the agency disclosed 650 pages with redactions under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. In his first ruling in the case, Walton agreed with Heffernan that the agency had not shown that it **conducted an adequate search**. Several items related to the search remained, including Heffernan's claims that the agency improperly used compound search terms, failed to use certain other search terms, and failed to search all offices likely to have responsive records. Walton found the agency had justified its use of compound search terms, noting that "in instances where the defendant concluded that the use of compound search terms was not appropriate, [the agency] ran additional searches utilizing individual search terms." As to the agency's failure to use search terms suggested by Heffernan, Walton pointed out that "the defendant has explained why the use of other search terms suggested by plaintiff is not reasonable." Walton also found the agency had justified its decision to limit the search to certain staffers. Heffernan challenged the agency's decision to withhold a draft press release under Exemption 5 because its creation involved a consultant retained by the agency rather than an agency employee. Walton indicated that the consultant was included within the scope of the deliberative process privilege, noting that "the Court concludes that the consultant corollary is applicable and that the defendant did not waive his right to assert the applicability of the deliberative process privilege to the draft press release by sending the draft release to [the consultant]." Walton explained that he had already concluded that the draft press release was both predecisional and deliberative. Heffernan cited *Mayer, Brown v. IRS*, 537 F. Supp. 2d 128 (D.D.C. 2008), as holding that draft press releases were not protected by the deliberative process privilege. Walton disagreed, noting that "*Mayer, Brown* does not, as the plaintiff suggests, stand for the proposition that all draft press releases are not protected by the deliberative process privilege; rather, it instructs only that draft press releases that are similar to a final release ultimately issued by an agency are not covered by the deliberative process privilege." Walton observed that "the defendant's declarant makes clear that the draft press release was never adopted." Walton also concluded that the agency had shown that it conducted an adequate **segregability**

analysis. (*Henry Heffernan v. Alex Azar*, Civil Action No. 15-2194 (RBW), U.S. District Court for the District of Columbia, Oct. 16)

A federal court in Minnesota has ruled that the U.S. Postal Service failed to show that its *Glomar* response, neither confirming nor denying the existence of records, was justified under **Exemption 3 (other statutes)**, citing the good business practices exception in the Postal Reorganization Act. In response to requests from the law firm of Dorsey & Whitney for records concerning several negotiated service agreements, the agency issued a *Glomar* response, claiming that even the existence of such agreements were protected by the good business practices exception. Dorsey & Whitney argued that negotiated service agreements were routinely disclosed by the agency as good business practices. The agency claimed these disclosures were immaterial because they did not reveal specific pricing or terms. The court noted that "this argument is unavailing. The issue before the Court is whether the *existence* 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." The agency also argued that USPS-customer partnerships were distinguishable from the NSAs. The court rejected the claim, observing that "but USPS's distinction falls short. Conclusory statements about competitive versus non-competitive markets do not satisfy USPS's burden of establishing that one of FOIA's narrow exemptions applies." (*Dorsey & Whitney LLP v. United States Postal Service*, Civil Action No. 18-2493 (WMW/BRT), U.S. District Court for the District of Minnesota, Oct. 11)

A federal court in Pennsylvania has ruled that the Wolk Law Firm, representing a number of victims in suits involving fatal airplane accidents, failed to show that it was entitled to access to wreckage and cockpit videos under the Administrative Procedures Act. In response to its FOIA requests to the NTSB, the agency told Wolk that wreckage was not considered an agency record under FOIA and that cockpit videos were exempt. Wolk then pursued a claim under the APA, contending that the agency's refusal to comply with its subpoenas to grant access violated the statute. The court first found that Wolk could bring such a claim. The court pointed out that "FOIA provides for the production of 'records.' Records include videos, but cockpit videos are exempt from production. As [another judge in the district] noted in a similar action, 'wreckage itself cannot be the subject matter of a FOIA request because it is not an 'agency record' that is subject to FOIA.' Because FOIA does not provide an 'adequate remedy' to obtain cockpit videos and wreckage, an NTSB refusal to provide these materials is subject to judicial review." However, the court explained that "a court may only compel the NTSB to produce these materials if its withholding of them was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' This standard 'is narrow, and a court is not to substitute its judgement for that of the agency.'" The court then indicated that "the NTSB's refusal to produce the cockpit videos was not arbitrary, capricious or an abuse of discretion. Cockpit videos are statutorily exempt." As to access to wreckage, the court observed that while the NTSB asserted exclusive authority to inspect aircraft crash wreckage, the agency "assured Wolk that it would preserve all evidence related to the crash, consistent with the requirements of its investigation. It reminded Wolk that the results of the investigation would be released publicly as the conclusion of its investigation." (*Wolk Law Firm v. United States of America, National Transportation Safety Board*, Civil Action No. 19-1401, U.S. District Court for the Eastern District of Pennsylvania, Oct. 10)

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